No._____

In the
Supreme Court of the United States

RANDALL PIERCE, Petitioner

v.

STUART SHERMAN Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

VOLUME OF APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A
DENIAL OF PETITION FOR REHEARING

FILED

MAR 4 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDALL PIERCE, Petitioner-Appellant, v. STUART SHERMAN, Warden, Respondent-Appellee.	No. 17-15539 D.C. No. 5:15-cv-05568-LHK Northern District of California, San Jose ORDER

Before: CLIFTON and FRIEDLAND, Circuit Judges, and ADELMAN,* District Judge.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Friedland has voted to deny the petition for rehearing en banc. Judge Clifton and Judge Adelman recommend denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

* The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

APPENDIX B
MEMORANDUM OPINION OF NINTH CIRCUIT

NOT FOR PUBLICATION

FILED

JAN 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANDALL PIERCE, Petitioner-Appellant, v. STUART SHERMAN, Warden, Respondent-Appellee.	No. 17-15539 D.C. No. 5:15-cv-05568-LHK MEMORANDUM *

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

Submitted January 16, 2019**
San Francisco, California

Before: CLIFTON and FRIEDLAND, Circuit Judges, and ADELMAN, District Judge***

Randall Pierce appeals the district court's decision denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

In state court, Pierce was charged with failing to properly register as a sex offender. At his initial appearance, he waived his right to counsel. But the waiver colloquy was defective, in that the court did not advise the petitioner of the nature of the charges against him and the range of penalties he faced. Pierce represented himself at trial, was convicted, and was sentenced to five years and four months' imprisonment. After exhausting his state-court remedies, Pierce filed his federal habeas petition, alleging that he did not knowingly and intelligently waive his Sixth Amendment right to counsel. The district court denied the petition, holding that although the waiver colloquy was defective, the petitioner had not carried his burden to prove that, at the time of the waiver, he did not know the nature of the charges against him or the range of penalties he faced. "[I]n a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel." *Iowa v. Tovar*, 541 U.S. 77, 92 (2004); *see also Cordova v. Baca*, 346 F.3d 924, 926 (9th Cir. 2003) (recognizing that inadequate waiver colloquy does not automatically invalidate the waiver).

On appeal, Pierce does not argue that, in the district court, he carried his burden to show that he did not know the nature of the charges against him or the

range of penalties he faced.[1] Instead, he argues that the district court improperly dismissed his habeas petition based on a pleading defect without granting him an opportunity to amend his petition, even though he failed to request leave to amend. But Pierce misunderstands the district court's order. The court did not *dismiss* the petition based on a pleading defect. It *denied* the petition after considering the entire record. That is, the court considered the petition, the attached brief and other supporting materials, the respondent's answer, the respondent's brief, and the state-court record, and then concluded that Pierce had failed to point to any allegations or evidence suggesting that his waiver was not knowing and intelligent. Because a district court is generally prohibited from holding evidentiary hearings in habeas cases and must usually decide them based on the state-court record, *see, e.g.*, 28 U.S.C. § 2254(e); *Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014), habeas cases are almost always decided based on the briefs and other papers. *See also* Rule 8(a), Rules Governing § 2254 Cases ("If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court

[1] Pierce does argue that he satisfied his burden to prove that the waiver colloquy was defective, but, as already noted, a defective waiver colloquy will not automatically invalidate the waiver. *See Cordova*, 346 F.3d at 926. Pierce also argues that he alleged in the district court that the record did not demonstrate that his waiver was knowing and intelligent. But, as noted, on collateral review, it is the petitioner who bears the burden of demonstrating that his waiver was *not* knowing and intelligent. So Pierce could not obtain habeas relief by proving only that the state had not shown that his waiver was knowing and intelligent.

proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted."). Here, in resolving this case based on the paper record, the district court fully adjudicated Pierce's claim—it did not dispose of it based on a pleading defect. Therefore, it was not an abuse of discretion to fail to grant Pierce leave to amend where he did not request it.

We also note that the district court gave Pierce an opportunity to refute the respondent's argument that he had not met his burden to prove that his waiver was not knowing and intelligent. Specifically, the court gave Pierce an opportunity to file a reply (which it called a "traverse") to the respondent's answer. Pierce chose not to file a reply, and thus he chose not to respond to the respondent's argument that Pierce had not met his burden of proof. Accordingly, the district court did not act unfairly in adjudicating the petition without granting Pierce a further opportunity to submit allegations or evidence in support of his claim.

AFFIRMED.

APPENDIX ER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 17-15539

RANDALL PIERCE,

Petitioner-Appellant.

v.

STUART SHERMAN, Warden

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of California
D.C. No. 5:15-cv-05568-LHK
Honorable Lucy H. Koh
United States District Judge

EXCERPT OF RECORD
VOLUME ONE OF ONE

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EXCERPT OF RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RANDALL PIERCE,
Petitioner,

v.

STUART SHERMAN,
Respondent

15-cv-05568-LHK

NOTICE OF APPEAL

Notice is hereby given that RANDALL PIERCE, petitioner in the above named case, appearing *pro se* , hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the petition with prejudice entered on February 13, 2017, Dkt. 47.

Respectfully Submitted,
Randall Pierce

Randall Pierce
pro se appellant

Date: MARCH 3RD, 2017
@ 1700 hours

that he did not understand the right he was giving up); *Chandler v. Blackletter*, No. 06-1777-PK, 2008 WL 4899131, *15 (D. Or. Nov. 10, 2008) (recognizing that the burden rests with petitioner, and concluding that petitioner's "unsupported assertions that he was unaware of the dangers of self-representation" do not satisfy his burden). Based on the record, petitioner has failed to carry his burden of showing that he did not knowingly and intelligently waive his right to counsel.

Accordingly, petitioner is not entitled to habeas relief.

CONCLUSION

The petition for a writ of habeas corpus is DENIED.

Petitioner has shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right [or] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Specifically, a certificate of appealability is granted as to the issue of whether petitioner is entitled to habeas relief on the ground that his waiver of his right to counsel was not knowing and intelligent. Accordingly, a certificate of appealability is GRANTED.

IT IS SO ORDERED.

DATED: 2/13/2017

Lucy H. Koh

LUCY H. KOH
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RANDALL PIERCE,

Petitioner,

v.

STUART SHERMAN, Warden,

Respondent.

Case No. 15-CV-05568 LHK (PR)

JUDGMENT

The court has denied the petition for writ of habeas corpus. Therefore, judgment is entered in favor of respondent. Petitioner shall take nothing by way of his petition. The Clerk shall close the file.

IT IS SO ORDERED.

DATED: 2/13/2017

Lucy H. Koh

LUCY H. KOH
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RANDALL PIERCE,

Petitioner,

v.

STUART SHERMAN, Warden,

Respondent.

Case No. 15-CV-05568 LHK (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; GRANTING CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner raised three claims in his petition. The court dismissed Claims 2 and 3, and ordered respondent to show cause why the petition should not be granted as to Claim 1. Specifically, petitioner alleges that his waiver of his right to counsel was not knowing and intelligent. Respondent has filed an answer. Although given an opportunity, petitioner did not file a traverse. Having reviewed the briefs and the underlying record, the court concludes that

petitioner is not entitled to relief, and DENIES the petition, but GRANTS a certificate of appealability ("COA").

PROCEDURAL HISTORY

On September 28, 2012, petitioner appeared in Superior Court pursuant to a criminal complaint. The commissioner granted petitioner's request to represent himself. Following a preliminary hearing, on October 26, 2012, petitioner was charged by information with willfully violating the Sexual Offender Registration Act (Count 1); failing to register within five working days of moving (Count 2); and failing to register within five days of his birthday (Count 3). The information also alleged four prior convictions. On the prosecutor's motion, the court dismissed Count 1. The court also dismissed one of the prior convictions. After a trial, the jury found petitioner guilty of Counts 2 and 3, and found the remaining allegations of prior convictions to be true. On April 12, 2013, the court sentenced petitioner to a term of five years and four months in state prison.

On January 26, 2015, the California Court of Appeal affirmed. On April 15, 2015, the California Supreme Court denied review. Petitioner filed the instant federal habeas petition on December 4, 2015.

FACTUAL BACKGROUND

On September 28, 2012, a felony complaint was filed against petitioner. CT 1-2. That same day, at petitioner's initial appearance, the following colloquy occurred between the commissioner and petitioner:

THE COURT: Randall Pierce, line 15. He is present in custody. No. He doesn't want a lawyer. Do you have the forms filled out?

[PIERCE]: No, ma'am. Verbal threat.

THE COURT: What?

[PIERCE]: Verbal threat, please.

THE COURT: I can't understand you. What did you say?

[PIERCE]: A verbal threat, *Ferrata* [sic] motion.

THE COURT: All right. So do you want to go pro per in this matter?

[PIERCE]: Yes, ma'am.

THE COURT: Did you fill out the pro per form?

[PIERCE]: No, ma'am.

THE COURT: You need to do that then we will call you back.

[PIERCE]: All right.

THE COURT: Is this a third strike?

[PROSECUTOR]: Yes.

Dkt. No. 36-15 at 5-6. Petitioner then completed and signed the form entitled, "Waiver of Right to Counsel and Order Permitting Appearance in Propria Persona." The form read:

I, the undersigned, understand that I have a right to be represented by a lawyer at all stages of the proceedings and, that if I cannot afford a lawyer, to have the Court appoint one for me at no cost to me.

I understand:

1. I could change my mind and retain a lawyer to represent me or petition the Court for appointment of a lawyer to represent me or to assist with my defense;

2. That no postponement would be permitted at any time during the proceeding for the reason that a lawyer was newly brought into the case;

3. That the Court may and will terminate self-representation if I deliberately engage in serious and obstructionist misconduct before the court or in any proceeding;

4. That the Court considers it a mistake for me not to accept or employ counsel to represent me;

5. That if I am allowed to represent myself, I must follow all legal rules applicable to the trial of any criminal action;

6. That there are numerous dangers and disadvantages to self-representation, including the following:

(a) The law provides for numerous pretrial motions available to defendants, which are of a technical nature, the advantage of which I would lose if allowed to represent myself;

(b) My vocabulary may impede clear communication with the Court and opposing counsel;

(c) Judges will not act on my behalf in asserting objections or in making appropriate motions where ordinarily it is the duty of a lawyer to call such matters to the Court's attention;

(d) The District Attorney will not assist in the defense of the case;

(e) The rules of law are highly technical and will not be set aside because I represent myself;

(f) I may waive constitutional, statutory, and common law rights unknowingly;

(g) If I am in custody, it would be difficult for me to locate witnesses, interview them, prepare [subpoenas], and have them served;

(h) I may, in effect, conduct a defense which is ultimately to my own detriment;

7. That the maximum sentence for the offense is _____;

8. That, in spite of my best efforts, I will not be able to claim afterwards I was inadequately represented by myself.

I have read and fully understand all of the rights and matters set forth above. With all of the above in mind I wish to waive my right to a lawyer and wish to represent myself."

Resp. Ex. 11. Petitioner signed and dated this form. At the end of the form below petitioner's signature was an "order" which stated,

> Whereas Defendant appeared personally in Department 33 of the above-entitled court and moved he be permitted to represent himself in propria persona, without the assistance of counsel, the Court inquired into the Defendant's education and understanding and the Court finds the Defendant has made a knowing and intelligent waiver of counsel and a knowing and intelligent decision to represent himself. The Court allows the Defendant to appear in propria persona.

