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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LESHAWN BOONE,

Defendant and Appellant.

F062332

(Fresno Super. Ct. No. CF05904824)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Kyle Gee, under appointment by the Court of Appeal, for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

In 2001, a masked man broke into a woman's apartment and sexually assaulted her at gunpoint. The woman reported the sexual assault to the police, and she was taken to the hospital for a sexual assault examination. During that examination, biological

evidence was recovered from her body and a DNA profile was obtained. In 2005, a “cold hit report” matched the DNA evidence recovered from the victim, with the DNA of appellant/defendant James Leshawn Boone, through a search of the CAL-DNA database. Defendant’s palm print also matched a latent print which had been found outside the woman’s apartment on the night of the crime.

Defendant was charged with multiple felonies based on the sexual assaults. During the lengthy pretrial period, a judge reduced defendant’s bail to \$25,000 without making any findings to support the reduction. Defendant was initially represented by counsel but then represented himself. The prosecution filed an amended information which added “One Strike” allegations pursuant to Penal Code<sup>1</sup> section 667.61 allegations. Just prior to his scheduled trial date, the prosecution requested the court to increase defendant’s bail. The court granted the motion and increased defendant’s bail to \$200,000. Defendant was remanded into custody and requested the appointment of an attorney to represent him. The court-appointed counsel represented defendant throughout his jury trial.

Defendant was charged and convicted of count I, unlawful sexual intercourse by force, violence, duress, menace, or fear of immediate bodily injury (§ 261, subd. (a)(2)); and count II, unlawful oral copulation by force, violence, duress, menace, or fear of immediate bodily injury (§ 288a, subd. (c)(2)). As to both counts, the jury found as to section 667.61, subdivision (a), that the offenses were committed during a residential burglary. Also as to both counts, the jury found that two circumstances existed pursuant to section 661.61, subdivision (e), that defendant personally used a dangerous or deadly weapon, and he committed the offenses during a burglary. Defendant was sentenced to 25 years to life.

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

On appeal, defendant contends that the court improperly granted the prosecution's motion to increase his bail, and asserts the court's ruling violated his Sixth Amendment right to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), because he was remanded into custody, unable to prepare for his trial, and forced to ask for appointment of counsel. We will affirm.

## **PART I**

### **FACTS**

On April 8, 2001, G.D. lived in a one-story apartment complex in Fresno with her three young children. Around 9:00 p.m., she was walking to a friend's apartment when she saw a strange man in her own apartment complex. He was standing in the dark, dressed in black, and "sort of meandering" around the area. The man made eye contact with G.D. G.D. felt "a fear" and made sure the windows of her apartment were locked.

Around 10:30 p.m., G.D. was back in her own apartment. She had put her children to bed and cleaned the kitchen. She was watching television and decided to get a beer from the kitchen. She was in the kitchen when she heard a noise from the children's bedroom.

G.D. headed to the children's bedroom to check them. As she approached their bedroom door, she was confronted by a gunman. The gunman was dressed in black and wearing a black hood. He had a ski mask over his head, so that she could only see his eyes and not his face. The gunman put a small black gun to her forehead and told her not to make any noise. G.D. said she would do anything as long as he did not harm the children. The gunman said he would not harm the children, but warned G.D. that she was " 'gonna do what I tell you do to.' "

The gunman grabbed G.D.'s arm and pushed her into the other bedroom. He ordered her to get on her knees and perform an act of oral copulation on him. G.D. again said she would do what he wanted, if he did not harm her or her children. The gunman

lowered his zipper, pushed her down to her knees, and made her perform the sexual act. He pushed her head against his body and made her repeat the sexual act two more times.

The gunman then ordered G.D. to undress, get on the floor, and lie on her back. G.D. removed her shorts and underwear. The gunman got on top of her and performed sexual intercourse three or four times until he ejaculated. She saw part of his body and realized he was African-American. He was not using a condom.

G.D. testified that the gunman kept the gun aimed at her head during the entire incident, as he ordered her to undress and perform the sexual acts. He repeatedly said that he was going to kill her and told her not to make any noise. G.D. testified the gunman performed the sexual assaults in a short period of time. The children remained asleep during the entire incident.

G.D. testified that after the gunman raped her, he said that he would come back and kill G.D. and the children if she called the police. He left through the window of her children's bedroom. G.D. realized he had also broken into the apartment through the same window.

G.D. immediately locked the bedroom window. G.D. felt nauseous and threw up. She was going to take a bath to clean herself. However, she remembered a program that she had seen on television, about preserving evidence after a sexual assault, and decided not to take a shower. G.D. was afraid because of the gunman's threats, but she had the courage to ask for help because she didn't want someone else to go through the same experience. G.D. went to a friend's apartment for help, and her friend called the police.

### **The initial investigation**

At 11:40 p.m., Officer Eric Ia responded to the apartment complex and interviewed G.D. G.D. believed the gunman was a young African-American male, but she said that she could not identify the man because of the mask.

A police evidence technician lifted a latent print from the outside of the children's bedroom window. There were shoe imprint marks in the dirt outside the bedroom

window. There was dirt on the inside of the window, the window rail, the children's mattress and blanket, and the bedroom floor.

G.D. was taken to University Medical Center where she received a sexual assault examination. A nurse observed vaginal injuries consistent with G.D.'s description of the sexual assault. The nurse obtained evidentiary samples from G.D.'s vaginal area. A semen sample was obtained, and a male DNA profile was created from that sample.

According to the prosecution, the police attempted to match the latent print to known sex offenders but no matches were found.

