IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ANDREW D. JOHNSON, Defendant and Appellant. _____/	No. S188619 Court of Appeal No. A124643 Solano County Superior Court Nos. VCR 191129 & VCR 191363

APPELLANT'S OPENING BRIEF ON THE MERITS

After Decision of the Court of Appeal, First Appellate District, Division Four,

Affirming the Judgment of Conviction on Octob

Barry M. Karl
State Bar Number 76953
620 Jefferson Avenue
Redwood City, CA 94063
(650) 366-6789

Attorney for Appellant

By appointment of the California Supreme Court

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TO: THE HONORABLE TANI CANTIL-SUKAUYE, CHIEF JUSTICE OF SUPREME COURT OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

APPELLANT'S OPENING BRIEF

QUESTION PRESENTED FOR REVIEW

Should trial courts apply a higher standard of mental competence for self-representation than for competence to stand trial? (*Indiana v. Edwards* (2008) 554 U.S. 164.)

SUMMARY OF ARGUMENT

In this case, appellant Andrew D. Johnson was granted the right to represent himself before the preliminary examination. Some six months later the trail court declared a doubt as to appellant's competency to stand trial.

After a jury trial on the issue of his mental competency in which the court provided the jury an unusual jury instruction[1] appellant was found competent, that he could assist his attorney in a rational manner and that *he could conduct his own defense in a rational manner*. The court, nevertheless, revoked appellant's right to represent himself.[2]

The Court of Appeal affirmed appellant's conviction, holding as no California court had held since the United States Supreme Court decided *Faretta*, that a court may apply a higher standard of mental competence for self-representation than for competence to stand trial, even though there was no finding or agreement that appellant suffered from a severe mental illness that interfered with his ability to rationally conduct his own defense.

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[1] "You must decide whether the defendant is mentally competent to stand trial. That is the only purpose of this proceeding. Do not consider whether the defendant is guilty or not guilty of any crime or whether he was sane or insane at the time that any alleged crime was committed.

The defendant is mentally competent to stand trial if he can do all of the following:

1. Understand the nature and purpose of the criminal proceedings against him;
2. Assist, in a rational manner, his attorney in presenting his defense *or conduct his own defense in a rational manner*;
   AND
3. Understand his own status and condition in the criminal proceedings.

The law presumes that a defendant is mentally competent. In order to overcome this presumption, the defendant must prove that it is more likely than not that the defendant is now mentally incompetent because of mental disorder."

[2] Both the trial court and the Court of Appeal rulings were contrary to well-established California law at the time of their individual decisions. And at the time of the respective rulings California had not adopted a standard different than *Faretta v. California* (1975) 422 U.S. 806 or *Godinez v. Moran* (1993) 509 U.S. 389. (See, *People v. Taylor* (2009) 47 Cal. 4th 850, 891-893.)

Appellant respectfully asserts that there is no need to depart from the longstanding rule that the same standard applies to competence to stand trial and competence for self-representation.

STATEMENT OF THE CASE

On July 19, 2007, appellant, acting as his own lawyer, was arraigned on information VCR191129, which charged him with violating Penal Code[3] section 220, assault with intent to commit rape, sodomy, and oral copulation; section 289, subdivision (a) (1), penetration by foreign object by means of force and violence; section 288a, subdivision (c) (2), forcible oral copulation; section 261, subdivision (a) (2), forcible rape; and section 243, subdivision (d), battery with serious bodily injury. The information also alleged that appellant had suffered prior convictions under section 667, subdivisions (b) through (i), section 1170.12, subdivisions (a) through (d), and 667, subdivision (a) (1). (1 CT[4] 16-19.) Appellant entered a plea of not guilty and denied the prior convictions and enhancing allegations. (1CT 20.)

On September 18, 2007, the prosecution filed a motion to consolidate case VCR191129 with case VCR191363. (1 CT 104-111.) VCR191363, at least as a felony complaint, alleged a violation of section 245, subdivision (a) (1), assault with a deadly weapon, to wit, a chair, and a violation of section 243, subdivision (d), battery causing serious bodily injury. (1 CT 199-200.)

