Filed 12/21/09 P. v. Faultry CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES B. FAULTRY, Defendant and Appellant.	A122829 (Super. Ct. of the City & County of San Francisco No. 199476)

Defendant was convicted following a jury trial of two counts of first degree robbery (Pen. Code, § 212.5, subd. (a)),[1] three counts of second degree robbery (§ 212.5, subd. (c)), and assault with a firearm (§ 245, subd. (a)(2)), with associated enhancements for personal use of a firearm (§ 12022.53, subd. (b)), personal discharge of a firearm (§ 12022.53, subds. (c), (e)(1)), and personal use of a revolver (§ 12022.5, subd. (a)(1)), in the commission of the offenses. In this appeal he argues that the trial court erred by denying his motion to represent himself at trial, and claims that the jury committed misconduct by conducting an experiment with physical evidence offered at trial. We conclude that the trial court, on this record, improperly denied defendant's timely *Faretta*[2] motion, and therefore must reverse the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

STATEMENT OF FACTS

Defendant was convicted of a series of robberies committed in San Francisco within the span of a few days in early November of 2005.[3] We will separately recite the evidence pertinent to each of the robberies, according to the established standards of appellate review of a judgment of conviction, which require that we view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The Robbery of Said Hasan at the Hilltop Market (Count 5)

At 12:45 p.m. on November 4, 2005, Said Hasan was working in the Hilltop Market he owned on Broderick Street in San Francisco. A man Hasan had never seen before entered the store and "asked for change for $20." The man left the store after Hasan gave him the change he requested, but returned about 15 minutes later. The man approached the counter with a box of cookies in one hand and a small silver revolver in the other. He pointed the gun at Hasan and demanded "all the money" in the cash register. Hasan gave the man $250 in cash from the cash register, along with ATM receipts, food stamps and checks. The man then directed Hasan to the back of the store. After the man left the store Hasan called the police.

Hasan described the robber as "a Black man," between six feet and six feet, three inches tall, 280 to 300 pounds, 28 to 35 years old, wearing a black beanie over half of his face, and a white T-shirt. He viewed a videotape lineup on November 14, 2005, and selected "number 2," defendant, as "similar to the person, but not 100 percent." Hasan testified at the preliminary hearing in August of 2006, that defendant was "not the guy" who robbed him. At trial, Hasan described defendant as the "same height," but "darker"

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[3] Defendant was also charged in Counts 1 and 2 with robbery and assault with a knife of a Yellow Cab Company driver, Leonardo Perez, that occurred on October 29, 2005, but the jury was not able to reach a verdict on those charges. We will therefore not discuss the evidence that relates to those crimes.

and "20 pounds heavier" than the robber. He testified: "I cannot say 100 percent, but I have a deep feeling he is not the man who robbed me."

The box of cookies left by the robber on the counter was not touched by anyone until it was processed by a crime scene investigator. A latent fingerprint taken from the cookie box was subsequently identified as a match for defendant's left thumb print.

The Robberies and Assault with a Firearm of Jong Kook Kim and Chung Sook Kim at the Drink Liquor Store (Counts 6 through 8).

Jong Kook Kim (Kim) and his wife Chung Sook Kim owned Drink Liquor, a grocery and liquor store on Second Avenue in San Francisco. Just before 5:00 on the afternoon of November 4, 2005, a large, tall "Black man" appeared in the store, took a Snapple from the refrigerator, and placed it on the counter. He said something that Kim and his wife did not understand, then pulled out a small gun and shot at the floor. Kim told his wife to open the cash register and "give the money" to the man. Mrs. Kim placed all the money from the cash register into a paper bag along with the Snapple, and gave it to the man. The man then walked out of the store, turned left, and headed toward Balboa Street and Third Avenue.

Steven Jue, the owner of an aquarium shop next to Drink Liquor, who was on the street in front of his store talking with a customer, testified that he noticed the "African-American man" walk past him "going westbound" toward Balboa and Third. He described the man as mid-twenties, "five-ten, five-eleven," about 280 pounds, wearing a white T-shirt, black pants, and a black "do-rag on his head."

Kim and his wife followed the man out of the store. They encountered Jue, who characterized them as "very hysterical," and told him they had been robbed. They all watched as the man walked to the corner, then turned around and proceeded to a car parked on the street. Jue testified that the car was a "late '70's Chevy Caprice Classic, bluish-greenish color," with tinted windows and an "out-of-state license plate," the first three numbers of which "were 733." Mrs. Kim asked Jue to remember and "write down" the license number of the car. The man got into the car and drove away.

Kim returned to the store to look for evidence of the gunshot. He discovered a small "piece of metal" on the floor that was not present before the robbery, which he later gave to a police officer.

Kim and his wife subsequently viewed a video lineup: Kim identified defendant as the robber by placing an X on subject number 2; Mrs. Kim "wasn't able to" make an identification. Neither Kim nor his wife identified defendant as the robber at trial, although Mrs. Kim testified that defendant "might be him." Jue identified defendant in the video lineup, at the preliminary hearing, and at trial.

Kim and his wife and Jue were taken to a police vehicle impound yard to separately "look around" and see if they recognized the car driven by the robber. They all recognized and pointed out a blue "80's Chevy Caprice" with an "out-of-state plate" that read 773LSS that had been towed to the impound lot from the Westside Housing Projects on Post and Broderick after defendant's arrest there. When the Caprice was seized the police found a black "do-rag underneath the seat," a small knife under the driver's seat back rest, and "indicia" related to defendant and his home address at 2011 Delta View, Bay Point.

The Robbery of Myles Kilroy (Count 3)

Myles Kilroy was working as a cab driver for Yellow Cab Company when he received a dispatch at 10:15 a.m. on November 7, 2005, for an address on Ingalls Street in the Bayview Hunters Point area near Candlestick Park. When Kilroy reached Ingalls Street he noticed a man running toward the cab. The man got in the right rear passenger seat of the cab, and asked Kilroy to "go down to the next block and hang a right." After Kilroy made two right turns as directed, the man asked him to stop the cab. Kilroy pulled over to the side of the road in front of a residence. He then turned around and realized that the passenger had pulled out a gun and was pointing it at him. The man ordered Kilroy to hand over his money. Kilroy extracted his billfold from his breast pocket and gave it to the man. Kilroy was also ordered to give the man his wallet, cell phone, and car keys, and he did so. The man returned the wallet and cell phone, "saying, 'I don't

want this shit.' " He then walked away, but as he did so he threw the keys to the cab in the street.