### **The 2005 investigation**

According to the trial evidence, on June 18, 2005, defendant became a suspect in the case when the latent print lifted from the outside of the bedroom window was positively matched to defendant's known palm print.

Also in 2005, after defendant became a suspect, the police obtained a blood sample from him. Defendant's blood sample was compared to the DNA from the sperm sample found on G.D.'s body. The DNA profile was very rare, and it was matched to defendant.

## **PART II**

### **PROCEDURAL HISTORY**

Defendant was arrested in this case in June 2005. At that time, Judge Cabrera reduced his bail without stating reasons for the reduction, and he was released on a surety bond. There was a lengthy pretrial period, and his jury trial did not occur until 2011. During that time, defendant was alternatively in custody or released on bail. Defendant was initially represented by counsel and then moved to represent himself pursuant to *Faretta*. In 2010, the prosecution moved to increase defendant's bail. Judge Sanderson granted the motion and reset bail at the scheduled amount of \$200,000. Defendant was remanded into custody, withdrew his pro. per. status, and requested appointment of counsel for trial.

On appeal, defendant contends the prosecutor waived any right to contest Judge Cabrera's decision to reduce defendant's bail. Second, he contends that Judge Sanderson improperly increased his bail in 2010, simply based on her belief that Judge Cabrera's decision to reduce bail was erroneous. Third, he asserts that Judge Sanderson's decision to increase bail to \$200,000, while he was representing himself, violated his Sixth Amendment rights because he was remanded into custody, unable to continue to represent himself, and forced to ask the court to appoint an attorney to represent him, when he would have preferred to continue representing himself.

In order to address these issues, we must review the lengthy procedural history of this case. As we will explain, *post*, the court retained statutory authority to review and increase defendant's bail during the pretrial period, the court's ruling was not erroneous, and the ruling did not violate defendant's Sixth Amendment right to represent himself.

**A. The complaint and initial bail order**

On April 8, 2001, G.D. was sexually assaulted. While a latent print was found outside the children's bedroom window, and DNA evidence was obtained from G.D.'s body, there were no suspects in the case and no one was arrested.

In May 2002, defendant was convicted, in an unrelated case, of violating section 261.5, subdivision (d), unlawful sexual intercourse by a person older than 21 years old with a minor under the age of 16 years. He was placed on probation and ordered to register as a sex offender, and apparently complied with that order.

As to this case, the trial evidence did not explain the actual sequence of events which led to defendant's arrest for the sexual assault of G.D. According to the prosecution's moving papers, the DNA sample obtained from the evidence found on G.D.'s body was matched with defendant's DNA sample through a "cold hit report" in May 2005, based on a search of the CAL-DNA database. Defendant was presumably in the database because he had been ordered to register as a sex offender in 2002.

On or about June 28, 2005, defendant was arrested for the sexual assault of G.D., and a blood sample and a palm print were obtained from him. Defendant's palm print matched the latent print found outside the children's bedroom window, and his DNA again matched the DNA from the evidence found on G.D.'s body.

On June 28, 2005, a felony complaint was filed against defendant in case No. 05904824-0, the sexual assault of G.D., alleging count I, unlawful sexual intercourse by force, violence, duress, menace, or fear of immediate bodily injury (§ 261, subd. (a)(2)); count II, residential burglary (§§ 459/460, subd. (a)); and count III, unlawful oral copulation by force, violence, duress, menace, or fear of immediate bodily injury (§ 288a, subd. (c)(2)).

On July 1, 2005, defendant appeared for arraignment. He was represented by attorney Ernest Kinney. Defendant pleaded not guilty and remained in custody. According to the minute order, the court stated that it would consider bail at a later hearing.

On July 27, 2005, defendant and Mr. Kinney appeared before Judge Cabrera. Defendant was in custody. According to the minute order, the "matter on bail was addressed" and bail was reduced to \$80,000. According to the probation report, defendant was released on bail that day.

On August 10, 2005, defendant and Mr. Kinney appeared for a hearing, and defendant entered a general time waiver. According to the minute order, defendant was not in custody.

Defendant remained out of custody throughout 2005 and into 2006 and appeared for all hearings.

On July 10, 2006, defendant failed to appear, and the court issued a bench warrant. On July 11, 2006, defendant appeared, the court vacated the bench warrant, and defendant remained out of custody.

**B. Waiver of preliminary hearing and further reduction of bail**

On July 24, 2006, defendant and Mr. Kinney appeared before Judge Cabrera for the preliminary hearing. Defendant was still out of custody. Defendant waived his right to a preliminary hearing. The court accepted defendant's waiver and held him to answer.

The court noted there was "a question on the bail bond which is due to expire soon." Mr. Kinney stated that based on their previous discussion in chambers, defendant was employed full time, he had made all court appearances except for one, and Mr. Kinney claimed responsibility for defendant's only failure to appear. Mr. Kinney requested the court reduce bail to \$25,000.

The court replied: "Bail will be reduced to \$25,000." The court did not make any findings in support of the reduction of bail. The court ordered defendant to appear for the next hearing.

Thereafter, defendant apparently made bail and was out of custody. Defendant remained out of custody until August 2006.

**C. Filing of the unrelated case and remand into custody**

The parties agree that at some point during the pendency of the instant case, defendant was arrested in a second and unrelated criminal case, identified as case No. F07901226, and felony charges were filed against him. The exact sequence of events is not clear from the appellate record, except for the fact that defendant was taken into custody for that second case.

The record shows that on August 8, 2006, defendant appeared before Judge Sanderson, apparently on the second case. He was remanded into custody, and bail was set at \$25,000.

According to the probation report, defendant was rearrested on March 7, 2007. According to respondent, on April 26, 2007, the court remanded defendant into custody based on the unrelated case No. F07901226.