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

[4] "CT" refers to the Clerk's Transcript in *People v. Andrew D. Johnson*, No. A124643.

On January 30, 2008, the court declared a doubt as to appellant's competency, suspended criminal proceedings, and appointed counsel to represent appellant. (1 CT 152-153, 159-161, 300-302; 2 CT 304-306.)

A jury trial on appellant's competency was had. Appellant was found to be competent by the jury on October 28, 2008. (2 CT 477-480; 2 RT 568.)

On October 30, 2008, the court revoked appellant's pro per status because the court did not feel that appellant would receive a fair trial if he continued to represent himself. (2 CT 513.)

A consolidated information was filed that same day. The information alleged the five counts[5] found in VCR191129, the two counts[6] found in the complaint related to VCR191363, plus an additional count of grand theft from the person, in violation of section 487, subdivision (c). The enhancing allegations remained the same. (2 CT 515-519.)

On December 5, 2008, appellant entered pleas of not guilty to the consolidated information and denied all special allegations. (2 CT 530.)

Jury trial began on December 15, 2008. Appellant's section 1118.1 motion was denied. The jury returned with verdicts on December 17, 2008. Appellant

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[5] Sections 220, 289, subdivision (a) (1), 288a, subdivision (c) (2), 261, subdivision (a) (2), and 243, subdivision (d).

[6] Sections 245, subdivision (a) (1) and 243, subdivision (d).

was found guilty of all eight counts. (2 CT 574, 584-591,593-594, 596; 4 RT[7] 965-969, 1048-1050.)

Appellant also had a jury trial on the prior conviction allegations. The jury found those allegations to be true. (3 CT 645-646, 649-650; 4 RT 1103-1104.)

On March 13, 2009, appellant filed a motion for a new trial. (3 CT 669-676.) The prosecution filed an opposition. (3 CT 677-682.) Appellant's motion was denied on April 9, 2009. (4 RT 1121.)

Appellant was sentenced to eighty-five years to life in state prison. As to Count 1, the assault with intent to commit a sex crime, that sentence was stayed pursuant to section 654; Count 2, penetration by foreign object, the court imposed a sentence of twenty-five years to life in state prison; Count 3, forcible oral copulation, the court imposed a sentence of twenty-five year to life in state prison consecutively to Count 2;Count 4, forcible rape, the court stayed that sentence pursuant to section 654; Count 5, battery resulting in serious bodily injury, the court stayed that sentence pursuant to section 654; Count 6, assault with a deadly weapon, the imposed a sentence of twenty-five to life in state prison consecutively to Count 2 and Count 4, Count 7, battery resulting in serious bodily injury, the court stayed that sentence pursuant to section 654; and Count 8, grand theft person, the court imposed a mid term sentence of two years to run concurrently with appellant's sentence. The court also imposed the two section 667,

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[7] "RT" refers to the Reporter's Transcript in *People v. Andrew D. Johnson*, No. A124643.

subdivision (a) (1) priors for a total of ten additional years. (3 CT 683-691; 4 RT 1126-1130.)

A timely notice of appeal was filed on April 16, 2009. (3 CT 694.)

A Petition for Rehearing was filed on November 9, 2010, and denied on November 15, 2010.

A Petition for Review was filed before this Court on December 2, 2010, and granted on February 16, 2011.

STATEMENT OF THE FACTS

Prior to the preliminary examination, appellant requested and was granted his right to represent himself.[8] On January 30, 2008, some six months later, the trial court ordered appellant, who continued to act as his own lawyer, to appear in court. At that hearing the court told appellant that some documents authored by appellant had come to the court's attention. Because of the documents "and some of the conduct previously in court and your conduct here just a minute ago, I was wondering - - *and this has nothing to do with your pro per status*, because you've told me you want to be pro per, represent yourself. I've discouraged you from it, but you've repeatedly told me, '*No, I understand what's going on, I want to represent myself.*' . . . And a long story short, it says that I have an affirmative duty if I feel or I have a doubt that you are competent, based on either your performance in court, reports I've gotten, the manner in which you've behaved in the back, or any other thing that's part of the court file. *And I'm including in that*