Kilroy described the man who robbed him as "African-American," late 20's to early 30's, a "big guy," at least 200 pounds, who wore a black do-rag tied tightly around his head. Three days later, Kilroy viewed a video lineup. He selected subject number 2, defendant, as someone who strongly resembled the "person who robbed" him, and subject number 5, a person who "lightly resembled the person" Kilroy remembered. Kilroy testified in court that defendant "looks a lot like" the robber; he was "fairly certain" of his identification.

The Robbery of Joel Lipkins (Count 4)

At 10:50 on the morning of November 7, 2005, cab driver Joel Lipkins arrived at an address on Velasco Street in the Sunnydale Projects in San Francisco to pick up a fare. Lipkins discovered "there was no such address," but a minute later heard a man yell, "Pull around the corner. My wife will be out in a minute." The man then got into the back seat of the cab and directed Lipkins around the corner. Lipkins testified that the man was "Black," 30 to 35 years old, about 6 feet tall, and 300 pounds.

After Lipkins drove around the corner the man "pulled out a gun and said, 'Give me all your money.' " Lipkins reached in his left side shirt pocket "and gave him all of the money." The man also demanded Lipkins's wallet. Lipkins replied that he did not keep money in his wallet. The man "said, 'Okay,' " took the money and got out of the cab. From outside the cab the man told Lipkins, "Give me your keys." Lipkins complied, whereupon the man took the cab keys and threw them down the street. The man then entered an old, maroon or brown "boxy-type car," like an Oldsmobile, Pontiac or Buick, and drove away.

Lipkins viewed a video lineup on November 10, 2005. He placed a mark on "Number 2," defendant, as the man who robbed him. He identified defendant at the preliminary hearing and again at trial as "the one that did it." He had "no question" of the accuracy of his identifications. Lipkins also identified three photographs taken by the automated "FareView" camera system mounted in his cab: one of himself and the robber,

another of just the robber, and a third of the robber "with a gun." Lipkins testified that he was positive the photos were accurate and depicted the man who robbed him the morning of November 7, 2005.

The Arrest of Defendant and the Police Investigation

Defendant was arrested by plain clothes officers of the San Francisco Police Department on the evening of November 8, 2005, at the West Side Housing Development on Baker Street in San Francisco. He was wearing a white "do rag," a white T-shirt, and blue jeans. Defendant gave the officers his name and a residence address of 2011 Delta View Lane in Bay Point, the same address specified on the registration documents for the blue Chevrolet Caprice found near the location of defendant's arrest. He was subsequently questioned at the robbery detail interview room. When defendant was shown a photograph taken by the FareView camera system in Lipkins's cab, he remarked, "That's me." An examination of the records of a cell phone seized from defendant revealed that numerous calls were made from that phone to the Yellow Cab Company on the morning of October 29, 2005,[4] and again on the morning of the robberies of cab drivers Lipkins and Kilroy.

DISCUSSION

Defendant complains that the trial court erred by denying his *Faretta* motion to represent himself. He asserts that the "*Faretta* motion was timely made at least 26 days before trial could possibly have begun," and was "unequivocal." Defendant also submits his *Faretta* motion was not made "for the purpose of delaying the trial" or otherwise obstructing the proceedings. He therefore argues that the court was required to conduct the requisite inquiry into the voluntariness of his request, and grant him the right of self-representation upon a finding that his waiver of the right to counsel was knowing and voluntary. He points out that the erroneous denial of the constitutional right to self-

[4] The date of the charged robbery of cab driver Leonardo Perez.

representation is "prejudicial per se," and necessitates reversal of the judgment. (*People v. Sohrab* (1997) 59 Cal.App.4th 89, 99.)

Before discussing the issues of this case, a few introductory remarks regarding the *Faretta* decision need mentioning. The case holds an accused has an independent constitutional right of self-representation, guaranteed by the Sixth Amendment. The notion of self-representation was acknowledged and appreciated during colonial times and is integral to the Bill of Rights. (*Faretta, supra*, 422 U.S. 806, 833–834.) When an accused, after asserting an unequivocal desire for self-representation, is compelled to accept counsel, the constitutional error taints the criminal trial process to the core. "But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." (*Id.* at p. 834.)

Of course the exercise of this right of self-representation must be knowingly and intelligently manifested, hence the trial court record will establish the choice was made with " 'eyes open.' [Citation.]" (*Faretta, supra*, 422 U.S. 806, 835.) This election must be unequivocal, a feature the reviewing court can find from review of the trial court colloquy with the defendant. And the application must be timely, which in the *Faretta* case was found to be "weeks before trial." (*Ibid*.; see also *id*. at p. 808 [Also "[s]everal weeks . . . but still prior to [the] trial" the hearing on self-representation occurred.].)

A narration of the protracted procedural history of the present case is also essential to our review of the trial court's ruling on the *Faretta* motion. The crimes were committed in November of 2005, and the information was filed on August 23, 2006. Thereafter, the case proceeded unhurriedly as pretrial motions were heard, trial dates

were repeatedly set, and numerous continuances were granted at the request of both the prosecution and defense. Defendant made a *Marsden*[5] motion to relieve his appointed counsel, Phong Wang, that was heard and denied on November 17, 2006. By April of 2007, in light of defendant's complaints with his appointed counsel the public defender's office decided to "substitute public defenders" rather than face a formal *Faretta* motion or another *Marsden* motion. Mark Jacobs was substituted as counsel of record for defendant. Additional continuances of the scheduled trial dates were granted.

By January 15, 2008, a date set for trial, defense counsel again requested a continuance due to a scheduling conflict with another trial and the need to present defense motions. The case was continued to the next day.

On January 16, 2008, defendant appeared, still represented by Jacobs, and moved for release on his own recognizance and for severance of charges. A possible negotiated disposition was also discussed, which included another pending robbery case charged against defendant in Contra Costa County. Defendant then stated: "I'd like to file a *Faretta* motion so I could represent myself." Defendant explained that he "wasn't too happy" with his two appointed attorneys, and wanted "a better deal" of 20 years with the potential for "halftime" served based on sentence credits. Defendant added that he faced "a lot of time," and would rather study and present the case himself. He also requested his "own investigator" to "look into" the case and "run the errands" necessary to discover information, as well as additional "access to the law library." When the court inquired as to the time necessary for defendant to prepare for trial, he replied "at least four or five months." The court asked defendant for the reason for the delay in seeking self-representation. Defendant responded that as the case began "getting close to going to trial" he realized that he was "still not happy with a different person representing" him, and felt he could better represent himself.

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[5] *People v. Marsden* (1970) 2 Cal.3d 118.

