IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. CHARLES EDWARD MOORE, Defendant and Appellant.	Appeal No. S075726

Appeal from the Superior Court of the State of California
Los Angeles County No. A0185568
Hon. James Pierce, Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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PRELIMINARY STATEMENT

Appellant will respond to portions of the Attorney General's brief where additional comment appears likely to be helpful to the court in deciding this case. To the extent consistent and possible with that objective, repetition of the appellant's earlier briefing will be avoided. Both sides have thoroughly briefed the issues presented, and the appellant continues to rely primarily on that briefing. The absence of additional comment on all aspects of the Attorney General's brief in this reply should not be taken as a concession of any nature or as a lack of confidence in the merits of the matters not addressed. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

* * * * *

GUILT PHASE ARGUMENT

I.

APPELLANT WAS DENIED HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO MEANINGFUL SELF-REPRESENTATION WHEN THE SUPERIOR COURT DENIED HIS REQUEST FOR THE APPOINTMENT OF CO-COUNSEL.

A. Introduction

In his capital trial, appellant's request to represent himself was granted and he did so for most of the proceedings. Appellant represented himself during all of the pretrial proceedings and during the penalty phase portion of the trial, having previously relinquished his pro per status right before trial after the sheriffs at the county jail terminated his library privileges. (6 CT 1565, 7 CT 1923.) Additionally, appellant repeatedly asked the trial court for the appointment of co-counsel and/or *Keenan* counsel, (*Keenan v. Superior Court* (1982) 31 Cal.3d 424), to assist him while he was representing himself. Appellant told the trial court that he wanted an attorney who not only would help him outside the courtroom with the preparation of his defense, but under certain limited circumstances would assist him at trial. His repeated requests were denied.

Instead, the trial court appointed Mr. Schmocker as advisory counsel. The trial court mistakenly believed that advisory counsel was only able to

assist appellant with legal matters but could not assist him with the presentation of his case at trial. (2 RT 352-354.) Unsatisfied with the stated limitations of advisory counsel, appellant repeatedly requested the appointment of an attorney who willing to act as second chair at trial, but his requests were repeatedly denied. The trial court told appellant that it believed that appointing advisory counsel to him was best way of assuring appellant competent counsel, (2 RT 423-430), but the record indicates that the real reason for the denial of co-counsel was because it mistakenly believed that it could not compensate co-counsel for an *pro se* defendant.

In this appeal, appellant has raised several issues concerning the denial of his requests for the appointment of second counsel. For the reasons discussed in his opening brief and herein, he maintains that the denial of the appointment of second counsel for him was error. The failure of the court to act within its discretion deprived appellant of his due process right to a fair trial as guaranteed by the Fifth Amendment and Fourteenth Amendments, his right to meaningful self-representation under the Sixth Amendment, equal protection under the Fourteenth Amendment, and his Eighth Amendment right to a reliable capital trial.

B. The Respondent Misstates the Issue of the Trial Court's Refusal to Grant Appellant's Request for Co-Counsel As an Abuse of the Court's Discretion. In This Instance, the Court's Refusal to Grant Appellant's Request Represents The Absence of the Exercise of Any Discretion

Respondent argues that the trial court did not abuse its discretion by denying appellant's request for co-counsel and placing restrictions on the duties of advisory counsel. (RB 47-48.) However, the respondent misstates the issue as one of an abuse of discretion. The problem here is not that the trial court abused its discretion. The problem is that the trial court did not exercise any discretion in denying appellant's requests for co-counsel.

The exercise of discretion requires that a trial court weigh the competing interests involved and reach a decision based on that weighing process:

> "The governing canons are well established: "... discretion . . . is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]" (*People v. Warner* (1978) 20 Cal.3d 678, 683.) "Obviously the term is a broad and elastic one [citation] which we have equated with 'the sound judgment of the court, to be exercised according to the rules of law.' [Citation.]" (*People v. Russel* (1968) 69 Cal.2d 187, 194.) Thus, "[t]he courts have never ascribed to judicial discretion a potential without restraint." (Ibid.) "Discretion is compatible only with decisions 'controlled by sound principles of law, . . . free from partiality, not swayed by sympathy or warped by prejudice . . . .' [Citation.]" (*People*

> *v. Bolton* (1979) 23 Cal.3d 208, 216.) "[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel, supra*, at p. 195; *People v. Superior Court* (*Alverez*) (1997) 14 Cal. 4th 968, 977.)
>
> "'[W]here fundamental rights are affected by the exercise of discretion by the trial court, . . . such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re Carmaleta B.* (1978) 21 Cal. 3d 482, 496; *People v. Davis* (1984) 161 Cal.App.3d 796, 802-803.) 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. Davis, supra*, 161 Cal.App.3d at p. 804.)'" (*People v. Lara* (2001) 86 Cal.App.4th 165.)

This Court has stated that a *pro per* defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity but without surrendering effective control over presentation of the defense case, may do so with the court's permission and upon a proper showing. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219; *People v. Crandell* (1988) 46 Cal.3d 833, 861.) A trial court "is not foreclosed from permitting a greater role for counsel assisting a *Faretta* defendant, so long as defendant's right to present his case in his own way is not compromised. If the defendant so desires and assisting counsel agrees, the court may allow counsel's limited participation as a trial advocate, where this will serve the interests of justice

and efficiency." (*See, People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14.)

This Court has also indicated the concerns necessary for a trial court to rule on a *pro per* defendant's motion for co-counsel should be that of ensuring the defendant does not lose control over the presentation of the defense case, that a person's *Faretta* rights are not compromised, and the interests of justice and efficiency. Here none of those concerns were even raised or considered by the trial court. The only factor considered by the trial court was its mistaken belief that it could not compensate co-counsel. (2 RT 404-422A.) That decision to deny appellant's request therefore was not a proper exercise of its discretionary authority but arbitrary and capricious decision based on factors having nothing to do with the relevant factors.

The trial court told appellant that it had personally spoken with the coordinator of the capital case panel and was informed that appointment of co-counsel had to be appointed from the Capital Case List. (2 RT 404 et. seq.) At that time Ms. Morsell, the one attorney appellant had found who was willing to accept a co-counsel appointment, stated she had also spoken to someone who helped administer the contract. According to the representations made to her by those administrators, under the terms of the

local contract second chair or co-counsel would usually receive 15% of whatever the first appointed counsel would receive, which was about $90,000. However, since at that time this case had gone past the preliminary hearing stages, the compensation would be about $45,000, and a person designated as co-counsel would receive about 15% of that, which was calculated at $6,750. (2 RT 406-407.)[1/] Ms. Morsell also noted that because appellant was representing himself and therefore there was no first appointed counsel, there were no specific provisions for what co-counsel to a self-represented defendant would receive, if anything. (2 RT 404-408.) The local appointment contract provided for a payment system for appointed counsel and *Keenan* counsel, as well as advisory or standby counsel, but contained no provisions for the appointment of second counsel for a *pro per* capital defendant. Thus, effectively, co-counsel for a self-represented defendant would receive nothing.

At the next hearing where the court denied appellant's motion for co-counsel the court stated:

> "I have talked to attorneys that have appeared here and *also to the judges that administer the contract by which persons are*

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1. At that hearing was another attorney who was also considering accepting the appointment as co-counsel, Mr. Urban. He too had been advised about the provisions of the local contract and advised that compensation as co-counsel would only be in the amount of $6,750.

> *paid*, and with the discussion that I had both with attorneys and with respect to how them might be compensated for those services, and with Judge Czuleger and Judge Malano, who are the judges who administered the contract, I believe that the most efficient way to assure your assistance with counsel is to have either advisory counsel or stand-by. That would assure *appropriate compensation* so you would have competent counsel to give that assistance in either of those capacities." (2 RT 424, emphasis added.)