On June 26, 2008, defendant appeared before Judge Sanderson, who noted that Mr. Kinney had died, and appointed the public defender to represent defendant in the instant case for the sexual assault of G.D. Defendant remained in custody. On August 28, 2008, Judge Sanderson also appointed the public defender to represent defendant in the unrelated criminal case No. F07901226. Defendant remained in custody.

**D. First amended information**

On April 16, 2009, the prosecution filed a first amended information against defendant in the instant case No. 05904824-0, the sexual assault of G.D. It alleged the same three counts as the felony complaint: count I, unlawful sexual intercourse by force, violence, duress, menace, or fear of immediate bodily injury; count II, residential burglary; and count III, unlawful oral copulation by force, violence, duress, menace, or fear of immediate bodily injury.

In addition, the amended information further alleged as to both counts I and III, that defendant committed the sexual assault offenses during a burglary within the meaning of section 667.61, subdivision (a), an allegation which meant defendant faced a possible sentence of 25 years to life if he was convicted.<sup>2</sup>

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<sup>2</sup> Section 667.61, known commonly as the “One Strike” law, “mandates indeterminate sentences of 15 or 25 years to life for specified sex offenses that are committed under one or more ‘aggravating circumstances,’ such as when the perpetrator kidnaps the victim, commits the sex offense during a burglary, inflicts great bodily injury, uses a deadly weapon, sexually victimizes more than one person, ties or binds the victim, or administers a controlled substance to the victim. [Citations.] The purpose of the One Strike law is ‘to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction,’ ‘where the nature or method of the sex offense “place[d] the victim in a position of *elevated vulnerability*.” [Citation.] [Citation.]’ (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 186.) The One Strike law “reflects a legislative finding that the victims of a residential burglary are more vulnerable because they are inside a structure rather than out in public. [Citations.] Moreover, common experience reveals that people usually lower their guard at home, especially when they are eating, reading, watching television, bathing, and sleeping. However, at those very times, they are unsuspecting and particularly vulnerable to shock and surprise by an

On the same day, defendant pleaded not guilty and denied the special allegations. Defendant remained in custody.

**E. Defendant's *Faretta* motion**

On May 14, 2009, defendant appeared before Judge Sanderson with his deputy public defender. Defendant was in custody. Defendant moved to represent himself pursuant to *Faretta* in both case No. 05904824-0, the sexual assault of G.D., and the unrelated case No. F07901226. The court granted the motion, relieved the public defender, and defendant assumed representation of himself in both cases.

During the course of the hearing, the court advised defendant as follows:

“THE COURT: You understand, sir, *you will remain in custody while your trial is progressing or pending, and you will be required to direct all of your investigation from the jail.* And you understand that while in jail you’ll be subject to Fresno County Sheriff’s Department rules and regulations as to your access to any of these opportunities, whether it’s law library, phones, services, supplies. You understand that?”

“THE DEFENDANT: Yes, Your Honor.” (Italics added.)

Defendant asked for the appointment of an investigator, paralegal, and/or legal runner. The court instructed defendant to file the appropriate request. Defendant remained in custody. The court subsequently granted defendant’s motion for appointment of an investigator.

Thereafter, defendant filed several discovery motions. The court conducted hearings on those motions; defendant appeared and argued at those hearings; and the court partially granted the motions.

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intruder. [Citations.] [T]he Legislature sought to deter by harsher punishment those who burglarize homes and exploit the vulnerability of people inside to commit sex offenses.” (*Id.* at pp. 186-187.)

Defendant also filed a motion to dismiss all charges based on the sexual assault on G.D. and argued the prosecution was barred by the statute of limitations. Defendant was in custody when he filed these motions and appeared for hearings on the motions.

**F. Dismissal of burglary charge**

On August 10, 2009, the court heard defendant's motion to dismiss all charges based on the sexual assault of G.D. The court granted the motion only as to count II, residential burglary and found that count was barred by the statute of limitations.

However, the court denied defendant's motion to dismiss as to count I, unlawful sexual intercourse by force or fear, and count III, oral copulation by force or fear. In addition, the court did not dismiss the special allegations that defendant committed counts I and III during a burglary, within the meaning of section 667.61, subdivision (a), which meant he still faced a possible life term.

From August 2009 to June 2010, defendant remained in custody, continued to represent himself, and filed additional discovery motions.

**G. Dismissal of the unrelated case**

On June 17, 2010, defendant appeared before Judge Sanderson. The court granted the prosecution's motion to dismiss without prejudice in the unrelated case No. F07901226, because the alleged victim could not be located.

The court asked the prosecutor about the status of case No. 05904824-0, the sexual assault of G.D. The prosecutor stated that he had just found the victim, who now lived out of state, and needed a continuance to arrange for the victim's appearance.

The court asked defendant if he wanted to continue to represent himself:

“THE COURT: [O]n that case, sir, thus far you have been off and on pro per and most recently pro per for sometime now with ... your investigator, assisting you. Sir, at this time, do you still wish to maintain that case as a pro per status?”

“THE DEFENDANT: Yes.”

“THE COURT: So you do not wish to have the Court reappoint any public attorneys for your assistance to assist you and to represent you on that case?

“THE DEFENDANT: Not at this time.

“THE COURT: Very well then. [¶] On that case, you will remain pro per for the time being until you tell me different. Please make sure you do so if you change your mind. You understand that?

“THE DEFENDANT: Yes, Your Honor.”

Defendant withdrew his general time waiver. The court set the trial date for July 29, 2010. The court noted that bail in the instant case had been set \$25,000.