Defense counsel advised the court that the other case to which he was assigned was a "no time-waiver" trial "on calendar" the next day, and would take "no more than about two weeks" to complete. Counsel announced that he was prepared to begin trial in the present case immediately upon the conclusion of his other trial.[6]

The trial court acknowledged to defendant that he had a "constitutional right" to represent himself, but denied the *Faretta* motion for lack of timeliness. The court expressed concern with the "enormous delay" in the case that was "already more than two years old," and was "ready to start trial within a matter of weeks." Defendant asserted that he was not aware of his right to represent himself until "a month ago," and was "not trying to inconvenience the court." Defense counsel interjected that he had not advised defendant of his right of self-representation. The court found, in light of the pertinent factors articulated in "the *Windham* case,"[7] including the "disruption and delay" that would attend according defendant the right to represent himself, that the "motion is untimely."

The court proposed to hear the severance motion on January 23d, then "put the matter over until February 4th" to start trial if defense counsel was available. The case ultimately proceeded to trial with defendant represented by counsel, but not until May 6, 2008, due primarily to the court's scheduling conflicts.

The starting point for our inquiry into the denial of the *Faretta* motion in the present case is recognition of the fundamental rule that the federal constitutional right of self-representation is "unconditional," but "not self-executing." (*Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1529; see also *People v. Bradford* (1997) 15 Cal.4th 1229,

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[6] At least one unusual feature of the Faultry trial assignment is the fact that the Master Calendar Department assigned this case, a "time-waiver" case, to trial without assigning Public Defender Jacobs' "no-time-waiver" trial to the same department. If the trial of Faultry was truly "imminent," as suggested by the dissent, the best way to facilitate that would be assigning both cases with the same public defender to the same trial department. (Dis. opn., *post*, at p. 1.) Then, the Faultry time-waiver case could have directly followed the completion of the "no-time-waiver" matter.

[7] *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*).

1365.) "Criminal defendants have the right both to be represented by counsel at all critical stages of the prosecution and the right, based on the Sixth Amendment as interpreted in *Faretta, supra*, 422 U.S. 806, to represent themselves. [Citation.] However, this right of self-representation is not a license to abuse the dignity of the courtroom or disrupt the proceedings. [Citation.] *Faretta* motions must be both timely and unequivocal." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1001–1002; see also *People v. Roldan* (2005) 35 Cal.4th 646, 683.) "The right of self-representation is absolute, but only if knowingly and voluntarily made and if asserted a reasonable time before trial begins." (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) " 'A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. . . .' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 931–932.)

We are presented in this appeal only with the issue of timeliness.[8] "[T]he timeliness of one's assertion of *Faretta* rights is critical." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433.) "If a request for self-representation is unequivocally asserted within a reasonable time before the commencement of the trial, and if the assertion is voluntarily made with an appreciation of the risks involved, the trial court has no discretion to deny it." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1219; see also *People v. Halvorsen, supra*, at p. 434; *People v. Dent* (2003) 30 Cal.4th 213, 217.) " 'When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' [Citation.] In exercising this discretion, the trial court should consider factors such as ' "the quality of counsel's

[8] The evidence clearly shows that defendant's *Faretta* motion was unequivocal, and the Attorney General does not argue otherwise. Upon finding the request untimely, the trial court did not reach the competence and voluntariness elements of the right of self-representation.

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." ' [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959; see also *Windham, supra*, 19 Cal.3d 121, 128; see also *People v. Lawley* (2002) 27 Cal.4th 102, 149.)[9] " 'The "reasonable time" requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.' [Citation.]" (*People v. Percelle* (2005) 126 Cal.App.4th 164, 175.)

Thus, the "first step" of our inquiry "is a determination of whether defendant's [*Faretta*] motion was made a reasonable time prior to the commencement of trial," a calculation "*Windham* left unresolved." (*People v. White* (1992) 9 Cal.App.4th 1062, 1071; see also *id.* at p. 1072.) We construe the California Supreme Court's proclamation in *Windham* that a timely *Faretta* request must be asserted within a *reasonable time prior* to the commencement of trial, to mean precisely what it says: first, that merely because trial has yet to actually commence does not dictate that the request must be considered timely; and second, that the element of a *reasonable* time prior to trial directs us to consider all of the "circumstances surrounding" the request. (*People v. White, supra*, at p. 1073, quoting from *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791.) The

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[9] The "*Windham* factors" come into play only if the *Faretta* motion is "not timely for purposes of invoking [the] right [to] self-representation under *Faretta*." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1105; see also *id.* at pp. 1104, 1106.) It is to be noted that the facts in *Windham* dealt with a request for self-representation in the third day of a trial and the *Windham* factors should be considered accordingly. "When such a *midtrial* request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors [so-called *Windham* factors] underlying the request . . . ." (*Windham, supra*, 19 Cal.3d 121, 128, italics added.) The *Windham* court made a critical distinction regarding timing of the motion. "The experience of other jurisdictions in dealing with the procedural implementation of a constitutionally based right of self-representation demonstrates that the requirement of a pretrial motion to that effect is a workable and appropriate predicate to the exercise of the *Faretta* right. We hold that in order to invoke the *constitutionally mandated unconditional right* of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of the trial." (*Id.* at pp. 127–128, italics added.) Then the court only introduces the so-called *Windham* factors when discussing the self-representation request "once a defendant has chosen to proceed to trial represented by counsel" and later seeks self-representation during trial. (*Id.* at p. 128.)

determination of timeliness is not reduced to consideration of " 'some Pythagorean "secret magic of numbers[]" . . .' " or formula. (*People v. White, supra,* at p. 1072, citation & fn. omitted.)[10] On appeal, we conduct an independent examination of the record to determine if a *Faretta* motion has been knowingly, timely and unequivocally asserted. (*People v. Doolin, supra,* 45 Cal.4th 390, 453; *People v. Stanley, supra,* 39 Cal.4th 913, 931–932.) We undertake our assessment " 'based on the " 'facts as they appear at the time of the hearing on the motion rather than on what subsequently develops.' " [Citations [and fn.] omitted.]' [Citation.]" (*People v. White, supra,* at p. 1072.)