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[8] July 5, 2007. (1 CT 13; RT, 7/5/07, 6-14.)

these letters, and your performance in court has been from time to time a little unusual, but it hasn't risen to the level of being contemptuous or anything of that nature, and I have no report that you are causing trouble in the back. . . . So one of the things I have to do, because I may be right, if you are not competent, you can't waive your right to a jury to determine whether you are competent. So that means at a competency hearing, I am under an affirmative obligation to appoint a lawyer to represent you only for the purpose of determining whether you are competent or not. *It's got nothing to do with whether or not you are going to represent yourself at a trial or not.*" (1 RT 157-158. Italics added.) The court then declared a doubt as to appellant's competency and appointed a lawyer to represent him. (1 RT 154-161.)

The next day, counsel appeared in court with appellant. The court indicated that he had provided information to counsel (letters that appellant had written to the court and members of the court's staff) and pointed out factors that raised the question in the court's mind as to whether appellant was competent. (1 RT 164.) Counsel also indicated that he had spoken with appellant. Counsel told the court that "it's a close call," but that he shared the court's opinion for a variety of reasons; "the letters, and in my discussions with him, *with respect to his perspective on his own case and the ideas that he has about his case* would lead me to, looking at it from a standpoint if I was his lawyer and I had just met Mr. Johnson, and I was going to represent him, one of the first things I would do was I would do this type of evaluation. *I may do it in the form of a 1017 first*, but I also

think inevitably there would be a 1368 evaluation. So I do, based on that, and looking at it from that standpoint if I were to represent Mr. Johnson that I think *any competent lawyer would have that looked into.* So I do share the Court's concerns with respect to Mr. Johnson in that regard." (1 RT 165-166. Italics added.)

After the court suspended criminal proceedings, the court then appointed two psychiatrists.[9] (1 RT 166.) The court also received a stipulation from the prosecutor and defense counsel stating "that whatever those reports say, that the issue can be submitted on their reports as opposed to having them come into court." (1 RT 167-168.) Defense counsel then asked for a clarification by asking the court the following, "Is the Court asking me to get a waiver from Mr. Johnson with respect to his right to a trial on that issue or just for the consideration of the Court."[10] The court responded, "[j]ust for the consideration of the receipt of those reports." (1 RT 168.)

Following the receipt of the reports of the two psychiatrists, neither of which indicated that they had spoken with appellant nor indicated that he was incompetent, the court appointed a third expert, Dr. O'Meara. Dr. O'Meara's report, again without personally interviewing appellant, indicated that appellant

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9 See California Rules of Court, rule 4.130, subd. (d) (1) (a) & (b).

10 Counsel may waive the statutory jury trial right, or agree to a determination with less than twelve jurors, even over the defendant's express objection. (See, *People v. Masterson* (1994) 8 Cal. 4th 965, 969.) Moreover, the issue of competency may be submitted to the trial court on a stipulation of counsel for a determination on the basis of the reports. (*People v. Weaver* (2001) 26 Cal. 4th 876, 903.)

was paranoid and that he believed that he was being persecuted because he was African American and because the court, the prosecutor, and any appointed counsel engaged in a conspiracy to harm him. The court was calendaring the matter for April 4th and inquired whether defense counsel desired the appearance of Dr. O'Meara for that date. Counsel indicated that he desired Dr. O'Meara to appear personally for a hearing as to whether appellant was or was not competent. (1 RT 171-173; Defense Exhibit 4, pp. 4-5.)

The matter was continued a number of times. On May 15, 2008, a jury trial as to competency was demanded, apparently by the prosecution. (2 CT 412; 3 RT 662.)

A jury trial on appellant's competency was had. Appellant was found to be competent by the jury on October 28, 2008. His pro per status was reinstated. (2 CT 477-480; 2 RT 568.)

