IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

# APPELLANT'S REPLY BRIEF ON THE MERITS

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

Affirming the Judgment of Conviction on October 25, 2010



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

(2 RT 537), moved to dismiss the charges at the conclusion of the preliminary examination (2 RT 539), requested that his bail be lowered (2 RT 540), objected to the prosecutor's motion to consolidate cases (2 RT 541), filed a *Pitchess*[1] motion (2 RT 541), and asked the court to remove the appointed investigator and substitute a different investigator who had not previously worked as the prosecutor's agent (2 RT 542-543).

Dr. O'Meara, the expert who suggested that appellant might not be competent testified that appellant understood "his own status and condition in the criminal proceedings." (2 RT 417-418.) She did indicate that, in her opinion, appellant *probably* could not conduct his own defense in a rational manner. Dr. O'Meara stated that, "when a defense attorney would have enough concerns not to sit right by his defendant, that would raise some red flags to me that cooperation is a serious problem." (2 RT 419.) She believed that appellant's desire to represent himself sprung "very possibly" from "part of his mental illness," though she conceded that appellant's reasons for representing himself could spring from a reasonable and rational thought process. (2 RT 419-420.)

In believing that appellant's choice to proceed pro se was not a rational decision she testified thusly, "*I'm speculating here*, but I think if Mr. Johnson has a major mental disorder, there is a lot of evidence that he also has a personality disorder, and that's a whole other thing, but it seems like there's a lot of trouble that he has taking responsibility for himself. So to project his hostilities and

---

[1] *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531.

resentments on the attorney is a misplacement of those feelings. It seems to me that he needs to take responsibility for himself." (2 RT 423-424. Italics added.)

After indicating that appellant appeared rational and made appropriate motions (2 RT 426-428), Dr. O'Meara stated the following, "I think that he certainly has some understanding and perhaps in some areas he has greater understanding, but, again, there is a two-pronged test of competency. And the question of whether or not he can cooperate with a bar-card-holding attorney *to deal with a case of this magnitude,* I don't believe he's met that prong." (2 RT 428-429. Italics added.)

Further, Dr. O'Meara could not rule out that appellant was malingering and not mentally ill. (2 RT 433, 435-441.) She could not rule out that appellant suffered from an Axis II disorder, an antisocial personality disorder,[2] rather than an Axis I disorder, "a major mental illness that could be interfering with his ability to cooperate rationally." (2 RT 439-440.)

In the most telling portion of her testimony, Dr. O'Meara stated that she recommends to courts that *it would not be a good idea* for an otherwise competent defendant to represent himself. (2 RT 447-448.)

---

[2] It would seem that a large percentage of persons who are accused of violating the law suffer from an antisocial personality disorder. To say that someone who has an antisocial personality disorder cannot represent himself would essentially overrule the Supreme Court's decision in *Faretta v. California* (1975) 422 U.S. 806.

The evidence introduced by defense counsel, including Dr. O'Meara's testimony, failed to convince the competency jury that appellant was unable to represent himself in a rational manner.

While representing himself appellant *did not* disrupt court proceedings.[3] He was exercising the "substantial freedom of expression" that attorneys are given to protest what he believed to be erroneous rulings. (See, *In re Hallinan* (1969) 71 Cal 2d 1179, 1183.) Later, appellant did disrupt court proceedings. All of those disruptions occurred after counsel was appointed and was "representing" appellant.

Further, it seems unfair for the Attorney General to suggest that there is "just no way to tell whether the jury found appellant could only assist counsel, or found that he could assist counsel *and* conduct his own defense." (Answer, p. 31. Italics in original.) Maybe respondent made an honest mistake in using the word "and." The instruction given to the competency jury used the word "or," not the word "and." The District Attorney told the competency jury that appellant was competent, that he had an antisocial personality and not a mental illness, that he was malingerer, and that he had conducted his defense in a rational manner.

---

[3] See People's Exhibits 3 (July 19, 2007), 4 (July 20, 2007), pp. 27-34; and 11 (September 20, 2007), pp. 116-118. On January 30, 2008, the court had this to say about appellant's behavior, "[a]nd I'm including in that 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. . . ." (1 RT 158.)

Based on that argument the jury found appellant competent.[4] This Court should not now allow the Attorney General to take a contrary position. (See, e.g., *People v. Castillo* (2010) 49 Cal. 4th 145, 154-156.)