According to the probation report, defendant was released on bail in this case on June 18, 2010.

#### **H. The prosecution’s motion to increase bail**

On July 8, 2010, defendant filed another motion to dismiss the remaining charges in case No. 05904824-0, the sexual assault of G.D., and claimed the delayed prosecution violated his due process rights.

On July 15, 2010, defendant appeared for a hearing in this case. He still represented himself. According to the minute order, defendant was still out of custody, having been released on surety bond.

On July 20, 2010, the prosecution filed a motion to increase bail in this case to \$200,000, pursuant to section 1270.1. The motion argued that when the court reduced bail to \$25,000, on July 24, 2006, the court failed to comply with statutory procedures and state reasons for the reduction. The motion further stated that circumstances had changed since the order to reduce bail, because the first amended information had been filed and it alleged section 661.61, subdivision (a) enhancements for both counts, which exposed defendant to a life term.

### **I. The court's decision to increase bail**

We now reach the court's decision to increase bail, which is the contested ruling in this case. On July 22, 2010, defendant appeared before Judge Sanderson. Defendant was still representing himself, and he was not in custody. At this point, defendant was charged under the first amended information with count I, unlawful sexual intercourse by force or fear, and count III, unlawful oral copulation by force or fear, with section 667.61 special allegations. Defendant's trial was tentatively scheduled to begin on July 29, 2010.

The court denied defendant's pending motion to dismiss the remaining charges in case without prejudice.

The court next considered the prosecution's motion to increase bail. Defendant objected and argued that he had made every court appearance. The prosecutor replied that the court's previous reduction of bail was erroneous, and there were changed circumstances because the amended information included special allegations which dramatically increased his exposure. The prosecutor further argued there were changed circumstances because defendant had been charged in another criminal case, and bail should be increased to protect public safety, and because he was a flight risk. The court pointed out that the other criminal case had been dismissed.

The court believed the scheduled bail for each count was \$50,000, but bail was \$100,000 for each count with the special allegation. The court was concerned because defendant's bail had previously been reduced to \$25,000 without that court making proper findings of unusual circumstances to justify the reduction. The court called a brief recess to determine the bail amounts for each count in 2006, when bail was reduced.

When the court returned to the bench, it made the following findings:

“[Section] 1275 of the Penal Code demands and expects a court to review the case before it, and I have done so, sir. And this is a serious, violation and a violent felony that's been alleged. The [section 667.61] enhancement, whether or not it's found to be true or untrue, is still alleged.

And for purposes of a bail setting this Court has to follow the statutory language. In order for me to reduce it I have to find unusual circumstances. I don't believe—and I cannot take in consideration the fact that you were in custody on another case which eventually got dismissed as an unusual circumstance, sir. That might be what you think in your own mind that you've already done three years on another case not related to this. Certainly, you've gained credit for time served as well in this case. But I cannot just look at that and say you should be allowed to remain out of custody pending your trial next week because you were in custody on another case for three years. So at this time, Mr. Boone, the Court is denying the request on your part to remain out of custody. Granting the People's motion to increase this bail in light of the findings that this is, in fact, a violent and serious offense that are before the court. I have to assume them to be true for purposes of bail. I am also to consider the [section 667.61] enhancement and raise the bail to the scheduled amount of \$200,000."

The court asked defendant if he wanted the existing surety for \$25,000, based on the previous bail amount, to remain if he believed he would be able to come up with the additional \$175,000. Defendant did not immediately respond to this question.

The court also asked defendant the following question:

"[THE COURT:] The next question I would like to ask of you, Mr. Boone, do you still wish to continue with pro per status or do you feel the need to have an—

"THE DEFENDANT: Yes. I would like an attorney, Your Honor."<sup>3</sup>

Defendant asked the court to explain the original bail amount and the reduction. The court replied that defendant's bail should have been \$130,000 based on the three counts charged in the original complaint. The court further explained that while it had dismissed count II, burglary, the People had the right to file an amended information to allege the section 667.61 special allegations, which added \$50,000 per count. The court

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<sup>3</sup> We note that during the June 17, 2010, hearing, when the court was setting the July 29, 2010, trial date, it also asked defendant whether he wanted to continue representing himself.

explained that based on the two remaining counts and the special allegations, defendant's bail was \$200,000.

Defendant asked why his bail could not be further reduced since count II, burglary, had been dismissed. The court explained that the current calculation of bail was based on the still-existing counts I and II, and the special allegations which applied to both counts, but it was not based on count II since it was dismissed. The prosecutor said that he would file another amended information to clarify that count II, burglary, had been stricken, and to renumber the two remaining charges accordingly.

The court reviewed the record from the proceeding where Judge Cabrera reduced defendant's bail to \$25,000.

“[Y]ou already have the benefit of a much lower bail long before today's date, in my impression[] inappropriately, because unusual circumstances were not stated on the record why a lower bail is being scheduled. With the Information the People enhanced your charges with [the] sentencing enhancement which raised bail. And therefore, whether or not the [burglary] charge was even considered—which was not, based on what I've read, the enhancements increased your bail to the amount of \$200,000. That's where the Court is going to set the bail.”

The court turned to defendant's request for an attorney, and reappointed the public defender. The court remanded defendant into custody with bail at \$200,000. After a brief recess, the public defender declined to accept the case. The court appointed David Mugridge to represent defendant.

The court asked Mr. Mugridge if he could be ready by the scheduled trial date of July 29, 2010. Mr. Mugridge said no, and that his own trial calendar would require postponement of this case until at least October 2010. The prosecutor replied that he wanted the trial to occur sooner rather than later, in order to ensure the presence of his witnesses, and said he would expedite forwarding all discovery to Mr. Mugridge.