On October 30, 2008, the court revoked appellant's pro per status because the court did not feel that appellant would receive a fair trial if he continued to represent himself. (2 CT 513.)

I

THE ROAD FROM FARETTA TO EDWARDS

A. The Long Haul

In *Faretta v. California*, *supra*, the United States Supreme Court stated that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State[11] interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists." (*Id.*, at p. 820.) The Sixth Amendment, therefore, "implies the right to self-representation." (*Id.*, at p. 821.)

From the earliest of times in our country, "the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as 'assistance' for the accused, to be used at his option, at defending himself." (*Id.*, at p. 832.) The Court continued, "[i]t is undeniable that in *most* criminal prosecutions defendants 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

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[11] The dreaded Star Chamber was the only tribunal in the long history of British criminal jurisprudence that forced counsel on an unwilling defendant. (*Id.*, at p. 821.)

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[12] by conducting his own defense." (*Id.*, at p. 834. Italics added.)

Yet this right to self-representation is not absolute. (See, *Id.*, at p. 836, fn. 46.) Further, a defendant, in order to afford him or herself of this right, must "knowingly and intelligently" renounce any benefit encompassed by the right to counsel. "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he 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.'" (*Id.*, at p. 835.) For a defendant to avail him or herself of the right to self-representation the record needed to affirmatively show that the defendant, at the time of exercising that right, was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will." (*Id.*)

The Court's decision, though, did not address the issue of whether a defendant had "the mental ability to present a rudimentary defense." (See, e.g., *People v. Burnett* (1987) 188 Cal. App. 3d 1314, 1323, [abrogated by *People v.*

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[12] See, *Indiana v. Edwards*, *supra*, where the Court states that pro se defendants achieve a higher felony acquittal rate than defendants represented by counsel. (*Id.*, at p. 178.)

Hightower (1996) 41 Cal. App. 4th 1108, 1112-1116]; *People v. Manago* (1990) 220 Cal. App. 3d 982, 986-988. Both these cases are discussed in *People v. Taylor*, *supra*, a post *Edwards* case, at pp. 891-893.) That was because the Court's decision rested on the defendant's Sixth Amendment right to counsel and not on the resulting reliability of the trial process.

Following *Faretta*, a court could ensure that a defendant possessed the mental ability to present a rudimentary defense by engaging him on the record to determine whether he has the ability to participate intelligently in the proceedings and whether he can make a reasoned choice among the alternatives presented to him. (See, e.g., *Harding v. Lewis* (9th Cir. 1987) 834 F. 2d 853, 856-868.)

Faretta was followed some eighteen years later by *Godinez v. Moran*, *supra*. There, a depressed and medicated defendant who had unsuccessfully attempted to kill himself was permitted to proceed *pro se* even though he opposed all efforts to mount a defense. (*Id.*, at p. 410.) The Court held that the lower court had committed error when it ruled that the "the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial." (*Id.*, at pp. 396-397.) The Court then stated that it rejected the notion "that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* [*v. United States* (1960) 362 U.S. 402] standard." (*Id.*, at p. 397.) The Court rejected any necessity for a different standard by stating that "*all* criminal defendants – not merely those who plead guilty – may be required to make important decisions

once criminal proceedings have been instituted. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of the decisions that a defendant may be called upon to make during the course of a trial." (*Id.*, at p. 398. Italics in original.) The Court then stated, rather emphatically, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." (*Id.*, at p. 400. Italics in original.)

The Court, though, signaled quite clearly that the states were free "to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements." (*Id.*, at p. 402.) California, though, repeatedly refused the high court's invitation. (See, *People v. Welch* (1999) 20 Cal. 4th 701, 730-734; *People v. Halvorsen* (2007) 42 Cal. 4th 379, 431-434; *People v. Taylor*, *supra.*)

Finally, in *Indiana v. Edwards*, *supra*, the Court grappled with the request by Mr. Edwards for self-representation, which was not granted. Edwards was a delusional schizophrenic who had been found to be incompetent to stand trial and sent to a state hospital on two occasions prior to his final request. The trial court stated that "[w]ith these findings [that Edwards still suffered from schizophrenia], he's competent to stand trial but I'm not going to find he's competent to defend himself." (*Id.*, at p. 169.)