This case is not one that fits neatly into the category of timely or untimely. "Although *Windham* makes clear that a *Faretta* motion made after commencement of trial is not timely, it does not state a hard and fast rule delineating when a pretrial motion is timely." (*People v. Ruiz, supra,* 142 Cal.App.3d 780, 787.) If trial had been definitively set to begin within a few days or perhaps even a week we would likely find the *Faretta* motion untimely. (Cf. *Moore v. Calderon, supra,* 108 F.3d 261, 264–265; *People v. Frierson* (1991) 53 Cal.3d 730, 742; *People v. Burton, supra*, 48 Cal.3d 843, 852; *People v. Moore* (1988) 47 Cal.3d 63, 79–81; *People v. Rudd* (1998) 63 Cal.App.4th 620, 627–628; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1688–1689.) "Motions

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[10] The Ninth Circuit and other federal courts have " 'added a gloss to *Faretta* [by] establishing a bright-line rule for the timeliness of *Faretta* requests: a request is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay. [Citations.]' " (*People v. Rudd, supra,* 63 Cal.App.4th 620, 627, quoting *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 265; see also *United States v. Johnson* (7th Cir. 2000) 223 F.3d 665, 669.) California has not adopted the federal bright-line rule. In *People v. Burton* (1989) 48 Cal.3d 843, 852, 853, 854, the California Supreme Court "declined to follow the federal rule that a motion for self-representation is timely as a matter of law if made before the jury is impaneled and must be granted unless shown to have been made for the purpose of delay. [Citation.] The court noted that the federal rule was in practice *similar* to the California one, as it would allow denial of a *Faretta* motion before the jury was impaneled if the motion was made for the purpose of delay and the need for a continuance could be evidence of dilatory intent. The federal rule differed, however, in that California put the burden on the defendant to explain the delay when making a late motion. [Citation.] The court concluded, 'To the extent that there is a difference between the federal rule and the California rule, we find the federal rule too rigid in circumscribing the discretion of the trial court and adhere to the California rule.' [Citation.]" (*People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1124, italics added.)

made just prior to the start of trial are not timely." (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1205; see also *People v. Caird* (1998) 63 Cal.App.4th 578, 585.)

However, the case before us is factually quite distinguishable. (*People v. White, supra,* 9 Cal.App.4th 1062, 1073.) While the proceedings languished after the information was filed in August of 2006, with many trial dates set and continued, when the motion for self-representation was made on January 16, 2008, trial had neither commenced nor was imminent. The case was "assigned out for trial," but a jury had not been impaneled, and no firm date for the beginning of the trial was set.

The ambiguity surrounding the date of trial is demonstrated by the record of the proceedings which occurred immediately before the *Faretta* motion. On January 11, 2008, the case was transferred from Department 22 (Master Calendar Department) to Department 28, not for trial that day or on any specified date, but rather for trial "forthwith."[11] At the hearing on January 15th, the day before defendant's *Faretta* motion was made, the trial court referred to the transfer from Department 22, and announced that another trial set in Department 28 had settled that morning, so "*discussion* in this case" could *begin*. (Italics added.) The court and defense counsel then mentioned the motions to be filed, which prompted the court to put the matter over to the next day to "give counsel a chance to get their motions filed" and for her to "speak with the master calendar judge about the assignment timing relating to this case." In summary, on January 16th, the motions and possible settlement of the case were discussed, along with defense counsel's scheduling conflict and the *Faretta* issue. The case was further continued to February 4, 2008.

Also, the events and pronouncements of the trial court following the denial of the *Faretta* motion, while not part of our appraisal of timeliness, at the very least reaffirm the

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11 It is of course a very common practice for cases to be sent from the master calendar of the criminal courts to a particular department (a trial department) for the purpose of handling all aspects, including trial, of a matter. An assignment or transfer of the nature that occurred here does not mean that the trial will proceed immediately, or even imminently. Naturally the record in this case illustrates this observation. And it must be noted that appellate courts have some familiarity with this practice.

exceedingly indefinite schedule and state of the proceedings when the case first arrived in Department 28 on January 15, 2008, the day before defendant moved to represent himself. When the parties appeared on February 7, 2008, to present the severance motion and consider the psychological evaluation of defendant, the court expressed concern that the case was trailing two other "no time waiver" trials. Because of that, the court had inquired of the "supervising judge in Department 22" to determine if the case should even remain in Department 28. On April 2, 2008, the present case was still trailing one other trial that was not anticipated to be completed until late April, and a defense motion still needed to be resolved.

It therefore appears to us that when defendant presented his *Faretta* motion neither the court nor the parties had any firm notion of when trial would begin. The date of commencement of trial, although vaguely contemplated to occur on February 4th, was still nebulous and speculative. More than that, serious obstacles to the commencement of trial within a reasonable time remained unsettled. While the dissent suggests that "[b]oth counsel" were ready to proceed with trial when the *Faretta* motion was made, that was hardly the situation. (Dis. opn., *post*, at p. 2.) Only when defense counsel was relieved of the obligation to complete another trial in another department – that also had not yet received a set trial date – pretrial motions in the present case were resolved, and a courtroom was available, could trial begin as hoped within the next few weeks. The prosecution seemed prepared to proceed, but defense counsel had a calendar conflict and pretrial motions to present.[12] Also, the parties were still in the process of discussing what appears from the record to be quite tentative proposals for a negotiated disposition of the case that included a possible global settlement of charges against defendant in Contra Costa County. Trial was at least weeks away, and contingent upon resolution of other pretrial matters. "The rationale behind the rule giving the trial court the discretion to

[12] On the date of the *Faretta* motion, the prosecution filed a proposed witness list. We note that defense counsel's "no-time-waiver" trial was scheduled in a different department, so the trial court in the present case had no control over when the other trial would be completed.

deny an untimely *Faretta* motion – to avoid disruption of an *ongoing* trial – thus is not implicated in this case." (*People v. Halvorsen*, *supra*, 42 Cal.4th 379, 434, italics added.)

We recognize that defendant did not expeditiously assert his *Faretta* rights following the initiation of criminal proceedings. As we have observed, the crimes were committed over two years before the motion was made. The case was filed in August of 2006, and defendant was represented by counsel the entire time the action was pending. He apparently made two *Marsden* motions, and appointed counsel was substituted once at his instigation. However, nothing in the record suggests that defendant acted for the purpose of obstructing or delaying the proceedings. Defendant stated without contradiction that he was unaware of his right to represent himself until "a month ago," and counsel affirmed that defendant had not been advised of his right to self-representation. In response to the court's inquiry, defendant explained the reasons for his failure to pursue the motion earlier: he "wasn't happy" with the efforts of his first appointed attorney, but thought his substituted counsel "would probably be better"; as the trial date grew near, defendant realized he was "still not happy with a different person representing" him, and "could represent [him]self better" if the case went to trial; and, with the prospect of "facing a lot of time" in prison he would rather represent himself than place the case in "somebody else's hands." Thus, although a palpable delay preceded defendant's decision to seek self-representation, it was not unexplained or demonstrated to be based upon improper motives. It is understood that an accused would prefer to be represented by counsel when facing serious charges. The request to represent oneself is often the result of an accused's disappointment with appointed counsel. The law does not require a defendant to act quickly to exercise the unconditional right to self-representation, only to act within a reasonable time prior to commencement of trial.[13] (*People v. Marlow* (2004) 34 Cal.4th 131, 146.) And, significantly, the trial court made no finding on the record regarding the issue of obstruction or appellant's motivation.

