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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CLARENCE LEON DEWS,

Defendant and Appellant.

F061339

(Fresno Sup. Ct. No. F09906781)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

William A. Malloy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

On the night of December 1, 2009, Gerald McCarter (Gerald)<sup>1</sup> arrived at a residence he owned on West Belmont in Fresno County and found the front door was broken open. He produced his nine-millimeter handgun, entered the residence, and found appellant/defendant Clarence Dews (Clarence), and his brother, codefendant Archie Dews (Archie) inside the house. Gerald fired a warning shot and held them at gunpoint until sheriff's deputies arrived, and defendants were arrested for burglary. When they were searched, they were found in possession of personal property which had been taken from Gerald's house.

Gerald's house had been burglarized a few weeks before defendants were arrested. At that time, a distinctive white car with a black spoiler was parked in front of the house. On the night that defendants were arrested, the same white car with a black spoiler was parked in front of the house. The car belonged to Archie and the registration had expired. The deputies impounded the vehicle, conducted an inventory search, and found personal property which had been taken from Gerald's house during the prior burglary which occurred on November 14, 2009.

Archie was charged with count I, first degree residential burglary (Pen. Code,<sup>2</sup> §§ 459, 460, subd. (a)); and count II, grand theft of personal property (§ 487, subd. (a)),

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<sup>1</sup> We refer to the defendants and some of the parties by their first names for the sake of clarity; no disrespect is intended. We will refer to Gerald's father as Mr. McCarter, Sr., given the lack of further identifying information in the record.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

with both offenses committed on November 14, 2009. Archie and Clarence were jointly charged with count III, first degree residential burglary, with the special allegation that the offense was a violent felony because it was committed while a person, other than an accomplice, was present (§ 667.5, subd. (c)(21)); and count IV, receiving stolen property, (§ 496, subd. (a)), with both offenses committed on December 1, 2009. As to Clarence, it was further alleged that he had one prior strike conviction (§ 667, subs. (b)-(i)); one prior serious felony conviction (§ 667, subd. (a)(1)); and nine prior prison term enhancements (§ 667.5, subd. (b)).

After a joint jury trial, Archie was convicted as charged of counts I, III, and IV, and the jury found the special allegation true as to count III. As to count II, Archie was convicted of the lesser included offense of misdemeanor petty theft (§ 484). Archie was sentenced to an aggregate term of seven years four months.

Clarence was found not guilty of count III, and guilty of count IV. The court found the special allegations true. He was sentenced to 15 years.

In this appeal, we address Clarence's sole contention that the superior court improperly denied his second motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). We will affirm.

### **FACTS**

For many years, Gerald's father, Mr. McCarter, Sr., lived in a house on an 18-acre parcel on West Belmont, in a rural part of Fresno County. Mr. McCarter, Sr., collected and kept numerous memorabilia in his house, and the interior was very cluttered and run-down.

Mr. McCarter, Sr., had two sons. One son and his son's wife (Veronica) lived in a house located directly next to Mr. McCarter, Sr.'s, house. Gerald, his other son, lived about four miles away.

In 2006, Mr. McCarter, Sr., died and left his West Belmont house to Gerald. Gerald, a retired carpenter, planned to remodel the house so that he and his wife could

eventually move in. Gerald's primary residence was still four miles away, but Gerald considered the West Belmont house as his own residence.<sup>3</sup>

Gerald testified he visited the West Belmont house nearly every day. At trial, Gerald conceded the house looked rundown and abandoned from the outside, and the interior was still cluttered with his father's clothing and possessions. There were mice in the house. Gerald brought in construction materials and planned to remodel the house, but he had procrastinated because of the amount of work required.

Gerald testified that the West Belmont house had running water and electricity, an operable hot water heater, a microwave, an operable TV and DVD player, and it was heated with natural gas. The telephone service was disconnected. Gerald stored his fishing poles, camping supplies, and canoe at the house. He also stored his tools in the garage and used it as his workshop. Gerald occasionally ate at the house and used the microwave, but he never stored any perishable food. Gerald testified the bathroom sink and toilet were functional but "pretty unsanitary." He never used the shower. Gerald slept overnight in the house about once a month, usually when he was working late or trying to clean up the clutter. Gerald slept in a sleeping bag placed either on the floor or the living room couch.

Veronica, Gerald's sister-in-law, lived next door to the West Belmont house, and testified that Gerald spent time there every day. Victoria testified that Gerald stayed overnight at the West Belmont house about once or twice a month as he worked on the house.

The West Belmont house was surrounded by a chain-link fence and a locked driveway gate. However, the McCarters had left a hole in part of the chain-link fence

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<sup>3</sup> At trial, Gerald admitted that he was convicted of two misdemeanors: annoying a minor in 1982, and soliciting a prostitute in 1991.

that was large enough for the PG&E meter reader to walk through and enter the property. The house was locked and secured with a deadbolt.

**Counts I and II (Archie)—November 14 & 15, 2009**

On the evening of November 14, 2009, Veronica was driving home when she noticed a white vehicle parked on the side of West Belmont, in front of and between the McCarters' two houses. The white vehicle was distinctive because it had a black "spoiler" on the trunk. The vehicle's headlights were on. Veronica stayed in her own car for several minutes, and watched as the headlights on the white vehicle were switched off. After about five minutes, the white car's headlights were again activated and it drove away. She did not see anyone in the car or around Gerald's house, and she went into her own home.

On the morning of November 15, 2009, as Veronica left her house, she looked at Gerald's adjacent house and saw the front door was wide open. She discovered the door had been forced open. The house had been ransacked and several items were missing, including Mr. McCarter, Sr.'s antique Victrola phonograph.

Veronica contacted the Fresno County Sheriff's Department and reported the burglary. She also called Gerald and told him about the incident.