After another recess, Mr. Mugridge stated that he had talked with defendant and explained that he needed time to prepare the case, and would not be ready until October

2010. The court asked whether defendant would enter another general time waiver. Defendant said yes. The court set the trial for October 25, 2010.

Mr. Mugridge asked the court about the status of bail. The court explained that bail had been calculated at \$200,000, based on counts I and III, and the special allegations, in the first amended information, and that count II had been stricken. The court explained its earlier bail ruling, which had occurred before Mr. Mugridge was in the courtroom:

“I’ve also noted this morning ... on the record that at the time of the setting of the initial \$25,000 bail for this case, *Judge Cabrera did not state on the record any unusual circumstances that he was taking in consideration to set bail at a much lower bail amount than the schedule, which is required by [section] 1275 of the Penal Code in serious and or violence charges.* And when [the] People brought the motion to increase the bail, I have to re-assess all those reasons and found that there was none available for this Court. I have noted on the record that I’m aware that Mr. Boone was in custody for substantial period of time on another case, but the fact that he was in custody for lengthy period of time on another case is not by itself an unusual circumstances that this Court would consider.” (Italics added.)

The court advised defense counsel that if he wanted to file any additional motion to revisit the bail issue, he could do so through a properly filed noticed motion. Defense counsel replied that he would “reserve that.” Defense counsel requested the court to exonerate the previously existing \$25,000 bond. The court granted the request, and defendant was remanded into custody.

#### **J. Second amended information and oral motion for bail reduction**

On October 19, 2010, the prosecution filed the second amended information, which eliminated the residential burglary charge that had been stricken because it was barred by the statute of limitations.

The second amended information charged defendant with count I, unlawful sexual intercourse by force, violence, duress, menace, or fear of immediate bodily injury; and

count II, unlawful oral copulation by force, violence, duress, menace, or fear of immediate bodily injury.

As to both counts, it was alleged as to section 667.61, subdivision (a), that the offenses were committed during a residential burglary. Also as to both counts, it was further alleged that two circumstances existed pursuant to section 667.61, subdivision (e), that defendant personally used a dangerous or deadly weapon, and he committed the offenses during a burglary.<sup>4</sup>

On the same day, defendant and Mr. Mugridge appeared before Judge Sanderson. Defendant pleaded not guilty and denied the special allegations. Mr. Mugridge moved for a continuance to prepare for trial, and defendant entered another general time waiver. The court granted the continuance and set the trial for January 2011.

Defense counsel made an oral motion for bail reduction:

“MR. MUGRIDGE: There was an issue in light of the discovery problems that we’ve had, we would ask the Court to revisit the issue of bail again. The discovery request is keeping him in away from trial, which I would otherwise have tried to [go] to. But now that he’s in custody a little bit longer due to no fault of the defense, we would ask the Court re-evaluate the issue of bail.

“THE COURT: On the issue of bail, Mr. Mugridge, I would at this time deny that request without prejudice. However, if you wish the Court to re-assess it, it should be filed with a formal noticed motion and any additional documents or information that you feel is pertinent to the Court’s decision consistent with [section] 1275 of the Penal Code.”

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<sup>4</sup> Defendant erroneously states that the second amended information, which added additional section 667.61 allegations, was filed on October 19, 2009, before the court heard the prosecution’s motion to increase bail. The first amended information, which initially added the section 667.61 allegations, was filed on April 16, 2009, *before* the court increased bail. The second amended information was filed on October 19, 2010, *after* the court’s order.

## **K. Trial and sentence**

Thereafter, defendant remained in custody for the rest of the case, and he was represented by Mr. Mugridge for the entirety of the proceedings. On March 8, 2011, defendant's jury trial began with motions in limine. On March 15, 2011, defendant was convicted as charged and the jury found the special allegations true. On April 13, 2011, he was sentenced to 25 years to life on count I; the court stayed the life term for count II.

Defendant never filed a motion for reconsideration of bail, requested to again represent himself, or argued that the court's decision to increase bail on July 22, 2010, violated his Sixth Amendment right to represent himself.

## **DISCUSSION**

### **I. The court did not abuse its discretion or violate defendant's Sixth Amendment rights when it increased his bail.**

Defendant raises several contentions based on Judge Sanderson's decision on July 22, 2010, to increase his bail to \$200,000. First, he contends the prosecutor waived any right to contest Judge Cabrera's July 24, 2006, decision to reduce defendant's bail. Second, he contends that Judge Sanderson improperly increased his bail on July 22, 2010, simply based on her belief that Judge Cabrera's decision to reduce bail was legally erroneous. Third, he asserts that Judge Sanderson's decision to increase bail to \$200,000, just prior to trial and while he was representing himself, violated his Sixth Amendment rights because he was remanded into custody, unable to continue representing himself, and forced to ask the court to appoint an attorney to represent him, when he would have preferred to continue representing himself.

#### **A. Bail**

We begin with the well-settled principles regarding the court's ability to set, increase, or reduce bail. "Except under limited circumstances, the California Constitution guarantees a pretrial right to release on nonexcessive bail. [Citation.] A defendant is entitled to one automatic review of the order fixing the amount of bail and the issue of

appropriate bail may be raised at various times throughout the criminal proceedings. [Citations.] The court in setting, reducing, or denying bail must primarily consider the public safety. [Citation.] Additionally, the court considers the seriousness of the offense charged, the defendant's criminal record and the probability the defendant will appear for hearings or trial. [Citation.] As to the seriousness of the offense charged, the court, inter alia, considers the alleged injury to the victim, alleged threats to victims or witnesses, the alleged use of a firearm and the alleged use or possession of controlled substances. [Citation.]" (*In re Weiner* (1995) 32 Cal.App.4th 441, 444.)