The Court held that reversal of Edwards' convictions was not constitutionally mandated because "the Constitution permits States to insist upon

representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings for themselves." (*Id.*, at p. 178.) Even though this appears to be the same rule formulated by the Court in *Godinez*, the Court distinguished *Godinez* on two points; where the defendant wanted to plead guilty [to use the judicial process as an aider and abettor in his plan to kill himself], and where Godinez had already been granted the right of self-representation. (*Id.*, at p. 173.)

In *Edwards*, the Court considered whether self-representation should require a mental competence beyond that needed to stand trial. (*Id.*, at pp. 174-178.) Though the test of competence to stand trial assumes that the defendant will be represented by counsel, the Court questioned whether that standard would accurately predict whether the accused will be able "to carry out the basic tasks needed to present his own defense without the help of counsel."[13] (*Id.*, at pp. 175-176.) The Court also accepted the fact that a trial of an "insane" defendant, unaided by counsel, was unlikely to appear fair. (*Id.*, at p. 177.)

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[13] The Court's belief is based on an assumption that may not be accurate, that an individual may be competent because "he *will* be able to work with counsel at trial." Many persons suffering from a mental illness, be it depression or paranoia, will not be able to cooperate with counsel yet may be able to carry out the rudimentary tasks required for a *pro se* defendant.

Though *Edwards* did not overrule *Godinez*, it did give permission to states to impose, if established though appropriate guidelines and rules,[14] a higher standard of mental competence for self-representation than for trial with counsel. Such a situation, though, creates an unusual situation, allowing various state courts to determine the level of competency necessary for the exercise of a federal constitutional right such that a defendant's right to counsel under the federal constitution may vary from state to state.[15] Additionally, the Court's concern for the guarantee of a "fair trial," though noble, does nothing but undercut the specific protections found in the Sixth Amendment. '"The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.' In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146.)

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[14] According to the Court, "the Constitution permits judges to take a realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (*Id.*, at pp. 177-178.)

[15] See, generally *Virginia v. Moore* (2008) 553 U.S. 164. Though dealing with a Fourth Amendment problem, the Court stated, "linking Fourth Amendement protections to state law would cause them to 'vary from place to place and from time to time.'" The Court disapproved of this procedure because it would produce a vague and unpredictable constitutional regime. (*Id.*, at pp. 172, 175.)

B. The Detour

The *Edwards* decision provides this Court with an "opportunity" to depart from the relatively clear standard provided by the *Godinez* court. However, the *Edwards* court failed to provide state courts with any sort of roadmap, leaving state courts to meander and guess, without knowing what will pass as constitutionally acceptable. The *Edwards* court declined to follow Indiana's request to overrule *Faretta*, and also declined Indiana's invitation to "deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or jury." (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 178.) The failure to provide courts with guidance leads to a significant problem. Should the state court, like was done in the present case, require too high a standard, the erroneous denial of a *Faretta* motion, or the erroneous withdrawal of an already granted motion will result in reversal per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8.)

C. This Court Should Decline Edwards' Invitation

Continuing to apply the *Godinez* standard appears to be the most reasonable course, at least until the United States Supreme Court fills in the contours as to what is necessary for a defendant to possess "the mental ability to present a rudimentary defense," the functional competence *Edwards* suggests is necessary. Continuing with the knowing and intelligent waiver standard provides courts with a clear, straightforward, and relatively easy to administer method of affording a defendant his constitutional right to self-representation.