Gerald testified that the dead bolt on the front door had been broken out of the wood, and the lock in the door handle had been pried open. Gerald also determined that several other items were missing from the house, including his own fishing poles, an old-style wrench, and other personal items which had belonged to his father. These missing items were reported to the sheriff's department. Gerald repaired the dead bolt and made sure the house was again secure.

Deputy Jared Mullis investigated the burglary and determined the house had been ransacked, the TV/DVD player had been moved from its normal position, and an antique Victrola and several fishing poles were missing. The Victrola's estimated value was \$10,000, while the fishing poles were worth about \$500.

**Counts III and IV (Archie and Clarence)—December 1, 2009**

On the afternoon of December 1, 2009, Gerald arrived at his West Belmont house and discovered the front door had been forced open again. The interior had been ransacked and some of his father's personal property was missing. Gerald noticed that some property had been moved and stacked by the front door, as if someone was going to return and take the items.<sup>4</sup>

Gerald stayed at the house for about four hours, hiding in the living room "with a loaded handgun waiting for whoever it was to come back." No one appeared. Around 6:30 p.m., Gerald locked up the house, the front door, and the driveway gate, and left.

Around 10:30 p.m., Gerald drove back to the house to make sure everything was okay. He noticed a car parked on the street in front of the house. He also noticed the front screen and door were open.

Gerald parked at his brother's house and retrieved his nine-millimeter semiautomatic handgun from his car. He loaded his handgun and "jacked one in the chamber." He walked through the hole in the fence, approached the open front door, and walked two to three feet inside the house. The kitchen light was on.

Gerald testified he saw a man, later identified as Archie, going through some electrical equipment in the living room. Archie was about seven to eight feet away from Gerald. Archie was wearing a stocking cap. Gerald asked Archie what he was doing in his house. Archie did not respond and continued to look through various items.

Gerald testified that he pointed his handgun at Archie and said, "I have a legal right to shoot you. You are in my home." Gerald testified that Archie stared at him and moved "a little bit," and Gerald felt threatened. Gerald pointed his handgun to Archie's right side and fired a "warning shot" into the wall. Gerald explained why he did so:

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<sup>4</sup> Defendants were not charged with any offenses based on the apparent burglary that Gerald discovered on the afternoon of December 1, 2009.

“Most people with a loaded handgun are generally hesitant to pull the trigger. And I didn’t want this guy jumping me. I wanted him to understand that the gun was loaded and I was capable of pulling the trigger.”

Gerald testified that as a result of the warning shot, Archie “immediately stayed put,” and another man, later identified as Clarence, emerged from the back bedroom. Clarence raised his hands and said “don’t hurt us.” Gerald was shocked that another person was in the house. He ordered both Archie and Clarence to lie on the floor with their hands in front of them, and they complied. Gerald called 911 and reported that he was holding two burglars at gunpoint.

Gerald testified he held defendants at gunpoint for the 10 to 15 minutes it took until the sheriff’s department arrived. Defendants stayed on the floor and did not move. Gerald asked them if someone else was outside, and they assured him that no one else was there.

When the deputies arrived, Gerald shouted that he had a gun and not to shoot him. Gerald backed out of the house through the front door, turned his handgun over to a deputy, and defendants were taken into custody.

### **The arrest of defendants**

Fresno County Sheriff’s Deputies Coningsby and O’Neill responded to the dispatch indicating a burglary and shots fired. They found Gerald standing in the front doorway, aiming his handgun inside the house. Gerald said there were two guys in the house. A deputy took Gerald’s gun and escorted him from the area.

Deputy Coningsby testified that defendants were still in the house and lying on the floor. The deputies ordered Archie and then Clarence to crawl out of the front door. Both defendants complied with the orders and were taken into custody. The deputies used a canine unit to clear the house. One of the dogs made contact with Archie and inflicted minor injuries on him.

### **Searches of defendants**

Both Archie and Clarence were searched incident to their arrests. Archie was found in possession of five wooden smoking pipes and a very old electric razor. He had a bracelet on his wrist, and voluntarily said that the bracelet did not belong to him. Gerald looked over the items, and said they had belonged to his late father and been taken from the house. Clarence was also found in possession of distinctive items which Gerald identified as having belonged to his late father, and which had been removed from the house.

### **Search of Archie's car**

Veronica testified that she went outside when she saw the patrol cars, and saw a vehicle parked on the street in front of the two houses. She immediately recognized the vehicle as the same white car with the black spoiler that she saw parked there on the evening of November 14, 2009. She told a deputy that she was "100 percent sure" it was the same white car with the black spoiler.

Deputy Coningsby testified he noticed the white vehicle after defendants were arrested. The vehicle was registered to Archie, but the registration was expired. Deputies decided to impound and tow the vehicle. Deputy Centeno conducted an inventory search of the car before it was towed.

Deputy Centeno found several fishing poles and an old-style wrench in the trunk. The deputies asked Gerald to look over the property, and Gerald identified the fishing poles and the wrench as items which had been taken from his house during the November 14, 2009, burglary.

### **Defense evidence**

Clarence did not testify or present any defense evidence. It was stipulated that on November 14 and 15, 2009, Clarence was not in Fresno County and he could not have committed the offenses charged in counts I and II.

Archie testified that he was convicted of marijuana sales in 1994, and felony possession for sale and the sale of drugs in 2000. Archie was homeless and usually spent the night in a tent in West Fresno. Archie owned an older model white Volvo. Archie testified that he had never been to the house on West Belmont prior to the evening of December 1, 2009.

Archie testified that on December 1, 2009, someone had stolen his sleeping bag and tent. It was too cold to sleep outside, it was too late to go to a shelter, and he had nowhere to go.<sup>5</sup> Archie testified that he met “Dave” on the street. Dave was a homeless man and a crack user. Dave told him about Gerald’s house on West Belmont, and that there was a big hole in the fence. Dave said the house was vacant, he had stayed there before, and there was a lot of trash and junk there. Dave also said there may be some things that he could get a few dollars for, and provided directions to the house. Archie gave marijuana leaves to Dave, and Dave gave him three fishing poles in exchange.

