In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
ZEFERINO ESPINOZA, Jr.,
Defendant and Appellant.

Case No. S224929

Sixth Appellate District, Case No. H039219
Santa Clara County Superior Court, Case No. C954850
The Honorable Paul Bernal, Judge

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Following a knowing and voluntary waiver of counsel under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), a pro se defendant's voluntary abandonment of trial forfeits constitutional trial rights of an accused to personal presence, confrontation of adverse witnesses, and the presentation of a defense through counsel, until such time as the defendant appears in court to personally exercise those rights in the trial itself. Appellant does not dispute that he forfeited his right to presence; indeed, he states that "is not at issue here." (ABOM 36, fn. 4.) Nor does appellant contest that a pro se defendant's voluntary abandonment of trial can forfeit the rights to confrontation and to the presentation of a defense through counsel.

Appellant argues instead that his abandonment of trial forfeited his right to self-representation, and that the trial court constructively so found by itself serving as his counsel for the balance of trial. "There is general agreement," his argument runs, "that, when the trial court terminates a defendant's right to self-representation for misconduct, the right to counsel endures and counsel must be appointed." (ABOM 4.) From that principle, he derives a conclusion that "[t]he trial court's error . . . was in undertaking the appellant's representation itself, rather than appointing counsel for that task." (ABOM 23.) Because, according to this claim, the trial court's representation of appellant was a de facto revocation of his pro se status, the court's continuation of trial without appointing the counsel demanded by the Sixth Amendment was structural error. (ABOM 3-4, 21-24, 25-26, 30-48.)

In addition to a Sixth Amendment requirement that he be appointed counsel when the court constructively terminated his *Faretta* rights, appellant argues state law required the appointment of counsel because appellant did not meet the required standard of competency due to mental illness. (ABOM 24, 48-52.)

Lastly, appellant contends that once the trial court granted him the right to represent himself it was obligated to grant him a necessary continuance to prepare. (ABOM 24, 53-57.) "Under this standard, as the court of appeal properly held, denial of a one-day continuance was an abuse of discretion." (ABOM 24.)

Appellant's claims are baseless. First, appellant's claim that he forfeited his right to self-representation when he abandoned trial and that the trial court constructively so found by itself serving as his counsel for the balance of trial is a new claim that is not fairly included in the question on review. It is thus forfeited. It is also without merit as the trial court did not act as appellant's counsel and did not constructively revoke appellant's self-representation status, requiring the appointment of new counsel.

Second, appellant's new claim that state law required appointment of counsel when the trial court terminated his *Faretta* rights is both forfeited and moot because the court did not terminate appellant's *Faretta* rights.

Third, appellant's claim that the trial court abused its discretion in denying his request for a one-day continuance is premised on a misreading of the record.

ARGUMENT

I. BECAUSE THE TRIAL COURT DID NOT TERMINATE APPELLANT'S SELF-REPRESENTATION STATUS IT HAD NO SIXTH AMENDMENT OBLIGATION TO APPOINT COUNSEL

Appellant's Sixth Amendment claim is novel. He asserts that the Court of Appeal never "fully understood the case law." (ABOM 25.) In reality, however, he has jettisoned altogether the constitutional claim he raised below (see Ct.App. AOB 5-10), in order to assert a new Sixth Amendment claim that his *Faretta* rights were revoked without the required appointment of new counsel—based on different case law. He now invokes three of this court's cases—*People v. Clark* (1992) 3 Cal.4th 41 (*Clark*),

People v. Stansbury (1993) 4 Cal.4th 1017 (*Stansbury*), and *People v. Carson* (2005) 35 Cal.4th 1 (*Carson*)—and argues that his abandonment of trial was not "a 'conscious decision to force the prosecution to its proof,'" but "'a deliberate course of action designed to cause as much disruption as possible'" and "intended to 'interject error and delay in the proceedings.'" (ABOM 33, quoting *Clark*, *supra*, 3 Cal.4th at p. 116; *Stansbury*, *supra*, 4 Cal.4th at p. 1046.) He states that "[n]ot only was appellant's conduct obstructive and intended to delay and sow error into the trial, but it threatened to produce, and did in fact produce, a one-sided proceeding. This threatened a core concept of a criminal trial." (ABOM 41.) He further argues that the trial court so found because it ruled upon his abandonment that "the purpose for which he chose to not come to trial was evasion of the trial or avoiding penalty for the alleged crimes that he allegedly committed or another delay tactic with the [appellant] perhaps believing that if he didn't show up to trial that the court would terminate this jury trial, send the jurors home and then when he comes in in a month he would try to delay the trial again for another three years." (11 RT 608.)