That statement from the trial court underscores appellant's argument. The trial court had consulted the administrators of the local appointment contract, discussed appellant's request and the situation with them, and it is apparent that its reason for denying appellant's request was its mistaken belief that it could not authorize any compensation to second chair since appellant was representing himself. The court noted that ". . . because of the way the contract is written and administered. . . " it had to deny his request for co-counsel. (2 RT 425.) The trial court mistakenly thought that at best counsel could receive $6,750 in compensation but there was not even a guarantee of that amount under the contract since that amount was calculated for second counsel as 15% of appointed counsel's compensation post-preliminary hearing. But since there was no appointed counsel, second counsel would receive 15% of nothing, or zero.

Furthermore, when appellant sought reconsideration of motion for co-counsel, he specifically asked about the issue of funding. Appellant

asked the court if the reason the motion was denied was because no attorney wanted to work for $6,750. The court acknowledged that played a part in its decision to deny the motion. (2 RT 451-452.) The court also stated that other reasons included the fact that the appointment had to come from the panel list, and that the attorneys that had come to court were unwilling to accept appointment under those terms. (2 RT 451-452.)

Here lies the problem. None of the reasons given for denying appellant's request concerned his needs, or the administration and efficiency of justice. The court's illogical belief that it could not authorize compensation for second chair for appellant because he was representing himself was the sole reason for the denial his motion. Thus, the issue here is not simply whether the trial court abused its discretionary authority as the respondent seeks to characterize appellant's argument. (RB 47-48.) The issue concerns the trial court's failure to actually exercise discretion as required by law. "A decision calling for the exercise of judicial discretion hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. [¶] Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise. (*United States v. Taylor* (1988) 487 U.S. 326, 336 [108 S.Ct.

2413, 101 L.Ed.2d 297].) "A failure to exercise discretion is an abuse of discretion." (*People. v. Orabuena* (2004) 116 Cal.App.4th 84, 99.)

Since the trial court here failed to exercise any of its discretionary authority, this case is readily distinguishable from *People v. Frierson* (1991) 53 Cal.3d 730, and *People v. Clark* (1992) 3 Cal.4th 41, upon which the respondent relies. (RB 48.) *Frierson* is distinguishable since that case did not even involve the appointment of co-counsel for a pro per defendant. In that case, the defendant, who was represented by counsel, sought co-counsel status for himself. (*Id.*, at p. 741.) In *People v. Clark*, the defendant represented himself but argued on appeal that the trial court abused its discretion in not appointing advisory counsel for him. This Court found that the trial court had exercised its discretion and that there was no abuse of that exercise of discretion since the trial court was not required "to place an attorney under the personal direction of someone with defendant's history of manipulative, obstructive and abusive conduct." (*Id.*, at pp. 111-112.)

The respondent further misrepresents appellant's argument by suggesting that he is merely complaining that the trial court placed impermissible restrictions on the duties of trial counsel, which respondent argues was within the court's discretion. (RB 48-51.) Respondent asserts

that the trial court appropriately considered relevant factors in determining the scope of any hybrid representation it might allow. (RB 49.) Respondent fails to explain exactly what were those relevant factors actually considered by the trial court. The reason for this is obvious. There were none. Both the trial court below and the respondent on appeal merely assume that advisory counsel is limited to certain responsibilities and under no circumstances may advisory or other hybrid counsel can perform other tasks. Respondent does not explain why appellant could not have counsel to question witnesses if doing so would (1) preserve appellant's right of self-representation, and (2) promote the orderly and efficient administration of justice. A relevant factor in limiting advisory counsel, had any existed, would have been that appellant insisted in conducting his own defense in front of the jury without any help from an attorney. In this case, appellant specifically requested help, so obviously that factor was not a consideration here.

As the respondent has acknowledged, *People v. Frierson* allows a court to appoint co-counsel to a *pro per*. (RB 48) Yet in this case, the trial court's absurd and mistaken belief that he could not pay an attorney to question witnesses prevented appellant from even having a chance to get co-counsel, while other similarly situated defendants at least have such a

chance. The United States Supreme Court and the federal circuits have been particularly vigilant where claims concern states' applications of their own statutory rules in the context of capital litigation. (See, e.g., *Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama* (1980) 447 U.S. 625.) The state may create a liberty interest in the correct application of its own statutes; this liberty interest is protected by the Fourteenth Amendment. Federal Courts have held on more than one occasion that "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." (*See, Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) Furthermore, The U.S. Supreme Court has also stated:

> "Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. . . " (*Hicks v. Oklahoma* (1990) 447 U.S. 343, 346, 348; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.)

Contrary to the respondent's argument, the issue here concerns the quality of the assistance provided to appellant as a self-represented defendant in his capital trial. Appellant was specifically told that he could have the legal assistance of counsel who would not participate in any way at

trial, or counsel who would only be available should appellant relinquish his right to self-representation. (1 RT 24-29, 2 RT 352-354, 6 RT 1451-1452.) Those were the only two options presented to him. He was never presented with the option of having counsel with the ability to directly assist him in court. That is why he pursued his request for co-counsel.

Appellant sought the appointment of counsel whose duties went beyond those limitations and what appellant wanted was not inconsistent with the law. The overriding principle to be achieved with hybrid representations is that either the accused or the attorney must be in charge. This Court has said at all times the record should be clear that the accused is either self-represented or represented by counsel. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1003.) That does not mean however, that counsel is strictly prohibited from assisting a self-represented defendant at trial.

The respondent also misreads the decision in *McKaskle v. Wiggins* (1984) 465 U.S. 168, 182, as holding simply that a defendant does not have a constitutional right "to choreograph special appearances by counsel," and therefore the trial court was correct to limit the role of the advisory counsel. (RB 51.) Yet in *McKaskle* the Court stated:

> "*Faretta* does not require a trial judge to permit 'hybrid' representation of the type Wiggins was actually allowed. But

> if a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." (*Id.*, at p. 183.)

Thus, as the Court can see, *McKaskle v. Wiggins* stated that the function of counsel is dependent on the rights and needs of the individual defendant. If a self-represented defendant expressly approves of appointed counsel's participation at trial, there is nothing impermissible with appointing counsel for that purpose. In those situations, all that is required is that the defendant expressly agree with the arrangement. In this instance, appellant was willing to abide by that arrangement, and in fact had found one attorney who was willing to do so as well. Nevertheless, the trial court incorrectly believed that it could not permit such participation by second counsel.

The attorney general suggests that appellant's motives for wanting co-counsel were somehow improper (RB 47, 53) because "[i]ndeed, appellant's underlying reason for his request was that he wanted to control his defense strategy and tactics, but wanted to have an attorney whom he

could order to do the work for him, such as the questioning of witnesses and other in-court presentations during trial." (RB 53.) The attorney general, however, never explains why appellant's motives were inconsistent with the law. There was nothing wrong with this arrangement and it was expressly approved by the U.S. Supreme Court in *McKaskle v. Wiggins*.

Appellant also disagrees with the respondent's assertion that this case is analogous to the situation in *People v. Bradford* (1997) 15 Cal.4th 1229. (RB 49-50), or for that matter, any other case previously before this Court. In *People v. Bradford*, the defendant had been represented by appointed counsel during the guilt phase portion of his trial, but before the penalty phase began he decided to represent himself. The trial court granted his *Faretta* request, and appointed counsel was then designated as advisory counsel. Unlike the situation here, Bradford did not specifically explain what he expected from advisory counsel. Thus, despite his decision to represent himself, at various times advisory counsel attempted to take over certain matters. For example, during the discussion of the penalty phase motions which had been prepared by counsel, instead of Bradford arguing the motion, counsel tried to explain the motions to the court. Counsel also tried to make objections and in court instructed the defendant on what to say. The trial court had to remind both counsel and the defendant that

because Bradford was representing himself, he personally, and not counsel, would have to respond to the court's questions about the motions. At one point, advisory counsel even suggested that he, and not Bradford, be allowed to argue the legal motions while Bradford be allowed to examine the witnesses and make the opening statement and closing argument. (*Id.*, at p. 1368.) It is apparent that in *Bradford,* the function of the defendant's advisory counsel was blurred and it was obvious that the self-represented defendant was not in control. Advisory counsel sought to take the primary role. That is why this Court stated that in all cases of shared or divided representation, either the accused or the attorney must be in charge. "Stated otherwise, at all times the record should be clear that the accused is either self-represented or represented by counsel; the accused cannot be both at once." (*Id.*, at p. 1368.)