D. Accepting Edwards and what to do

But, should this Court accept *Edwards* it should adopt specific standards to assist trial courts in the difficult determination as to whether a defendant, though competent to stand trial, is sufficiently competent to represent him or herself. What cannot occur, though, is what happened in appellant's case. Appellant was found by the jury to understand the nature and purpose of the criminal proceedings against him, to assist counsel in a rational manner, to conduct his own defense in a rational manner, and to understand his own status and condition in the criminal proceedings. Yet in spite of this jury determination, the court, over appellant's objection, and without any proof that appellant could not represent himself "adequately," deprived appellant of his constitutional right to self-representation. "Once the right to self-representation for the mentally ill is a sometime thing, trial judges will have every incentive to make their lives easier – to avoid the painful necessity of deciphering occasional pleadings of the sort contained in the Appendix to today's opinion – by appointing knowledgeable and literate counsel." (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 189. (Scalia, J., dissenting).)

Any standard approved by this Court should not be the amorphous abuse of discretion standard,[16] but should it be the at one time discarded formulation[17] found in *People v. Burnett*, *supra*, or should it be some other standard?

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[16] See, e.g., *People v. Lawrence* (2009) 46 Cal. 4th 186, 196. What occurred there might not seem fair to an outside observer. "A denial of a criminal defendant's right to counsel affects 'the framework within which the trial

The *Amici Curiae* brief by the American Psychiatric Association (APA), relied upon by the Court in *Edwards*, indicates that cognitive/communication deficiencies on the part of a *pro se* defendant, who has a mental illness, may be sufficient to deny an individual his constitutional right to self-representation. (Brief for APA et al., as *Amici Curiae* 23-26.) Further, the brief states that there is not much research available presently to assist a court on what is a relatively rare circumstance, "while there is a considerable professional literature on techniques for assessing the competency to stand trial and all sorts of other competencies, no comparable professional attention has focused on the relatively rare phenomenon of mentally ill defendants asserting *Faretta* rights. (*Id.*, at 26.) The brief indicates that evaluations, like those performed for competency to stand trial, would be necessary for a sound determination as to whether a *pro se* defendant is "capable" of representing himself at trial. Those evaluations should be specifically focused on "the underlying capabilities relevant to self-

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proceeds' and thus it is not 'simply an error in the trial process itself.'" (*Id.*, at p. 203. (Kennard, J., dissenting).)

[17] "Unfortunately, there is no easy way to establish competence to waive counsel. . . . In addition to an appreciation of the risks run by any accused person who exercises the right to self-representation, which is the threshold consideration, competence to waive counsel also includes an array of basic cognitive and communicative skills relating to the presentation of a defense to criminal charges. Such skills are present when the accused: (1) possess a reasonably accurate awareness of his situation, including not simply an appreciation of the charges against him and the range and nature of possible penalties, but also his own physical or mental infirmities, if any; (2) is able to understand and use relevant information rationally in order to fashion a response to the charges; and (3) can coherently communicate that response to the trier of fact." (*People v. Burnett*, *supra*, 188 Cal. App. 3d at p. 1327.)

representation.[18] (*Id.*, at pp. 26, 27.) Finally, the brief indicates that a court should "take into account the availability of standby counsel" and, should the court find the defendant incompetent to proceed pro se, determine whether "available treatment would likely render the defendant competent to represent himself" and whether the delay in the proceedings would be warranted. (*Id.*, at 34-35.)

The brief is premised on the belief that the United States Supreme Court "has recognized the strong public interest, when criminal charges are contested, in the reliability of the adversarial process used to adjudicated the truth of the charges." (*Id.*, at pp. 8-9.) Such a premise is well-intentioned but "[e]xperience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." (*United States v. Olmstead* (1925) 277 U.S. 438, 479 (Brandeis, J., dissenting).)

An acceptance of *Edwards* requires a two-tiered system for exercising the constitutional right of self-representation. People who wish to plead guilty may waive their rights and be sentenced to death, even if they suffer from severe mental illness but are still competent, while an individual suffering from the same severe mental illness and also competent may not be allowed to represent himself

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[18] What specifically would this Court define as "underlying capabilities relevant to self-representation" that does not also eviscerate an individual's choice for self-representation?

at trial. How does this appear fair or even rational to an impartial observer of the court system?