In this roundabout manner, appellant arrives at an argument that it is constitutionally irrelevant whether or not he voluntarily abandoned the trial for the Sixth Amendment claim he now presses. According to appellant's current position, "[t]he relevant distinction is not whether the pro se defendant's absence is voluntary or involuntary. While that distinction is relevant under Penal Code section 1043 for determining whether the defendant has forfeited *his right to be present and confront witnesses*, a different analysis governs with respect to a pro se defendant's *right to counsel*. The relevant question is whether the pro se defendant has forfeited his right to self-representation. If the right to self-representation has been forfeited, counsel must be appointed." (ABOM 25, original italics.)

A. Appellant's New Claim Is Not Fairly Included in the Question on Review and Is Forfeited

For two reasons, the court need not reach appellant's argument. First, the claim is not fairly included in the issue upon which the court granted review. (Cal. Rules of Court, rule 8.516(b)(1); *People v. Alice* (2007) 41 Cal.4th 668, 677-678 (*Alice*); *People v. Estrada* (1995) 11 Cal.4th 568, 580 (*Estrada*).) The court granted respondent's petition for review in the absence of an answer or cross-petition by appellant. The question raised in the petition is whether a voluntary and intentional absence of a self-represented defendant forfeits trial rights otherwise afforded by the defendant's presence and authorizes continued trial, without a knowing and intelligent advanced waiver of the rights. That question encapsulates the judgment of the Court of Appeal, which held the trial court erred in proceeding with trial in the absence of appellant or defense counsel because appellant did not knowingly waive his fundamental trial rights. (Typed Opn. at pp. 2, 15-19.) Respondent's petition for review and brief on the merits addressed the question presented in the context of the holding by the Court of Appeal, not in the context of any tagalong issue about the superior court judge erroneously acting as appellant's counsel at the trial and thereby actually or constructively revoking appellant's *Faretta* rights.

As appellant's brief makes clear, his current argument does not involve mere differences in emphasis about the proper procedure for determining when it is proper to proceed with trial after its abandonment by a self-represented defendant. Instead, his argument amounts to a brand new Sixth Amendment denial-of-counsel claim, focused on facts and legal principles separate from those relevant to the question on which review was sought. Whether the trial court made a de facto revocation of *Faretta* rights following appellant's abandonment of the trial is not inherent in whether that court constitutionally ordered trial to proceed in the first place.

Accordingly, the issue is not properly raised in this case and need not be considered. (Cal. Rules of Court, rule 8.516(b)(1); *Alice*, *supra*, 41 Cal.4th at pp. 677-678; *Estrada*, *supra*, 11 Cal.4th at p. 580.)

Second, appellant's claim of error was neither raised nor decided below and was forfeited. "No procedural principle is more familiar . . . than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (*United States v. Olano* (1993) 507 U.S. 725, 731, internal quotation marks omitted; accord, *People v. Saunders* (1993) 5 Cal.4th 580, 590.) Self-represented defendants are subject to the forfeiture doctrine, including the loss of fundamental constitutional rights. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1224 & fn. 2.) If appellant thought he was denied counsel based on a de facto *Faretta* revocation, he should have said so promptly on his return to the trial court. Appellant did not raise any such claim of error on his motion for a new trial—even with the assistance of counsel at the time. As we pointed out in our respondent's brief in the Court of Appeal (Ct.App. RB 10, fn. 2), appellant instead tacitly conceded in the trial court that he voluntarily absented himself for the purpose of evading trial and observed that *People v. Parento* (1991) 235 Cal.App.3d 1378 (*Parento*), "held that a [voluntarily absent] defendant can waive his right to counsel and his right to be present." Rather than contend this factual scenario did not apply to him, appellant argued *Parento* was wrongly decided. (3 CT 463.) Similarly, appellant's present issue was not before the Court of Appeal, nor addressed in its opinion. Indeed, of the three cases by this court cited in appellant's brief for his new argument, only *Clark* appears in the opinion of the Court of Appeal, and then only in connection with its separate holding that appellant was improperly denied a one-day continuance. Appellant forfeited his claim.