Unlike the situation in *Bradford*, at all times here appellant stated his intention to remain in control of his case. In terms of his pretrial work, he wanted someone who would help him prepare the defense he wanted presented. To a very limited extent he thought co-counsel might *possibly* be available to help with jury selection and *possibly* question witnesses. It was more important that he have counsel available to question him should he decide to testify. (2 RT 388-394.) The arrangement appellant sought would

in no way relinquish his control over the case or erode his right of self-representation.

The restrictions placed on advisory counsel here did not allow for such an arrangement. At no time did the court indicate to appellant that it was permissible for advisory counsel could perform these limited tasks, and in fact, appellant was told that advisory counsel was prohibited from performing such tasks. As appellant explained in his opening brief, there is no absolute bar to participation by counsel for a self-represented defendant at trial. (AOB 44; *McKaskle v. Wiggins*, 465 U.S. at p. 182.) What appellant sought was to represent himself, and under certain very limited circumstances permit counsel to assist him in court. Based on the mistaken belief that these limited tasks could not be performed by advisory counsel, appellant's requests were improperly denied.

Respondent further argues that the trial court properly denied his request for co-counsel because appellant failed to articulate sufficient grounds for the appointment of co-counsel. Specifically respondent argues that appellant failed to show that the appointment of co-counsel for him would promote justice and judicial efficiency. (RB 51-54.) Respondent contends that the only reasons offered by appellant as to why co-counsel should have been appointed was because (1) the law library at the jail did

not have Colorado law books he needed to fight the admission of the Colorado charges; (2) the case was complicated and technical just because it was a death penalty case and therefore needed help presenting his case; and (3) he needed help because he was representing himself. (RB 52.) The respondent is simply wrong.

While it is true that in his moving papers, appellant was less specific as the function of co-counsel, (5 CT 1256, 1313-1314), in court he did explain that the appointment of co-counsel would promote the orderliness of his defense and expedite his preparation and presentation of his defense. (2 RT 371.) Appellant explained:

> "I wanted co-counsel in this trial also to promote the orderliness of my defense and preparation to this court so it will help me present it to the court in an orderly matter instead of like pro pers coming in here making a shambles out of the trial and going through all kinds of changes and stuff. I would help both the orderly administration of justice in this situation." (2 RT 401.)

Appellant wanted the help of counsel to assist with the orderly and efficient presentation of his case to the jury. Appellant stated sufficient grounds for the appointment of co-counsel.

C. Reliance Upon the Payment Restrictions in the Local Appointed Counsel Contract To Deny Appellant Request for Co-Counsel Was Not An Exercise of Any Discretion

As explained above, the trial court's absurd belief that it could not compensate co-counsel under the provisions of the local appointment contract prevented a legitimate exercise of judicial discretion. As for this claim of error, respondent argues that any issue regarding the terms of the local appointment contract from 1997 cannot be adequately addressed on appeal because the terms of that contract is not part of the appellate record. (RB 55.) Appellant disagrees. The record aptly supports his claim.

The parties below thoroughly discussed on the record the provisions of the local contract and its application to this case. Discussion about the problems with the local contract was thoroughly raised and discussed in the trial court. Mr. Schmocker first commented to the court that "pursuant to the contract with the county," co-counsel appointments for pro per defendants were "disapproved of." (2 RT 357.) At that time, no one challenged that representation about the local contract. Later, the trial court told appellant that it had spoken with the coordinator of the capital case panel and was informed that appointment of co-counsel had to be appointed from the Capital Case List. At that time Ms. Morsell, stated she had too had spoken to someone who administers the contract and she was specifically

told how the contract operated in that second chair would normally be compensated at a rate of 15% of that received by first chair, but since appellant was representing himself, there were no specific provisions for what co-counsel to a self-represented defendant would receive. (2 RT 404-408.) The record shows that the local appointment contract provided for a payment system for appointed counsel and *Keenan* counsel, as well as advisory or standby counsel, but contained no provisions for the appointment of second counsel for a pro per capital defendant. (See also discussion at 2 RT 424-425.)

The trial court also explained that it had spoken with the administrators of the contract and concluded there was no provisions in the contract for payment of co-counsel under these circumstances. (2 RT 424.)

When appellant sought reconsideration of motion for co-counsel, he specifically asked about the issue funding. He asked the court if the reason the motion was denied was because no attorney wanted to work for $6,750. The court acknowledged that played a part in its decision to deny the motion. (2 RT 451-452.) Thus for purposes of this argument, the trial court's reliance upon its understanding of the terms of the local contract is what guided its decision to deny appellant's request, and therefore it really does not matter that the specific language of that contract is not a part of the

record. What matters was the trial court's belief that the local contract prohibited payment of co-counsel to a *pro per* defendant.

Finally, by arguing that the local appointment contract is not part of the record, the respondent again misconstrues appellant's argument. (RB 54.) Appellant's argument is not that the local contract itself precluded the appointment of co-counsel for appellant. Rather, it was the trial court's slavish adherence to his interpretation of the appointment contract that prevented him from appointing co-counsel, and thereby failed to make a reasoned decision based on the particulars of this case and appellant's needs.

Based on these discussions in the record, appellant's claim that the provisions of the local contract impermissibly restricting adequate compensation for *Keenan* counsel assisting a *pro per* capital defendants is properly before the court. The trial court had discretion to appoint counsel for a *pro per* defendant based upon his particular needs and not the arbitrary restrictions in the local contract. Obviously that contract did not provide for the appointment counsel for a *pro per* defendant who would participate in any capacity other than as advisory or standby counsel.

Appellant maintains that this consideration was not an exercise of judicial discretion. Denying the appointment of co-counsel in this instance

was not an informed decision based upon the needs of appellant. The court should have considered appointing co-counsel for appellant regardless of the terms in the local appointment contract and it had ample authority to do so under *Penal Code* section 987.9. (See section below.)

D. The Denial of Appellant's Request for Co-Counsel Deprived Appellant of His Constitutional Right to Self-Representation, And Due Process Right To A Fair Trial.

Appellant's request was simple but consistent. He wanted to control his defense by representing himself with the assistance of counsel who would work with him in presenting his defense. The court told appellant that he would have to find an attorney willing to work as co-counsel. Appellant found several attorneys willing to accept the role as co-counsel but then was denied such assistance. He was not denied because of a lack of showing of need, but because of the faulty belief that counsel appointed to assist a *pro per* defendant could not participate in the trial as appellant wanted, all based on the erroneous interpretation of the local appointment contract. Proof of this fact is in appellant's record. While discussing whether to appoint co-counsel, the court actually appointed Ms. Morsell as co-counsel (2 RT 393), only to rescind the appointment for lack of funding. (2 RT 404.) This shows that the trial court's decision was based on its understanding that it could not fund co-counsel, not that co-counsel should

not be appointed for any merits-based reasons. As a result, appellant never received the assistance he needed to prepare his defense. Had the court's decision been guided by appellant's needs rather than arbitrary factors, there is no doubt the situation that eventually occurred at trial with the constant disagreements with advisory counsel which ultimately lead to appellant deciding to return to his pro per status near the end of trial. As the trial court advised appellant relieving Mr. Schmocker would have a "devastating impact" on the jury and the message the change would be sending to the jury. (6 RT 1450, 1456.)