Id. The commissioner signed and dated the form under the "order." *Id.*

After petitioner completed the form, the following colloquy occurred:

> THE COURT: All right. So let's recall line 15, Randall Pierce. He is present in custody. And do you understand you are representing yourself and all of the consequences on this form?
>
> [PIERCE]: Yes, ma'am.
>
> THE COURT: And you wish to proceed going pro per status?
>
> [PIERCE]: Yes, ma'am.
>
> THE COURT: All right. So I will grant you pro per status. And do you waive formal reading and advice of rights?
>
> [PIERCE]: I do. But I don't waive being arraigned by a commissioner rather than a judge.
>
> THE COURT: So you want to have you arraigned in front of a judge not a commissioner?
>
> [PIERCE]: Yes, ma'am.
>
> THE COURT: All right. We will call down to the presiding judge and get you down there.

Dkt. No. 36-15 at 6. After the presiding judge arrived, the judge confirmed with petitioner that petitioner was representing himself. *Id.* at 7. The Superior Court judge read the charges to petitioner, and petitioner pleaded not guilty. *Id.* at 7-8. Petitioner indicated that he was not going to "waive time," and requested a "speedy trial and discovery." *Id.* at 8.

On October 15, 2012, petitioner represented himself at the preliminary hearing. CT 13-49. During the hearing, petitioner cross-examined a prosecution witness, conducted direct examinations, and asserted objections. *Id.* At the conclusion of the hearing, the Superior Court found probable cause, and ordered petitioner to appear for arraignment. *Id.* at 48. On October 30, 2012, petitioner was arraigned on an information charging him with three counts. CT at 11. Petitioner entered a plea of not guilty to all counts, and denied all special allegations and priors. *Id.*

On December 10, 2012, the parties met for a day-of-trial settlement conference. Dkt. No. 36-15 at 15. Prior to that date, petitioner had met at least twice with the Superior Court judge and the prosecution during pretrial hearings where he had rejected a settlement offer. *Id.* at 18. At the day-of-trial settlement conference, petitioner affirmed that he was still uninterested in the offer, and wanted to proceed to trial. *Id.* However, petitioner requested the trial date be held over. *Id.* at 19. Petitioner stated:

> My position, sir, is that if it is okay, I would like to have Mr. Lorvan for the narrowly defined purpose of assisting me to testify because these new developments, just in week Wednesday and Friday, have caused me to adjust my strategy. I am going to testify now. I wasn't before. [¶] The paperwork I got on Friday caused me to make a radical adjustment in my trial strategy which caused me to testify. I am not the Dalai Lama, sir. I would like somebody to directly examine me, and I would like Mr. Sydney Lorvan to do that. If that

is okay, great. If not, let's start today.

Id. The Superior Court judge confirmed with petitioner that petitioner wanted counsel only for conducting direct and redirect examination of petitioner at trial, and not for the general purpose of advisory counsel for another part of the case. *Id.* at 23. The Superior Court judge then appointed counsel for petitioner for these limited purposes.

On December 18, 2012, the parties re-appeared in the Superior Court to argue the prosecution's in limine motion. For the purpose of the in limine motion, the Superior Court judge suggested, and petitioner agreed, to allow appointed counsel to argue against the prosecution's motion on petitioner's behalf. Dkt. No. 36-8 at 20-31. The Superior Court judge granted in part and denied in part the prosecution's in limine motion. Dkt. No. 36-4 at 90.

Also at the December 18, 2012 in limine hearing, the prosecution summarized that it had offered a deal wherein, if petitioner pleaded guilty to Count 1 and admitted a strike, the prosecution would ask for a 32 month sentence. Dkt. No. 36-8 at 13. The prosecution reminded petitioner that he was facing a maximum sentence of six years without the plea. *Id.* at 13, 54. Petitioner affirmed that he had previously rejected this offer, and continued to do so. *Id.* at 13. The Superior Court judge permitted petitioner to discuss with appointed counsel the terms of the plea offer. *Id.* at 47-48. Ultimately, after discussing the offer with counsel, petitioner rejected the offer and opted for trial. *Id.* In discussing whether petitioner would wear plain clothes instead of jail clothes and wear restraints, petitioner remarked, "I don't need fancy clothes or a highfalutin lawyer. I just got good common horse sense." *Id.* at 74.

The following day, on December 19, 2012, petitioner's trial began. At trial, petitioner

made an opening statement, cross-examined prosecution witnesses, questioned his own witnesses, and made a closing statement. *People v. Pierce*, No. A138870, 2015 WL 325028, at *2 (Cal. App. Jan. 26, 2015). When petitioner took the stand, his appointed counsel conducted the direct examination. *Id.* Ultimately, the jury returned a guilty verdict on all charges. Thereafter, petitioner requested and received several extensions of time, filed a motion for new trial, and made a motion to reduce his sentence under *People v. Romero*, 13 Cal.4th 497 (1996). *Id.*; Dkt. No. 36-14 at 8. At the hearing on petitioner's motion for new trial, the Superior Court judge stated, "I think we've reached the point where I'm almost convinced that you're trying to game the system." Dkt. No. 36-14 at 7. Petitioner was ultimately sentenced to a term of five years and four months. *Pierce*, 2015 WL 325028, at *2.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court

arrives at a conclusion opposite to that reached by [the U.S. Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the U.S. Supreme Court as of the time of the state court decision. *Id.* at 412. Clearly established federal law is defined as "the governing legal principle or principles set forth by the [United States] Supreme Court." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

DISCUSSION

Petitioner's sole claim in his petition for writ of habeas corpus is that his decision to represent himself, and waive his right to counsel, was not knowing and intelligent.

A criminal defendant has a Sixth Amendment right to self-representation. *Faretta v. California*, 422 U.S. 806, 832 (1975). But a defendant's decision to represent himself and waive

the right to counsel must be unequivocal, knowing and intelligent, timely, and not for purposes of securing delay. *Id.* at 835. Consequently, the Sixth Amendment requires that a state trial court, before letting an accused proceed pro se, be assured that he "is made aware of the dangers and disadvantages of self-representation so the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Snook v. Wood*, 89 F.3d 605, 613 (9th Cir. 1996) (quoting *Faretta*, 422 U.S. at 835). It is the criminal defendant's burden to prove that he "did not competently and intelligently waive" his right to the assistance of counsel. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004).

The California Court of Appeal rejected petitioner's claim. The state appellate court identified *Faretta* as the controlling U.S. Supreme Court law. The state appellate court recognized that the failure to give a particular set of advisements or read a script does not necessarily demonstrate that a *Faretta* waiver was inadequate. *Pierce*, 2015 WL 325028, at *3. Rather, the state court noted, that the form that petitioner signed was sufficient to give petitioner notice of the dangers and disadvantages of self-representation, and there was no indication in the record that petitioner did not understand what he was reading and signing. *Id.* at *3-*4. The state court relied on state case law in its analysis, and concluded that although the form did not advise petitioner of the nature of charges or the maximum sentence he faced, the record overall showed that petitioner wanted to waive counsel and understood the risks of doing so. *Id.*

On federal habeas review, this court must ascertain whether the California Court of Appeal's decision was contrary to, or an unreasonable application of, clearly established U.S. Supreme Court law. A review of the U.S. Supreme Court's opinion in *Tovar* and the Ninth

Circuit's opinion in *Arrendondo v. Neven*, 763 F.3d 1122 (9th Cir. 2014), is helpful to this analysis.

In order to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized, the U.S. Supreme Court follows a "pragmatic approach" to the waiver question, "one that asks 'what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage.'" *Tovar*, 541 U.S. at 90 (quoting *Patterson v. Illinois*, 487 U.S. 285, 298 (1988)). "The information a defendant must possess in order to make an intelligent election . . . will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88.

In *Tovar*, the U.S. Supreme Court considered the "extent to which a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation." *Id.* at 81. It answered that the U.S. Constitution only requires that the trial court inform the defendant of the nature of the charges against him; the defendant's right to be counseled regarding the plea; and the range of allowable punishments the defendant faces upon pleading guilty. *Id.* Although not constitutionally mandated, the states are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful. *Id.* at 94; *Lopez v. Thompson*, 202 F.3d 1110, 1117 (9th Cir. 2000) (en banc) (neither the U.S. Constitution nor *Faretta* requires a state court to engage in any particular procedure or specific colloquy with the defendant; a federal habeas court only considers whether the state trial court

made the defendant "aware of the dangers and disadvantages of self-representation") (quoting *Faretta*, 422 U.S. at 835). *Tovar* reaffirmed that, in general, a waiver is knowing and intelligent "if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it." *Tovar*, 541 U.S. at 92 (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original).

Ten years after *Tovar* was issued, the Ninth Circuit reiterated, "No clearly established Supreme Court case law requires trial courts to apprise defendants in any particular form of the risks of proceeding to trial pro se." *Arrendondo*, 763 F.3d at 1130 (rejecting the argument that the U.S. Constitution requires particularized warnings when a defendant seeks to represent himself because it is not supported by established Supreme Court law under 28 U.S.C. § 2254(d)(1)). In *Arrendondo*, the Ninth Circuit considered an appeal from the denial of a federal habeas petition, where petitioner claimed, *inter alia*, that the petitioner's waiver of counsel was invalid. What happened in *Arrendondo* was that, more than eight months after petitioner's arraignment, petitioner requested dismissal of appointed counsel, and wanted to proceed pro se. *Id.* at 1126. The trial court engaged in a colloquy with the petitioner regarding the waiver of counsel, and ultimately granted petitioner's motion and concluded that petitioner waived his right to counsel knowingly and intelligently. *Id.* at 1127. In the federal habeas petition, the petitioner in *Arrendondo* alleged: (1) the trial court failed to ensure that the petitioner was advised of the possible range of punishments prior to accepting the waiver of counsel; and (2) petitioner did not know that he was facing a maximum sentence of life in prison.

In *Arrendondo*, the Ninth Circuit stated that the U.S. Supreme Court had clearly established that a criminal defendant must have a general understanding of the potential penalties he faces before entering into a valid waiver of counsel. *Id.* at 1130. Specifically, the Ninth Circuit reasoned that, at a minimum, the U.S. Supreme Court in *Tovar* clearly established that, before waiving his right to counsel for the purpose of entering a guilty plea, a defendant must be aware "'of the nature of the charges against him, of his right to be counseled regarding his plea, and of *the range of allowable punishments* attendant upon the entry of a guilty plea.'" *Arrendondo*, 763 F.3d at 1131 (emphasis in original) (quoting *Tovar*, 541 U.S. at 81). The Ninth Circuit explained that *Tovar* and *Faretta* complemented each other; *Tovar* required a trial court to ensure that a criminal defendant knows the range of possible punishments before deciding to proceed to trial pro se, while *Faretta* focused instead on ensuring that a criminal defendant knows of the dangers and disadvantages of going to trial without counsel. *Id.* "Taken together, [*Tovar* and *Faretta*] outline the minimum necessary knowledge for a defendant to calculate knowingly and intelligently the risk of proceeding to trial pro se." *Id.* The Ninth Circuit expressly stated that *Tovar*'s requirement that a criminal defendant understand the range of potential punishments prior to a valid waiver of counsel during a guilty plea extends to the trial context, and that to conclude otherwise "would be an unreasonable interpretation of clearly established [U.S.] Supreme Court law." *Id.* at 1132.