B. Appellant Was Not Denied the Sixth Amendment Right to Counsel Following his Voluntary Abandonment of Trial

In *Clark*, *supra*, 3 Cal.4th 41, trial resumed after a three-day weekend, and the pro se defendant, out of the presence of the jury and prior to resuming his cross-examination of a prosecution witness, made a number of motions. (*Id.* at p. 113.) Some involved the manner in which the court would allow him to question witnesses and handle exhibits, and the court made several rulings against the defendant. The defendant also moved to recuse the prosecutor, and during the course of the defendant's "rambling discourse" on that motion, "the court twice warned him not to abuse his 'pro per status' or it would be revoked. After allowing the defendant to discuss at length his unfocused motion to recuse, the court denied it as 'frivolous.' The defendant tried to continue arguing the issue. The court stated it had already ruled and that the defendant was not to speak further on that point. It asked if the defendant was ready to proceed. The defendant responded, 'I'm ready to proceed with this motion [the one the court had just ruled upon]. [¶] You have not heard this motion.'" (*Id.* at pp. 113-114.) The trial court ordered the jury brought into the courtroom, and told the defendant he could continue cross-examining the prosecution witness. The defendant immediately stated, "'Your Honor, the defense stands mute throughout the rest of the trial.'" (*Id.* at p. 114.) After the trial court excused the jury it found that the defendant had renounced his pro per status, and it ordered counsel to resume conducting the defense. Counsel represented the defendant for the rest of the day. (*Ibid.*) The following day, counsel advised the court that the defendant had reconsidered his position and was now willing to continue cross-examining the prosecution witnesses. The court opined that the defendant was attempting to place the court in a dilemma and was "playing games," but agreed to give the

defendant another chance to represent himself. The court reinstated the defendant's in propria persona status, and warned that any further misbehavior or delaying tactics would result in revocation of that status. (*Ibid.*) This court rejected the defendant's claim that the trial court improperly revoked his pro se status because he had a right to conduct his defense by standing mute:

> Throughout the trial, defendant had frequently and vehemently made clear that he desired to prove that others had committed the crimes. He had been vigorously defending himself, and indeed had clearly been planning to continue his detailed cross-examination of the pathologist as late as the court's ruling on the recusal motion. Then he apparently became disgruntled with the court's rulings. In front of the jury, he suddenly stated an intent to stand mute. This statement was clearly not motivated by the sincere desire to withhold a defense; it was instead an attempt to either inject error into the case, or to pressure the court into reconsidering its earlier rulings, or, most likely, both. It was merely one of a series of attempts to manipulate or coerce the trial court.
>
> The court was not required to tolerate this conduct. As *Faretta* itself made clear, a constitutional right of self-representation "is not a license to abuse the dignity of the courtroom." (*Faretta v. California*, *supra*, 422 U.S. 806, 835, fn. 46.) Thus, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Id.* at p. 834, fn. 46.)

(*Clark*, *supra*, 3 Cal.4th at pp. 114-115.)

This court concluded that *Faretta* issues often present trial courts with tough judgment calls, and that courts are entitled to deference on such issues. Where a court justifiably views a defendant's statement to "stand mute" not as a conscious decision to force the prosecution to its proof, but as part of a deliberate course of conduct designed to cause as much disruption as possible, the court may properly revoke the defendant's *Faretta* status. (*Clark*, *supra*, 3 Cal.4th at p. 116.) "As the court stated in

People v. Davis (1987) 189 Cal.App.3d 1177, 1187, 'Trial courts are not required to engage in game playing with cunning defendants who would present Hobson's choices.' *Faretta v. California*, *supra*, 422 U.S. 806, held generally that a defendant may represent himself. It did not establish a game in which defendant can engage in a series of machinations, with one misstep by the court resulting in reversal of an otherwise fair trial." (*Clark*, *supra*, 3 Cal.4th at p. 116.)

In the second of this court's cases cited by appellant, *Stansbury*, *supra*, 4 Cal.4th 1040, the pro se defendant twice assertedly tried to stand mute, but each time the trial court told him that it would strip him of his pro se status unless he put on a defense. (*Id.* at pp. 1040-1041.) This court followed *Clark* and rejected the defendant's contention that the trial court substantially impaired his ability to conduct his defense by threatening to revoke his pro se status in a dispute. This court recognized that in some circumstances a defendant representing himself, unlike counsel, may elect to refuse to participate actively in his defense, but that this was not the situation before it:

> As in *People v. Clark*, *supra*, 3 Cal.4th at page 114, defendant had eagerly sought to defend himself and had a particular defense strategy in mind when he became disgruntled with some of the court's rulings and with his assistant counsel's attitude. He admitted that he would be kidding himself to think he had any chance of prevailing at trial if he put on no defense; rather, he sought to interject error into the trial so that the conviction would be reversed on appeal. At the very least, he was operating under the misapprehension that he was sure to prevail on appeal. Both the court and defendant's assistant counsel expressed the opinion that defendant was simply playing for time.