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[13] We note that many times a defendant may not reach the decision that self-representation is appropriate during the early stages of criminal proceedings.

That defendant's assertion of *Faretta* rights was coupled with the request for a continuance, a rather prolonged one at that, does not necessarily render the motion untimely. The California Supreme Court has declared "that '[w]hen the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly processes of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by a reasonable standard.' " (*People v. Miller, supra,* 153 Cal.App.4th 1015, 1021–1022, quoting from *Windham, supra,* 19 Cal.3d 121, 128, fn. 5.) The court in *Windham* also cautioned that the "imposition of a 'reasonable time' requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation." (*Windham, supra,* at p. 128, fn. 5, italics omitted; see also *People v. Miller, supra,* at p. 1021.) We also observe that the trial court failed to properly consider the grounds for the continuance requested by defendant based on the particular circumstances and reasons presented in the case. (See *People v. Butler* (Dec. 10, 2009, S068230) ___ Cal.4th ___ [2009 Cal. Lexis 12407, *28–*29].)

The dissent emphasizes the practicalities of a "busy trial court" and the disruption of the process that would have resulted from granting defendant the right to represent himself, with the attendant delays and rescheduling of the appearance of witnesses. (Dis. opn., *post,* at p. 8.) While we point out that nothing in this case was firmly scheduled, so no *rescheduling* was necessary, considerations of expediency are not of consequence in the present case. A timely *Faretta* motion cannot be denied because it inconveniences the court or the prosecution. The California Supreme Court very recently reiterated that " '[w]hen "a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so," ' " irrespective of any other considerations. (*People v. Butler, supra,* ___ Cal.4th ___ [2009 Cal. Lexis 12407, *18], citation omitted.) A trial court's second guessing of this election is not a valid component of the analysis. (*Ibid.*) As the law stands and has long stood, if the motion for self-representation is knowingly,

unequivocally and timely made, it is in nearly all respects "unconditional." (*People v. Jenkins, supra*, 22 Cal.4th 900, 959; *People v. Leonard* (2000) 78 Cal.App.4th 776, 784.) "If a defendant makes a timely request for self-representation under *Faretta* v. *California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525], his right to do so is unconditional and the trial court must grant the request." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048.) "[T]he state may not constitutionally prevent a defendant from 'controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant.' " (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 595, quoting *Windham, supra*, 19 Cal.3d 121, 130; see also *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057–1058.) We reiterate that only if the defendant has misused the *Faretta* mandate as "a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice" may the motion for self-representation brought at the commencement of trial be denied. (*Windham, supra*, 19 Cal.3d 121, 128, fn. 5; *People v. Miller, supra*, 153 Cal.App.4th 1015, 1021.)

The dissent suggests that defendant played the "*Faretta* game,"[14] but nothing in the record indicates he intended to delay the proceedings or obstruct the orderly administration of justice. (Cf. *People v. Scott, supra*, 91 Cal.App.4th 1197, 1203; *People v. Rogers, supra*, 37 Cal.App.4th 1053, 1057.)[15] And critically, the trial court made no inquiry in the matter or finding that defendant pursued self-representation for any purpose other than his expressed dissatisfaction with defense counsel and a desire to present the case in the manner he considered most advantageous to him. In the assessment of the timeliness of the motion the court did not undertake an adequate examination to determine defendant's motives or the reasonableness of his request for a continuance based on his expressed disagreement and discontent with appointed counsel. For

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[14] See dissenting opinion, *post*, at page 5.

[15] He did not, for instance, move to represent himself on the heels of denial of a *Marsden* motion to substitute his appointed attorney, as so often happens when defendants seek to manipulate the proceedings. In fact, defendant had been represented by the same attorney for the past nine months.

instance, the court failed to evaluate defendant's present knowledge of the case, any prior review of the evidence he had conducted, or whether he was ready and willing to condition his right to self-representation upon a postponement of the trial for less than the four or five months he suggested.[16] Given the very tentative, unspecified date of the upcoming trial and the cognizable delay that was expected to ensue even if defendant continued to be represented by counsel – and which ultimately reached essentially the same time span as the continuance requested by defendant in pro per – without a further inquiry by the court or indication of an improper purpose we cannot find that defendant's *Faretta* motion was without reasonable justification. When dealing with a request for self-representation *before* the commencement of a trial, the judge should conduct an inquiry that *assesses* the timeliness issue for appellate purposes. "[O]ne reason for requiring the court to undertake such an inquiry is to ensure that the record permits meaningful appellate review." (*People v. Rivers, supra*, 20 Cal.App.4th 1040, 1048.) Since the exercise of a Sixth Amendment right is implicated, the trial court has an obligation to develop a colloquy that reflects an effort by the trial judge to fairly assess defendant's request; appropriately reflect the court's analysis of that request; and, significantly, develop "a sufficient record on appeal . . . in order to sufficiently evaluate alleged abuses of discretion when motions for self-representation are denied." (*Windham, supra*, 19 Cal.3d 121, 129, fn. 6.) That did not happen here. Once the defendant mentioned his need for a continuance, conversation with him essentially stopped. Appropriate colloquy will generally facilitate an evaluation of the sincerity of the underlying reasons for the *Faretta* motion and the necessity of any requested continuance. (Cf. *People v. Ruiz, supra*, 142 Cal.App.3d 780, 789–790.)

Taking into account the entire procedural context of the case we are persuaded that the motion was timely. Defendant acted at least two to three weeks before the most

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[16] Defendant may then have assented to a minimal or less prolonged continuance as a condition of his exercise of *Faretta* rights. (*People v. Clark* (1992) 3 Cal.4th 41, 110; *People v. Rudd, supra*, 63 Cal.App.4th 620, 627–628.)