"When a defendant on bail appears for arraignment on an information or indictment, the court may order an increase in the amount of bail.... The court is not required to show 'good cause' for the increase. [Citation.]" (*People v. Annis* (2005) 127 Cal.App.4th 1190, 1195.) "However, once a defendant has been admitted to bail on the indictment or information, the court may increase or decrease the amount of bail only upon a showing of good cause or a change in circumstances. [Citations.]" (*Id.* at p. 1196.)

The court's decision to increase or reduce bail is reviewed for an abuse of discretion. (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107.) The trial court's statement of reasons shall " 'contain more than mere findings of ultimate fact or a recitation of the relevant criteria for release on bail; the statement should clearly articulate the basis for the court's utilization of such criteria.' [Citation.]" (*Ibid.*)

A series of statutes control the court's ability to set, increase, or reduce bail for someone charged with a serious or violent felony, who is awaiting trial. First, section 1270.1 provides that when a defendant is *arrested* for a serious or violent felony, the court must hold a hearing before the defendant may be released on bail "in an amount that is either more or less than the amount contained in the schedule of bail for the offense ...." (§ 1270.1, subd. (a).) The prosecutor and the defense attorney must "be given a two-court-day written notice and an opportunity to be heard on the matter."

(§ 1270.1, subd. (b).) At the hearing, the court shall consider the following factors: “[E]vidence of past court appearances of the detained person, the maximum potential sentence that could be imposed, and the danger that may be posed to other persons if the detained person is released.” (§ 1270.1, subd. (c).) “If the judge or magistrate sets the bail in an amount that is either more or less than the amount contained in the schedule of bail for the offense, *the judge or magistrate shall state the reasons for that decision ... in the record.*” (§ 1270.1, subd. (d), italics added.)

Section 1289 addresses the court’s ability to reconsider bail after the information has been filed:

“After a defendant has been admitted to bail upon an indictment or information, the Court in which the charge is pending may, *upon good cause shown*, either increase or reduce the amount of bail. If the amount be increased, the Court may order the defendant to be committed to actual custody, unless he gives bail in such increased amount. If application be made by the defendant for a reduction of the amount, notice of the application must be served upon the District Attorney.” (Italics added.)

Section 1275 states that in setting, reducing, or denying bail, the judge or magistrate shall take into consideration “the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. The public safety shall be the primary consideration.” (§ 1275, subd. (a).) “In considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant. (*Ibid.*)

Before the court “reduces bail below the amount established by the bail schedule approved for the county” for a defendant charged with a serious or violent felony, “the court *shall* make a finding of *unusual circumstances* and *shall set forth those facts on the record*. For purposes of this subdivision, ‘unusual circumstances’ does not include the

fact that the defendant has made all prior court appearances or has not committed any new offenses.” (§ 1275, subd. (c), italics added.)

**B. The prosecution’s failure to object to Judge Cabrera’s order**

Defendant’s first issue is that the prosecution waived any right to challenge Judge Cabrera’s decision to reduce his bail because it did not object at the time of the order. The procedural history shows that on July 1, 2005, defendant was arraigned and remained in custody. On July 27, 2005, Judge Cabrera reduced bail to \$80,000, and defendant was released. On July 24, 2006, defendant waived the preliminary hearing, and the court noted the bail bond was due to expire. The court granted defendant’s motion to further reduce bail to \$25,000, and defendant remained out of custody throughout 2006, until the unrelated criminal case was filed against him.

There is no evidence that Judge Cabrera made the requisite findings of good cause and unusual circumstances, pursuant to sections 1275 and 1289, to support the orders to reduce bail to \$80,000, and then \$25,000. Judge Sanderson later determined that defendant’s bail originally should have been set at \$130,000, based on the bail schedule for the three felony offenses that he was charged with at the time of Judge Cabrera’s orders. Defendant has not challenged the correctness of Judge Sanderson’s statement about that amount.

There is also no evidence that the prosecution objected to Judge Cabrera’s decision to reduce defendant’s bail to \$80,000 and then \$25,000. If the prosecution objected at the hearings, and the objections were overruled, then the prosecution could have sought review of that denial through a petition for extraordinary writ with the appellate court, and argued that Judge Cabrera “erred as a matter of law in the setting of bail by, for example, considering factors not permitted by law, ignoring relevant information, or failing to make required findings.” (*People v. Alberto* (2002) 102 Cal.App.4th 421, 431 (*Alberto*)). The prosecution did not seek any type of writ review.

Nevertheless, even though the prosecution failed to object or seek review of Judge Cabrera's orders to reduce bail, it still had the statutory authority to ask the court to increase defendant's bail during the pretrial period. As explained *ante*, section 1289 provides in relevant part, that "[a]fter a defendant has been admitted to bail upon an indictment or information, the Court in which the charge is pending may, *upon good cause shown*, either increase or reduce the amount of bail." (Italics added.) "[O]nce a defendant has been admitted to bail on the indictment or information, the court may increase or decrease the amount of bail only upon a showing of good cause or a change in circumstances. [Citations.]" (*People v. Annis, supra*, 127 Cal.App.4th at pp. 1195-1196.)

The prosecution was statutorily authorized to file the July 20, 2010, motion to request the court to increase defendant's bail. The next question is whether Judge Sanderson properly granted that motion.

### **C. Alberto**

Defendant next contends that even if Judge Sanderson could have considered the prosecution's motion to increase bail, principles of comity prevented the court from granting the motion simply based on the determination that Judge Cabrera's original orders to reduce bail were legally erroneous.