An additional *Amici Curiae* brief was submitted to the Edwards court by the American Bar Association (ABA). That brief referred the Court to the American Bar Association Criminal Justice Mental Health Standards (ABA 1989) Standard 7-5.3 [Competence to waive counsel and to proceed without the assistance of counsel]. The standard suggests a mental evaluation, a report, and a hearing before determining whether a defendant can proceed *pro se*. (Brief for ABA as *Amici Curiae* Appendix B 4a-5a.)

All of these formulations seem unworkable. *Godinez* suggests that the standard of competence will focus on a defendant's mental capacity to *understand* the proceedings. (*Godinez v. Moran*, *supra*, 509 U.S. at p. 401, fn. 12. Italics added.) It would be wrong to believe that a court may deny a defendant's personal right to represent himself just because a court does not believe that the defendant has the education, skills, or knowledge to effectively represent himself. And because *Edwards* only dealt with individuals with "severe mental illness," a litany of problems that may keep a *pro se* defendant from effectively representing himself would be beyond the reach of any judicial interference. Thus, a slow witted defendant, who knowingly, intelligently, and timely asserts his right to self-representation, could not be denied his right even though the resulting trial would look to any unbiased observer as unfair and there would be, in essence, no adversarial testing of the prosecution's case.

II

WHATEVER THIS COURT DECIDES, APPELLANT IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS

This Court faces two questions; should California impose a higher competence standard for self-representation at trial than for trial with counsel and, if it does, should that standard be applied retroactively or prospectively.

Assuming this Court adopts the higher standard, the rule should not be applied retroactively. As a general rule, new constitutional rules of criminal procedure, even if they represent a "clear break" from the past, are fully retroactive to cases not yet final where the new rule expands the rights of criminal defendants. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328; but see *People v. Reyes* (1998) 19 Cal. 4th 743, 755-756.) A decision adopting a higher competence standard will not expand the rights of criminal defendants. Statutory enactments, though, are presumed to operate only prospectively. (*Tapia v. Superior Court* (1991) 53 Cal. 3d 282, 287.) The situation here, however, involves neither a new constitutional rule of criminal procedure nor a statutory enactment.

This Court declined to give *Faretta* retroactive application because *Faretta* was a "clear break" from existing interpretation of the right to counsel and was not designed to "aid in the search for truth or to insure the integrity of the fact-finding process." (*People v. McDaniel* (1976) 16 Cal. 3d 156, 162-168.)

This Court's adherence to that rationale was reaffirmed in *People v. Bloom* (1989) 48 Cal. 3d 1194. "The core rationale of *Faretta* is that an unwanted

counsel represents the defendant only through a tenuous and unacceptable legal fiction, and that although [the defendant] 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. [¶] This court's opinions have been sensitive to the basic Sixth Amendment values found controlling in *Faretta*. On numerous occasions we have recognized the need to respect the defendant's personal choice on the most fundamental decisions in a criminal case. Thus even in a capital case defense counsel has no power to prevent the defendant from testifying at trial and the defendant may testify at the penalty phase to a preference for the death penalty. By exercise of the right of self-representation, a capital defendant may dispense with the advice and assistance of counsel entirely, waive jury trial, and elect not to oppose the prosecution's case at the guilt phase." (*Id.*, at pp. 1221-1222 [citations and internal quotation marks omitted].)

Here, the jury found appellant "able to understand the nature and purpose of the proceedings against him and to conduct his own defense in a rational manner." (2 CT 477-480; 2 RT 568; *People v. Merkouris* (1959) 52 Cal. 2d 672, 678, overruled on other grounds in *People v. Pennington* (1967) 66 Cal. 2d 508, 518-519.)[19] Two days later, without any change of circumstance, the court revoked

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[19] The California Constitution, prior to June, 1972, stated that an accused had the right "to appear and defend in person and with counsel." (Cal. Const., art. I, section 13.) That provision was rewritten in 1972 and states that a "defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense . . . ." (Cal. Const., art. I, section 15.) This amendment

appellant's right to proceed *pro se*. Appellant responded first by objecting and then by stating, "[h]ow is you doing all of this stuff and you just got through having a competency hearing that was all fraud, the whole competency hearing that you just had was straight fraud. I don't have any history of mental illness. I don't have one sheet of paper of mental illness, so how could you even have a competency trial with no . . ." (2 RT 584.)

