

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA	)	Court Of Appeal
	)	No. B230679
	)	
Plaintiff and Respondent,	)	Superior Court
	)	No. VA116772
vs.	)	
	)	COURT OF APPEAL - SECOND DIST
JOSEPH SMITH,	)	<b>FILED</b>
	)	SEP 20 2011
Defendant and Appellant	)	
_____	)	<u>JOSEPH A. LANE</u> Clerk
		<u>S. LUI</u> Deputy Clerk

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY  
HONORABLE ROGER ITO, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

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## ARGUMENT

### I.

**APPELLANT WAS DENIED HIS RIGHT TO COUNSEL BECAUSE  
THE TRIAL COURT DID NOT ADEQUATELY WARN  
APPELLANT OF THE DANGERS OF SELF-REPRESENTATION  
AND THE TRIAL COURT ABUSED ITS DISCRETION BY  
REFUSING TO ALLOW APPELLANT TO REVOKE HIS RIGHT  
TO SELF-REPRESENTATION AFTER APPELLANT MADE AN  
UNEQUIVOCAL REQUEST FOR COUNSEL**

Respondent argues that appellant was properly advised of the risks of self-representation because appellant completed a written form and understood the risks of self-representation. (Respondent's Brief at p. 8.) Respondent further contends that the trial court properly denied appellant's midtrial requests to terminate self-representation because the requests were untimely and a tactic designed to delay or inject error. (Respondent's Brief at pp. 9-11.)

However, appellant was not adequately advised of the risks and dangers of self-representation or that he had no right to standby counsel. (2RT C-6-C-10) Appellant specifically requested co-counsel or standby counsel after waiving his right

to counsel, demonstrating his lack of understanding of the dangers of self-representation. (2RT 301-302) On January 11, 2011, after jury voir dire, appellant stated, "I'd like to speak with my co-counsel." (2RT 301) The trial court responded, "You don't have co-counsel, sir." (2RT 301) Appellant stated, "I'm talking about the person that would step in if I decide to relieve my pro per status." (2RT 301) The trial court replied, "You don't have the option of relieving your pro per status, sir. You announced ready, we picked a jury, we're going forward. So you do not have co-counsel. You do not have stand-by counsel. We're doing the trial now." (2RT 302) Surprised, appellant asked, "I don't have no stand-by counsel? ... So I have nobody to confer with in regards to decision making on my case?" (2RT 302)

Further, during trial, appellant unequivocally requested to revoke his in propria persona status and have an attorney appointed. (2RT 1202-1205, 1428-1429) On January 12, 2011, appellant did not come to court for trial and told the court he was hearing voices, he was suicidal, and he "Can't do it." (2RT 603-607) On January 18, 2011, appellant expressly stated, "I don't want to represent myself no more. I fractured my skull, okay. I'm on psych meds. I'm committing suicide,

whatnot. I'm not able to represent myself is what I'm saying. I don't have no problem with coming to the courtroom. I just can't represent myself. ... I'm not refusing to come to court. I can't represent myself, your honor. That's what I'm trying to explain to you. ... I cannot represent myself. I have hemorrhaging in my head. I'm bleeding. ... I'm on psych meds right now. I take pills three times a day. ... I'm not able to represent myself, your honor. I'm trying to explain that to you." (2RT 1202-1205) Again, on the afternoon of January 18, 2011, appellant explained, "I'm not competent to represent myself. ... I'm not capable of representing myself right now, and I'm not able to do it." (2RT 1427-1429) The trial court denied appellant's requests, finding appellant was more than adequately able to represent himself and was engaged in games and antics. (2RT 606-607, 1201-1205, 1428)

Prior to waiving his right to counsel, a defendant should be told he will receive no help or special treatment from the court and that he does not have a right to standby counsel. (*People v. Phillips* (2006) 135 Cal.App.4<sup>th</sup> 422, 428; *People v. Noriego* (1997) 59 Cal.App.4<sup>th</sup> 311, 315, 321-322 [reversal where the trial court failed to properly advise the appellant of the risks and dangers of self-representation as required by *Faretta*].) In

*Faretta v. California* (1975) 422 U.S. 806, 836 [95 S. Ct. 2525, 45 L.Ed.2d 562], the United States Supreme Court held that a defendant has a constitutional right to proceed in propria persona when the defendant intelligently and knowingly elects to do so. The defendant should be made aware of the dangers and disadvantages of self-representation so that the record will establish that the defendant knows what he is doing and his choice is made with his eyes open. (*Id.* at p. 835.)

Here, the trial court failed to adequately advise appellant that he had no right to standby counsel, that he lacked legal skills, that his opponent would be experienced and did not inquire whether appellant understood the charges and consequences. (2RT C-6-C-10, 301-302) Because appellant's Sixth Amendment right to counsel was violated, reversal is required. The error was not harmless beyond a reasonable doubt because appellant may have chosen professional representation had he been fully informed of the disadvantages and risks of self-representation. (*People v. Noriego, supra*, 59 Cal.App.4<sup>th</sup> at pp. 321-322.)