Archie testified that he later met his brother, Clarence, and they drove to the West Belmont house in Archie’s car because they were looking for someplace to sleep inside. Archie and Clarence walked through the hole in the fence. The front door was already open, but Archie did not suspect anything was wrong because Dave said he had already slept there. There was a lot of junk inside and Archie thought it was abandoned. Archie and Clarence sat down and talked, and then they looked for someplace to sleep. Clarence went into a rear bedroom and cleaned an area to sleep. Archie looked through some boxes in the front room for a blanket.

Archie testified he was still looking for a blanket when Gerald arrived and fired a shot in his vicinity. He said Gerald never gave any warning before he fired the shot.

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<sup>5</sup> Archie admitted his mother lived in the vicinity, but testified that he decided not to go to her house. Archie’s sister testified that she cared for their elderly mother, they had a small house, and there was no room for Archie.

Archie testified that Gerald never entered the house, and he stood outside the doorway when he fired the gun. After he fired, Archie and Clarence told him to stop, and they complied with his orders to get on the floor. They never tried to escape or resist.

Archie testified he did not enter the house with the intent to steal anything. He just needed a place to sleep because it was so cold. He did not look through property, collect items, or move things in the house with the intent to steal them. However, Archie admitted that he told a deputy that he was looking for things in the abandoned house that he could recycle for a few dollars.

Archie admitted that when he was arrested, he had five smoking pipes and an old razor in his pockets, and he had found those items in the house. Archie explained that he intended to use the pipes to smoke a combination of tobacco and marijuana leaves, and he intended to shave his beard with the razor until he realized it didn't work. Archie was also wearing a bracelet when he was arrested, but testified his wife gave him the jewelry.

Archie further testified that the items found in Clarence's pockets belonged to Clarence.

Archie admitted his white car was parked in front of the house and the deputies searched it. Archie testified the old wrench found in the trunk used to belong to his own father, and now belonged to him.

Archie also admitted there were about eight fishing poles in the trunk of his car. Archie denied taking the fishing poles from the house, and testified he had never been in the house prior to December 1, 2009. Archie testified he had received three fishing poles from Dave in exchange for marijuana leaves. Archie further testified the other fishing poles in the trunk belonged to him, and he had inherited one from his father.<sup>6</sup>

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<sup>6</sup> Archie's sister testified that Archie inherited one fishing pole from his father. Archie's sister admitted she had a misdemeanor conviction for obtaining aid by fraud in 1980.

## **Rebuttal**

Deputy Hamilton testified he interviewed Archie after he was arrested, and asked about the fishing poles in the car trunk. Archie said he had just received three poles from Dave in exchange for marijuana. Archie never said the other fishing poles belonged to him or that he had inherited them from his father.

Deputy Hamilton asked Archie how he found Gerald's house on West Belmont. Archie said Dave, who used crack, told him about the house. Dave said there was a lot of stuff there, including some pretty good fishing poles. Archie said he was looking for a place to sleep, and for some stuff that he could get a few dollars for. Hamilton asked Archie about the items found in his pockets. Archie said he found them in the house, and he thought he could get a couple of dollars for them.

## **Convictions**

Based on the November 14, 2009, incident, Archie was charged and convicted of count I, first degree residential burglary. In count II, he was charged with grand theft of personal property; the jury found him guilty of the lesser included offense of misdemeanor petty theft (§ 484).

Based on the incident that occurred on the evening of December 1, 2009, Archie and Clarence were jointly charged with count III, first degree residential burglary, with the special allegation that a person, other than an accomplice, was present during the commission of the offense; and count IV, receiving stolen property.

Archie was convicted of counts III and IV, with the special allegation found true as to count III. Clarence was found not guilty of count III and guilty of count IV.

## **DISCUSSION**

### **THE COURT PROPERLY DENIED CLARENCE'S SECOND FARETTA MOTION TO REPRESENT HIMSELF**

Clarence's sole contention on appeal is that the superior court violated his Sixth Amendment rights when it denied his second request to represent himself, which was

made a few days before his trial was scheduled to begin. Clarence argues his *Faretta* motion was timely, it was not made for purposes of delay or disruption, and he always engaged in respectful behavior before the court.

As we will explain, however, Clarence had initially moved to represent himself shortly after the preliminary hearing, and the court granted that motion. During the lengthy pretrial proceedings, Clarence entered a general time waiver and obtained numerous continuances of the trial date. He repeatedly filed the same voluminous motions, claimed the court had failed to rule on his repetitive motions for discovery, re-filed motions that had been denied, demanded new rulings, and accused the court and the investigating deputies of misconduct. After nearly six months of representing himself, Clarence requested reappointment of counsel and withdrew his general time waiver.

On September 21, 2010, just one week before trial and days before his criminal case was going to “time out,” Clarence again requested to represent himself and asked for a continuance because he was not ready for trial. The court denied that motion, and Clarence now contends that denial violated his Sixth Amendment rights.

#### **A. Faretta**

We begin with the well-settled standards for a court to consider a defendant’s request to represent himself pursuant to *Faretta*. “A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. [Citation.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 20.)

A defendant’s ability to competently represent himself is not a proper factor for a court to consider under *Faretta*. (*People v. Welch* (1999) 20 Cal.4th 701, 732-734.) “[T]he competence that is required of a defendant seeking to waive his right to counsel is

the competence to *waive the right*, not the competence to represent himself.” (*Godinez v. Moran* (1993) 509 U.S. 389, 399, italics in original, fn. omitted.)

“Generally, under the *Faretta* test, if a request for self-representation is unequivocally asserted within a reasonable time before the commencement of a trial, and if the assertion is voluntarily made with an appreciation of the risks involved, the trial court has no discretion to deny it. [Citations.] [¶] However, ‘unlike the right to be represented by counsel, the right of self-representation is not self-executing.’ ” (*People v. Williams* (2003) 110 Cal.App.4th 1577, 1585-1586.)