The respondent argues that even assuming that refusal to appoint co-counsel for appellant in this instance was error, appellant has failed to demonstrate that he was prejudiced by the error. Respondent alleges that appellant has failed to demonstrate that a result more favorable to him would have been reached had the trial court granted his request for co-counsel. (RB 56-59.) By characterizing appellant's argument merely as an abuse of discretion, the respondent seeks to have this Court review the issue under the standard of *People v. Watson* (1956) 46 Cal.2d 818.

However what we have here is not an abuse of the trial court's discretion. Rather there is a complete failure to exercise any discretion because of the court's erroneously belief that it could not authorize payment

for co-counsel. "[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]" (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302 .) "Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]" (*Id.*, at p. 306; *People v. Downey* (2000) 82 Cal.App.4th 899, 912; *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392.) As appellant has discussed the trial court failed to exercise the authority that it was vested with to ensure that appellant's right to counsel, which includes his right of self-representation, was protected. Appellant's conviction and death sentence must be set aside for that reason.

Moreover, although appellant may not have had an absolute right to the appointment of second counsel under the state and federal constitutions, he did have an absolute right to represent himself without unreasonable interference based on arbitrary reasons and, the absolute right to, at a minimum, the appearance of a fair trial, and the right to a reliable death judgment. The trial court's decision served none of these purposes and in fact interfered with appellant's Sixth Amendment right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806.)

Furthermore, the ruling here was erroneous under *Hicks v. Oklahoma, supra*, where the state has created a liberty interest that is protected under the due process clause of the Fourteenth Amendment against arbitrary deprivation of that interest, thus mandating use of the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] standard of prejudice.

Moreover, appellant was deprived of co-counsel during the penalty phase portion of his trial and this Court has held that penalty phase error should be assessed under a standard closer to *Chapman*, *supra*: In *People v. Brown* (1988) 46 Cal.3d 432, this Court reaffirmed the "reasonable possibility" test as the appropriate standard for assessing the effect of state law error in the penalty phase of a capital trial:

> [W]hen faced with penalty phase error not amounting to a federal constitutional violation, we will affirm the judgment unless we conclude there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred. (*Id.*, at p. 448.)

In *People v. Ashmus* (1991) 54 Cal.3d 932, 983-984, this Court again invoked *People Brown*, explaining that to apply the standard required the reviewing court to reverse based on even the possibility that a hypothetical juror might have reached a different decision absent the error: "We must

ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*Id*, at p. 983-984.)

The reasonable possibility test applied to state law error in the penalty phase of a capital trial is more exacting than the usual reasonable probability standard for reversal as stated in *People v. Watson, supra*, 46 Cal.2d 818, 836. The Court in *Brown* stated, "we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial." (*People v. Brown, supra*, 46 Cal.3d at 447.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. The *Brown* Court stated:

> A capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant – i.e., whether he should live or die. When the 'result' under review is such a normative conclusion based on guided, individualized discretion, the *Watson* standard of review is simply insufficient to ensure 'reliability in the determination that death is the appropriate punishment in a specific case'. (*Id.*, at 448 [emphasis in original], quoting *Woodsen v. North Carolina* (1976) 428 U.S. 280, 305. See also, *People v. Ashmus, supra,* 54 Cal.3d at 965 [equating the reasonable possibility standard of *Brown* with the federal harmless beyond a reasonable doubt standard].)

The prejudicial effect of the denial of appellant's request can be readily seen in the fact that the trial court's decision did little to protect the orderly presentation of the trial or protect appellant's right of self-representation. Although appellant relinquished his self-incrimination rights during the guilt phase portion of the trial, he was frequently at odds with appointed counsel over his handling of the defense as evidence by the numerous *Marsden* hearings held. Ultimately appellant again had to step in and take over the case with little time to prepare because he was not happy with the quality of representation he had received from appointed counsel. (6 RT 1447-1506.) This would not have happened had the court exercised its discretion when ruling on appellant's request for counsel.

Furthermore, appellant specifically stated that when he testified he did not want to present just a narrative, but wanted counsel to examine him as any other witness. However his request for co-counsel for that purpose was denied. Yet, when appellant wanted to return to representing himself right before the defense rested its case, one of the first questions asked by the trial court was "what if you testify, how are you going to do that? Who's going to question you?" (6 RT 1451-1452.) Appellant reminded the court that he had sought the appointment of co-counsel for that very purpose but was told he would have to testify in the narrative. (6 RT 1452.)

By denying appellant's request for co-counsel, appellant had to relinquish his constitutional right to testify on his behalf. At the penalty phase appellant presented compelling testimony from his family members as to why he should not be sentenced to death. One compelling witness was noticeably absent, appellant himself. The trial court erroneous ruling resulted in appellant not testifying. In light of these facts, it cannot be said that the court's mistaken adherence to his belief that it could not compensation co-counsel was harmless beyond a reasonable doubt. That decision prevented appellant from receiving a fair trial, interfered with his right of self-incrimination, and precluded a reliable death judgment.

* * * * *

II.

THE RESTRICTIONS IN THE LOCAL APPOINTMENT CONTRACT IMPERMISSIBLY INTERFERED WITH APPELLANT'S DUE PROCESS RIGHTS AS WELL AS HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL SINCE IT CREATED A CONFLICT OF INTEREST

Appellant has also argued that the terms of the local appointment contract were an unlawful impediment to his right to the appointment of *Keenan* counsel in violation of both his due process right under the Fifth and Fourteenth Amendments, and his Sixth Amendment right to effective assistance of counsel. Appellant has argued that this was true in several distinct ways. First, the local appointment contract itself impermissibly foreclosed any reasonable payment for second counsel to a *pro per* capital defendant. Second, the trial court's reliance upon that contract as the basis for its denial of appellant's request for co-counsel not only prevented appellant from obtaining the necessary ancillary services he had a right to under Penal Code section 987.9, but also created an impermissible conflict of interest because appellant's only options were that he represent himself or give up that right in order to have two attorneys . (AOB 60-74.)

Reliance upon the local contract to deny appellant necessary ancillary services interfered with appellant's Sixth Amendment right to effective assistance of counsel because the contract created an intolerable

conflict of interest similar to that in *People v. Barboza* (1981) 29 Cal.3d 375. In *Barboza*, this Court invalidated a local appointment contract with the Madera County Public Defender's Office that created a financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel.[2/] This Court held that as a "'judicially declared rule of criminal procedure' [citations omitted], that contracts of the type herein presented contain inherent and irreconcilable conflicts of interest. (*Id.*, at p. 381.)

Such was true here where the court relied upon the local appointment contract to deny appellant request for second counsel. As a capital defendant, appellant's choices were that he could either represent himself or he could get two attorneys under Penal Code section 987.9. Appellant was

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2. Under the agreement in effect from 1976-1979, the Public Defender's office was paid $104,000 per year. From this amount, $ 15,000 was deducted and deposited in a reserve account which was required to be maintained at all times to pay other defense counsel who were appointed when the public defender was disqualified because of a conflict of interest. The balance of the defender's compensation was payable in monthly installments of $ 7,416.66. The amount of any deficiency in the reserve account was subtracted from the monthly payment and deposited in the account. At the end of each fiscal year, any unexpended balance in the reserve account was paid to the public defender, and conversely, the public defender was liable for any deficiency in the account. (*Id.*, at pp. 378-379.)

faced with a choice no other capital defendant in the state had to face–either represent himself or be allowed two attorneys. That was an irreconcilable conflict of interest and interfered with appellant's effective assistance of counsel.

In response, the attorney general makes two arguments. One, the record fails to support appellant's contention that the contract interfered with his ability to effectively represent himself, (RB 59-60), and two, that appellant never made the requisite showing of genuine need required to trigger the presumption that a second attorney was necessary to his defense under section 987.9. (RB 60.) Neither of these arguments are responsive to appellant's conflict of interest claim.