Here, both *Tovar* and *Arrendondo* had been decided by the time the California Court of Appeal issued its opinion affirming petitioner's case. The state appellate court identified *Faretta* as the controlling U.S. Supreme Court law, but did not mention *Tovar*. It concluded that even

though petitioner was not given a particular set of advisements, the form that petitioner signed was sufficient to give petitioner notice of the dangers and disadvantages of self-representation, and there was no indication in the record that petitioner did not understand what he was reading and signing. *Pierce*, 2015 WL 325028, at *3-*4. The state court rejected petitioner's claim and concluded that although the form did not advise petitioner of the nature of charges or the maximum sentence he faced, the overall record showed that petitioner wanted to waive counsel and understood the risks of doing so. *Id.*

The Ninth Circuit in *Arrendondo* plainly stated, "*Tovar*'s statement concerning the defendant's knowledge of possible punishments is clearly established Supreme Court law, and was at the time of the Court's decision on the merits." *Arrendondo*, 763 F.3d at 1132; *see id.* at 1130 ("The Supreme Court has clearly established that a defendant must have a general understanding of the potential penalties of conviction before waiving counsel to render that waiver valid."). The Ninth Circuit interpreted *Tovar* to require that before any waiver of counsel could be found knowing and intelligent, a criminal defendant must know the nature of the charges against him, his right to be counseled regarding his plea, and the range of allowable punishments. The Ninth Circuit in *Arrendondo* reasoned that the *Tovar* requirements were just as applicable in the trial context, and that to find otherwise would be "an unreasonable interpretation" of clearly established law.

A review of other circuit cases shows that no other circuit has extended *Tovar* to form a similar conclusion. Rather, other circuits limit *Tovar*'s three-warning requirement to waivers invoked at the time of a guilty plea. *See, e.g.*, *Spates v. Clarke*, No. 13-6358, 547 Fed. Appx. 289,

294 (4th Cir. 2013) (per curiam) (specifically limiting *Tovar*'s requirements to the context of a guilty plea) (unpublished memorandum disposition); *Page v. Burger*, 406 F.3d 489, 494-95 (8th Cir. 2005) (recognizing a waiver of counsel to be valid if defendant is "made aware of the dangers and disadvantages of self-representation" at the time of the waiver, and specifying that with regard to a guilty plea, the constitution requires the defendant be made aware of the nature of charges, the right to be counseled regarding plea, and the range of allowable punishments) (emphasis added).

Indeed, in the Ninth Circuit's concurrence in *Arrendondo*, Judge Fernandez noted his reluctance to rule on issues unnecessary to the decision, and specifically found that the opinion's discussion and conclusion that "any *Tovar* requirement must apply in the trial context (whatever that means for the whole period from the beginning of a case to its termination) is especially unnecessary and problematic." *Arrendondo*, 763 F.3d at 1141.

This court is aware that "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,' 28 U.S.C. § 2254(d)(1)," and it "therefore cannot form the basis for habeas relief under AEDPA." *Parker v. Matthews*, 132 S. Ct 2148, 2155 (2012). Furthermore, circuit precedent may not be used to "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013). But circuit decisions, such as *Arrendondo*, may still be relevant as persuasive authority to determine whether a particular state court holding is an "unreasonable application" of Supreme Court precedent or to assess what law is "clearly established." *Clark v. Murphy*, 331 F.3d 1062, 1070-71 (9th Cir. 2003).

Here, the Ninth Circuit in *Arrendondo* expressly stated that the failure to extend *Tovar*'s

requirement that a criminal defendant be aware of the range of possible punishments when the waiver of the right to counsel is invoked in the trial context is an unreasonable interpretation of clearly established U.S. Supreme Court law. This court is bound by the law of the Ninth Circuit. *See, e.g.*, *Day v. Apoliona*, 496 F.3d 1027, 1031 (9th Cir. 2007) (district courts are bound by circuit authority unless there is clearly irreconcilable intervening Supreme Court authority); *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981) ("District courts are bound by the law of their own circuit."). As such, the court finds that the state appellate court's decision was contrary to, or an unreasonable application of, the clearly established U.S. Supreme Court law in *Tovar*. *See* 28 U.S.C. § 2254(d)(1).

Because the state court's error satisfies Section 2254(d)(1), this court now reviews petitioner's claim de novo. *See Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (per curiam) ("we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised.").

Ultimately, fatal to petitioner's claim is his failure to plead or prove that he did not knowingly and intelligently waive his right to counsel. It is well-established that "[w]hen collaterally attacked, the judgment of a court carries with it a presumption of regularity." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). Here, the issue of whether petitioner validly waived his right to counsel is not determined in a vacuum without regard to the proof required to be shown. Where, as here, "a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon

him to establish that he did not competently and intelligently waive his constitutional right to assistance of [c]ounsel" *Id.* at 468-69; *Tovar*, 541 U.S. at 92-93; *cf. People v. Barlow*, 103 Cal. App. 3d 351, 370 (1980) ("That is right; in any collateral attack on the judgment the burden is on the [petitioner] to demonstrate unconstitutional deprivation."). Petitioner must meet this burden by a preponderance of the evidence. *See Johnson*, 304 U.S. at 469.

Petitioner has not done so. In his federal petition, petitioner merely writes, "Perfunctory Faretta. Please see the legal briefs inclusive herewith." Dkt. No. 1 at 6. Petitioner attached his "legal briefs" to the petition.[1] Those "legal briefs" include his opening brief to the California Court of Appeal, as well as his petition for review to the California Supreme Court. Dkt. Nos. 1-1 at 1-26; 1-6 at 3-12; 1-8 at 3-15. Both briefs were prepared and filed by counsel. In those briefs, counsel for petitioner argued that the record "fail[ed] to demonstrate that [petitioner] knowingly

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[1] The court notes that in the California Court of Appeal, petitioner also raised a claim that the trial court failed to re-advise him of his right to counsel after the preliminary hearing and before trial. Petitioner raised this claim only as a state law claim, did not allege that the failure to re-advise him violated any federal constitutional law, did not raise this claim in the California Supreme Court, and did not raise this claim at all in his federal habeas petition. In the federal petition, petitioner merely stated, "perfunctory *Faretta*" and referred the court to his state court pleadings.

Even assuming that petitioner intended to raise the failure to re-advise him as a federal claim, it is without merit. The Ninth Circuit has stated that in general, a *Faretta* waiver remains in effect throughout the criminal proceedings, unless the circumstances change in a significant way or the waiver was limited. *United States v. Hantzis*, 625 F.3d 575, 580-81 (9th Cir. 2010) (the trial court was not required to conduct a new *Faretta* colloquy at subsequent hearings where, among other things, "there is nothing in the record to suggest that any changes occurred . . . that would have affected [the defendant's] understanding of the charges or penalties against him"). Therefore, "[a] properly conducted *Faretta* colloquy need not be renewed in subsequent proceedings unless intervening events substantially change the circumstances existing at the time of the initial colloquy." *Id.* On this record, there is no indication, and petitioner does not argue, that any intervening event substantially changed petitioner's circumstances after his initial colloquy.

and voluntarily waived his right to counsel," and appeared to place the burden on the prosecution to show that the waiver was valid. Dkt. No. 1-8 at 3.

Petitioner's argument, as set forth in his state court appellate briefs, focuses only on the waiver form, and the lack of an oral colloquy. Petitioner specifically argued that the "advisement by form" was not sufficient to provide a knowing and voluntary waiver, and together, the lack of colloquy and the form failed to inform petitioner of the nature of the charges, the elements of the offenses, any possible defenses, or the possible punishments. In essence, petitioner's argues that the record fails to affirmatively "demonstrate that his purported waiver of counsel was knowing and intelligent." Dkt. No. 1-1 at 18. That is not the focal point of this court's inquiry. Although subtle, petitioner's argument is different from one that asserts he did not know about a particular danger or disadvantage of self-representation before he chose to waive counsel.

In *Tovar*, the U.S. Supreme Court reaffirmed that it is petitioner's "burden to prove that he did not competently and intelligently waive" his right to counsel. *Tovar*, 541 U.S. at 92-93.

> [W]e note that Tovar has never claimed that he did not fully understand the charge or the range of punishment for the crime prior to pleading guilty. Further, he has never "articulate[d] with precision" the additional information counsel could have provided, given the simplicity of the charge. *See Patterson*, 487 U.S. at 294, 108 S.Ct. 2389; *supra*, at 1384. Nor does he assert that he was unaware of his right to be counseled prior to and at his arraignment. Before this Court, he suggests only that he "may have been under the mistaken belief that he had a right to counsel at trial, but not if he was merely going to plead guilty." Brief for Respondent 16 (emphasis added).

Id.

Thus, "the burden of proof rests upon [the defendant] to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel." *Johnson*,

304 U.S. at 468-69. This inquiry should not necessarily evaluate what the trial court said or understood, but must instead look at what petitioner understood. *See United States v. Erskine*, 355 F.3d 1161, 1169-70 (9th Cir. 2004).

Given "the particular facts and circumstances surrounding [this] case," *see Johnson*, 304 U.S., at 464, petitioner does not allege or establish that he in fact did not know the nature of the charges, the disadvantages of self-representation, or the potential range of punishment before waiving his right to counsel. *See Tovar*, 541 U.S. at 92 ("[W]e note that [the petitioner] has never claimed that he did not fully understand the charge or the range of punishment for the crime prior to pleading guilty."); *Erskine*, 355 F.3d at 1170 ("[H]ad [the petitioner] admitted . . . that he had known the maximum penalty all along, this evidence would be relevant to our determination because it would shed light on the state of his understanding at the time of the prior *Faretta* hearing."); *Akins v. Easterling*, 648 F.3d 380, 399 (6th Cir. 2011) (affirming the denial of habeas on *Faretta* claim because petitioner's speculation that something "might have tipped the scales in [his] decisionmaking," or "may [have been] a major factor in the decision to waive the right to counsel" was insufficient to meet petitioner's burden on habeas review).

Here, as in *Tovar*, there is nothing in the record to show, and petitioner does not allege, that he failed to appreciate some consequence arising from his waiver, or that he did not fully understand the nature of his right to counsel; that is, there is nothing to indicate that petitioner did not choose to enter into his waiver "with eyes open." *Faretta*, 422 U.S. at 836. Even with liberal construction of petitioner's petition and attached state briefs, petitioner has never claimed – either in this court or in the state courts – that he was unaware of the range of punishment, the nature of

the charges, or the disadvantages of self-representation. He has never suggested, much less "articulated with precision," what additional information counsel could have provided. *Tovar*, 541 U.S. at 92-93. At no time in petitioner's state court record or in petitioner's federal habeas pleadings, does petitioner attempt to affirmatively demonstrate that the waiver was not knowing or intelligent, as is his burden at this point in the proceedings. *See id.* at 92 ("in a collateral attack on an uncounseled conviction, it is the [petitioner's] burden to prove that he did not competently and intelligently waive his right to the assistance of counsel").

At most, petitioner proffers that if he had counsel, "one can't know whether he might have taken" two previously rejected plea offers, even though he rejected a third with the assistance of counsel, or whether counsel would have been able to negotiate a better offer. Dkt. No. 1-1 at 26. Any speculation that petitioner mentions in his state appellate briefs is wholly insufficient to meet his burden on habeas review, to prove by a preponderance of the evidence that the waiver of counsel was not knowing and intelligent. *See Tovar*, 541 U.S. 92-93; *see, e.g.*, *United States v. Lenihan*, 488 F.3d 1175-77 (9th Cir. 2007); *Akins*, 648 F.3d at, 399 (concluding that the trial judge erred by failing to inform petitioner of the "range of allowable punishments," but because petitioner had the burden to show that he did not know about the range of punishments prior to waiving counsel, habeas relief was not warranted); *Jones v. Walker*, 540 F.3d 1277, 1293-97 (11th Cir. 2008) (affirming the denial of a Section 2254 petition after recognizing that the facts in the record suggested that petitioner's waiver of his right to counsel may not have been made with a full understanding of the dangers of self-representation, but ultimately concluding that petitioner failed to meet his burden by producing no evidence to show by a preponderance of the evidence

that he did not understand the right he was giving up); *Chandler v. Blackletter*, No. 06-1777-PK, 2008 WL 4899131, *15 (D. Or. Nov. 10, 2008) (recognizing that the burden rests with petitioner, and concluding that petitioner's "unsupported assertions that he was unaware of the dangers of self-representation" do not satisfy his burden). Based on the record, petitioner has failed to carry his burden of showing that he did not knowingly and intelligently waive his right to counsel.