(*Stansbury*, *supra*, 4 Cal.4th at p. 1044.)

In *Stansbury*, the court's examination of the record supported its view that the defendant's desires to stand mute were insincere and manipulative.

The court concluded: "In sum, we see no improper interference with defendant's right to represent himself. Defendant used the threat to stand mute as a weapon when the court ruled against him. The court was within its power to counter that apparently insincere threat with its threat to revoke defendant's pro se status, which, after all, was not inviolate. (*Faretta, supra*, 422 U.S. at p. 835, fn. 46; *People v. Clark, supra*, 3 Cal.4th at p. 115.)" (*Stansbury, supra*, 4 Cal.4th at p. 1046.)

In the third case comprising appellant's trilogy of authority, *Carson, supra*, 35 Cal.4th 1, the defendant's investigator mistakenly gave him discovery material to which he was not entitled, including witness addresses and telephone numbers, and criminal history records. (*Id.* at p. 12.) In light of the defendant's improper acquisition of this discovery, and his "antecedent attempts to suborn perjury, fabricate an alibi, and possibly intimidate a prosecution witness," the trial court terminated his *Faretta* right. (*Id.* at pp. 6, 13.) This court ruled that "serious and obstructionist out-of-court misconduct" that threatens to "subvert 'the core concept of a trial' [citation] or to compromise the court's ability to conduct a fair trial [citation]," may lead to forfeiture of the right to self-representation. (*Id.* at p. 10.)

This court offered guidance on when out-of-court conduct by a pro se defendant may subvert the core concept of a trial or compromise the court's ability to conduct a fair trial and sanction termination of the defendant's *Faretta* rights. (*Carson, supra*, 35 Cal.4th at p. 10.) First, the trial court should consider "the nature of the misconduct and its impact on the trial proceedings." (*Ibid.*) The trial court should also consider "the availability and suitability of alternative sanctions" and "whether the defendant has been warned that particular misconduct will result in termination of in propria persona status." (*Ibid.*) "Additionally, the trial court may assess whether the defendant has 'intentionally sought to disrupt and delay his

trial.' [Citations.] In many instances, such a purpose will suffice to order termination . . . ." (*Ibid.*) The court remanded the case to the trial court for a hearing on whether defendant's *Faretta* rights were properly terminated. (*Carson, supra*, 35 Cal.4th at p. 14.)

At most, *Clark*, *Stansbury*, and *Carson* might be authority that the court would not have committed error by revoking appellant's pro per status and appointing counsel. Of course, that principle does not lead to any conclusion that the court here revoked petitioner's *Faretta* status, let alone to a view that a court commits structural error by not revoking pro se status when the defendant voluntarily abandons trial.

In an attempt to bridge that yawning gap in the argument, appellant asserts the trial court "acted as self-appointed counsel for appellant" and "constructively revoked appellant's right to self-representation." (ABOM 4.) "This much is clear from the fact that the court did not permit appellant to control his defense through non-participation. Instead of permitting appellant to exercise and control a defense strategy of non-participation, the court took the unusual step, throughout trial, of serving as appellant's counsel." (ABOM 38.) Appellant recounts a trial hearing concerning the prosecution's proffer of certain evidence in which the court stated that it "has also taken into consideration the argument likely that the defendant/or his defense attorney would have made if they had been present . . . ." (11 RT 624.) Later, before another in limine evidentiary hearing, the trial judge stated: "The court is going to conduct a 402 hearing as if defense were here and had objections to things that this officer would be testifying to and the court is having this hearing to protect the rights of the defendant in his absence." (11 RT 662-663.) Still later, referring to the instructions given by the court to the jury, the trial judge stated, "The Court took into consideration arguments, requests, and objections that the defense would

have made." (11 RT 761-762.) And appellant points to remarks by the trial judge in denying appellant's motion for new trial, where the court stated:

> In Mr. Espinoza's absence during the trial, I, as a court, voiced a defense position on behalf of the defendant as if he were here during the trial. I iterated what the defense would want on all substantial issues and motions. I basically sat in defense counsel's seat to protect the rights of the defendant, and I took all possible, reasonable defense positions into account before I ruled on any issues that were before the court in the defendant's absence. So the court did everything it could given the situation that defendant put the court in to make sure that the court was following the law, completing the trial, and making sure that the jurors were deciding the issue, on the right issues before them and not on inappropriate issues. So for all of those reasons the motion for new trial is denied.