optimistic possible trial date, and four months before trial eventually occurred. (*People v. Dent, supra,* 30 Cal.4th 213, 221; *People v. Jenkins, supra,* 22 Cal.4th 900, 959, 961 [where the defendant's first *Faretta* motion made in a capital case "during hearings on pretrial motions to be resolved before the commencement of jury selection," was found timely, but the second, "made after the jury had been selected and the prosecution had delivered its opening statement," was "left to the trial court's sound discretion"].) Motions for self-representation made several weeks before even definitively scheduled trials have been found to be within the requisite " ' "reasonable time prior to the commencement of trial." ' " (*People v. White, supra,* 9 Cal.App.4th 1062, 1074, quoting *People v. Freeman* (1977) 76 Cal.App.3d 302, 307.)[17] The court in *People v. Ruiz, supra,* 142 Cal.App.3d 780, 790, observed: "We find no case holding that a motion for self-representation presented six days or three *days* before trial is untimely." (Italics added.) Also, in *People v. Nicholson, supra,* 24 Cal.App.4th 584, a special circumstances prosecution, the court declared that a motion for self-representation by the two defendants made and denied *seven* days before the start of the trial "would *per se* require reversal." (*Id.* at p. 595, italics added.) No evidence in the record demonstrates that defendant was misusing the *Faretta* mandate as a device to impede the progress of the proceedings, foment delay or frustrate the administration of justice. To the contrary, the reasons he expressed to support his request for self-representation were based on his views of the representation he received and his personal preference, unwise as it may have been, to act as his own counsel. Further, the four-month continuance he sought, although legitimately troubling to the trial court, was not manifestly unreasonable – particularly without a deft examination by the court regarding the necessity of delaying

[17] In the *Faretta* opinion itself, " 'the Court twice described the timing of Faretta's request to represent himself: it was made "weeks before trial," 422 U.S. at 835, . . . and "well before the date of trial," *id*. at 807 . . . . The Court's acknowledgment of the timing of Faretta's request was neither a recitation of the background facts of the case nor *obiter dictum*; instead, it is mentioned not only in the opening paragraphs, but also in the very breath with which the Court announced its decision. *Id*. at 835 . . . . It is properly considered necessary to the Court's decision, and therefore is a holding of the Court. . . .' " (*People v. Rudd, supra,* 63 Cal.App.4th 620, 627–628, quoting from *Moore v. Calderon, supra,* 108 F.3d 261, 265.)

the proceedings for the duration defendant proposed, or any suggestion by the court of an alternative, less lengthy postponement of trial – given the numerous and serious charges he faced, the complexity of the trial before him, and the glaring fact that trial was not in any sense ready to begin.

The trial court did not find, and the record does not reflect, that defendant lacked the mental competence necessary to waive his constitutional right to counsel knowingly and intelligently, with a realization of the probable risks and consequences of self-representation. (*People v. White, supra*, 9 Cal.App.4th 1062, 1076.) The request for self-representation was unequivocal and timely, and the court therefore had no discretion to deny it. (*People v. Halvorsen, supra*, 42 Cal.4th 379, 434; *People v. Nicholson, supra,* 24 Cal.App.4th 584, 594; *People v. White*, *supra*, at p. 1076; *People v. Herrera* (1980) 104 Cal.App.3d 167, 174; *People v. Tyner* (1977) 76 Cal.App.3d 352, 355.) We decide this case under compulsion of United States Supreme Court and California Supreme Court precedent, and we are "not empowered to narrow the established scope of a federal constitutional right. Accordingly, we conclude that defendant's conviction and sentence must be reversed under the prevailing constitutional standards." (*People v. Butler, supra*, ___ Cal.4th ___ [2009 Cal. Lexis 12407, *29-*30].)

DISPOSITION

The erroneous denial of a timely motion for self-representation is a structural error of constitutional magnitude that is subject to the rule of per se reversal. (*People v. Jones* (1998) 66 Cal.App.4th 760, 770; *People* v. *Sohrab*, *supra*, 59 Cal.App.4th 89, 99; *People* v. *Robinson* (1997) 56 Cal.App.4th 363, 373; *People v. Nicholson, supra*, 24 Cal.App.4th 584, 594.) Accordingly, we must reverse the judgment in its entirety and remand the case to the trial court to conduct further proceedings not inconsistent with the views expressed herein. (*People v. Butler, supra,* ___ Cal.4th ___ [2009 Cal. Lexis 12407, *30]; *People v. Nauton* (1994) 29 Cal.App.4th 976, 981.)[18]

[18] In light of our conclusion we need not address defendant's contention that jury misconduct was committed.

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Dondero, J.

I concur:

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Margulies, J.

I dissent for the following reasons. An unhappy defendant suddenly brings an oral *Faretta*[1] motion before the trial judge after the case is sent for trial. When defendant informs the court that he needs four to five months to get ready for trial, the trial court denies the motion as untimely and trails the case until defense counsel, who is ready for trial, completes a previously set no time waiver case. The request for self-representation was untimely. The court correctly denied defendant's request.

In analyzing what transpired, we do not use a retrospectoscope. A trial judge is not blessed with clairvoyance about what may transpire weeks later. Let's review the record for what confronted the court on January 16, 2008, the day that it denied defendant's *Faretta* motion.[2]

The calendar judge sent a multi-count case involving five separate robberies while using a gun that had languished for over two years to the trial judge "for trial forthwith." On January 16, 2008, defense counsel and the prosecutor are ready except that defense counsel also has a no time waiver case that would take no more than two weeks to try while defendant's case trailed.[3] Defendant is trying to negotiate a resolution of the case. Defendant wants a sentence of less than 20 years which would include a Contra Costa County felony case where he was facing an additional 25-year sentence for a robbery and firing a gun during the robbery. Defendant is facing more than 40 years in prison with the ante raised considerably by Contra Costa County when this case is over. No deal is struck. The trial judge starts to discuss how the trial will proceed. Trial is imminent. The Rubicon was crossed, the die was cast.

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1 *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

2 In determining the issue of timeliness, the trial court's decision is based on the facts as they appear at the time of the hearing on the motion rather than on what subsequently develops. (*People v. Moore* (1988) 47 Cal.3d 63, 80.)

3 The Superior Court of San Francisco City and County, Local Rules, rule 16.3B, Criminal, provides that if on the date set for trial, counsel is engaged in another trial, the case scheduled for trial will trail until completion of the other case.

Both counsel are ready and the case is in front of the trial judge for pretrial motions. Defendant waits to invoke his right to self-representation until he does not receive the deal he wants. Defendant says that he just learned about *Faretta* a month ago after doing some research, and now wants to represent himself since he did not get a better deal. He says that if he has to go down facing 20 to 50 years, he might as well lose the case on his own. He thought it might get better with his new attorney, who was appointed over seven months ago after he filed a *Marsden* motion. Now that it was getting close to trial, he explains that he still is not happy and thinks he can represent himself better. The prosecutor has his witness list, defense counsel presents a motion to sever, and the court indicates the trial will proceed as soon as defense counsel concludes his no time waiver case that will take no more than two weeks. The court emphasizes defendant's case, now ready for trial, is more than two years old, and has been continued six other times. Defendant is asked how much time he will need to prepare for trial. His reply, four or five months with an investigator and law library access. Clearly defendant cannot be ready by the time the no time waiver case is completed. The prosecutor argues that the case has already been continued multiple times. He points to the disruption that delay would cause. Six victims, taxicab drivers and small liquor store owners from five separate robberies, are witnesses. Defendant made two prior unsuccessful *Marsden*[4] motions.