Accordingly, petitioner is not entitled to habeas relief.

CONCLUSION

The petition for a writ of habeas corpus is DENIED.

Petitioner has shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right [or] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Specifically, a certificate of appealability is granted as to the issue of whether petitioner is entitled to habeas relief on the ground that his waiver of his right to counsel was not knowing and intelligent. Accordingly, a certificate of appealability is GRANTED.

IT IS SO ORDERED.

DATED: 2/13/2017

Lucy H. Koh

LUCY H. KOH
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

AO 241
(Rev. 01/15)

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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Northern District
Name (under which you were convicted): Randall Pierce	Docket or Case No.: CV 15 5568
Place of Confinement: CSP-Corcoran (SATF)	Prisoner No.: #AP0633 NC (PR)
Petitioner (include the name under which you were convicted) Randall Pierce	Respondent (authorized person having custody of petitioner) v. The People of the State of Calif.
The Attorney General of the State of: California	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
San Mateo Superior Court
So. San Francisco, CA.
(b) Criminal docket or case number (if you know): Not sure

2. (a) Date of the judgment of conviction (if you know): don't know
(b) Date of sentencing: April 12th

3. Length of sentence: 5 yrs and 4 months

4. In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☒ No

5. Identify all crimes of which you were convicted and sentenced in this case:
failure to Register only.

6. (a) What was your plea? (Check one)

☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)
☐ (2) Guilty ☐ (4) Insanity plea

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____ , you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and ____ copies to the Clerk of the United States District Court at this address:

Clerk, United States District Court for
Address
City, State Zip Code

If you want a file-stamped copy of the petition, you must enclose an additional copy of the petition and ask the court to file-stamp it and return it to you.

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

Nothing whatsoever.

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☒ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Appellate

(b) Docket or case number (if you know): not sure

(c) Result: Affirmed

(d) Date of result (if you know): don't know

(e) Citation to the case (if you know): don't know (Unpublished)

(f) Grounds raised:

Please see the elaborate legal documents that are hereby included herewith.

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: California Supreme Court

(2) Docket or case number (if you know): not sure

(3) Result: Petition for review - denied

(4) Date of result (if you know): don't know for sure

(5) Citation to the case (if you know): don't Know

(6) Grounds raised:

Same As Above

(h) Did you file a petition for certiorari in the United States Supreme Court? ☒ Yes ☐ No

If yes, answer the following:

(1) Docket or case number (if you know): don't Know

(2) Result: Still pending

(3) Date of result (if you know): don't Know what to say here.

(4) Citation to the case (if you know): Same As Above

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes ☒ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes ☐ No

(7) Result: Oral Arguement

(8) Date of result (if you know): don't Really Know.

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: N/A

(8) Date of result (if you know): N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☒ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Perfunctory FARETTA

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Please see the legAl briefs inclusive herewith.

(b) If you did not exhaust your state remedies on Ground One, explain why:

Did exhast All state Remedies (Please see the voluminous legAl briefs included Herewith.

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

Did Raise it.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Appellate Court, San Francisco, Ca.

Docket or case number (if you know): don't Know

Date of the court's decision: can't Remember Right now.

Result (attach a copy of the court's opinion or order, if available): Already included herewith - Please the exhibits.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: formal complaint with the State commission of Judicial Performance; Letter to the Grand jury.

GROUND TWO:

CAN A Peace Officer be A witness & bailiff

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The prosecutions star witness had A dual role in the trial --- Not just A witness but also AS assistant, (Part time) Guardian, shepard and Jury Usher - All in the same courtroom!

(b) If you did not exhaust your state remedies on Ground Two, explain why: N/A

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: 1181. Motion for A new trial.

Name and location of the court where the motion or petition was filed: Superior Court of San Mateo So. San Francisco, CA

Docket or case number (if you know): don't know

Date of the court's decision: April 12th (I think)

See • Turner v. Louisiana AND • Mattox v United States

Result (attach a copy of the court's opinion or order, if available): Please see the voluminAS documentation, that are ALREADY Inclusive herewith.

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: SAN MATEO Superior Court - So. SAN FRANCISO, CA.

Docket or case number (if you know): don't know either

Date of the court's decision: I think it was April 12th

Result (attach a copy of the court's opinion or order, if available):

SAME AS ABOVE

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : 832.5 (California Penal Code) *RE: State Personnel Board

GROUND THREE:

CAN A gravelly disabled person Be ALLOWED to Represent ONESELF IN A COURT of LAW for ANY REASON WhatsOEVER!! (See Edwards VS. INDIANA

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why: N/A

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:
I Am not completely sure what to say about this part.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?
☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: ORAL ARGUEMENTS

Name and location of the court where the motion or petition was filed:
Appellate Court, San Francisco, CA.

Docket or case number (if you know): Not sure.

Date of the court's decision: don't Remember

Result (attach a copy of the court's opinion or order, if available):
denied & Affirmed

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: I Am getting very confused

Docket or case number (if you know): don't Know

Date of the court's decision: don't know

Result (attach a copy of the court's opinion or order, if available):
Just as before — please take A close look @ the legal BRIEFS that ARE Already inclusive herewith.
THANK You!

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

1181. CA. PENAL Code section

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) If you did not exhaust your state remedies on Ground Four, explain why:

N/A

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No N/A

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

N/A

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

NO.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☒ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

Certificate/Writ of Certiorari in the United States Supreme Court - Washington, D.C.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☒ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

Writ of Certiorari in the Supreme Court of the United States of America. (Still pending)

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: PRO PER (RANDALL PIERCE)

(b) At arraignment and plea: PRO PER

(c) At trial: SAME AS ABOVE (PRO PER)

(d) At sentencing: SAME AS ABOVE (PRO PER)

(e) On appeal: MATT WILSON, 17 Bird Street SAN FRANCISCO, CA.

(f) In any post-conviction proceeding: SAME AS ABOVE

(g) On appeal from any ruling against you in a post-conviction proceeding: MATT WILSON

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No N/A

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

This petition is timely - just like everything giving RISE To these moving papers AS well.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: Undertake A fearless, REVIEW OF Whole CASE -- AND then show CAUSE, Reverse AND REMAND.

or any other relief to which petitioner may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on Nov. 26th 2015 (month, date, year).

@1600 hours (Thanksgiving day)

Executed (signed) on 26 Nov. 15 (date).

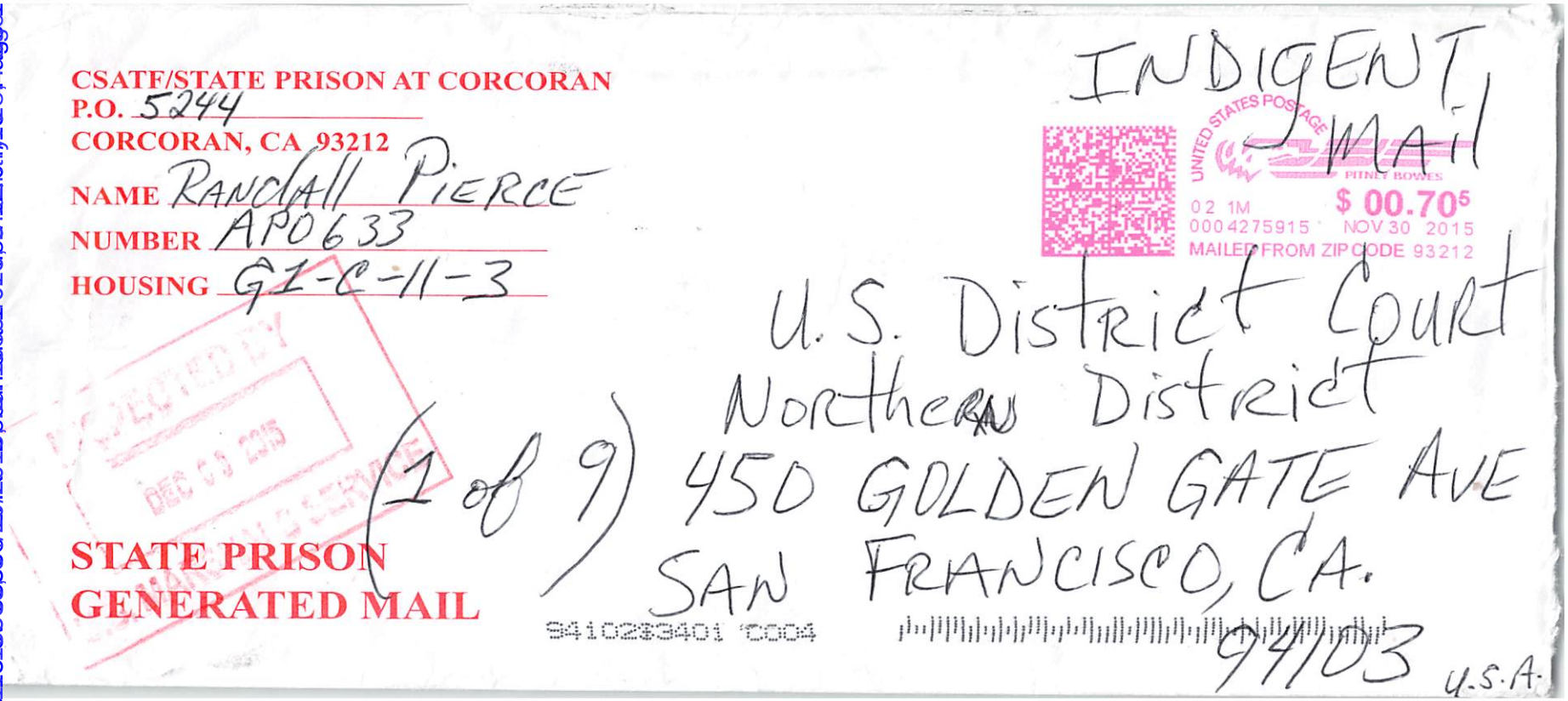
Respectfully submitted,

Randall Pierce

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

N/A



CSATF/STATE PRISON AT CORCORAN
P.O. 5244
CORCORAN, CA 93212
NAME Randall Pierce
NUMBER AP0633
HOUSING G1-C-11-3

INDIGENT MAIL

UNITED STATES POSTAGE PITNEY BOWES
02 1M $ 00.70⁵
0004275915 NOV 30 2015
MAILED FROM ZIP CODE 93212

U.S. District Court
Northern District
(1 of 9) 450 GOLDEN GATE AVE
SAN FRANCISCO, CA.
94103