(13 RT 1029-1030.)

The trial court simply considered the position the defense would likely take in ruling on the prosecution's various submissions. Appellant cites no decisions holding the *Faretta* right of self-representation is considered revoked if a judge makes a ruling at a trial in absentia after considering, hypothetically, the position the defense might have taken if there had been representation of an absconding pro se defendant. We know of no such authority.

It would be, to say the least, ironic if a court's bending backward to afford due process to an absconding pro se at a trial in absentia were deemed reversible per se as appellant claims. The court's remark, such as its figurative comment about sitting at counsel's chair in considering motions and other trial issues, does not suggest it represented appellant *as his counsel*. Quite to the contrary, the remarks confirm that it impartially presided as the judge deciding questions of law despite appellant's efforts to derail the trial altogether.

Moreover, the record does not hint at the possibility the jury viewed the court as somehow acting as counsel for petitioner. The court nowhere

ordered appellant's *Faretta* right revoked, or appointed itself (or anyone else) as counsel (or cocounsel or advisory counsel). The court did not purport to conduct any defense. It did not cross-examine prosecution witnesses, did not call defense witnesses, did not make defense motions, and did not present argument. Its actions are not evidence of judicial impropriety, or of interference with the defense, and certainly not of any revocation of appellant's *Faretta* right. The court exercised its inherent powers to control the proceedings to make the trial fundamentally fair. That action fully honors a defendant's desire for self-representation.

Parento, *supra*, 235 Cal.App.3d 1378 also validates the trial court's actions. There, the defendant, who had previously chosen to represent himself, requested appointment of counsel and a continuance on the day of trial. (*Id.* at p. 1380.) When the requests were denied, the defendant refused to participate further in the proceedings and voluntarily absented himself from the trial. (*Id.* at pp. 1380-1381.) The trial proceedings continued in his absence without the appointment of defense counsel. (*Id.* at p. 1380.) On appeal, the defendant argued that it was error for the trial court to proceed with trial in his absence or without the appointment of counsel. (*Ibid.*) The Court of Appeal rejected this claim. (*Id.* at pp. 1381-1382.) In doing so, the *Parento* court recognized that a noncapital, self-represented defendant not only has a right to conduct a defense by nonparticipation, but also has the right to absent himself from the proceedings. (*Id.* at p. 1381.) *Parento* concluded: "There is no question but that a defendant's right to effective counsel is violated if his attorney fails to attend the proceedings. Where a defendant has chosen to represent himself, however, he is entitled to conduct that defense in any manner he wishes short of disrupting the proceedings, and thus is free to absent himself physically from trial. If, as here, that choice was voluntary, it will be respected. It follows that a defendant who has exercised his right of

self-representation by absenting himself from the proceedings, may not later claim error resulting from that exercise." (*Id.* at p. 1382.)

Appellant seeks to limit *Parento*. He claims the decision "was explicitly based on the theory that the defendant's refusal to participate was a conscious defense strategy to put the prosecution to its proof, that he continued to act as counsel, and his right to self-representation was therefore not subject to forfeiture." (ABOM 34.) He misreads *Parento*. Parento absconded after essentially daring the trial court to conduct the trial without him: "Just do it without me then. That's what you do. . . . You just write me a letter when it's over. That's what you do." (*Parento*, *supra*, 235 Cal.App.3d at p. 1380, fn. 2.) The Court of Appeal did not hold the defendant made a conscious strategic decision to put the prosecution to its proof, nor did the court address whether the defendant's self-representation was subject to forfeiture.

Trial courts on occasion must interpret and apply *Faretta* to vindicate legitimate rights of a pro se defendant while at the same time taking measures to ensure the trial does not become a charade. Here, appellant's actions presented the court with a "judgment call" that he voluntarily abandoned the trial. The court honored appellant's self-representation right rather than revoke it and appoint counsel for him. Nothing in the Sixth Amendment prevented it making that choice. The trial of appellant properly proceeded pursuant to Penal Code section 1043 without his knowing and intelligent waiver of trial rights or an appointment of counsel.