In *Dusky v. United States* (1960) 362 U.S. 402 the United States Supreme Court established the standard for competence to stand trial. For the Court it was not enough that a criminal defendant be "oriented to time and place and [had] some recollection of events." The criminal defendant must also have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as functional understanding of the proceedings against him." (*Id.*) California's statutory requirement for competence, though, is a little different. "The examining psychiatrists or licensed psychologists shall evaluate the nature of the defendant's *mental disorder*, if any, the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a *mental disorder*. . . ." (Pen. Code, § 1369, subd. (a). Italics added; see also, *People v. Leonard* (2007) 40 Cal. 4th 1370, 1391-1392.)

Further, an Axis II disorder, which Dr. O'Meara indicated that appellant may possess, is a personality disorder and is not the same as a mental disorder. (See, e.g., *People v. Blair* (2005) 36 Cal. 4th 686, 714-715.)

---

[4] Defense counsel told the jury that appellant could not "rationally assist" him. (2 RT 550-551.)

The defendant in *Indiana v. Edwards* (2008) 554 U.S.164 suffered from a "schizophrenic illness" and his "delusions and his marked difficulties in thinking make it impossible for him to cooperate with his attorney." (*Id.*, at p. 168.) Edwards had been found to be incompetent on two occasions in that case, and was still suffering from schizophrenia[5] when he requested to represent himself. (*Id.*, at pp. 168-169.)

Appellant did not suffer from such a severe mental illness, if he suffered from any mental illness at all. The DSM-IV-TR states the following:

"Some behaviors that are influenced by sociocultural contexts or specific life circumstances may be erroneously labeled paranoid and may even be reinforced by the process of clinical evaluation. Members of minority groups, immigrants, political and economic refugees, or individuals of different ethnic backgrounds *may display guarded or defensive behaviors* due to unfamiliarity (e.g., language barriers or lack of knowledge of rules and regulations) or *in response to the perceived neglect or indifference of the majority society. These behaviors can, in turn, generate anger and frustration in those who deal with these individuals, thus setting up a vicious cycle of mutual mistrust, which should not be confused with Paranoid Personality Disorder.* Some ethnic groups also

---

[5] Schizophrenia is a disorder that lasts for at least six months and includes at least one month of active-phase symptoms (i.e., two [or more] of the following: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, negative symptoms). (Am. Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders, (2000 4th ed. DSM-IV-TR) p. 298.) That, according to the *Edwards* Court, is a "severe mental illness to the point where [Edwards was] not competent to conduct trial proceedings by [himself]. (*Id.*, at p. 178.)

display culturally related behaviors that can be misinterpreted as paranoid." (Am. Psychiatric Assn., *supra*, at p. 692. Italics added.)

Moreover, as this Court has stated, even a history of serious mental illness [i.e.,"bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition"] does not necessarily constitute substantial evidence of incompetence that would require a court to declare a doubt as to a defendant's competence.[6] (See, *People v. Ramos* (2004) 34 Cal. 4th 494, 508-511.)

Thus, the Court of Appeal's conclusion, that appellant though competent to stand trial was not competent to conduct trial proceedings as his own lawyer, has no substantial basis of factual support.

The Attorney General's claim, that the appropriate "new" standard to be adopted post *Edwards* could be "as simple as determining whether the defendant can conceive of a defense and coherently communicate it to the judge and jury"[7] (Answer, p. 28), was itself rejected by the *Edwards* Court. (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 178. [The Court declined to accept Indiana's request to "deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or jury"].)

---

[6] A finding of incompetence [meaning the declaration of a doubt] requires that a psychiatrist or psychologist have "sufficient opportunity to examine the accused." The psychologist in question, Mr. Sussman, had worked with the defendant for seven years at Atascadero State Hospital. (*People v. Ramos*, *supra*, 34 Cal. 4th at p. 508, quoting from *People v. Pennington* (1967) 66 Cal. 2d 508, 519.)

[7] Does that mean that someone with a low IQ who could state that the person who did the crime "was not me," or that the witnesses were mistaken in the identification would "pass" the Attorney General's test?

The more sound procedure in the future, if this Court is going to embark on this new, uncharted voyage, is to require a competency evaluation that is specifically tailored to the context and purpose of the proceeding, i.e., whether the defendant has the mental abilities to conduct his or her defense without counsel and in a rational manner.[8] (See, e.g., *Rees v. Peyton* (1966) 384 U.S. 312, 314; *United States v. Johnson* (9th Cir. 2010) 610 F. 3d 1138, 1146. [The psychiatric evaluation considered the defendant's competence for self-representation].) In the instant case it appears that the trial court attempted to have appellant evaluated for his competence to represent himself. (1 CT 160, 161.) But the court, after learning that appellant was not interviewed by any of the three mental health professionals, did not compel appellant to submit to an examination by court appointed psychiatrists and/or psychologists to determine whether he was competent [had the mental capacity] to represent himself in a rational manner.[9] (See, e.g., *Tarantino v. Superior Court* (1975) 48 Cal. App. 3d 465, 469.) He should have done this because no mental health profession could properly determine appellant's competency without such an evaluation. (2 RT 332, 437, 482-484, 507-508, 512.)