An unequivocal midtrial request to revoke in propria persona status and have an attorney appointed is committed to the sound discretion of the trial court. (*People v. Lawrence*

(2009) 46 Cal.4<sup>th</sup> 186, 192-193.) The court must consider the totality of the facts and circumstances in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial. (*Id.* at p. 192.) A trial court should consider the following factors and any other relevant circumstances: (1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. (*Id.* at p. 192; *People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994; *People v. Gallego* (1990) 52 Cal.3d 115, 163-164].)

It is an abuse of discretion to deny a defendant's request to withdraw his *Faretta* waiver where no showing of disruption was made from a continuance to appoint counsel. (*People v. Hill* (1983) 148 Cal.App.3d 744, 760-761 [abuse of discretion where request made before jury selection, no showing of disruption from short continuance]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 319 [abuse of discretion where request made

before assignment to trial department, no showing of disruption from continuance]; *People v. Elliott, supra*, 70 Cl.App.3d at pp. 994-998 [abuse of discretion where request made before presentation of evidence, prompted by prosecutor's offer of proof regarding an uncharged offense and no showing of disruption from continuance] *People v. Nague* (1991) 229 Cal.App.3d 1115, 1122-1125 [matter remanded to trial court to hold hearing on request for counsel made after trial for assistance at sentencing].)

Here, appellant unequivocally requested the withdrawal of his *Faretta* waiver during trial. (2RT 1202-1205, 1428-1429) Appellant repeatedly explained that he was unable to effectively represent himself and requested that counsel be appointed to represent him in this three strikes case. Appellant had no prior history of alternating between self-representation and representation by counsel, and the reason he gave for wanting counsel was a valid one—he realized that he lacked the necessary skills to represent himself in trial. No showing of an unreasonable disruption from appointing previous counsel was made. Despite the serious nature of the case, the trial court refused to allow appellant to withdraw his *Faretta* waiver and

appoint counsel to represent appellant during trial and at sentencing.

Reversal is required because a denial of a criminal defendant's right to counsel under the Sixth and Fourteenth Amendments affects "the framework within which the trial proceeds" and thus it is not "simply an error in the trial process itself." (*People v. Lawrence, supra*, 46 Cal.4<sup>th</sup> at p. 203, Kennard, J. dissenting, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Further, the trial court's error in denying the request to retract the *Faretta* waiver was not harmless beyond a reasonable doubt. (*People v. Hill, supra*, 148 Cal.App.3d at p. 762 [reversal required where error was not harmless beyond a reasonable doubt]; *People v. Sampson* (1987) 191 Cal.App.3d 1409, 1418; *People v. Nague, supra*, 229 Cal.App.3d at pp. 1126-1127.)

At a minimum, counsel should have been appointed for sentencing and would have been able to assist at sentencing by arguing for a lesser sentence or bringing a *Romero* motion. (*Menefield. v. Borg* (9th Cir. 1989) 881 F.2d 696, 700-701 [a defendant should be allowed to withdraw a *Faretta* waiver at the time of sentencing unless the government can show that the request is made for a bad faith purpose]; *People v. Nague*,

*supra*, 229 Cal.App.3d at pp. 1122-1125 [same]; *Robinson v. Ignacio* (9<sup>th</sup> Cir. 2004) 360 F.2d 1044, 1048 [explicit request for counsel at sentencing].)

### **CONCLUSION**

Because the record does not establish that appellant knowingly and intelligently waived his right to counsel and the trial court abused its discretion in denying appellant's unequivocal request to withdraw his *Faretta* waiver, reversal is required.

Dated: September 19, 2011

Respectfully submitted,



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Marta I. Stanton  
Attorney for Appellant  
Joseph Smith

**CERTIFICATE OF WORD COUNT [CRC 8.360]**

I certify that the text of Appellant's Reply Brief consists of 2,096 words.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct, and that this Declaration was executed on September 19, 2011, at Agoura, California.

September 19, 2011

Respectfully submitted by:

A handwritten signature in cursive script, appearing to read "Marta I. Stanton", is written over a horizontal line.

Marta I. Stanton

## PROOF OF SERVICE BY MAIL

I, Marta I. Stanton, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is 638 Lindero Canyon Rd., #192, Agoura, CA 91377. On September 19, 2011, I served the within

## APPELLANT'S REPLY BRIEF

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Agoura, California, addressed as follows:

State Attorney General  
300 South Spring Street  
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California Appellate Project  
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Los Angeles Superior Court  
12720 Norwalk Blvd.  
Norwalk, CA 90650  
For Delivery to the Honorable Roger Ito

District Attorney  
Ann Park, Deputy  
12720 Norwalk Blvd., Rm. 201  
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Joseph Smith, 2469333  
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P.O. Box 86164 Terminal Annex  
Los Angeles, CA 90086-0164

I declare under penalty of perjury that the foregoing is true  
and correct and that I signed this declaration on September 19,  
2011, at Agoura, CA.

  
-----  
Marta I. Stanton