“A trial court must grant a defendant’s request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently. [Citations.] As the high court has stated, however, ‘*Faretta* itself and later cases have made clear that the right of self-representation is not absolute.’ [Citations.] Thus, a *Faretta* motion may be denied if the defendant is not competent to represent himself [citation], is disruptive in the courtroom or engages in misconduct outside the courtroom that ‘seriously threatens the core integrity of the trial’ [citations], or the motion is made for purpose of delay [citation].” (*People v. Lynch* (2010) 50 Cal.4th 693, 721-722 (*Lynch*), overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

“ ‘Likewise, we have long held that a self-representation motion may be denied if untimely. [Citation.] [A] motion is timely if made ‘a reasonable time prior to the commencement of trial.’ [Citation.] ‘[O]nce a defendant has chosen to proceed to trial represented by counsel,’ a defendant’s motion for self-representation is ‘addressed to the sound discretion of the court.’ [Citation.] We observed that our imposition of a timeliness ‘requirement should not be and, indeed, must not be used as a means of limiting a defendant’s *constitutional* right of self-representation.’ [Citation.] Rather, the purpose of the requirement is ‘to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.’ [Citation.]”

(*Lynch, supra*, 50 Cal.4th at p. 722, italics in original, fn. omitted.) “ ‘For example, a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for trial and needs further time for preparation.’ [Citations.]” (*People v. Burton* (1989) 48 Cal.3d 843, 852-853.)

“In assessing an untimely self-representation motion, the trial court considers such factors as ‘the quality of counsel’s representation of the defendant, the defendant’s prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.’ [Citation.]” (*Lynch, supra*, 50 Cal.4th at p. 722, fn. 10.)

“The high court has observed that lower courts generally require a self-representation motion to be timely, a limitation that reflects that ‘the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.’ [Citation.] Despite this tacit approval of the timeliness limitation on the self-representation right, the high court has never delineated when a motion may be denied as untimely. Nor has this court fixed any definitive time before trial at which a motion for self-representation is considered untimely, or articulated factors a trial court may consider in determining whether a self-representation motion was filed a reasonable time before trial.” (*Lynch, supra*, 50 Cal.4th at p. 722.)

“Along these lines, we have held on numerous occasions that *Faretta motions made on the eve of trial are untimely.*” (*Lynch, supra*, 50 Cal.4th at p. 722, italics added.) “Likewise, we have concluded that motions for self-representation made long before trial were timely. [Citations.]” (*Lynch, supra*, 50 Cal.4th at p. 723, fn. omitted.)

“[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is ‘to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.’ [Citation.]” (*Lynch, supra*, 50 Cal.4th at p. 724.)

Clarence’s appellate arguments are based on the superior court’s denial of his second request to represent himself, which was made on September 21, 2010. However, the court’s denial of his second *Faretta* motion must be reviewed in the context of Clarence’s prior conduct while he represented himself during the lengthy pretrial proceedings. Thus, with the applicable legal standards in mind, we turn to the pretrial procedural history of this case.

**B. Appointment of counsel and preliminary hearing**

The complaint jointly charged Clarence and Archie with multiple felony offenses in this case, and their criminal case remained joined for all purposes. On December 4, 2009, the court appointed the public defender to represent Archie, and the law firm of Ciummo and Associates, as conflict counsel, to represent Clarence. On December 18, 2009, the joint preliminary hearing was conducted and defendants were held to answer. On January 5, 2010, the court arraigned defendants on the information, and their joint jury trial was set for February 18, 2010.

**C. Clarence’s first *Faretta* motion**

On February 5, 2010, both Clarence and Archie moved to represent themselves. The court advised defendants of their constitutional rights, reviewed the answers in their questionnaires, and granted both *Faretta* motions.<sup>7</sup>

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<sup>7</sup> While Archie also represented himself prior to trial, we will focus on Clarence’s conduct while he was in pro. per.

The prosecutor stated he was ready for trial. Clarence asked for the trial date to be vacated, and he entered a general time waiver. Clarence asked the court not to set a specific trial date. The court agreed, but explained that it would not continue the matter for a significant period of time.

**D. Clarence's initial discovery motions**

On March 3, 2010, the court conducted the trial confirmation conference, and asked Clarence if he still wanted to represent himself. Clarence said yes, but asked for a continuance to file several motions, and complained about limited access to the jail's law library. Clarence also complained that the jail refused to let him review photographic DVDs pursuant to discovery, and that he had contacted Senator Barbara Boxer and the Department of Justice to complain about the restriction. The court explained that there were serious jail safety issues which prevented inmates from having access to DVDs.

The court had a lengthy exchange with Clarence about his oral motions for discovery, and explained that he had to file written discovery motions. The court repeatedly stated that it would not discourage defendants from representing themselves, but defendants had to comply with the same rules as attorneys. Clarence's general time waiver was still in place, and the court granted his request for a continuance.

On April 7, 2010, the court conducted another trial confirmation conference. Clarence again asked for a continuance and reaffirmed his general time waiver. The court granted the continuance. Clarence also filed nearly 200 pages of handwritten motions, including a demurrer to the amended information and a request for an investigator. Many of the motions consisted of "boilerplate" allegations that were not relevant to the charged offenses in this case.

On April 12, 2010, Clarence filed over 400 pages of additional motions, some of which were duplicative to the motions already filed.

On April 19, 2010, Clarence again moved for a continuance and said he just received the People's opposition to some of his motions. The court granted the

continuance. On April 23, 2010, Clarence filed a 40-page motion for discovery. The motion generally requested disclosure of all evidence and was not specific to his particular case, except for a discovery demand for the specific items of personal property which were found on defendants when they were searched, and when Archie's car was searched.<sup>8</sup>

**E. The April 26, 2010, hearing on Clarence's motions**

On April 26, 2010, the court was set to hear arguments on defendants' pending motions. The court asked Clarence if he wanted to continue to represent himself. Clarence said yes. The court ordered discovery to be provided to Clarence, and appointed an investigator.