The parties agree the case on point is *Alberto, supra*. 102 Cal.App.4th 421, which addressed a situation similar to the instant case. In *Alberto*, the defendant was indicted for attempted murder and robbery. He appeared for arraignment before a judge who set bail at \$35,000, below the scheduled amount, without stating reasons for the reduction. The defendant posted bail. The case was later assigned to a trial judge for all purposes. The prosecution moved for the trial judge to increase bail to the scheduled amount of \$1,050,000, and asserted that the arraignment failed to consider the relevant factors and state reasons for departing from the bail schedule. Defense counsel argued that the trial judge could not increase bail since the prosecution failed to show any changed

circumstances, and defendant had appeared for all hearings. (*Id.* at pp. 424-425.) The trial judge concluded that the arraignment judge had not identified any unusual circumstances justifying departure from the bail schedule and had not considered all the relevant factors before setting bail at \$35,000. The trial judge further determined this failure constituted “good cause” under section 1289 to reconsider the amount of bail, and fixed bail at the scheduled amount of \$1,035,000. (*Id.* at p. 425.) The defendant filed a pretrial petition for writ of habeas corpus with the appellate court to review the trial court’s bail order. (*Ibid.*)

*Alberto* held that the trial judge could not overrule the arraignment judge’s bail reduction order based solely on the belief that the arraignment judge had not complied with the statutory requirements for departing from the bail schedule, and such a reason did not constitute “good cause” under section 1289. (*Alberto, supra*, 102 Cal.App.4th at p. 426.) *Alberto* acknowledged that a court “generally has authority to correct its own prejudgment errors. [Citation.]” (*Ibid.*)

“Different policy considerations, however, are operative if the reconsideration is accomplished by a different judge. Accordingly, the general rule is just the opposite: *the power of one judge to vacate an order made by another judge is limited.* [Citation.] This principle is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice. ‘If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. To affirm the action taken in this case would lead directly to forum shopping, since if one judge should deny relief, defendants would try another and another judge until finally they found one who would grant what they were seeking. Such a procedure would instantly breed lack of confidence in the integrity of the courts.’ [Citations.]” (*Id.* at p. 427, italics added.)

*Alberto* explained that “[f]or one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court.” (*Alberto, supra*, 102 Cal.App.4th at p. 427.) *Alberto* acknowledged there were

“two narrow lines of cases that appear to authorize one trial judge to reconsider an issue already decided by a colleague: one, where the first judge is unavailable [citation], or two, where the first order was made through inadvertence, mistake, or fraud. [Citations.] The People do not claim that [the arraignment judge] was unavailable to hear a renewed bail motion or that his order was the product of any inadvertence, mistake, or fraud.” (*Id.* at p. 430.)

*Alberto* clarified that the arraignment judge retained the power to conduct a bail hearing pursuant to section 1289 and could have increased bail upon a showing of good cause. However, the arraignment judge’s alleged legal error did not constitute good cause to increase bail. (*Alberto, supra*, 102 Cal.App.4th at p. 431.)

*“[T]he good cause must be founded on changed circumstances relating to the defendant or the proceedings, not on the conclusion that another judge in previously setting bail committed legal error. Although not necessarily exhaustive, factors to be considered in ‘setting, reducing or denying’ bail are set forth in section 1275: protection of the public (the ‘primary consideration’), seriousness of the offense, previous criminal record, and probability of defendant appearing in court. [Citations.] Whether subsequent to Judge Wesley’s bail order circumstances have changed in the context of these factors is an appropriate consideration for the court in conducting a hearing pursuant to section 1289. [Citation.]”* (*Alberto, supra*, 102 Cal.App.4th at pp. 430-431, italics added.)

*Alberto* remanded the matter for another judge to conduct a hearing pursuant to section 1289 to determine if there was good cause and changed circumstances to increase defendant’s bail, or for the arraignment judge to conduct another bail hearing and reconsider his original ruling. (*Alberto, supra*, 102 Cal.App.4th at p. 432.)

#### **D. The court’s order to increase bail**

Defendant contends that the only reason Judge Sanderson increased defendant’s bail on July 22, 2010, was because she found that Judge Cabrera’s original orders to reduce bail were legally erroneous. Defendant asserts that such a reason did not constitute good cause or changed circumstances under *Alberto*.

As explained in *Alberto*, Judge Sanderson retained discretion under section 1289 to consider the prosecution's motion to increase defendant's bail "upon good cause shown." (§ 1289.) Such "good cause" could not be based on Judge Cabrera's legal error when he reduced bail. (*Alberto, supra*, 102 Cal.App.4th at p. 431.) In order to increase bail, the court was required to consider "the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. The public safety shall be the primary consideration." (§ 1275, subd. (a).) "In considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant." (*Ibid.*) The court could not reduce bail below the scheduled amount unless it found unusual circumstances, and " 'unusual circumstances' does not include the fact that the defendant has made all prior court appearances or has not committed any new offenses." (§ 1275, subd. (c).)

During the course of the July 22, 2010, hearing, Judge Sanderson reviewed the entirety of the record and concluded that defendant's bail should have originally been set at \$130,000, based on the three felony charges in the complaint, and that Judge Cabrera improperly reduced bail without stating reasons under sections 1275 and 1289.