Respondent's first point can be rejected for the reasons discussed previously at pp. 19-22 of this brief. Also, relying solely on the payment provisions of the local appointment contract to deny appellant's request for co-counsel, the trial court failed to even consider whether the funds were available under Penal Code section 987.9. Thus, once again the court's strict adherence to the provisions of the local contract prevented it from any consideration whatsoever of the possibility appointing *Keenan* counsel under section 987.9.

That brings us to the respondent's second argument that appellant failed to make the requisite showing of need for second counsel to his defense against capital charges. (RB 60.) The problem of course with that argument is that it assumes that *any* showing of need would have made a difference to the trial court. Where, as here, the only fact the trial court ever considered was the absence of authority to pay co-counsel under the local appointments contract, there never was any real possibility that appellant could ever provide sufficient justification under the section 987.9, since the trial court never considered anything beyond the express limitations of the local contract. What the trial court failed to appreciate was that despite the provisions of the local contract, it had the statutory authority to appoint second counsel and provide payment for those services. Had the trial court even considered the provisions of section 987.9, it may well have determined that appellant had provided sufficient justification under the statute.

The district attorney suggested that appellant had failed to make a requisite showing of need when he argued that appellant was not entitled to co-counsel absent unusual circumstances or that this was a particularly difficult case, and that neither circumstance applied here. (2 RT 382-385.)

But the trial court never even reached that issue since it adhered strictly to the provisions of the local contract.

Nonetheless, as argued in his opening brief, (AOB 45-46), appellant did make a sufficient showing of need to require *Keenan* counsel. He should not faulted now for failing to adduce additional reasons because he was not afforded an *in camera* opportunity to present more reasons in private. Furthermore, the state should be precluded from now arguing that he failed to present a sufficient showing of need because appellant was not afforded any opportunity to develop additional reasons for second counsel *in camera*, without the district attorney present, as other attorneys can do. Had the trial court even considered the provisions of section 987.9, appellant would have been able to provide *in camera*, any additional reasons necessary for the court to make a reasoned determination as to whether to appoint second counsel under the statute. Instead the state reaped the benefits of the trial court's error because of the court's strict adherence to the local contract, and therefore should not now be allowed to argue that this Court should reject appellant's claim based on the reasons he offered in court, when he was denied the opportunity to present his case as any other capital defendant *in camera*.

As anticipated in his opening brief, (See, AOB 78-81), respondent relies on the one court of appeal decision discussing this issue, *People v. Scott* (1989) 212 Cal.App.3d 505. (RB 60.) *Scott* held that although an attorney in a capital case may seek appointment of a second attorney, since the defendant was not an attorney and had abandoned his constitutional right to counsel in favor of his right to self-representation, *Keenan* counsel was unavailable to him. (*Id.*, at p. 511-512.) In his opening brief appellant thoroughly discussed the problems with the reasoning of that court of appeal decision. (See, AOB at pp. 78-81.)

Furthermore, *Scott* is distinguishable on one significant point. In *Scott*, the court of appeal determined that virtually all of the tasks urged in support of the defendant Scott's request for *Keenan* counsel, i.e., interviewing witnesses, including experts, aiding in obtaining his own expert witnesses, preparation of mitigating evidence at the penalty phase of the trial, assistance in challenging the special circumstance allegation, would be accomplished with the assistance of his investigators and advisory counsel. The court specifically said there was nothing preventing the superior court from granting a specific and limited request, upon a proper showing, to allow advisory counsel, to question specific witnesses. (*Scott v. Superior Court,* 212 Cal.App.3d at p. 512.) In this instance, that option was

not available to appellant. The trial court had already stated that advisory counsel was precluded from questioning witnesses and assisting with the presentation of the defense case during the trial. Additionally, appellant was limited in his access to his assigned runners because of his curtailed telephone privileges. Thus, appellant's ability to utilize the services of his advisory counsel as co-counsel, and use other ancillary services was not the same as in *Scott*.

Nonetheless, appellant notes that on this point *Scott* actually supports appellant's argument that appointment of co-counsel for him to perform some of the defense tasks was appropriate in this case. Had the court actually permitted advisory counsel to question witnesses, assist with voir dire and perform other tasks appellant wanted, *Scott* would support the respondent's position. In the factual context of this case, *Scott* actually supports appellant's position.

Appellant has a liberty interest in the non-arbitrary enforcement of state created rights, which were denied him in this case in violation of the Fourteenth Amendment. (*Hicks v. Oklahoma, supra*; *Fetterly v. Paskett, supra*.)

Also, due process guarantees the accused the right to access to the courts and the right to a meaningful opportunity to be heard. (See e.g., *In re*

William F. (1974) 11 Cal.3d 249, 255 [due process requires fundamental fairness in the fact finding process]; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914; see also *People v. Braxton* (2002) 103 Cal.App.4th 471 ["justice" requires remand where defendant was improperly denied an opportunity to make motion for new trial].) Appellant did not get that here.

Furthermore, the restrictions in the local appointment contract presented an irreconcilable conflict of interest where appellant had to choose between his constitutional right of self-representation and the ability to seek second counsel in this capital case. "It is settled that an indigent charged with committing a criminal offense is entitled to legal assistance unimpaired by the influence of conflicting interests." (*People v. Rhodes* (1974) 12 Cal.3d 180, 183.) As guaranteed by section 15 of article I of the California Constitution, the right to effective assistance of counsel ". . . means more than mere competence. Lawyering may be deficient when conflict of interest deprives the client of undivided loyalty and effort." (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612.) Under the California standard, appellate courts may not "'indulge in nice calculations as to the amount of [resulting] prejudice'" when a conviction is attacked on the ground that an appointed lawyer was influenced by conflict of interest. (*Ibid.*) "[Even] a potential conflict may require reversal if the record

supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." (*People v. Mroczko* (1983) 35 Cal.3d 86, 105; *Maxwell v. Superior Court, supra*, at pp. 612-613; see also *People v. Chacon* (1968) 69 Cal.2d 765, 776-777, and fn. 3 .) "Proof of an 'actual conflict' is not required." (*Mroczko*, at p. 105; cf. federal standard in *Cuyler v. Sullivan* (1980) 446 U.S 335, 346-350 [64 L.Ed.2d 333, 345-347, 100 S.Ct. 1708]; see also, *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392.)

As the case law makes clear, ineffective assistance of counsel due to a conflict does not require a showing of outcome-determinative prejudice:

> "It is important to recognize that 'adverse effect on counsel's performance under [*Cuyler v. Sullivan, supra*, 446 U.S. at pages 348 and 350], is not the same as 'prejudice' in the sense in which we often use that term. When, for example, we review a 'traditional' claim of ineffective assistance of counsel (i.e., one involving asserted inadequate performance as opposed to 'conflicted' performance), we require the defendant to show a reasonable probability that the result (i.e., the disposition) would have been different. . . . As we suggested in *Mroczko, supra*, *Sullivan* requires an inquiry into whether the record shows that counsel 'pulled his punches,' i.e., failed to represent defendant as vigorously as he might have had there been no conflict." (*People v. Easley* (1988) 46 Cal.3d 712, 725.)

Under our state Constitution "'even a potential conflict may require reversal if the record supports "an informed speculation" that [defendant's] right to effective representation was prejudicially affected.'" (*People v.*

Cox (1991) 53 Cal.3d 618, 654.) This informed speculation must be "grounded on a factual basis" in the record. (*People v. Cook* (1975) 13 Cal.3d 663, 671.) As this Court has observed, the proper inquiry is "whether the record shows that counsel 'pulled his punches,' i.e., failed to represent defendant as vigorously as he might have had there been no conflict." (*People v. Easley, supra*, 46 Cal.3d 712, 725.)