Thereafter, Clarence offered arguments in support of his demurrer and other motions, including a motion for the transcript of a purported "grand jury" hearing. As to each motion, the court carefully explained that all of his arguments were legally and factually meritless, and that an attorney could have explained these things to him.

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<sup>8</sup> One of the recurring arguments in Clarence's discovery motions was based on the deputies' decision to return various items of property to Gerald shortly after defendants were arrested. As explained in the factual statement, *ante*, defendants were arrested in Gerald's house and searched, and they were both found in possession of property which Gerald identified as previously belonging to his late father and had been taken from his house. Several fishing poles were found in Archie's car trunk, and Gerald identified them as being taken from his house. The deputies photographed all of the items and then returned them to Gerald. Both Clarence and Archie filed numerous discovery motions and claimed that by returning the property to Gerald, the prosecution had destroyed exculpatory evidence, because the "loss" of the property prevented defendants from proving that those items actually belonged to them and had not been removed from Gerald's house. As we will explain, the superior court granted Clarence's motion for evidence log sheets, but denied his motion for sanctions based on the prosecution's alleged "destruction" of exculpatory evidence by returning the property to Gerald. However, Clarence repeatedly renewed his discovery motions and insisted the photographic exhibits were inadmissible since the property was returned to Gerald.

However, the court permitted Clarence to continue making arguments in support of his demurrer and other motions for nearly one hour.

The court denied the demurrer and explained:

“I find each of the counts were statutorily plead, the arguments, I’m trying to be very careful, I have held a special session this afternoon for the [defendants’] themselves, there are no other defendants in court, it is an open courtroom, but I wanted to dedicate as much time as they felt they needed. We have now been arguing for almost an hour. I’m not saying it is inappropriate, I just want the record to be clear, I have tried to do anything I can to allow them to air all of their complaints and grievances.

“The court has made every effort, without providing legal counsel, to try to direct the [defendants] to other issues or other motions. I don’t want to rule on those motions that would cause them prejudice for the purpose, so therefore, the record should be clear, I’m only considering the demurrer motion today.

“I’m finding that each of the four counts and enhancements are properly charged and alleged, the statutory language is utilized, the demurrers are overruled. Discovery has been addressed, so I believe now we’re ready to set the case for trial.”

Clarence objected and said he was not ready since the court had just appointed the investigator. Clarence added: “I’m not in a rush to have a trial.” The court replied that “we’re going to get this matter taken care of as best as we can.”

Clarence asked for a file-stamped copy of his demurrer, and the court said it would be provided. Clarence complained that the court previously failed to deliver on its promises. The court provided Clarence with a copy on the record.

The court, the prosecutor, and the defendants then discussed possible plea negotiations and indicated sentences. Clarence said he was not interested in a negotiated plea and wanted to go to trial.

The court suggested putting over the matter for three to four weeks so Clarence could meet with the investigator and then determine a reasonable time estimate for trial. The court’s goal was to get the case to trial within 60-to-90 days because it had been

pending for some time. Clarence complained that he needed time to “do legal studies,” and he did not know what he would be facing at a trial.

The court replied:

“What I’m going to do is put it out 30 days, but ... *I can’t allow you to run this calendar.* I can’t allow you to say ... I might be ready for trial in two years. So in the next 30 days, please work closely with your investigator, define as best you can the tasks, get an estimate from the investigator when those tasks can be completed, but this matter will proceed to trial, and I’m not, I give, I do as best I can to recognize the burden of both pro per defendants and defense attorneys are under, and their investigators. But on the same hand, I also try to set to them firm guidelines as to when this case is going to go so they know what space they have to work with.” (Italics added.)

The court clarified that it had ruled on all of defendants’ pending motions, including discovery and the demurrer. Clarence asked additional questions about discovery, and how to seek review of the court’s ruling on his demurrer. The court declined to give him legal advice. Defendants’ time waivers remained in place. The court set another trial confirmation conference for May 24, 2010.

Thereafter, Clarence filed an appeal with this court of the superior court’s denial of his demurrer. This court apparently dismissed the appeal as premature.

#### **F. Clarence’s additional motions**

Clarence filed additional motions with the superior court, including motions to dismiss, exclude purported “profile” evidence, pretrial discovery of exculpatory evidence, and transcripts of the prior proceedings.

On May 24, 2010, the court partially granted Clarence’s motion for transcripts and continued the trial confirmation conference.

On May 27, 2010, Clarence filed nearly 300 pages of motions, including another discovery motion. The majority of the motions contained standard allegations that were not related to his case, with numerous pages attached from investigative reports and reporter’s transcripts of various hearings.

**G. The court's rulings on Clarence's pending motions**

On June 14, 2010, the court conducted the continued trial confirmation conference. The court asked Clarence if he wanted to continue to represent himself, and Clarence said yes. The court again advised Clarence that he could have legal counsel appointed to represent him if he wished, and Clarence declined.

The court reviewed the motions which Clarence had already filed, and stated that it had already ruled upon the demurrer, and the repetitive motions for discovery and transcripts. The prosecutor confirmed that he had complied with all pending discovery orders. The court refused to consider certain motions because they were inappropriate for the procedural status of his case. The court removed Clarence's pending motion to suppress from the calendar because it was not properly noticed, and the court had insufficient evidence to rule on it.

Clarence presented the court with an eight-inch stack of additional motions and documents, and asked several questions about whether he should file other motions. The court replied that it could not give him legal advice. Clarence then asked the court to again explain all of its prior rulings on all of his pending motions. The court stated that it had been very patient and spent the past 20 minutes explaining its prior rulings, and that it was not going to repeat the orders.