The court had stated, "[t]his matter is before this court for trial and this court is prepared to try this case." The court denied defendant's motion and made findings under *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*) and *People v. Caird* (1998) 63 Cal.App.4th 578, 584 (*Caird*) regarding the factors that caused denial of the untimely motion.[5] The court scheduled another hearing a few days later on January 23 for consideration of defense counsel's severance motion. The prosecutor was ordered to file

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4 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

5 In *Caird* the court denied defendant's *Faretta* motion made on the day before jury selection because defendant wanted a 60-day continuance to get ready for trial. (*Caird, supra,* at p. 584.)

his witness list. The court advised that jury selection would commence after February 4th.[6] A definitive date for jury selection could not be set until the no time waiver case was completed. Defendant's counsel had stated that as soon as he completed the no time waiver case, he was prepared to try this case. The expectation was that defendant's trailing case would start as soon as the no time waiver case was completed. Indeed, for management purposes, the court scheduled the next hearing for a few days later on January 23 to keep the case on track by hearing the severance motion.[7]

DISCUSSION

A defendant has a federal constitutional right of self-representation. As Justice Robert Puglia once explained in respecting the dignity and autonomy of the individual, a defendant has the right to go to hell in a hand basket and to do it his own way (*People v. Nauton* (1994) 29 Cal.App.4th 976, 981). The right, however, is not unfettered—it must be made in a reasonable time before " '[t]he commencement of trial.' "[8] If the motion is not timely made before the commencement of trial, the trial court exercises its sound discretion in granting or denying the motion based upon the factors explained in *People v. Rudd* (1998) 63 Cal.App.4th 620, 625−626 explicating *Windham's* principles. The court considers 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 that might follow the granting of the motion.[9] When the defendant cannot proceed without a continuance, the trial court determines if the motion is a tactic designed to cause delay and disrupt the judicial process. Here,

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6 By that time, presumably defense counsel's no time waiver case would have settled or would be completing trial. A prosecutor needs to know when jury selection will be completed so that subpoenaed witnesses can be informed when they must be ready to testify.

7 The majority opinion incorrectly states that on January 16, 2008 "[t]he case was further continued to February 4, 2008." (Maj. opn., *ante*, at p. 13.) The case trailed with the next hearing set for January 23, 2008, at which time the severance motion and the status of the no time waiver case were discussed.

8 Case law also refers to waiting until "the eve of trial," or when a trial is "imminent" in discussing timeliness of a *Faretta* motion.

9 *Windham, supra,* 19 Cal.3d at page 128.

defendant chose to proceed to trial represented by counsel, waited until negotiations for a lower sentence proved fruitless, and then facing an imminent trial made his *Faretta* motion and asked for a four- to five-month continuance. Under these circumstances, the untimely motion is left to the sound discretion of the court.

A comparison with what occurred in *People v. White* (1992) 9 Cal.App.4th 1062 (*White*) helps to shed some light on the issue of timeliness. In *White*, defendant made his self-representation motion four weeks before a tentative trial date that had just been set. His attorney had not announced he was ready, and a continuance was expressly contemplated by the court in the event defense cocounsel had to be replaced due to a calendar conflict. Justice Norman Epstein, in his concurring opinion, contrasted the case with an untimely *Faretta* motion made so close to an upcoming trial date that the date must be vacated, witnesses resubpoenaed and schedules rearranged. There the decision to grant the motion is left to the discretion of the trial court (*White*, *supra*, at pp. 1076−1077 (conc. opn. of Epstein, J.). In this case, granting defendant's motion would have the same effect: the trial date would be vacated, witnesses would have to be rescheduled, and schedules are disrupted. Defendant sought to delay justice through a lengthy continuance.

The Supreme Court has not fixed any particular time at which a motion for self-representation is considered untimely, other than the motion must be made a reasonable time before trial. Nor has it adopted a rigid rule that any *Faretta* motion made before the actual commencement of trial is deemed timely (*People v. Clark* (1992) 3 Cal.4th 41, 99). "We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice." (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5.)

People v. Howze explained that when a defendant raises the motion on the eve of trial, the trial court has the discretion to deny the motion. The court noted that a motion made within three days of the commencement of trial in one case and six days in another did not give rise to an unqualified right to self-representation, leaving the decision of

whether it was untimely to the court's discretion. (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397.)

"A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1203, italics omitted.) In *Scott,* after a *Marsden* motion was denied, defendant made his *Faretta* motion four days before trial, coupled with a request for a continuance of the trial. The motion was deemed untimely and properly denied. (*Id*. at pp. 1204−1205.)

Nor is a *Faretta* motion coupled with a request for a four- to five-month continuance made on the eve of trial an unequivocal *Faretta* motion, as *Faretta* law requires. Let's review again what happened on January 16.

Defendant learned his case would not settle on his terms and the case would proceed to trial. He previously made an unsuccessful *Marsden* motion four days before a prior trial date. Later, the public defender's office replaced that attorney with attorney Jacobs who was prepared to try the case and with whom defendant also became unhappy. His attorney candidly informed the court of "at least two *Marsden* motions made by the defendant." Although he had researched *Faretta* a month earlier, defendant did not make a *Faretta* motion on January 15 when the case came to Department 28, but waited until he saw the case indeed would go to trial on January 16. Defendant told the court that his motion was based on "just over the time of me having him [defense counsel Jacobs] and over the time of me thinking and it's getting close to trial, I was starting to realize that I'm still not happy with a different person representing me." Defendant recognized the imminence of his trial. Then he played his version of the *Faretta* game and asked for four to five months to prepare for trial.[10]

"[T]he trial court's determination of untimeliness necessarily must be evaluated as of the date and circumstances under which the court made its ruling; a trial court's

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10 Trial and appellate courts have referred to the manipulation of the system with untimely *Faretta* motions as the *Faretta* game.

reasonable and proper determination that such a motion is untimely does not become erroneous simply because, for example, an imminent trial ultimately is postponed. . . ." (*People v. Marshall* (1997) 15 Cal.4th 1, 24−25, fn. 2.) What may have transpired at later hearings is irrelevant to what confronted the trial judge on January 16, 2008 when the *Faretta* motion was denied as untimely. The plan for this case was not "nebulous" as the majority contends. (Maj. opn., *ante*, at p. 14.) This case was not rattling around aimlessly in Department 28. When the settlement discussions were over, the court turned the case to starting the trial. On the day of the *Faretta* motion, and after its denial, as the quotations from the transcript below bear out, the plan was to try the case once the no time waiver case was concluded. Simply because the court may have encountered problems later that caused the trial to be continued, does not render fatal the court's decision on January 16 to deny the *Faretta* motion. The majority opinion looks back in time from February 4 by alluding to the uncertainties and scheduling problems at that time as the case trailed.[11] But the trial court had a firm understanding as to what would transpire as of January 16. The record for January 16, 2008 demonstrates that the court was then prepared to try the case once the no time waiver case was concluded. This is what the court and counsel said on January 16 in connection with the trial in light of the *Faretta* motion:

"THE COURT: And it's further your understanding from the master calendar department that this case has been sent here for trial and that, as soon as you are finished with that other trial, that you are prepared to start this trial in this court; is that correct?