Federal law is similar. A conflict of interest requires reversal whenever the conflict adversely affected his attorney's performance. (*Cuyler v. Sullivan, supra*, 446 U.S. 335, 348.) An "adverse effect" is demonstrated by showing that "the attorney's behavior seems to have been influenced" by the conflict. (*Sanders v. Ratelle* (1994) 21 F.3d 1446, 1452.) "This showing need not rise to the level of actual prejudice . . . . " (*Maiden v. Bunnell* (19940 35 F.3d 477, 481.)

That law applies here even though appellant represented himself because it was the restrictions in the local appointment contract which interfered with appellant's effective representation of himself. He was forced to choose between representing himself or having the assistance of two attorneys. Here, there is more than informed speculation that this choice hindered appellant's right to effective representation.

Specifically, on several occasions appellant stated that although he was representing himself, he believe it best to present his own testimony by way of questions from counsel rather than simply presenting a narrative. (2 RT 353-354, 6 RT 1451-1452.) However, since advisory counsel was not allowed to participate at trial, and no other counsel was appointed even for this limited purpose, appellant had to forgo his right to testify, both at the guilt and penalty phase of the trial. Appellant's inability to effectively testify at his trial, as was his constitutional right, is more than sufficient grounds to reverse appellant's convictions.

* * * * *

III.

THE DENIAL OF APPELLANT'S REQUEST FOR CO-COUNSEL DENIED HIM EQUAL PROTECTION SINCE HE WAS FLATLY DENIED ANCILLARY SERVICES AVAILABLE TO OTHER CAPITAL DEFENDANTS

Appellant has also argued that the denial of his request for co-counsel under the circumstances presented here denied him equal access to the same ancillary services as any other capital defendant. (AOB 60-87.) While the specific issue raised herein concerns appellant's ability to obtain the ancillary service of *Keenan* counsel, the issue raised has far broader implications. The broader issue here is whether the state can deny a *pro per* capital defendant access to the same ancillary services, including *Keenan* counsel, as another other capital defendant.

Respondent argues that the state can deny such services to persons such as appellant because appellant was not similarly situated as other capital defendants by virtue of the fact that he chose to exercise his constitutional right to represent himself. (RB 66-67.) That is an arbitrary, unsupported distinction which does nothing more than penalize a defendant for exercising their constitutional rights. In fact, such a response is a flat conclusion, without support that additionally assumes the conclusion at issue. "It is well settled that to punish a person for exercising a

constitutional right is itself "a due process violation of the most basic sort." (*In re Lewallen* (1979) 23 Cal.3d 274.) The penalty which is prohibited for assertion of the privilege need not be a direct criminal punishment or fine. In explaining why commenting on a defendant's exercise of the right to remain silent is prohibited, the Supreme Court in *Griffin v. California* (1965) 380 U.S. 609, 614 [14 L.Ed.2d 106, 109-110, 85 S.Ct. 1229], wrote:

> "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."

By that same reasoning, to hold that a *pro per* capital defendant is not similarly situated with a capital defendant represented by counsel and deny equal access to the same ancillary services on that basis alone, is nothing more than an unlawful penalty on the exercise of a constitutional right. Thus, it is constitutionally impermissible to hold that a *pro per* capital defendant is not similarly situated as a defendant represented by counsel simply by virtue of the exercise of a constitutional right. Both groups are similarly situated.

The next issue to be determined in the equal protection analysis is what level of scrutiny applies. Respondent argues that the rational basis test applies, but no where does the respondent even attempt to articulate what rational basis exists for the distinction. Respondent's argument is that since

the right of second counsel in a capital case is not an absolute right under either the state or federal constitutions, but is merely discretionary under *Penal Code* section 987.9, then the rational basis test is the relevant standard of scrutiny. (RB 67.) Appellant continues to disagree with that analysis.

The level of scrutiny is determined by examining the interests affected. (*People v. Leng* (1999) 71 Cal.App.4th 1, 11.)

As discussed in his opening brief, the interests affected here are not only the fundamental interest of life, but also the fundamental right of effective assistance of counsel. Included in appellant's fundamental right of self-representation was his ability to have access to all of the necessary defense services afforded any other capital defendant in order to protect that litigant's right to effective assistance of counsel. A real, appreciable impact on or significant interference with this fundamental constitutional right is subject to the strict scrutiny standard. Although the federal constitution may not require this state to provide second counsel for indigent capital defendants, once it has done so for some capital defendants, it cannot reject that those resources to the select few who choose to represent themselves at trial. "'The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,' while

'[t]he due process concern homes in on the essential fairness of the state-ordered proceedings.' [citation omitted]" (*Halbert v. Michigan* (2005) 545 U.S. 606, 610-611, [125 S.Ct. 2582, 2586, 162 L.Ed.2d 552].)

Under a strict scrutiny standard, the state must show that the challenged classification: (1) bears a close relationship to the promotion of a compelling state interest; (2) is required to achieve the government's goal; and (3) is narrowly drawn to achieve the goal by the least restrictive means necessary. (*Craig v. Boren* (1976) 429 U.S. 190 [97 S.Ct. 451, 50 L.Ed.2d 397]; *People v. Leng*, *supra*, 71 Cal.App.4th at p. 11.) The state bears the burden of proving that the classification meets all three prongs of the aforementioned test. (*Craig v. Boren, supra*, 429 U.S. 190.)

Here the state has failed to meet its burden since it first erroneously concludes that represented defendants and *pro pers* are not similarly situated and the right affected here is merely the statutory right of *Keenan* counsel without any constitutional implications. (RB 67-68.) Appellant chose to represent himself but by doing so, he should not also be required to less resources at his capital trial than any other defendant. That analysis merely underscores the due process concerns discussed above. Since appellant exercised his right represent himself, he is entitled the same rights and privileges as another other capital defendant. In order to achieve the

same level of protection and scrutiny, appellant would have to forego his constitutional rights under *Faretta, supra.*

There are no compelling, or even rational, justifications for denying ancillary funding, including *Keenan* counsel for a pro per defendant simply because he or she chooses to self-represent. (See AOB 81-86.)

Respondent argues that the state has a legitimate interest to provide appointed counsel in a capital case with the assistance of co-counsel when needed, but is neither rationally nor constitutionally compelled to provide for the appointment of co-counsel where a defendant has advised the court that he or she does not want to be represented by counsel. (RB 67.) Yet, this line of thinking is a bald conclusion which assumes what is in issue and which in no way provides even a rational basis for the distinction it draws between a represented capital defendant and a pro per capital defendant. Respondent only asserts that the state has a legitimate interest in the distinction but never explains what that interest is. That interest certainly could not be monetary since the state already saves money by not paying *pro per* defendants.

The underlying premise of the state's argument is that by seeking the assistance of *Keenan* counsel, a *pro per* capital defendant is being

represented by counsel, which is inconsistent with the exercise of one's *Faretta* rights. That premise is simply wrong.

As appellant has stated elsewhere in this brief and his opening brief, there is nothing inconsistent or constitutionally impermissible with a defendant relinquishing some of the responsibilities of self-representation to second counsel. (*McKaskle v. Wiggns, supra.*) At all times appellant stated that he was in control of the case and its presentation. He never sought self-representation and second counsel merely to act at his whimsy. (RB 66.) Moreover, there is nothing in the record to suggest that any of the attorneys with whom he discussed the issue with perceived their role as merely his stooge. Their anticipated role in the trial was clearly defined by appellant as discussing tactics and strategy with him outside the courtroom, with possible limited responsibility of participating in jury selection, and questioning witnesses, particularly himself. Within these guidelines, there would not have been any diminution of appellant's right of self-representation. Even as the respondent points out, the trial court had the discretion to appoint second counsel for a defendant. Along with that discretion includes the right to limit counsel's participation to the parameters set out by appellant. All interests could have been served without the categorical bar to second counsel as was the case here.