Clarence requested the trial date be set out 90 days. The court replied that was unreasonable, and set another trial confirmation conference on July 14, 2010. Clarence complained that he could not get justice from the court. The court said it would look into recusing himself pursuant to Code of Civil Procedure section 170.1. Clarence said that was not necessary.

In June 2010, Clarence filed another voluminous series of motions, pleadings, declarations and points and authorities on several matters, including a motion to dismiss for failure to preserve exculpatory evidence. Many of the motions were duplicative of his

earlier pleadings, filed together with multiple pages from investigative reports and transcripts.

On July 14, 2010, the court convened a hearing and asked Clarence if he wanted to continue to represent himself, and Clarence said yes. The court heard defendants' joint motion to dismiss for failure to preserve exculpatory evidence. The motion was based on the deputies' decision to photograph and then return certain property to Gerald after defendants were arrested, particularly the fishing poles and the items that were found in defendants' pockets.

The court denied the motion, but ordered the prosecutor to submit an exhibit list of all the property sheets as to the status of all the evidence that was seized in the case. Defendants reconfirmed their general time waivers.

Thereafter, the prosecution filed opposition to Clarence's various motions, and argued the photographs of the evidence seized from defendants and Archie's car was sufficient to prove that defendants took Gerald's property from the house.

#### **H. Both defendants request re-appointment of counsel**

On July 29, 2010, the court heard Clarence's motions for dismissal for exclusion of exculpatory evidence and sanctions. The court again confirmed that Clarence wanted to continue representing himself.

Clarence argued the photographs of the alleged stolen property were inadmissible because they were used at the preliminary hearing. Clarence then claimed he had received "insufficient assistance of counsel" at the preliminary hearing. The court replied that was an inappropriate motion. Clarence ignored the court and complained about his previous defense attorney.

The court explained it had been more than patient with Clarence and would continue to do so, but asked Clarence to limit his argument to the pending motion before the court.

The court denied Clarence's motions for sanctions, found the alleged stolen property was properly returned to the owner, and the evidence was preserved since the deputies took photographs of all the items. The court stated that Clarence's latest stack of motions was about 12 inches tall, but it had addressed all of the motions. Clarence complained the court had failed to rule on his motion for discovery pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). The court replied that it had already ruled on his prior *Brady* motions on multiple occasions during the previous hearings.

The court called a recess so that Clarence and the prosecutor could discuss a trial date. After the recess, the court explained that if Clarence withdrew his general time waiver, the court had 60 days to get the case to trial, which would be September 29, 2010.

The court then went off the record with the parties. When the court returned to the record, both Clarence and Archie stated that they would no longer represent themselves and requested the court appoint legal counsel to represent them. The court appointed the public defender to represent Archie, and Ciummo and Associates as conflict counsel to represent Clarence.

#### **I. Clarence's withdrawal of his time waiver**

On August 2, 2010, Clarence appeared in court with Mr. Reshad of Ciummo and Associates. Clarence withdrew his general time waiver. The court set the trial confirmation conference for September 9, 2010, with a tentative trial date of September 16, 2010. The case was scheduled to "time out" on October 1, 2010.

On August 30, 2010, the prosecutor advised the court that two main witnesses were unavailable for trial, and requested a continuance. The court granted the continuance and the trial was set for September 28, 2010, by stipulation of the parties.

**J. The September 21, 2010, hearing—Clarence’s *Marsden*<sup>9</sup> motion and renewed *Faretta* motion**

All of Clarence’s appellate issues are based on the court’s rulings during the September 21, 2010, hearing, which culminated in the denial of his *Faretta* motion. On that date, the court convened the scheduled conference to confirm the joint jury trial for defendants. Clarence appeared with Mr. Asami of Ciummo and Associates. Archie appeared with a deputy public defender.

**Clarence’s *Marsden* and *Faretta* motions**

Mr. Asami stated that he thought Clarence wanted to make a *Marsden* motion, because Clarence believed Mr. Asami was being ineffective. The court conducted an in camera hearing and asked Clarence to explain his request.

Clarence insisted he was not making a *Marsden* motion, but instead a motion for ineffective assistance of counsel, because he wanted to tell Mr. Asami’s “boss” that his attorney was acting irresponsibly and going against him. The court explained that Clarence’s complaints were properly heard as a *Marsden* motion.

Clarence said he had a conflict with Ciummo and Associates, and he already filed a complaint with the State Bar so he could “get rid of the firm altogether.” Clarence then requested restoration of his *Faretta* right to represent himself. The court asked defendant if he was ready for trial. Clarence said yes, but then said he had not subpoenaed any witnesses, and conceded he was not ready for the September 28, 2010, trial date.

The court tentatively denied Clarence’s *Faretta* motion, and specifically found that Clarence made the request in order to delay the proceedings.

“My tentative is to deny the [*Faretta*] request. I recognize this is highly unusual, but I’m—at this point, I am making a find[ing] that [Clarence] is instituting procedures to try to unnecessarily delay his proceedings. [Clarence] was representing himself for months. A new attorney came in.

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<sup>9</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

It is now clear that [Clarence] is simply trying to sidestep the process and delay the proceedings unnecessarily.

“We have gone through this time and time again. I understand it is highly unusual for a Court to deny a defendant’s request to represent himself; however, based upon this Court’s continuous interaction with [Clarence], I am of the opinion and making the finding at this point that [Clarence] is requesting his *Faretta* rights, that is his right to represent himself today, for the majority, if not sole purpose of unnecessarily delaying the proceedings.”

The court returned to Clarence’s pending *Marsden* motion. Clarence complained that his attorney wanted to use the photographic evidence that Clarence had tried to exclude. Clarence also complained his attorney failed to read any of the voluminous motions Clarence had previously filed, and refused to file another *Brady* motion.

Clarence’s defense counsel stated that Clarence wanted him to file additional motions to exclude the photographs of the property which was allegedly stolen from Gerald’s house. Counsel declined to file another motion and tried to explain to Clarence that the photographs were admissible. The court acknowledged that they had previously litigated the admissibility of the photographic evidence.