II. APPELLANT'S CLAIM THAT STATE LAW REQUIRED THE APPOINTMENT OF COUNSEL IS BOTH FORFEITED AND MOOT

As with his Sixth Amendment claim, appellant never argued in the Court of Appeal that state law required the appointment of counsel because he was mentally ill and did not meet the state standards of competence. He should be held to have forfeited that claim. In any event, as argued in the

text, the trial court nowhere revoked appellant's self-representation status. Accordingly, this court need not determine whether appellant was mentally ill or whether in light of such an illness, state law would require the appointment of counsel if the trial court had terminated his right self-representation.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDITIONING THE GRANT OF APPELLANT'S *FARETTA* MOTION ON APPELLANT RECEIVING NO CONTINUANCE

The trial court consistently ruled that it would not grant appellant's untimely *Faretta* motions if appellant required a continuance to represent himself. The court granted the *Faretta* motion while trial was in progress—but only after the court explicitly conditioned the granting of the motion on appellant not receiving an immediate continuance, even for one day. (10 RT 480-487, 492-494.) The law permits this. (*Clark, supra,* 3 Cal.4th at p. 110; *People v Jenkins* (2000) 22 Cal.4th 900, 1039-1040; *People v. Valdez* (2004) 32 Cal.4th 73, 103 (*Valdez*) [a trial court's authority to deny a *Faretta* motion on the ground that it is untimely necessarily includes the authority to condition the grant of the motion on the defendant's agreement that a grant of the motion would not result in delay].)

Appellant disputes that the trial court conditioned his *Faretta* status on his agreement that trial resume immediately. (ABOM 54-58.) Appellant cites *Valdez* for the proposition that when a *Faretta* motion is granted a necessary continuance must also be granted. Appellant asserts that the record shows that (1) the trial court told appellant that it would only grant a "reasonable request" for a continuance; (2) the court then granted appellant's *Faretta* motion; and (3) appellant made, and the court denied, appellant's reasonable request for a one-day continuance. (ABOM 57.)

The record does not show a denial of a continuance after appellant's *Faretta* motion was granted. To the contrary, it shows when appellant told the court he needed two weeks to prepare for trial if he represented himself, the court responded that this was why appellant could not represent himself. (10 RT 476-477.) Moments later, the court told appellant that it would give him a fair trial and reiterated that it would permit him to represent himself only if he was "ready to go to trial now." (10 RT 480.) The court told appellant that he had two options: (1) trial with counsel, or (2) self-representation without a continuance. The court stressed, "I can't continue this case." (10 RT 480.) Appellant stated, "I will represent myself, your Honor." (10 RT 480.)

The court gave appellant a *Faretta* waiver form, and admonished him:

> THE COURT: Okay. Mr. Espinoza, I want to make it clear if you represent yourself you are not going to get any special treatment. *You are not going to get any continuance unless they are reasonable requests, which given the time frame we've given to the jurors we need to move forward with the case.* I'm not going to be extending it beyond that time limit I gave to the jurors. You need to get your own witnesses here without anybody's assistance. If you can't find them or locate them, if they don't agree to come in, if they're late because their bus didn't pick them up we're going without them. So I want to make sure you understand that.

(10 RT 481-482, emphasis added.)

When the court said appellant was not going to get any continuance unless it was a reasonable request, the court made clear it would not entertain a continuance motion before trial resumed. In context, the court merely indicated after trial resumed it would consider a reasonable request for a continuance that did not delay the trial outside the trial time period the court had given the jurors. This is clear because some 40 minutes later, after appellant had reviewed the *Faretta* form and before the court granted the *Faretta* motion, appellant asked the court, "Me taking the case today

can I at least get a continuance to tomorrow?" (10 RT 485.) The court said "no." Appellant continued to seek to represent himself, and the court granted him pro se status. The trial court did not abuse its discretion by conditioning the grant of appellant's *Faretta* motion on there being no continuance even for one day of the trial then in progress.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: November 9, 2015

Respectfully submitted,

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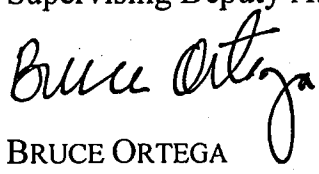

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,017 words.

Dated: November 9, 2015

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Espinoza, Jr.**
No.: **S224929**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 10, 2015, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 10, 2015, at San Francisco, California.

Maggie Melton
Declarant

Signature

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