In this particular instance, the trial court believed that it could not compensate co-counsel under the local contract because pro per defendants were not paid and therefore compensation for co-counsel was zero, or at most $6,750. (2 RT 404 et.seq.) Rather than serving any compelling purpose, the contract was designed to discourage such appointments. Any attorney willing to accept the case as co-counsel to a *pro per* defendant were discouraged since any compensation was not guaranteed.

There are no compelling or even a rational interest involved here that would outweigh appellant's fundamental right to a fair trial and effective representation. The trial court's interpretation of the terms of the local appointment contract which denied compensation to counsel appointed to a *pro per* defendant as co-counsel and thereby effectively denied *Keenan* counsel to *pro per* defendants, was a violation of appellant's right to equal protection of the law guaranteed by the federal constitution, (*Cleburne v. Cleburne Living Center, Inc.,* (1985) 473 US. 432,439; *Eisenstadt v. Baird* (1972, 495 U.S. 438, 446-447; *Reed v. Reed* (1971) 404 U.S. 71,75-76), and the California Constitution. (*People v. Boulerice* (1992) 5 Cal.App.4th 463,471; *People v. Leung* (1992) 5 Cal.App.4th 482,494.)

The contract operated to deny appellant equal protection under the law as guaranteed by the Fourteenth Amendment. Accordingly, neither the

convictions nor the sentence of death satisfies the Eighth and Fourteenth Amendments' guarantees of reliability in capital sentencing. For these reasons, the verdicts and the sentence of death must be reversed.

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IV.

THE TRIAL COURT'S DENIAL OF APPELLANT'S REQUEST FOR AN ORDER REINSTATING HIS LIBRARY PRIVILEGES DEPRIVED HIM OF THE ADEQUATE RESOURCES TO DEFEND HIMSELF

Just prior to the date on which appellant's trial was to begin, appellant's *pro per* privileges at the jail were revoked by the sheriff. (3 RT 712-724.) Appellant's only access to legal materials was through a legal runner, advisory counsel or investigator. (3 RT 740-742.) Twice appellant sought to have some of his privileges restored, and specifically asked that his telephone access be increased but each request was denied. (3 RT 755-757.) On June 9, 1998, appellant told the court that he still had no access to legal materials, law books, and the telephone. (3 RT 755-758.)

On appeal, appellant has also challenged the trial court's refusal to restore some of his *pro per* privileges, and thereby denying him access to the necessary tools for him to have a meaningful opportunity to represent himself. (AOB 89.)

Respondent contends there was no error since appellant had access to advisory counsel and an investigator/runner to bring legal materials to him and that was sufficient to preserve his right of access and a meaningful opportunity to represent himself. Respondent argues that appellant had no

right to dictate what "means would be available to him to prepare his defense." (RB 73-74.)

In making this argument respondent refers (RB 74), to this Court's discussion in *People v. Jenkins* (2000) 22 Cal.4th 900, 1000-1001, where in this Court discussed a case cited by appellant, *Milton v. Morris* (9th Cir. 1985) 767 F.2d 1443. In *Jenkins*, the defendant complained on appeal about the conditions of his confinement, such as difficulties he experienced in obtaining access to the jail law library, disruptive searches of his cell and legal materials, deprivation of appetizing food, being kept in solitary confinement as punishment for disciplinary infractions in jail that were not his fault, to transportation schedules that interfered with his ability to communicate with his counsel. Jenkins argued that these undermined his constitutional rights such that he was unable to assist his counsel in a meaningful way. (*Id.*, at pp. 999-1000.)

There is a significant difference between *Jenkins* and this case. Mr. Jenkins was not representing himself and trying to prepare his defense. Mr. Jenkins was represented by counsel and therefore his claims that he was deprived of his constitutional right to meaningfully assist counsel was rejected. In this instance, appellant, like the defendant in *Milton v. Morris*,

supra, represented himself. Like the defendant in *Milton v. Morris*, appellant was denied access to the means to properly defend himself.

Appellant in no way sought to manipulate the system as the respondent suggests. The trial court and the respondent believed that as long as appellant had the assistance of a runner, investigator and advisory counsel, no more was required. Respondent's argument is based on a misstatement of the facts. The respondent misstates the facts by asserting the appellant had access to the telephone during tier time. (RB 74) Yet, appellant told the court that he did not have access to the telephone and the state presented no evidence to the contrary. As appellant explained, without sufficient access to the telephones in order to reach these individuals, simply saying he had access to them is meaningless, and making appellant's position no different than the defendant in *Milton v. Morris, supra*, where the court of appeals reversed his conviction.

This Court has previously acknowledged limits on an incarcerated defendant's self-representation rights. In *People v. Noah* (1971) 5 Cal.3d 469, 479, the defendant contended that the trial court interfered with his right to represent himself by refusing, for security reasons, to order him moved to a facility where he would have greater access to legal materials. This Court said:

> "A prisoner's decision to represent himself does not entitle him to greater privileges than those granted other prisoners. . .Accordingly, refusal by the court to order that a prisoner who has elected to represent himself be transferred or that the conditions of his custody be modified does not constitute a denial of counsel." (5 Cal.3d at p. 479, citations omitted.)

Undeniably there is a tension between *Noah*, which was decided before *Faretta* and *McKaskle*, and the requirement that a defendant electing to represent himself shall not be given less consideration than a defendant represented by counsel. Subsequent decisions make it clear, however, that while some restriction on self-representation rights is inherent where the pro per defendant is incarcerated, he must nevertheless be given a reasonable opportunity to prepare his defense.

> "While it is true that a defendant, who chooses to conduct his defense pro per does so subject to the disabilities normally attendant upon the status as a prisoner. . ., a pro se defendant must be given a reasonable opportunity to prepare a defense." (*People v. Cruz* (1978) 83 Cal.App3d 308, 324, citation omitted.)

Thus, the implication in *Noah, supra*, that an accused's decision to represent himself does not entitled him to greater privileges than are accorded other prisoners, must give way to *McKaskle's* directive that the pro per defendant is entitled to "actual control" over the case he chooses to present and must be given a reasonable chance to prepare and conduct his case in his own way.

In this case where the trial court refused to grant appellant's request for greater telephone privileges in order that he might actually be able to obtain the assistance from his advisory counsel or investigator unreasonably hindered appellant's efforts to prepare his own defense and denied his Fifth and Fourteenth Amendments right to due process of law and Sixth Amendment right to self-representation. As a result, both the guilt and penalty judgments must be reversed.

* * * * *

V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE JEWELRY SEIZED DURING THE WARRANTLESS SEARCH OF HIS APARTMENT IN COLORADO.

Appellant has argued that the trial court erred in denying his motion to suppress the evidence used against him that had been seized during the warrantless entry and search of his apartment in Colorado. (AOB 92-102.)

Respondent argues that trial court was correct in denying the motion to suppress because appellant's arrest was based on a lawful arrest warrant, and that the seizure of the yellow bag was valid because it was in plain view. (RB 79-81.)

However, as appellant discussed in his opening brief, the two exhibits which were alleged to have been the warrants relied upon by the police when they arrested appellant were admitted over his objection. He maintains that based on the evidence presented, these warrants were unreliable evidence and should have been excluded. (See, AOB 98-99.) Therefore, this Court should not rely on those exhibits as evidence that the arrest here was based on a valid warrant.

Officer Deasy claimed the police possessed a warrant for the jewelry store robbery in Littleton, Colorado, but the record shows that when that warrant had not been issued until two days after appellant's arrest. (RT

594.) Thus, the police could not have relied on the purported jewelry store warrant as a basis to arrest him. Officer Deasy claimed he confirmed the existence of the jewelry store robbery before going to appellant's apartment, but that was uncorroborated hearsay. (RT 585-587.) Deasy testified that there was a Littleton officer with them that night, (RT 574), Littleton being the location of the jewelry store robbery, but apparently that officer failed to produce the arrest warrant that formed the basis for their entry. The fact remains that no valid warrant for appellant's arrest was ever produced. The second document admitted over appellant's objection was an arrest warrant for Lee Harris only. (RT 595-596.) Based on the totality of the evidence presented, the police failed to prove that there was a valid arrest warrant for appellant. Therefore, the trial court erred in finding that the police had obtained a warrant.