RECEIVED DEC 09 2015 CLERK, U.S. DISTRICT COURT

STATE PRISON
GENERATED MAIL

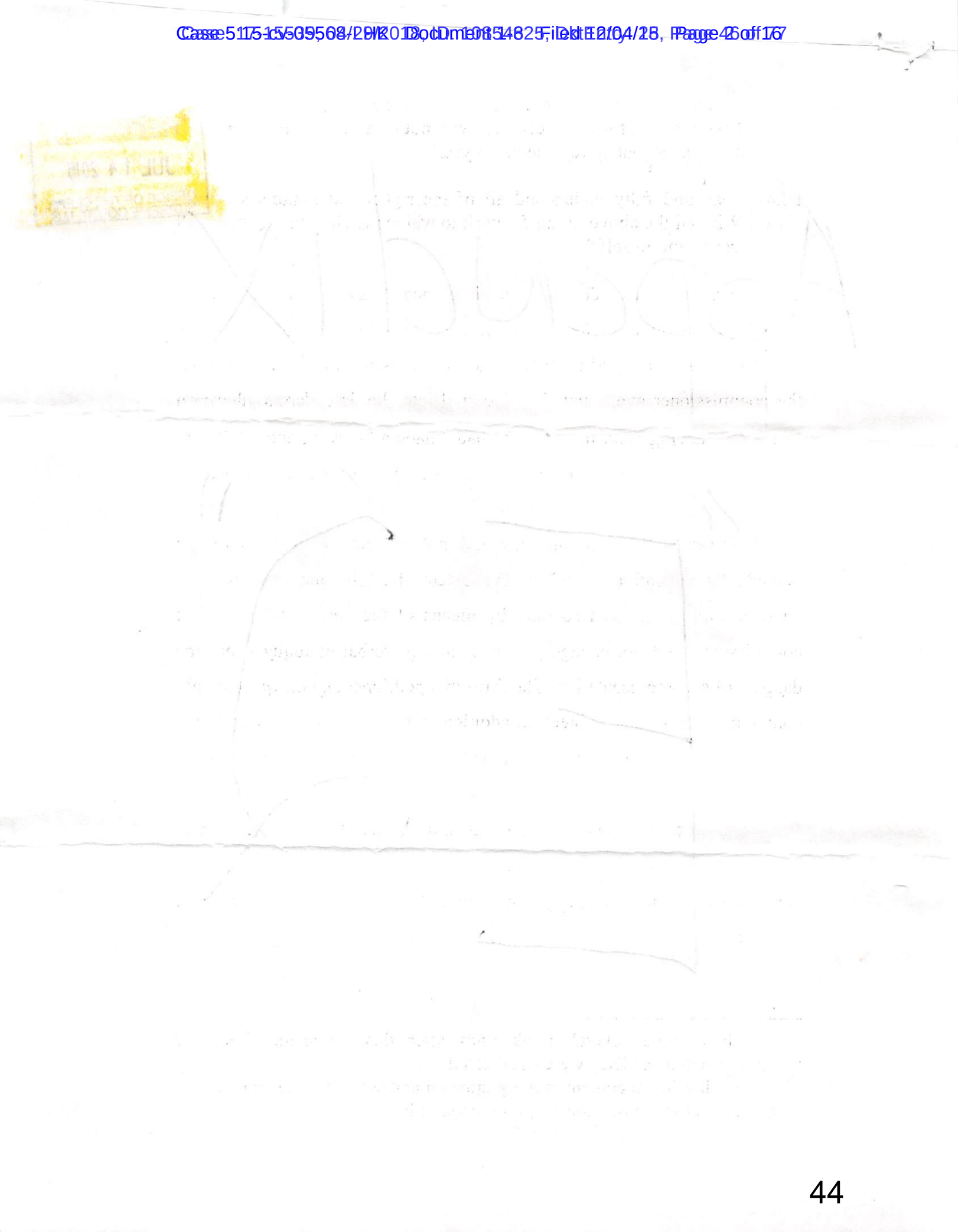
941023401 C004

U.S.A.

C.O. Please tape
Thank You!

Appendix

"E"



7. That the maximum sentence for this offense is _____[9]
8. That in spite of my best efforts, I will not be able to claim afterwards that I inadequately represented myself.

I have read and fully understand all of the rights and matters set forth above. With all the above in mind I wish to waive my right to a lawyer and wish to represent myself."

The document is then dated in pencil or pen "9/24/12" and apparently signed by petitioner. After that, there is an "ORDER" in which the commissioner grants petitioner the right to represent himself. In the order the commissioner avers that she "inquired into the defendant's education and understanding" and finds that he had "made a knowing and intelligent waiver of counsel and a knowing and intelligent decision to represent himself."[10]

However, the commissioner did not in fact "inquire[] into the defendant's education." And to the extent that she inquired into his "understanding," she did so only by means of the "pro per form." The commissioner did not engage petitioner in *any* verbal colloquy about the dangers of self-representation. The form that petitioner signed was the only communication on that subject. In addition, petitioner was never cautioned in any subsequent proceedings, such as the preliminary hearing or the trial, about the risks involved in self-representation.

In this argument, petitioner maintains that the admonitions he received by way of that form, combined with the remaining record, fail to demonstrate that he knowingly and voluntarily waived his right to counsel for the preliminary hearing and all the subsequent proceedings.

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[9] There were several blank lines after this statement about the maximum sentence. They were not filled in.

[10] Again, this document is not paginated and was not made part of the clerk's transcript, so petitioner has not cited to it.

- *The relevant law.*

Just as a defendant has a constitutional right to the assistance of an attorney, the sixth amendment also guarantees that defendant the right to self-representation. (*Faretta v. California, supra.*) But before a court can allow a defendant to represent himself or herself, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes wide open." (*Id.*, at p. 835, internal citations omitted.) Thus, a trial court must first satisfy itself that any waiver of counsel is a knowing and intelligent one. (*Id.*, at p. 807.)

But how does an appellate court determine that a purported waiver of counsel is knowing and intelligent? First of all, it should be noted that the trial court judge should be highly suspicious of a defendant's offer to forgo counsel. "Courts [will] indulge every reasonable presumption against waiver of fundamental constitutional rights." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) And to establish a *valid* waiver, the court must approach each case individually. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." (*Ibid.*) However, the trial court must make certain that the accused understands the full ramifications of the choice to proceed without an attorney. To that end, the court must conduct an extensive colloquy with the defendant, so that the he or she understands the nature of the charges and possible punishments, the possible defenses, and mitigating factors.

> "A judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's

> responsibility. To be valid such waiver must be made with the apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." (*Von Moltke v. Gillies* (1948) 332 U.S. 708, 723-724.)

(See also: *People v. Bautista* (1970) 6 Cal.App.3d 344, 352; *In re James* (1952) 38 Cal.2d 302, 313 – holding that in order to ascertain whether a purported waiver of counsel is valid, the trial court must determine that the defendant understands the nature of the charges, the elements of the offenses, the possible pleas and defenses to the charges, and the possible punishment on conviction. See also: *United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167 – holding that the defendant must be made aware of the nature of the charges, the possible penalties, and the dangers and disadvantages of self-representation.)

This Court has also articulated another suggested set of advisements that are mostly intended to impress upon the defendant how unwise it probably is for her or him to opt for self-representation. Thus, a defendant seeking self-representation should also be told that: (a) self-representation is almost always unwise and the defendant may conduct a defense ultimately to her/his own detriment; (b) that the defendant will receive no special indulgence by the court and is required to follow all the technical rules of substantive law, criminal procedure and evidence in making motions and objections, presenting evidence and argument, and conducting voir dire; (c) that the prosecution will be represented by a trained professional who will give the defendant no quarter on account of his lack of skill and experience; and (d) that the defendant will receive no more

library privileges than those available to any other self-represented defendant, or any additional time to prepare. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070-1071, citing *People v. Lopez* (1977) 71 Cal.App.3d 568, 572-574.) In addition, the *Koontz* court recommended that trial judges inquire into the defendant's education and familiarity with legal procedures, suggesting a psychiatric examination in questionable cases. Further, the trial court should probe into the defendant's understanding of the alternative to self-representation, i.e., the right to counsel, including court-appointed counsel at no cost to the defendant, and exploring the nature of the proceedings, potential defenses and potential punishments. Also, the defendant should be advised that in the event of misbehavior or disruption, his or her self-representation may be terminated. Finally, the defendant should be told that in spite of his or her best (or worst) efforts, the defendant cannot afterwards claim inadequacy of representation. (*People v. Koontz, supra*, at p. 1071, citing *People v. Lopez, supra*.)

The issue for the trial court is not how wise or unwise the decision to represent oneself is. Instead, the issue is whether the decision to proceed *pro se* is voluntary and intelligent. (*People v. Joseph* (1983) 34 Cal.3d 936, 943.) Thus, the defendant needn't be competent as a lawyer. He or she must only be competent enough to waive the right to a lawyer. (*Godinez v. Moran* (1993) 509 U.S. 389, 399.) "A criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." (*Id.*, at p. 400, emphasis in original.)

Even though a defendant should be made aware of the dangers and disadvantages of self-representation, the test on appeal is not whether specific warnings or advisements were given. (There is no "prescribed [] formula or script to be read to a defendant who states that he elects to proceed without counsel." (*Iowa v. Tovar* (2004) 541 U.S. 77, 88).) Rather, a reviewing court will look to the record as a whole to see if it demonstrates

that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225. See also, *People v. Koontz, supra* 27 Cal.4th at p. 1070.) However, it is through the colloquy in which the court advises the defendant about the dangers of self-representation and the other aspects of the case that a reviewing court can best determine whether the waiver of counsel was intelligent and knowing. (*United States v. Erskine, supra.*)

- *Why the advisements here were deficient.*

Petitioner contends that the record in this case fails to demonstrate that his purported waiver of counsel was knowing and intelligent. First off, it is important to note that the *only* mention of waiving counsel occurred before the preliminary hearing, when petitioner was arraigned on the original complaint. There was no subsequent colloquy and no subsequent waiver forms about self-representation after the information had been filed. Yet California law requires that a defendant must be advised of the right to counsel on at least two occasions before the trial begins – once when the defendant is brought before the magistrate on the complaint, and next when that defendant is arraigned in the superior court on the information. (Pen. Code, §§ 859/987; *People v. Crayton* (2002) 28 Cal.4th 346, 360-361.) Presumably, this requirement is to ensure that the defendant does in fact fully understand the right to counsel. And it is equally clear that petitioner in this case did not receive that statutorily required, "extra" advisement. Moreover, the form petitioner apparently signed failed to designate what proceedings the waiver of counsel applied to.

But even if the waiver form could be understood to refer to a waiver of counsel at both the preliminary hearing and the subsequent trial, it is clear that this "advisement by form" was deficient. The cases discussing self-representation contemplate a meaningful colloquy between the court

and the defendant. *Koontz* discusses the "advisements and inquiries" a court should make. (*People v. Koontz, supra.*) *Von Moltke* stresses that "[a] judge must investigate as long and as thoroughly as the circumstances of the case before him demand," before granting as defendant the right to self-representation. (*Von Moltke v. Gillies, supra*, 332 U.S. at p. 723.) In *Patterson v. Illinois* (1988) 487 U.S. 285, the court stressed that the warnings about the dangers of self-representation must be "rigorousl[y] conveyed." (*Id.*, at p. 298.) And in *Fowler v. Collins* (6th Cir. 2001) 253 F.3d 244, 249, the court noted that "a judge must thoroughly investigate the circumstances under which the waiver [of counsel] is made."