Clarence interrupted, but the court told him not to.

“[Clarence] continues to not listen to this Court, to not to listen [to] this Court’s rulings. I’m attempting to exercise the utmost patience with [Clarence], but is as exemplified even by his conduct in court when he is now represented by counsel. [Clarence] does not appreciate the fact that he has an attorney representing him; that that attorney is professionally trained; that that attorney is exceptionally competent in looking out for [his] best interest.

“[Clarence] is putting his own beliefs as misguided as they are, ahead of his attorney’s advice. It is up to [Clarence] and his attorney to decide how to proceed on the case. But his attorney is here to disagree with [Clarence] and to advise [him] if he feels [he] is not acting in his best interest.

“We have litigated this matter. We litigated this matter time and time again. The Court has made a ruling. There is nothing ... your

attorney can't just bring a motion because you say he should. If it has been litigated, it is decided. You have your record.”

Clarence complained his attorney refused to consider a motion for sanctions because of the loss of the alleged stolen property. The court again said that Clarence refused to acknowledge the court's prior rulings: “[A]t some point you need to stop. And you need to listen to your own attorney.”

Clarence continued to complain that his attorney refused to renew his motions for discovery and suppression of evidence, based on the deputies' decision to return the property to Gerald. The court replied that it had ruled on all of Clarence's pending motions, and his attorney understood that the motions were meritless and could not be renewed.

The court denied Clarence's *Marsden* motion and found there was no breakdown in communications between Clarence and his attorney, his attorney thoroughly understood the applicable law, and Clarence was “clearly able to communicate” with him. The court explained that Clarence was not entitled to another attorney just because he disagreed with his appointed counsel about the photographic exhibits. Clarence interrupted and said his objections had nothing to do with a *Marsden* motion. The court admonished Clarence and ended the closed hearing.

**The court's reconsideration of Clarence's Faretta motion**

The court returned to the open courtroom, and all parties announced they were ready for the joint jury trial for Archie and Clarence. The court explained that it had denied Clarence's *Marsden* motion, but that Clarence had requested to represent himself. The court asked Clarence if he wanted to renew his *Faretta* request. Clarence said yes, but that he needed more time to prepare.

The court stated that in “an abundance of caution,” it would reconsider Clarence's *Faretta* motion pursuant to the factors in *Lynch, supra*, 50 Cal.4th 693, including the quality of defense counsel's representative, defendant's prior proclivity to substitute

counsel, the length and stage of the proceedings, and the disruption or delay which might be expected to follow.

The court considered these factors and then denied Clarence's *Faretta* motion.

"I recognize that generally defendants [*sic*] *Faretta* rights require this Court to allow him to represent himself; however, I am making specific findings.

"As I noted, pursuant to *Lynch*, that at this time, the trial is now—it times out on October 1st. This is September 21st. The case—that is less than—eight court days from today's date. We have counsel ready and prepared. They both announced ready on this case.

"I'm finding that [Clarence's] request for self-representation is denied on separate and independently, in this Court's opinion, justifiable grounds *including the request is untimely, considering the time set for trial; considering the amount of time that has gone by; considering [Clarence's] proclivity at prior hearings to be disruptive*, though, I don't mean that in a negative sense. I am simply stating the obvious. I'm further finding pursuant to the *Lynch* factors noted, *that this is not only an untimely request, but the Court views it as a request that would cause substantial disruption or delay*.

"If I were to grant the request, it further borders, and I [am] making a finding actually at this point that *it is also for the purposes of unnecessary delay*; though, that is an independent ground.

"Even if that ground did not exist, I believe there is sufficient information before this Court to deny the request for self-representation at this late stage of the proceedings as untimely.

"[Clarence] previously represented himself. He withdrew that request for self-representation, had an attorney appointed, and candidly speaking, though, I, again, do not mean to be disrespectful to [Clarence], *it appears at this point that [Clarence] is using this to sidestep the case, and to simply move on with the case, get it delayed, so he can do what he feels is necessary*.

"I have listened to him at every stage of the proceedings. I have done my best to grant every justifiable order and follow the law. This case, simply put, has been litigated to death. It is ready for trial. We are going to proceed to trial absent a request for good cause continuance." (Italics added.)

The court confirmed the trial date for September 28, 2010.

Clarence's attorney stated that Clarence wanted him to file a motion about his alleged ineffective assistance, but counsel thought it was a *Marsden* motion. Clarence argued he was not making a *Marsden* motion. The court tried to respond, but Clarence interrupted and kept talking.

“THE COURT: Okay. Again, [Clarence's] comments as we speak in court exemplified the reason this Court has denied his request for self-representation. They exemplify each of the reason[s] the Court has made the previous findings. His arguments are illogical, legally not justifiable—I don't mean to be disrespectful ...

“[CLARENCE]: You are, Your Honor ....

“THE COURT: Well, I'm sorry you feel that way.

“[CLARENCE]: I was challenging, Your Honor, and I do challenge it. I do state that you are wrong. I will take it to the ....

“THE COURT: You have every right ....

“[CLARENCE]: I would like to speak ....

“THE COURT: [S]top. No. I am ordering you removed from the courtroom, but before I do that, you have every right to speak. You do not have every right to disobey this Court's order. You are once again disobeying this Court's order. I'm doing my best to be patient with you, but you have taken advantage of that patience enough.

“[CLARENCE]: All right.”

As the court tried to continue with the hearing, Clarence attempted to interrupt but the court told him, “No more.” Clarence replied: “There is a God. You are going to have to bow down to him, too.”

## **K. Analysis**

Clarence contends the court erroneously denied his *Faretta* motion to again represent himself, made during the September 21, 2010, hearing, and that error requires automatic reversal of his convictions. Defendant argues his *Faretta* motion was timely, it

was not made for purposes of delay, he was ready for trial except for the need to subpoena his witnesses, and he acted respectfully to the court when he represented himself during pretrial proceedings.