---

[8] This Court should also provide a defendant with the same procedural safeguards as presently found in Penal Code section 1369 regarding the appointment of experts and the right to a contested hearing.

[9] It would seem possible, at the time appellant waives his right to counsel and is allowed to proceed pro se, to include in the waivers something to the effect that should a doubt as to the defendant's competence to represent him or herself arise that the defendant agrees to cooperate with an examination by court appointed mental health experts to determine whether he or she could conduct the defense in a rational manner without the assistance of counsel.

Additionally, as suggested by *Edwards*, this new standard would require this Court to delineate the basic tasks that a defendant would be required to have the mental capacity to carry out to present his own defense without the help of counsel,[10] and delineate those tasks for mental health professionals so that the experts may properly evaluate the defendant. (*Indiana v. Edwards*, *supra*, 554 U.S. at pp. 175-176.) This minimum standard, though, may create unintended consequences. (See, e.g., *Rompilla v. Beard* (2005) 545 U.S. 374, 387.)

Furthermore, the Attorney General's broad brush of history leaves much to be desired. *Dusky*'s test for competency[11] was not framed "in these terms [has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . .] because representation by counsel was presumed by 1960." (Answer, p. 15.) The prevailing law at the time of *Dusky* was *Betts v. Brady* (1942) 316 U.S. 455. That case held that the Sixth Amendment's guarantee

---

[10] Does this mean, as suggested by the Attorney General, that a criminal defendant must merely have the ability to understand the charges and be able to "use relevant information rationally in order to fashion a response to the charges?" (*People v. Burnett* (1987) 188 Cal. App. 3d 1314, 1327.) A defendant who is competent to stand trial *with* a lawyer must have the mental acuity to understand and digest the evidence, and the ability to help counsel in preparing an effective defense. (*Dusky v. United States*, *supra*.)

[11] The defense offered in *Dusky* was that of insanity (Dusky was not criminally responsible because his unlawful act was the product of mental disease or mental defect). Prior to trial Dusky had been ordered to undergo medical and psychological examinations at the United States Medical Center for Federal Prisoners. He remained there for four months. A report detailing a neuropsychiatric examination of Dusky stated that he was schizophrenic, had visual and auditory hallucinations, and required the use of tranquilizing medications. Mental health professionals believed that Dusky could properly assist his counsel. The trial court rejected this conclusion. (*Dusky v. United States* (8th Cir. 1959) 271 F. 2d 385.)

of counsel only applied to trials in federal courts, not state courts. (*Id.*, at pp. 461-463, 466-471.) It was not until three years after *Dusky* that *Betts* was overruled in *Gideon v. Wainwright* (1963) 372 U.S. 335, 339, 345.

Further, his citation to *Wade v. Mayo*[12] (1948) 334 U.S. 672 seems strange, and does not stand for what the Attorney General claims, that a defendant representing himself without the requisite skills is a violation of due process. (Answer, p. 25.) The defendant in *Wade* requested that counsel be appointed for him because he was financially unable to employ one, but that request was denied. Wade was forced, against his wishes, to proceed to trial without counsel. (*Id.*, at p. 675.) As the facts of the case make clear, Wade was eighteen years old, "though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself." (*Id.*, at p. 683.) There was no issue related to competence decided by this case. The Court held that the conviction violated due process, under the all the circumstances present, because the trial court had denied Wade the counsel that he had requested.

The Attorney General's suggestion, that trial courts should have discretion to determine whether the accused are "incompetent to represent themselves," would seem to violate *Faretta*. As the United States Supreme Court has stated in *Godinez*, the only way that a trial court can deny a defendant's request to proceed pro se where the defendant wants to represent him or herself but not necessarily

---

12 This was also a case from Florida, as was *Gideon*.

proceed to trial is whether the request is timely, and knowingly and intelligently made.

Though *Edwards* did say that "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," that statement must be read in light of the facts of that case. Edwards was a diagnosed schizophrenic who had been found to be incompetent, and sent to state psychiatric hospitals on two separate occasions by the trial judge after hearings that included expert evaluations over a substantial period of time.

To allow a court to deny a criminal defendant's right to represent himself because of a court's seat-of-the-pants evaluation of the accused does not seem appropriate in light of the constitutional right at stake. Mental health professionals must be required to provide the court with appropriate evaluations and those evaluations must be subject to the appropriate adversarial scrutiny before a criminal defendant's right may be overruled.