Here, there was *absolutely no colloquy of any kind*, and no oral reference whatsoever to the rights petitioner apparently gave up by signing the form. And while the form did enumerate many of the warnings mentioned in *Koontz*, the focus of the form's admonitions was to advise petitioner of the dangers of self-representation. At no point did either the form or the commissioner discuss with petitioner the nature of the charges he was facing, the elements of the offenses, the possible defenses to those charges, or the possible punishments.[11] (*In re James, supra*, *People v. Bautista, supra*, *United States v. Erskine, supra.*) The complete failure to question petitioner about his desire to represent himself combined with the slapdash nature of the form completion process clearly fails to demonstrate the "penetrating and comprehensive examination of all the circumstances" that is required before a court will allow a particular defendant to waive his or her right to counsel. (*Von Moltke v. Gillies, supra.*) Thus, there can be

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[11] Once again, while the form had a place where the court might have filled in what the possible maximum sentence would be, that spot was left blank. And while in the order granting petitioner the right to represent himself the commissioner averred that she had "inquired into the defendant's education and understanding," in fact she did not.

little question that the trial court commissioner erred when she failed to question petitioner about his purported desire to waiver counsel.[12]

- *This record fails to show knowing and intelligent waiver.*

The issue on appeal is not whether the court gave any particular advisements. Rather, the issue is whether the record as a whole demonstrates that the waiver of counsel was knowing and intelligent. (*People v. Bloom,* supra.) This inquiry is case specific, and will depend on the particular facts and circumstances pertaining to that case alone. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 546.) But a record that shows a knowing and intelligent waiver will also show that the defendant understands the nature of the charges, the elements of the offenses, the possible defenses, and the potential punishment. (*People v. Bautista, supra*, 6 Cal.App.3d at p. 352.) And for a waiver to be knowing and intelligent [made with "eyes wide open"], a judge must thoroughly investigate the circumstances under which the waiver is made. (*Fowler v. Collins supra*, 253 F.3d at p. 249, citing *Von Moltke v. Gillies, supra.*)

The record in this case fails to make that showing. Again, when the commissioner had petitioner sign the "pro per form" she did not make any inquiries about his understanding of the charges or of what lay ahead. Nor did any judge in any subsequent proceeding ask petitioner about his decision to represent himself. The only inquiries/admonitions were contained in the form that petitioner apparently signed. And again, while

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[12] Petitioner has found a few cases where the respective courts approved the use of forms in the *Faretta* waiver process. But in those cases, unlike this one, the courts accompanied the use of the form with questioning and oral advisements. (*People v. Blair, supra*, 36 Cal.4th at p. 709; *People v. Silfa* (2001) 88 Cal.4th 1311; *People v. Fox* (2014) 224 Cal.App.4th 424, 430-432.) See also, *McCormick v. Adams* (9th Cir. 2010) 621 F.3d 970, where the court found no error because petitioner signed a waiver form *and* because the trial court conducted an extensive colloquy.

the form focused on the inadvisability of self-representation, that was also its entire focus. There was no mention of other critical criteria – the nature of the charges, the elements of the offenses, the possible pleas and defenses to the charges, and the possible punishment on conviction.

Nor does an examination of the rest of the record show that this waiver was knowing and intelligent. Petitioner participated in his trial – he cross-examined the prosecution witnesses; he testified (with questioning by counsel appointed for that purpose); he asked for certain instructions; and he filed a new trial motion and a *Romero* motion. But petitioner also fails to see how this suggests that his waiver of counsel was knowing and intelligent. (The Ninth Circuit, like California courts, looks at the entire record to determine whether a *Faretta* waiver was knowing and intelligent. But the Ninth Circuit also recognizes that the entire record is only likely to make such a showing when "the case involved an unusual fact situation in which the background and experience of the defendant in legal matters was apparent from the record." (*United States v. Keen* (9th Cir. 1996) 96 F.3d 425, 429, internal citations omitted. So even though the defendant in *Keen* had competently argued several motions at his trial, that was irrelevant to the analysis since it did not establish his state of mind at the time he decided to proceed without an attorney. (*Id.*, at p. 430). See also, *United States v. Forrester* (9th Cir. 2007) 512 F.3d 500, 508 – "The mere fact that a criminal defendant has been repeatedly exposed to the legal process and has even represented himself before cannot, without more, suffice to support a finding of a knowing and intelligent waiver."))

But even if this Court were to look at petitioner's performance at trial and his history to determine that the waiver was knowing and intelligent (see *People v. Sullivan, supra,* 151 Cal.App.4th at pp. 551-553), petitioner contends that this does not help in the calculation. He believes that a fair reading of the trial transcript shows that his performance at trial

did not help his case. Moreover, petitioner does not appear to have an extensive educational background or any legal training. (2CT 358.) When arrested, he reported being transient (2CT 356), and the evidence at trial showed that since 2003 he has been living, at least intermittently, at 505 Cypress Avenue, a state supported transitional housing facility. (3RT 168, 172-173; 4RT 194, 206, 239, 246-247.) Petitioner also appears to have severe behavioral/mental health issues. He again reported to the probation officer that he suffers from Tourette's Syndrome, encephalitis, and two varieties of Post Traumatic Stress Syndrome. Finally, he also reported taking a daily "psychotropic cocktail" consisting of 14 pills per day. (2CT 358-359.)

So under either the state or federal standard, petitioner contends that the entire record fails to show that his waiver was knowing and intelligent.

- *People v. Blair, supra, is distinguishable.*

The Court of Appeal relied on *People v. Blair, supra* to find that petitioner's argument had been "foreclosed." (Decision, p. 6.) The appellate court focused on language in *Blair* suggesting that the failure to question a defendant orally about her or his desire for self-representation is not absolutely necessary. But *Blair* is readily distinguishable, most obviously because the court in that case did in fact orally question the defendant, on multiple occasions, about his choice to waive counsel.

In *Blair* there was abundant evidence that that defendant fully understood what he was getting into. Blair was first charged with the attempted murder of Green and Miller. When he sought to represent himself at that trial, the judge "orally quizzed defendant concerning his knowledge of the charges, the possible penalties, and courtroom procedures, warning defendant of the pitfalls of self-representation and informing him he would be 'prosecuted by a professional prosecutor.' The court cautioned defendant: 'How would you like to get into the [boxing]

ring with Joe L[ou]is in his h[e]dey?... That's what you're asking to do.'" (*People v. Blair, supra* 36 Cal.4th at p. 703.) The trial court ultimately granted Blair's request and he represented himself throughout the trial. (*Ibid.*)

Shortly after the convictions were affirmed on appeal, victim Green died and Blair was then charged with Green's murder. When he was arraigned in the municipal court on that new charge, Blair again said he wanted to represent himself. The judge then orally advised Blair that this was not a good idea, and she then had Blair fill out a "Pro Per Advisement Form." (*Ibid.*) Blair completed the form, and the judge again questioned him. She ascertained that he understood that the prosecutor was an experienced attorney who might possibly have an advantage over him. She also made clear that Blair understood that it was probably unwise to represent himself. (*Id.*, at p. 704.) Even so, the court denied Blair's request on the grounds that he had placed X's on the pro per form when he should have initialed that he understood the specific rights he was waiving. (*Ibid.*)

A couple weeks later, Blair appeared before another municipal court judge and he again said that he wanted to represent himself. This judge knew that Blair had represented himself at the earlier trial, and the court granted the request. (*Ibid.*) A couple days after that Blair appeared for the preliminary hearing. (*Ibid.*) Before the hearing started the judge, by way of oral advisement, ascertained that Blair had been advised earlier about the "pain and pitfalls of self-representation and the warnings about it." (*Id.*, at p. 705.) The court then read Blair a statement which included the advisement that Blair had the right to be represented by an attorney at all stages of the proceeding. When Blair again indicated that he understood his rights, the court let him proceed and he did in fact represent himself at the preliminary hearing. (*Ibid.*)

Before the actual murder trial the court again questioned Blair about his desire to represent himself. The judge even stated: "I'm not going to let somebody walk into a death case pro. per. without making very sure that we aren't going to be trying this case again." To that the prosecution replied that there had already been three hearings on the issue, and the court then gave Blair a more extensive "Petition to Proceed in Propria Persona" form to complete. (*Ibid.*) The form covered a number of criteria. Among those factors were an acknowledgment by Blair of the offense with which he was charged and the fact that it was a specific intent crime. In addition, at several places on the form Blair acknowledged that he was facing a possible death sentence. (*Id.*, at pp. 705-706.) And after he completed the form, the court again orally questioned Blair about his decision. Blair stated that he understood that he would not get any "breaks" or help just because he was a layman. He was aware of the saying that "a lawyer who tries his own case has a fool for a client," and understood it to mean that a defendant trying his own case has problems being objective. Finally, after ascertaining that Blair had been represented previously by attorneys and had had troubled relationships each time, and after noting that Blair had represented himself previously in this same case, the court granted his request. (*Id.*, at p. 706-707.)

At the arraignment a few days later, the prosecution said it did in fact intend to seek the death penalty. That caused the court to once again question Blair. The court advised him that "the stakes have gone up quite a bit," and that he "really need[ed] at lawyer." The court warned him that he could very well lose his life. The court tried to get Blair to reconsider, and again warned him that he would get no special consideration and would likely be sentenced to death. (*Id.*, at p. 707.) Later that day, after Blair made a request, the court appointed two attorneys to act as advisory counsel during the trial. (*Id.*, at pp. 707-708.)

So in *Blair*, and unlike this case, there were numerous times where multiple judges had sustained oral colloquies about the inadvisability of self-representation. And by way of the forms and the colloquy before the attempted murder cases, the court knew that the defendant was aware of the charges and the nature of the case he was facing. Petitioner believes there was no similar showing in his case. At no time, either orally or by form, did any entity discuss with petitioner the nature of the charges he faced, the possible penalty on conviction, or the possible defenses. *Blair* is also distinguishable because in that case the two forms defendant completed were more extensive than the one in this case. And of course in *Blair* the defendant had also represented himself previously on essentially the same case. Where he had been tried and convicted of attempted murder the first time, he was tried for murder on the instant case because the attempted murder victim had died.

Thus, in *Blair* there was ample evidence from which this Court could conclude that the entire record showed a knowing and voluntary waiver of counsel. This case stands in marked contrast.

CONCLUSION

For the reasons stated in the foregoing petition, petitioner asks this Court to grant review.

Dated: March 2, 2015

Respectfully submitted,

MATTHEW H. WILSON
Attorney for Petitioner
17 Bird Street
San Francisco, CA 94110
Phone: 415-552-6047
Registration No. 133847

CERTIFICATE OF WORD COUNT

I, Matthew H. Wilson, counsel for petitioner, certify pursuant to the California Rules of Court, that this document contains 6462 words, excluding tables. This document was prepared using Microsoft Word, and the word count was figured using that program. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at San Francisco, California on March 2, 2015.

MATTHEW H. WILSON

Filed 1/26/15 P. v. Pierce CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A138870**

v. **(San Mateo County Super. Ct. No. SC076789A)**

RANDALL BLAINE PIERCE,

Defendant and Appellant.

_____/

At his initial arraignment, appellant Randall Blaine Pierce requested permission to represent himself. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) He completed and signed a form entitled "Waiver of Right to Counsel and Order Permitting Appearance in Propria Persona" advising him of the risks of self-representation. After confirming Pierce understood the consequences of self-representation listed on the form, the court allowed Pierce to represent himself. A jury convicted Pierce of failing to register as a sex offender within five working days of moving (Pen. Code, § 290.011, subd. (b))[1] and failing to register as a sex offender within five working days of his birthday (§ 290.012, subd. (a)) and found true prior conviction allegations. The court sentenced Pierce to state prison.

[1] Unless noted, all further statutory references are to the Penal Code.

Pierce appeals. He contends: (1) the record fails to demonstrate he knowingly and intelligently waived his right to counsel; and (2) the court failed to readvise him of his right to counsel after the preliminary hearing and obtain a new waiver of counsel as required by sections 859 and 987. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The People charged Pierce with willfully failing to register as a sex offender. (§ 290.011.) At his initial arraignment, the following colloquy occurred between the commissioner and Pierce:

"THE COURT: Randall Pierce, line 15. He is present in custody. No. He doesn't want a lawyer. Do you have the forms filled out?