An abuse of discretion exists whenever in the exercise of its discretion, the court exceeds the bounds of reason, all of the circumstances before it being considered. (*People v. Russell* (1968) 69 Cal. 2d 187, 194.) To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent, and just decision. (*People v. Surplice* (1962) 203 Cal. App. 2d 784, 791.) The trial court (and the Court of Appeal) in relieving appellant of his counsel of choice did not follow the jury's finding and did not follow the rules as stated by this Court. It abused its discretion. Further, no qualified expert ever unequivocally stated that appellant was not competent to represent himself or even that appellant suffered from a severe mental illness.

This case was a travesty on many fronts. Any impartial observer viewing the trial court's actions regarding appellant's right to counsel will not be able to

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eliminated the explicit guarantee of the right of the accused to represent himself. In *Faretta* the rewriting of California's constitution, and the interpretation given it, was rebuffed. (*Faretta v. California*, *supra*, 422 U.S. at p. 807.)

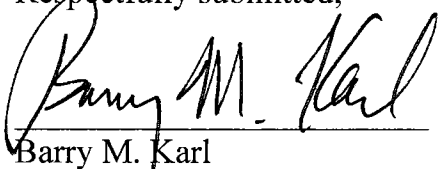
see any fairness, or even a rationality of approach, if his conviction is allowed to stand.

CONCLUSION

Appellant respectfully requests that this Court decline the United States Supreme Court's invitation to extend the *Edwards* decision to California and, at the same time, reverse appellant's convictions.

DATED: April 27, 2011

Respectfully submitted,



Barry M. Karl
Attorney for Appellant Andrew D. Johnson

CERTIFICATE OF APPELLATE COUNSEL

Pursuant to California Rules of Court, rule 8.520, subdivision (c) (1)

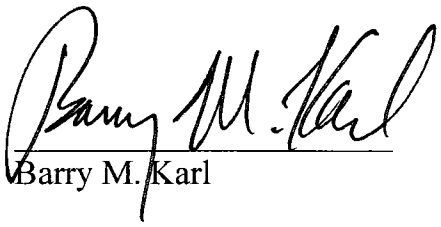
I, Barry M. Karl, certify that:

The length of Appellant's Opening Brief on the Merits does not exceed 14, 000 words, including footnotes;

In making this certification I am relying upon the word count of the computer program used to prepare Appellant's Opening Brief on the Merits;

The word count states that Appellant's Opening Brief on the Merits contains 5, 207 words.

DATED: April 27, 2011



Barry M. Karl

CERTIFICATE OF MAILING

Re: People v. Andrew D. Johnson, No. S188619
First Appellate District, Division Four, A124643
Superior Court Nos. VCR 191129 & VCR 191363

The undersigned declares under penalty of perjury:

That I am a citizen of the United States; that I am over the age of eighteen years and not a party to the within aforementioned action; that my business address is 620 Jefferson Avenue, Redwood City, California 94063;

That I served a true copy of the attached:

APPELLANT'S OPENING BRIEF ON THE MERITS

by placing said copy in an envelope addressed to:

Attorney General, State of California
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

First District Appellate Project
730 Harrison Street
Suite 201
San Francisco, CA 94107

Andrew D. Johnson

Superior Court
321 Tuolumne Street
Vallejo, CA 94590

District Attorney
321 Tuolumne Street
Room 205
Vallejo, CA 94590

Court of Appeal
350 McAllister Street
San Francisco, CA 94102

which envelope was then sealed and postage fully prepaid thereon and thereafter was deposited, on the date set forth below, in the United States mail at Redwood City, California.

Executed in Redwood City, California, this day of April, 2011.

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