As noted *ante*, however, the court made the following additional findings when it granted the prosecution's motion to increase bail: that defendant had been charged with serious and violent felonies, a section 667.61 enhancement had been added, and there were no unusual circumstances to reduce bail. Based on the entirety of the record, Judge Sanderson decided to increase defendant's bail to the scheduled amount because of the nature of the offenses and special allegations that were charged. While she addressed Judge Cabrera's prior orders, it is clear that her decision to increase bail complied with sections 1275 and 1289; that she found good cause and changed circumstances because

defendant faced special allegations under the One Strike law for committing the sexual assaults during a residential burglary. Defendant had not been charged with the special allegations when Judge Cabrera reduced his bail. While the first amended information had been filed over a year before the prosecution's motion to increase bail, the prosecution's section 1289 motion to increase bail was not time-barred. The court was required to review the nature and circumstances of the case at the time it was considering the prosecution's motion, and it properly considered the additional "one strike" special allegations which had not been charged in the original complaint.

We thus conclude that Judge Sanderson did not abuse her discretion when she granted the prosecution's motion to increase defendant's bail, the ruling was not based on Judge Cabrera's error, and the ruling was instead based on the changed circumstances of the "one strike" allegations that had not been charged in the original complaint.

**E. Defendant's Sixth Amendment right to represent himself**

Defendant contends that the court's decision to increase bail, while he was representing himself and just two weeks before the scheduled trial, violated his Sixth Amendment right to represent himself because it forced him to withdraw his pro. per. status and request appointment of counsel. There is no evidence to support this claim.

In June 2005, defendant was charged in this case and taken into custody. In July 2005, Judge Cabrera reduced his bail, and defendant was released. In July 2006, Judge Cabrera further reduced defendant's bail, and he remained out of custody.

In August 2006, however, defendant was taken into custody based on the second, unrelated criminal case. On May 14, 2009, defendant moved to discharge his attorney and represent himself in both the sexual assault of G.D., and the unrelated criminal matter. Defendant was in custody when he made his *Faretta* motion. Indeed, during the course of the *Faretta* hearing, the court warned defendant about the reality of representing himself while in custody:

“THE COURT: You understand, sir, *you will remain in custody while your trial is progressing or pending, and you will be required to direct all of your investigation from the jail.* And you understand that while in jail you’ll be subject to Fresno County Sheriff’s Department rules and regulations as to your access to any of these opportunities, whether it’s law library, phones, services, supplies. You understand that?”

“THE DEFENDANT: Yes, Your Honor.” (Italics added.)

The court granted defendant’s *Faretta* motion as to both cases and appointed an investigator to assist him. Thereafter, defendant remained in custody, but he filed numerous motions for discovery and dismissal in both cases.

In August 2009, the court dismissed the burglary charge in the instant case because it was barred by the statute of limitations. Defendant remained in custody and continued to represent himself.

On June 17, 2010, defendant was still in custody and represented himself. The court began the hearing by dismissing the second, unrelated case, because the complaining victim could not be located. The court then asked the prosecutor about the status of the criminal charges based on the sexual assault of G.D. The prosecutor replied that he had just found G.D., she lived out of state, and he needed more time to arrange for her appearance.

The court immediately asked defendant whether he wanted to continue representing himself. Defendant said yes. The court asked whether he wanted an attorney reappointed to represent him, and defendant said no. Defendant withdrew his general time waiver and indicated he was ready for trial.

After the June 17, 2010, hearing, and since the unrelated case had been dismissed, defendant was released on the original, reduced bail of \$25,000, in the instant case. His trial for the sexual assault of G.D. was set for July 29, 2010.

As explained *ante*, on July 22, 2010, after defendant had been out of custody for one month, the court heard the prosecution’s motion to increase bail. He still represented himself, and he objected to the prosecution’s motion to increase bail since he had made

all his appearances. However, defendant never stated that he would be unable to represent himself if he was returned to custody. Once the court granted the motion to increase bail, the court asked defendant if he wanted to continue representing himself. Defendant said no, and asked for reappointment of counsel.

Defendant asserts the court violated his Sixth Amendment rights when it increased his bail on July 22, 2010, because the court “proceeded directly and immediately from the increase in bail to [defendant’s] willingness to continue in pro. per., which reveals that the trial court recognized the two issues to be causally related. It is also telling that [defendant] directly and immediately abandoned his right of self-representation, which reveals with indisputable clarity that the two issues were in fact causally related.”

The record refutes this argument. First, the timing and phrasing of the court’s question on July 22, 2010, was virtually identical to the court’s more extensive inquiry on June 17, 2010, when it dismissed the unrelated criminal case and repeatedly asked defendant if he still wanted to represent himself in the sexual assault case.

Second, while defendant asked for appointed counsel at the July 22, 2010, hearing, defendant never said that he was forced to do so because he was being remanded into custody. Defendant had demonstrated that he could ably file and assertively argue motions before the court while he was in custody. At this hearing, however, defendant decided that he wanted the court to reappoint counsel to represent him. He did not explain why he wanted counsel, but he waived time and agreed to defense counsel’s request for a continuance. Defendant’s jury trial did not begin until March 2011, but he never complained that the court’s bail order had forced him into withdrawing from his pro. per. status.

Defendant has never claimed, either before the superior court or on appeal, that he was unable to obtain access to a law library, legal materials, an investigator, or other services reasonably necessary for his defense when he was in custody, or that he would be unable to obtain access if he was returned to custody. (See, e.g., *People v. James*

(2011) 202 Cal.App.4th 323, 334-336.) Defendant had spent more time in than out of custody. He had successfully filed discovery motions and obtained the dismissal of the burglary charge in this case while he was in jail.

We thus find that there is no evidence to support defendant's specious claim, based on a silent record, that the court's decision to increase bail thwarted his attempt to represent himself.

**DISPOSITION**

The judgment is affirmed.

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Poochigian, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Levy, J.