"[PIERCE]: No, ma'am. Verbal threat.

"THE COURT: What?

"[PIERCE]: Verbal threat, please.

"THE COURT: I can't understand you. What did you say?

"[PIERCE]: A verbal threat, *Ferrata* [*sic*] motion.

"THE COURT: All right. So do you want to go pro per in this matter?

"[PIERCE]: Yes, ma'am.

"THE COURT: Did you fill out the pro per form?

"[PIERCE]: No, ma'am.

"THE COURT: You need to do that then we will call you back.

"[PIERCE]: All right.

"THE COURT: Is this a third strike?

"[PROSECUTOR]: Yes.

"(Whereupon, the matter was passed.)"[2]

Pierce completed and signed the form entitled "Waiver of Right to Counsel and

[2] The commissioner's abrupt "No" at the beginning of the initial arraignment suggests the commissioner and Pierce may have had a discussion, on or off the record, before the transcribed proceedings.

Order Permitting Appearance in Propria Persona."[3] By signing the form, Pierce agreed he read it, and understood: (1) he was entitled to an attorney at all stages of the proceedings; (2) he could change his mind and request a lawyer; (3) the court considered it a mistake for him to represent himself; and (4) there were "numerous dangers and disadvantages to self-representation[.]" The space for "the maximum sentence for the offense" was left blank.

After Pierce completed the form, the following colloquy occurred:

---

[3] The form provided: "I, the undersigned, understand that I have a right to be represented by a lawyer at all stages of the proceedings and, that if I cannot afford a lawyer, to have the Court appoint one for me at no cost to me. I understand: [¶] 1. I could change my mind and retain a lawyer to represent me or petition the Court for appointment of a lawyer to represent me or to assist with my defense; [¶] 2. That no postponement would be permitted at any time during the proceeding for the reason that a lawyer was newly brought into the case; [¶] 3. That the Court may and will terminate self-representation if I deliberately engage in serious and obstructionist misconduct before the court or in any proceeding; [¶] 4. That the Court considers it a mistake for me not to accept or employ counsel to represent me; [¶] 5. That if I am allowed to represent myself, I must follow all legal rules applicable to the trial of any criminal action; [¶] 6. That there are numerous dangers and disadvantages to self-representation, including the following: [¶] (a) The law provides for numerous pretrial motions available to defendants, which are of a technical nature, the advantage of which I would lose if allowed to represent myself; [¶] (b) My vocabulary may impede clear communication with the Court and opposing counsel; [¶] (c) Judges will not act on my behalf in asserting objections or in making appropriate motions where ordinarily it is the duty of a lawyer to call such matters to the Court's attention; [¶] (d) The District Attorney will not assist in the defense of the case; [¶] (e) The rules of law are highly technical and will not be set aside because I represent myself; [¶] (f) I may waive constitutional, statutory, and common law rights unknowingly; [¶] (g) If I am in custody, it would be difficult for me to locate witnesses, interview them, prepare [subpoenas], and have them served; [¶] (h) I may, in effect, conduct a defense which is ultimately to my own detriment; [¶] 7. That the maximum sentence for the offense is _____ [¶] 8. That, in spite of my best efforts, I will not be able to claim afterwards I was inadequately represented by myself. [¶] I have read and fully understand all of the rights and matters set forth above. With all of the above in mind I wish to waive my right to a lawyer and wish to represent myself."

"THE COURT: All right. So let's recall line 15, Randall Pierce. He is present in custody. And do you understand you are representing yourself and all of the consequences on this form?

"[PIERCE]: Yes, ma'am.

"THE COURT: And you wish to proceed going pro per status?

"[PIERCE]: Yes, ma'am.

"THE COURT: All right. So I will grant you pro per status. And do you waive formal reading and advice of rights?

"[PIERCE]: I do. But I don't waive being arraigned by a commissioner rather than a judge."

The commissioner signed an order stating: "Whereas Defendant appeared personally in Department 33 of the above-entitled court and moved he be permitted to represent himself in propria persona, without the assistance of counsel, the Court inquired into the defendant's education and understanding and the Court finds the Defendant has made a knowing and intelligent waiver of counsel and a knowing and intelligent decision to represent himself. The Court allows the Defendant to appear in propria persona."

A judge entered the courtroom and asked, "Mr. Pierce, you are representing yourself?" Pierce replied, "Yes, sir." The court read the charges and Pierce pled not guilty. Pierce requested a "[s]peedy trial and discovery[.]" The prosecution amended the complaint and Pierce represented himself at the preliminary hearing, where he cross-examined a prosecution witness, conducted direct examination, and asserted objections. At the conclusion of the preliminary hearing, the court held Pierce to answer the charges. The prosecution filed an information and Pierce was arraigned.

At a pretrial hearing, Pierce confirmed he had represented himself since his arraignment and "want[ed] that to continue." He requested an attorney for the "narrowly defined purpose" of helping him testify at trial. The court granted the request and confirmed Pierce wanted to continue representing himself. Pierce represented himself at a motion in limine hearing, where the parties discussed Pierce's maximum sentence and the prosecution's plea offer. Pierce rejected the plea offer, made a motion in limine, and

objected to certain evidence offered by the prosecution. The court confirmed Pierce had chosen "to represent himself" and observed, "you have obviously proven to a judicial officer that you're capable of representing yourself." Pierce remarked, "I don't need fancy clothes or a highfalutin lawyer."

At trial, Pierce cross-examined prosecution witnesses and questioned two defense witnesses. He made an opening statement, testified in his defense (with his advisory attorney conducting questioning), and made a closing argument. A jury convicted Pierce of failing to register as a sex offender within five working days of moving (§ 290.011, subd. (b)) and failing to register as a sex offender within five working days of his birthday (§ 290.012, subd. (a)) and found true various prior conviction allegations. The court denied Pierce's new trial and *Romero* motions[4] and sentenced him to five years and four months in state prison.

DISCUSSION

I.

Pierce Knowingly and Intelligently Waived His Right to Counsel

Pierce contends the court erred by permitting him to represent himself pursuant to *Faretta, supra,* 422 U.S. 806, because the "record fails to show that he knowingly and intelligently waived" his right to counsel. "A criminal defendant has a right, under the Sixth Amendment to the federal Constitution, to conduct his own defense, provided that he knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel. [Citations.] A defendant seeking to represent himself 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [Citation].' [Citation.] 'No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation.' [Citation.] Rather, 'the test is whether the record as a whole demonstrates that the defendant understood the

[4] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court also denied Pierce's motion for compulsory process and a section 1181 hearing, and several habeas corpus petitions. At the hearing on Pierce's new trial motion, the court observed "I think we reached the point where I'm almost convinced that you're trying to game the system."

disadvantages of self-representation, including the risks and complexities of the particular case.' [Citations.]" (*People v. Blair* (2005) 36 Cal.4th 686, 708 (*Blair*), overruled on another point in *People v. Black* (2014) 58 Cal.4th 912.)

"The failure to give a particular set of advisements does not, of itself, show that a *Faretta* waiver was inadequate. Instead, '[t]he burden is on appellant to demonstrate that he did not intelligently and knowingly waive his right to counsel. . . . [T]his burden is not satisfied by simply pointing out that certain advisements were not given.' [Citations.]" (*People v. Weber* (2013) 217 Cal.App.4th 1041, 1058-1059 (*Weber*); *People v. Sullivan* (2007) 151 Cal.App.4th 524, 545 (*Sullivan*).) We independently examine the entire record to determine whether Pierce knowingly and intelligently waived his right to counsel. (*People v. Burgener* (2009) 46 Cal.4th 231, 241 (*Burgener*); *People v. Conners* (2008) 168 Cal.App.4th 443, 454 (*Connors*).)

Pierce claims his *Faretta* waiver was not knowing and intelligent because the court failed to "conduct[ ] an extensive colloquy" before allowing him to waive his right to counsel. This argument is foreclosed by *Blair*. There, the defendant argued his *Faretta* waiver was invalid because the trial court failed to make a "'searching inquiry'" before granting his request to waive counsel. (*Blair, supra,* 36 Cal.4th at p. 709.) The *Blair* court disagreed and concluded the court's oral advisements apprised the "defendant of the dangers and disadvantages of self-representation." (*Id.* at p. 708.) The court also noted the defendant "acknowledged, in writing, that he would have to handle pretrial, trial, and many posttrial matters himself without the assistance of an attorney, and that he would have to comply with all substantive and procedural rules, which could be quite technical. He thus demonstrated an understanding of the risks and complexities of his case." (*Id.* at pp. 708-709, fn. omitted.)

The *Blair* court explained, "That these latter warnings and understanding were expressed only in writing makes no difference in our determination. [Citation.] The . . . propria personal advisement form (sometimes referred to as a *Faretta* form) serves as 'a means by which the judge and the defendant seeking self-representation may have a meaningful dialogue concerning the dangers and responsibilities of self-representation.'

[Citation.] The court might query the defendant orally about his responses on the form, to create a clear record of the defendant's knowing and voluntary waiver of counsel.' [Citation.] The failure to do so, however, does not necessarily invalidate defendant's waiver, particularly when, as here, we have no indication that defendant failed to understand what he was reading and signing. To the contrary, defendant demonstrated his ability to read and write in numerous pro se filings before the court. Defendant also appeared to be of at least normal intelligence and spoke articulately in court. The last superior court judge who considered defendant's request for self-representation . . . found that defendant was 'in full control of his faculties' and was making 'a conscious choice.' We have no reason to question these findings." (*Blair, supra,* 36 Cal.4th at p. 709.)

The same is true here. Like the defendant in *Blair*, Pierce — who had previous experience with the criminal justice system — insisted on representing himself and repeatedly reaffirmed his desire for self-representation throughout the trial court proceedings. (*Blair, supra,* 36 Cal.4th at pp. 704-705.) The written form Pierce signed is similar to the one in *Blair*: it advised Pierce of the "dangers and responsibilities of self-representation" (*Blair, supra,* 36 Cal.4th at p. 709) and "communicate[d] powerfully . . . the 'disadvantages of proceeding pro se,' [which] is all '*Faretta* requires.' [Citation.]" (*Sullivan, supra,* 151 Cal.App.4th at p. 546.) When the court asked Pierce whether he understood he was representing himself "and all of the consequences on [the] form[,]" Pierce replied, "Yes, ma'am." Finally, and as in *Blair*, Pierce could read and write. He ably represented himself throughout the case, "appeared to be of at least normal intelligence[,]" and persuaded the court he was capable of representing himself.[5] (*Id.* at p. 709.) We have reviewed the entire record and find no indication Pierce did not

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[5] Pierce suggests his *Faretta* waiver was not knowing and intelligent because he "does not appear to have an extensive educational background or any legal training" and because he "appears to have severe behavioral/mental health issues." The record suggests otherwise. Pierce reported earning a college degree and displayed a rather sophisticated understanding of the criminal justice system. And although Pierce appears to have suffered from Tourette's Syndrome, nothing in the record suggests he was not competent to represent himself. (See *People v. Johnson* (2012) 53 Cal.4th 519, 530.)

understand what he was reading and signing when he completed the *Faretta* form. (*People v. Marshall* (1997) 15 Cal.4th 1, 24 [trial court's failure "to conduct a full and complete inquiry regarding a defendant's assertion of the right of self-representation" did not necessarily demonstrate waiver of counsel was not knowing and voluntary].)