"MR. JACOBS [Attorney]: That's correct."

At the conclusion of the session on January 16, the court summed up everyone's understanding: "[T]his trial has been sent here for trial, and as soon as Mr. Jacobs is available, I am prepared to start this trial." What would unfold in February causing a

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11 ("Hindsight is always 20/20," quoted by Billy Wilder <http://www.famousquotesandauthors.com/authors/billy_wilder_quotes.html> [as of Dec. 21, 2009].)

continuance was unknown and beyond the court's control on January 16 when the motion was properly denied.

The next session was scheduled for January 23 to consider the severance motion, receive witness lists and to ascertain the status of the no time waiver case. The prosecutor discussed starting the case on February 4 once the no time waiver case concluded.[12]

Faretta is a bedrock case that underpins fundamental, constitutional rights and should never be treated lightly. But here it was not invoked in a timely way to cause its denial to result in a reversal per se. The record demonstrates that, although dependent on the availability of another trial department to conclude the no time waiver case, court and counsel expected to try defendant's case as soon as the other case was completed. The court learned of defendant's need for a four- to five-month continuance, his prior *Marsden* motions, and his waiting until the case would not settle on his terms. The court was aware of the number of victims and witnesses who would have to be resubpoenaed, the disruption to the justice system in a case that had been continued far too long, and made the call within her discretion that the *Faretta* motion was untimely and for good reason denied it. The majority opinion faults the court for its failure to make an inquiry to determine the reasonableness of defendant's request for self-representation tied to a need for a four- to five-month continuance and whether a shorter continuance might be possible. When a defendant tells the court that it will take four to five months to prepare for a multi-count, five separate robberies trial with numerous witnesses, the court familiar with the case and its history can take the defendant at his word that it will take many months for him to prepare this type of case for trial. The court, in exercising its discretion, cited the five *Windham* factors for denial of the motion. Once the motion was

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12 At the January 23 hearing, the trial judge obtained a status report from defense counsel regarding his other case that had not yet started. The prosecutor again discussed starting the trial during the week of February 4th once the other case was concluded. Because defendant had suffered some falling episodes in the meantime, and at defense counsel's request, the court also ordered medical evaluations at that hearing.

untimely, the court properly considered those factors, all of which were present, and in its discretion denied the motion. (See Cal. Judges Benchguide 54: Right to Counsel Issues (CJER 2005) Timeliness of Request, §§ 54.8−54.9, pp. 54-11 to 54-13, and *People v. Perez* (1992) 4 Cal.App.4th 893, 903−905 discussing when the reasons for the denial are clear on the record.)

The majority opinion ignores what confronted a busy trial court where cases trail, witnesses must be subpoenaed, counsel juggle trial schedules, and certain trial departments are charged with the task of trying a case "forthwith," as happened here where the trial judge maintained the trial status with a commencement date as soon as the defense counsel's other case concluded and scheduled hearings on trial motions to ready the case for jury selection.[13]

On January 16, 2008, trial was imminent. Faced with an unhappy defendant who sought to delay the case for four to five months by asking for self-representation after the case was before the trial judge for trial forthwith, the trial court enhanced the justice system by denying defendant's *Faretta* motion that frustrated the orderly administration of justice. This case should not be reversed—it sets the wrong precedent for legitimately trailing cases.

A *Faretta* motion made in a timely way before the commencement of trial, after full advisement and waiver of the right to counsel, must be granted. (*White, supra,* 9 Cal.App.4th at p. 1076.)[14] But this case is different. The Supreme Court is asked to

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13 There was no lack of urgency in assigning the case on January 11 to Department 28 for trial forthwith. January 11 was a Friday. The case reached Department 28 on Tuesday, January 15, the next court day available after January 11, as the court was concluding a case, and it asked everyone to return on the 16th for trial.

14 The majority cites the recently decided *People v. Butler* (Dec. 10, 2009, S068230) ___ Cal.4th ___ [2009 Cal. Lexis 12407] to support its position. *Butler*, however, stands in marked contrast and involves the termination of *Faretta* rights after a defendant requested the right to represent himself in a timely manner and had been pro se for over a year, and again in a timely manner renewed his motion and was again granted *Faretta* rights that the court later improperly terminated due to jail restrictions. The Supreme Court held that when a motion to proceed pro se is timely interposed, the trial court must permit a defendant to represent himself after ascertaining he has voluntarily and intelligently done so. (*Butler, supra,* at p. *18].) The *Faretta* inquiry regarding the risks, detriments, and pitfalls of self-representation to determine a knowing

review this case to clarify what is meant by "the commencement of trial" for *Faretta* purposes.[15] When a case is in a trial department where it will trail until defense counsel completes another trailing case that has priority and pretrial motions are set, has trial commenced so that the court can exercise its discretion in granting or denying a *Faretta* motion? Should the happenstance of unknown, subsequent developments that ultimately cause the scheduled case to be continued be considered on review? In the interest of justice, it is respectfully requested that the Supreme Court grant review of this case.[16]

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Marchiano, P.J.

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and voluntary waiver of right to counsel in favor of self-representation is not implicated here where defendant waited until the case was proceeding to trial and then asked for self-representation coupled with a need for a four- to five-month continuance.

15 See footnote 8.

16 Because of the contrasting, divergent perceptions of the majority opinion and the dissent, attached as an appendix is a copy of the January 16, 2008 transcript so that the reader can see what actually transpired.

Double Click to View Appendix.

APPENDIX

ORIGINAL

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT A121839

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PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

CHARLES FAULKEY,

Defendant/Appellant.

Appellate No.
San Francisco Co. No. 2242162

ON APPEAL FROM THE JUDGMENT
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE HONORABLE CAROL YAGGY, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

January 16, 2008

Volume 3

Pages 23 to 44

JAN 14 2008

FILED
San Francisco County Superior Court

JAN 16 2008

GORDON PARK-LI, Clerk

By _____, Deputy Clerk
DEPT _____

Reported by: Joanne M. Farrell, CSR No. 4858, RPR, CRR
Official Court Reporter