The erroneous denial of a timely, unequivocal *Faretta* motion is reversible per se. (*People v. Joseph* (1983) 34 Cal.3d 936, 939, 943-944; *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1450.) A *Faretta* motion that is not made within a reasonable time prior to trial, however, is addressed to the sound discretion of the trial court. (*People v. Windham* (1977) 19 Cal.3d 121, 128.) The trial court's determination of untimeliness must be evaluated as of the date and circumstances under which the court made its ruling. (*People v. Marshall, supra*, 15 Cal.4th at p. 25, fn. 2.)

To assess a *Faretta* claim on appeal, we review the entire record de novo to determine whether the defendant's invocation of the right to self-representation was knowing and voluntary. (*People v. Marshall, supra*, 15 Cal.4th at p. 24.) The standard of review applicable to the court's determination that defendant's request was equivocal or untimely is not clear. (*Ibid.*)

In this case, however, we conclude that under either de novo review or the deferential substantial evidence standard, the court properly rejected what was an untimely motion for self-representation. In reaching this conclusion, we are mindful of the entirety of Clarence's conduct when he represented himself during the six-month pretrial period. Clarence filed voluminous motions, the court partially granted some of the motions and denied the balance of them, and he repeatedly re-filed virtually the same motions and sought to have the court reconsider the same issues. In doing so, Clarence said he was not in a rush to go to trial and the court admonished him that it would not allow him to control the trial schedule. Moreover, the court displayed an abundance of patience with Clarence, carefully explained the reasons for its rulings, and spent several hours reviewing his stacks of motions, many of which were not even relevant to his case.

As the pretrial proceedings continued, and Clarence repeatedly filed virtually the same motions and pleadings, the court continued to display forbearance as it tried to make Clarence understand that it had already denied the same motions. By the time of the September 21, 2010, hearing, it had become clear that Clarence was engaging in delay tactics. He had requested re-appointment of counsel and withdrawn his general time waiver. Next, he claimed his appointed counsel was ineffective but refused to acknowledge he was filing a *Marsden* motion. He then demanded to again represent himself and moved for a continuance, just days before the scheduled trial date and his case would time out.

We agree with the superior court's extensive findings in this case, based on the factors set forth in *Lynch*, that Clarence's *Faretta* motion, made on September 21, 2010, was untimely and for purposes of delay. (*Lynch, supra*, 50 Cal.4th at p. 722, fn. 10.) "[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is 'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.' [Citation.]" (*Lynch, supra*, 50 Cal.4th at p. 724.) The California Supreme Court has repeatedly held that "*Faretta* motions made on the eve of trial are untimely. For example, in [*People v. Frierson* (1991) 53 Cal.3d 730, 742] ... , we held that a self-representation motion made on September 29, 1986, when trial was scheduled for October 1, 1986, was made on 'the eve of trial' and was untimely. [Citations.]" (*Lynch, supra*, 50 Cal.4th at pp. 722-723; see also *People v. Hamilton* (1988) 45 Cal.3d 351, 356.)

Clarence's *Marsden* and *Faretta* motions, eight days before trial, were made in the context of his purported frustration with his appointed counsel's refusal to agree to his desired defense strategy, to file additional motions for discovery, sanctions, and exclusion

of the photographic evidence of the alleged stolen property found on defendants' when they were arrested. As explained by the court, the entirety of Clarence's conduct during the pretrial proceedings strongly implied that his untimely *Faretta* motion was brought for the purposes of disruption and delay, as the court repeatedly overruled his objections to the photographic evidence and the case against him was about to time out.

While Clarence insisted that he was not making a *Marsden* motion at the September 21, 2010, we cannot ignore that his *Faretta* motion was directly connected to the court's rejection of his complaints about appointed counsel's refusal to challenge the photographic exhibits. In many situations, a defendant's *Faretta* request has been found to be equivocal when it is made immediately after the court had rejected the defendant's *Marsden* motion. (See, e.g., *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205-1206; *People v. Skaggs* (1996) 44 Cal.App.4th 1, 5-6.)

Moreover, a defendant may not seek "to unnecessarily delay trial under the pretense of a *Faretta* motion." (*People v. Moore* (1988) 47 Cal.3d 63, 79.) " 'Trial courts are not required to engage in game playing with cunning defendants who would present Hobson's choices.' [*Faretta*] held generally that a defendant may represent himself. It did not establish a game in which defendant can engage in a series of machinations, with one misstep by the court resulting in reversal of an otherwise fair trial." (*People v. Clark* (1992) 3 Cal.4th 41, 115.) "[B]y juggling his *Faretta* rights with his right to counsel interspersed with *Marsden* motions," the superior court could have reasonably concluded that he was "playing 'the *Faretta* game' " in an effort to delay the trial, consistent with Clarence's initial statements that he was in no rush to go to trial. (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1170; *People v. Horton* (1995) 11 Cal.4th 1068, 1111; *People v. Marshall, supra*, 15 Cal.4th at p. 26.)

Clarence's *Faretta* motion at the September 21, 2010, must be considered in light of the entirety of his conduct, including the time in which he represented himself, particularly at the end of that six-month period. The court properly found that Clarence's

obstreperous tactics of refiling the same motions, making the same arguments, and moving for more continuances were indicative of the reasons he was making his untimely *Faretta* motion just days before his trial would begin and his case would time out. (Cf. *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1531 [timely *Faretta* motion unaccompanied by request for a continuance, was improperly denied when there was no evidence that defendant “was prone toward obstreperousness *before* the court denied his *Faretta* motion”].)

We thus conclude that Clarence’s *Faretta* motion on September 21, 2010, was untimely and properly denied by the superior court.

**DISPOSITION**

The judgment is affirmed.

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Poochigian, J.

WE CONCUR:

\_\_\_\_\_  
Cornell, Acting P.J.

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Detjen, J.