Furthermore, even though there may have been a prior warrant issued for Harris' arrest, they could not simply execute that warrant without first obtaining a search warrant for the premises, (*Steagald v. United States* (1981) 451 U.S. 204 [101 S.Ct. 1642, 68 L.Ed.2d 38]), which the record shows they never did. The sum total of the information available to the officers at the time of entry did not provide the significant standard of probable cause required for the substantial step of intruding into a residence

without a warrant. (See *People v. Ramey* (1976) 16 Cal.3d 263; *Payton v. New York* (1980) 445 U.S. 573, 589-590.)

The jewelry found in the apartment was a substantial part of the prosecution's case since it directly linked appellant to the murders and was a substantial part of the evidence used to corroborate the accomplice testimony. The failure to suppress this evidence standing requires reversal of appellant's convictions and death judgment.

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VI.

THE FIRST DEGREE MURDER CONVICTIONS MUST BE REVERSED BECAUSE APPELLANT WAS GIVEN CONSTITUTIONALLY INSUFFICIENT NOTICE THAT HE COULD BE CONVICTED OF A VIOLATION OF PENAL CODE SECTION 189, AND A CONVICTION UNDER THAT SECTION WAS BEYOND THE JURISDICTION OF THE COURT

Appellant hereby incorporates the briefing on this issue in the opening brief and will submit the briefing on this issue on that briefing.

* * * * *

PENALTY PHASE ERRORS

VII.

THE TRIAL ERRED IN ADMITTING AND INSTRUCTING UPON EVIDENCE IN AGGRAVATION THAT VIOLATED APPELLANT'S RIGHT TO A RELIABLE PENALTY DETERMINATION AND OTHER FUNDAMENTAL CONSTITUTIONAL RIGHTS, REQUIRING REVERSAL OF THE DEATH JUDGMENT.

The prosecution may not introduce aggravating evidence that is not relevant to the statutory factors listed in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) One such factor, factor (b), consists of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (*Cal. Penal Code* § 190.3(b).)

Factor (b) evidence must constitute a crime, and that crime must include a requisite degree of force or violence. (*People v. Boyd*, 38 Cal.3d at 776-777.) It may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt. (*People v. Clair* (1992) 2 Cal.4th 629, 672-73.) It is the responsibility of the trial court to determine that the evidence meets this high standard of proof. (*People v. Boyd*, 38 Cal.3d at p. 778 (citing *People v. Johnson* (1980) 26 Cal.3d 557, 576.) A trial court's decision to admit

evidence pursuant to factor (b) is reviewable for abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

Here, appellant has challenged the admission of seven incidents that occurred during the twenty years of his incarceration as aggravating acts because none of the acts constituted actual crimes. (AOB 122-132.) Appellant continues to maintain that none of the San Quentin incidents described an act consisting of a "willful and unlawful use of force or violence upon the person of another", which is required for battery under Penal Code section 242. The other incidents on the yard apparently involved mutual combat between the two inmates. In another incident appellant got into an argument with the other inmate that culminated in a fight. In the other incident the guard described appellant walking up to an inmate and punching him. However, the guard had no idea who or what started the altercations and therefore no evidence that the fight was unprovoked. Lastly was the incident with the food tray. Appellant was in his cell and he threw his food tray at the bars, not at the guard.

The county jail incidents also lacked sufficient proof to qualify as acts of violence or threat of violence under Penal Code section 190.3(b). As for the shank found over appellant's cell, again there was no evidence that appellant actually put it there. (AOB 127-128.) Respondent claims

appellant's possession of the urine bag was possessed to be used as a weapon because other inmates have used such bags to commit a battery. (RB 91.) That is nothing more than speculation which is insufficient to establish a crime.

The admission of this unreliable and inflammatory evidence was so prejudicial that it rendered appellant's trial fundamentally unfair and resulted in an unreliable, arbitrary, and non-individualized sentencing determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens* (1983) 462 U.S. 862, 885) undermined the heightened need for reliability in the determination that death is the appropriate penalty. (*Johnson v. Mississippi* (1985) 486 U.S. 585, 578.) In addition, the evidence was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of due process. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

The jury's consideration of non-statutory aggravation violated California law. (*People v. Boyd , supra*, 38 Cal.3d at p. 774.) Its use arbitrarily deprived appellant of his state-created liberty interest to have his

sentence determined without consideration of such evidence in violation of due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346-347.)

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VIII.

THE TRIAL COURT ERRED IN FAILING TO ENSURE IMPARTIALITY AND PARITY OF INSTRUCTIONS BETWEEN CALJIC NOS. 8.85 AND 8.87 REGARDING JURY NON-UNANIMITY THUS SKEWING THE INSTRUCTIONS TOWARD A DEATH VERDICT AND VIOLATING APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION.

Appellant hereby incorporates the briefing on this issue in the opening brief and will submit the briefing on this issue on that briefing.

* * * * *

IX.

CALJIC NO. 8.88, AS GIVEN, VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant hereby incorporates the briefing on this issue in the opening brief and will submit the briefing on this issue on that briefing.

* * * * *

X.

THE FAILURE TO GIVE APPELLANT'S SPECIAL PENALTY PHASE INSTRUCTION THAT THE JURY COULD CONSIDER THE FACT THAT HIS ACCOMPLICE A MORE LENIENT SENTENCE AS A MITIGATING FACTOR VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant has also argued that it was error the trial court to reject his special instruction to the jury that it could consider the fact that accomplice Avery received a more lenient sentence as a mitigating factor when deciding his fate. (AOB 150-155.) The respondent argues for rejection of this argument because this Court has previously held that such evidence is irrelevant at the penalty phase of the trial. (RB 105.) Appellant disagrees because in the context that appellant argued his case, the prosecution's treatment of Avery was relevant.

Appellant maintains that rejection of his special instruction was error because this was a proper pinpoint instruction that went to the heart of his defense. Appellant argued that Avery's entire testimony was premised upon lies in order for her to obtain leniency from the prosecution. Appellant's proposed instruction was proper for the jury's consideration as to Avery's credibility as well as the issue of corroboration of accomplice testimony. The trial court's refusal to give the instruction not only was

error under state law, it also violated appellant's federal constitutional rights to due process, equal protection, a fair trial by jury and a reliable and non-arbitrary penalty determination. (*U.S. Const.*, Amends. Fifth, Six, Eighth, and Fourteenth.) By refusing to specifically instruct that the jury could consider the leniency given to the accomplice, the trial court failed to give guidance to the jury with respect to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869; 71 L.Ed. 2d 1; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

* * * * *

XI.

THE FAILURE TO INSTRUCT THE JURY ON THE PRESUMPTION OF LIFE VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant hereby incorporates the briefing on this issue in the opening brief and will submit the briefing on this issue on that briefing.

* * * * *

CONCLUSION

For the reasons stated herein and in appellant's opening brief, appellant's guilty verdicts, determinate sentence and his death sentence should be reversed for the reasons set forth above.

Dated: November 1, 2007

Respectfully submitted

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(B)(2))

I, Cynthia A. Thomas, am the appointed counsel for Charles Edward Moore, in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 12,845 words in length excluding the tables and this certificate.

Dated: November 1, 2007

_____

Cynthia A. Thomas
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party within the action; my business address is 5050 Laguna Blvd., #112-329, Elk Grove, California, 95758.

On November 2, 2007, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States mail at each of the places so addressed, or there is regular communication between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 2007, at Elk Grove, California.

CYNTHIA A. THOMAS
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