The abuse of discretion standard, suggested by the Attorney General as the standard to apply by reviewing courts to the trial court's action, is not sufficient to protect a defendant's Sixth Amendment right to counsel. "[T]he 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.) Thus, the actions of a trial court

should be required to be reviewed by at least the *de novo*[13] standard. (See, *People v. Waidla* (2000) 22 Cal. 4th 690, 730. "An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement . . . .")

Appellant's convictions must be reversed.

It does not matter that appellant's trial took place after the high court's decision in *Edwards*. Trial courts and Courts of Appeal are not free to adopt whatever standard they wish. *Edwards* did state that the reversal of Edwards' conviction 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." (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 178.) But at the time of appellant's trial and Court of Appeal opinion neither the Legislature nor this Court had articulated a different standard. "Under the doctrine of stare decisis, all tribunal exercising inferior jurisdiction are required to follow decisions of courts exercising

---

[13] See, *Moon v. Superior Court* (2005) 134 Cal. App. 4th 1521. "The characterization of the right of self-representation as a fundamental constitutional right bearing on the structural integrity of the trial process is important when it comes to applying the 'plain error' rules . . . ." (*Id.*, at p. 1533.) "Federal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations." (*United States v. Young* (1985) 470 U.S. 1, 17, fn. 14.)

superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.)

Even if trial court and the Court of Appeal disagreed with this Court's opinions (see, *People v. Halvorsen* (2007) 42 Cal. 4th 379, 431-434; *People v. Taylor* (2009) 47 Cal. 4th 850, 891-893), each tribunal had no choice but to follow the declared law by this Court, unless and until the United States Supreme Court directly decided the issue to the contrary, and/or the California Supreme Court adopts a new standard. It is simply not appropriate for a trial court and/or a Court of Appeal to rule contrary to this Court's opinions. Either the trial court or the Court of Appeal could have made a record articulating why it believed this Court's opinions were erroneous and should be revisited, while at the same time upholding the binding decisions of the Court. To state, as the Court of Appeal did, "We express no opinion on whether trial courts in the future *should* employ the *Edwards* standard. This is a matter for our high court to decide. We find only that trial courts may employ the *Edwards* standard without offending the United States Constitution" (Opinion of Court of Appeal, pp. 22-23; italics in original), merely begs the question.[14]

---

[14] The question posed by the Court of Appeal, "does the trial court, following *Edwards*, have the *power* to deny self-represention to a trial-competent defendant," is wrong. (Opinion of Court of Appeal, p. 22. Italics added.) As this Court stated in *Taylor*, "While *Edwards* makes clear states may set a higher or different competence standard for self-representation than for trial counsel, *California has not done so* at the time of defendant's trial. *In the absence of a separate California test of mental competence for self-representation, the trial*

Moreover, the Court of Appeal's decision reeks of unfairness. It specifically states that appellant is to be treated one way but that other trial courts may treat similarly situated defendants differently, after this Court decides whether the *Edwards*' standard is to be applied in California or not.

Additionally, as explained above, the prosecutor at the competency trial convinced the trial court to provide an improper jury instruction ["assist, in a rational manner, his attorney in presenting his defense *or conduct his own defense in a rational manner*"] and argued that appellant was competent *because* he had conducted his own defense in a rational manner. Defense counsel only argued that appellant could not assist counsel in a rational manner. The jury's verdict, finding appellant competent, rejected defense counsel's position and adopted that of the prosecutor.

Further, the trial court's comment (Answer, p. 33) regarding the reason appellant lost his pro per status is belied by the record. The Attorney General knows better. All of appellant's acting out occurred after the trial court took away appellant's pro per status and appointed a lawyer to "represent" him.

However this Court should decide the issue regarding the adoption or not of the *Edwards*' standard, appellant's convictions must be reversed.

---

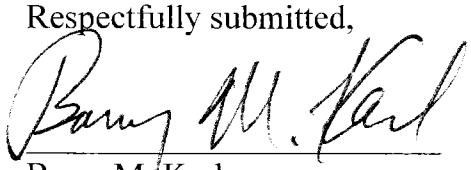
*court had no higher or different standard to apply to the question.*" (*People v. Taylor, supra*, 47 Cal. 4th at p. 866. Italics added.)

## CONCLUSION

For all the above reasons, and for all the reasons stated in Appellant's Opening Brief on the Merits, 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: August 9, 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 Reply Brief on the Merits does not exceed 8, 400 words, including footnotes;

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

The word count states that Appellant's Reply Brief on the Merits contains 3, 159 words.

DATED: August 9, 2010

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 REPLY 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 August, 2011.

_____