That the form did not advise Pierce of the nature of the charges or the maximum sentence he faced does not alter our conclusion. Several courts have rejected this argument and we agree with their reasoning. (See *Conners, supra,* 168 Cal.App.4th at p. 454 [waiver of counsel was knowing and intelligent even though judge did not advise the defendant of potential maximum sentence before accepting waiver]; *Blair, supra,* 36 Cal.4th at p. 709, fn. 7 [failure to advise the defendant of potential defenses does not invalidate *Faretta* waiver]; *People v. Lawley* (2002) 27 Cal.4th 102, 140 [rejecting complaint that the court "did not sufficiently explore whether [the defendant] 'truly appreciated the enormity of the charges facing him'" and concluding waiver of counsel was knowing and voluntary]; *People v. Harbolt* (1988) 206 Cal.App.3d 140, 150 [no requirement to advise the defendant of penal consequences before accepting *Faretta* waiver].)

"[T]he record shows [Pierce] wanted to waive counsel, understood the essential risks of doing so, and chose to do so." (*Weber, supra,* 217 Cal.App.4th at p. 1060.) Having reached this conclusion, we need not evaluate the parties' claims regarding prejudice. (See *Burgener, supra,* 46 Cal.4th at p. 245.)

II

Any Error in Failing to Readvise Pierce of His Right to Counsel After the Preliminary Hearing Was Harmless

Pierce contends the court erred by failing to readvise him of his right to counsel after the preliminary hearing. A "defendant in felony proceedings shall be advised of the right to counsel on at least two distinct occasions prior to trial: first, when the defendant is brought before a magistrate and advised of the filing of the complaint [under section 859], and second, after the preliminary examination, when the defendant is arraigned . . . on the information [under section 987]." (*People v. Crayton* (2002) 28 Cal.4th 346, 360

(*Crayton*).) The "language of section 987 sets forth no exceptions" to [redacted]. (*Id.* at p. 361.)

We assume for the sake of argument the court erred by failing to readvise Pierce of his right to counsel after the preliminary hearing and obtain a new waiver of counsel. We conclude, however, any error is harmless. "[W]hen a defendant charged with a felony has been fully and adequately advised at the . . . [arraignment on the complaint] of his . . . right to counsel throughout the proceedings (including trial) and the defendant has waived counsel under circumstances that demonstrate an intention to represent himself . . . both at the preliminary hearing and at trial, a superior court's failure to readvise the defendant and obtain a new waiver of counsel at the defendant's arraignment on the information in superior court, although erroneous under the governing California statute, does not automatically require reversal of the ensuing judgment of conviction." (*Crayton, supra,* 28 Cal.4th at p. 350.) We reverse only if we find a reasonable probability Pierce was unaware of his right to be represented by appointed counsel at trial or that he would have accepted the appointment of counsel had the court made the statutorily required inquiry at arraignment. (*Id.* at p. 366, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, the record demonstrates Pierce was aware of his right to be represented by counsel and wanted to represent himself. The form Pierce signed at his initial arraignment explicitly informed him of his right to counsel at all stages of the proceedings, and warned him of the risks of representing himself. Before trial, Pierce confirmed he had represented himself since his initial arraignment and "want[ed] that to continue." He told the court he did not need "fancy clothes or a highfalutin lawyer" and requested an attorney only for the "narrowly defined purpose" of questioning him at trial. Pierce's "desire to represent himself was unwavering throughout the proceedings. In light of the entire record . . . there can be no doubt that [Pierce] was aware of his right to appointed counsel at all stages of the proceedings and knowingly and voluntarily waived that right, insisting upon exercising his constitutional right to represent himself."

(*Crayton, supra,* 28 Cal.4th at p. 366.) Any error in failing to readvise Pierce of his right to counsel after the preliminary hearing was harmless. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.

APPEAL,CLOSED,HABEAS

U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #: 5:15-cv-05568-LHK

Pierce v. People of the State of California
Assigned to: Hon. Lucy H. Koh
Referred to: PSLC CLA
Case in other court: USCA, **17-15539**
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 12/04/2015
Date Terminated: 02/13/2017
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Randall Pierce

represented by **Charles Roger Khoury**
P.O. Box 791
Del Mar, CA 92014
858-764-0644
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

People of the State of California

Respondent

Stuart Sherman

represented by **Hanna Chung**
California Attorney General's Office
455 Golden Gate Avenue
Suite 11000
San Francisco, Ca 94102
415-703-1610
Email: hanna.chung@doj.ca.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/04/2015	1	PETITION for Writ of Habeas Corpus. Filed byRandall Pierce. (Attachments: # 1 Exhibit, # 2 Envelope, # 3 Envelope, # 4 Exhibit, # 5 Envelope, # 6 Exhibit, # 7 Envelope, # 8 Exhibit, # 9 Envelope, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Envelope, # 14 Envelope, # 15 Exhibit, # 16 Envelope, # 17 Exhibit, # 18

		Envelope, # 19 Exhibit, # 20 Envelope, # 21 Exhibit, # 22 Envelope, # 23 Exhibit, # 24 Envelope, # 25 Exhibit, # 26 Envelope, # 27 Exhibit, # 28 Envelope, # 29 Exhibit, # 30 Exhibit)(srnS, COURT STAFF) (Filed on 12/4/2015) (Entered: 12/09/2015)
12/04/2015	2	CLERK'S NOTICE re completion of In Forma Pauperis affidavit or payment of filing fee due within 28 days. IFP Form due by 1/11/2016. (srnS, COURT STAFF) (Filed on 12/4/2015) (Entered: 12/09/2015)
12/04/2015	3	Notice of Assignment of Prisoner Case to Magistrate Judge (srnS, COURT STAFF) (Filed on 12/4/2015) (Entered: 12/09/2015)
12/04/2015	4	MOTION for Leave to Proceed in forma pauperis filed by Randall Pierce. (srnS, COURT STAFF) (Filed on 12/4/2015) (Entered: 12/09/2015)
12/11/2015	5	Received Documents regarding Petitioner's status by Randall Pierce. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Envelope)(srnS, COURT STAFF) (Filed on 12/11/2015) (Entered: 12/16/2015)
12/14/2015	6	MOTION for Leave to Proceed in forma pauperis filed by Randall Pierce. (Attachments: # 1 Exhibit, # 2 Envelope)(srnS, COURT STAFF) (Filed on 12/14/2015) (Entered: 12/17/2015)
12/22/2015	7	Prisoner Statement of Account. (srnS, COURT STAFF) (Filed on 12/22/2015) (Entered: 12/28/2015)
12/22/2015	8	Prisoner Statement of Account. (srnS, COURT STAFF) (Filed on 12/22/2015) (Entered: 12/28/2015)
12/29/2015	9	Received envelopes and mental health brochure from petitioner. (Attachments: # 1 brochure)(srnS, COURT STAFF) (Filed on 12/29/2015) (Entered: 12/30/2015)
01/08/2016	10	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because a party has not consented to the jurisdiction of a Magistrate Judge. You will be informed by separate notice of the district judge to whom this case is reassigned. ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED. *This is a text only docket entry; there is no document associated with this notice.* (lmh, COURT STAFF) (Filed on 1/8/2016) (Entered: 01/08/2016)
01/08/2016	11	**ORDER REASSIGNING CASE. Case reassigned to Hon. Lucy H. Koh for all further proceedings. Magistrate Judge Nathanael M. Cousins no longer assigned to the case. Reassignment Order signed by Executive Committee on 1/8/2016. (bwS, COURT STAFF) (Filed on 1/8/2016) (Entered: 01/08/2016)**

01/11/2016	12	EXHIBITS filed byRandall Pierce. (Attachments: # 1 Envelope)(srnS, COURT STAFF) (Filed on 1/11/2016) (Entered: 01/14/2016)
01/26/2016	13	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Randall Pierce. (srnS, COURT STAFF) (Filed on 1/26/2016) (Entered: 01/28/2016)
01/26/2016	14	Received Documents submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 1/26/2016) (Entered: 02/12/2016)
01/26/2016	15	Received Documents submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 1/26/2016) (Entered: 02/12/2016)
02/18/2016	16	Letter dated 2/4/2016 from R. Hernandez, Group Facilitator. (dhmS, COURT STAFF) (Filed on 2/18/2016) (Entered: 02/19/2016)
02/29/2016	17	EXHIBITS re 1 Petition for Writ of Habeas Corpus, filed by Randall Pierce. (Related document(s) 1) (dhmS, COURT STAFF) (Filed on 2/29/2016) (Entered: 03/04/2016)
03/15/2016	18	**ORDER by Judge Hon. Lucy H. Koh granting 4 Motion for Leave to Proceed in forma pauperis; granting 6 Motion for Leave to Proceed in forma pauperis.(sms, COURT STAFF) (Filed on 3/15/2016) (Additional attachment(s) added on 3/15/2016: # 1 Certificate/Proof of Service) (sms, COURT STAFF). (Entered: 03/15/2016)**
03/28/2016	19	Letter to Judge Koh regarding font size for future responses to him filed by Randall Pierce. (bwS, COURT STAFF) (Filed on 3/28/2016) (Entered: 03/29/2016)
04/04/2016	20	MOTION for Judicial Notice filed by Randall Pierce. Responses due by 5/2/2016. Replies due by 5/16/2016. (dhmS, COURT STAFF) (Filed on 4/4/2016) (Entered: 04/04/2016)
04/07/2016	21	Received Documents submitted by Randall Pierce. (Attachments: # 1 Envelope) (dhmS, COURT STAFF) (Filed on 4/7/2016) (Entered: 04/07/2016)
04/18/2016	22	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Randall Pierce. (dhmS, COURT STAFF) (Filed on 4/18/2016) (Entered: 04/27/2016)
04/18/2016	23	Received Document by Randall Pierce. (Attachments: # 1 Envelope)(dhmS, COURT STAFF) (Filed on 4/18/2016) (Entered: 04/27/2016)
04/21/2016	24	REQUEST for Vision Impaired Materials by Randall Pierce. (dhmS, COURT STAFF) (Filed on 4/21/2016) (Entered: 04/28/2016)
04/22/2016	25	Received Document: Multiple Evidentiary Exhibits submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 4/22/2016) (Entered: 04/28/2016)
04/25/2016	26	Received Document: "Mini" Exhibits submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 4/25/2016) (Entered: 04/28/2016)

04/25/2016	27	Received Document: "Mini" Exhibits submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 4/25/2016) (Entered: 04/28/2016)
04/28/2016	28	Received Documents submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 4/28/2016) (Entered: 04/28/2016)
04/28/2016	29	Received Document: 41 Micro Mini Exhibits by Randall Pierce. (dhmS, COURT STAFF) (Filed on 4/28/2016) (Entered: 04/28/2016)
05/03/2016	30	**ORDER TO SHOW CAUSE by Hon. Lucy H. Koh, also denying 20 Motion for Judicial Notice.(sms, COURT STAFF) (Filed on 5/3/2016) (Additional attachment(s) added on 5/5/2016: # 1 Certificate/Proof of Service) (sms, COURT STAFF). (Entered: 05/03/2016)**
05/04/2016	31	Received Document: Mini Exhibits submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 5/4/2016) (Entered: 05/10/2016)
05/04/2016	32	Received Documents submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 5/4/2016) (Entered: 05/10/2016)
05/06/2016		Copy of Petition and Order to Show Cause mailed to Respondent and the Attorney General of the State of California. (dhmS, COURT STAFF) (Filed on 5/6/2016) (Entered: 05/06/2016)
05/18/2016	33	Received Documents submitted by Randall Pierce. (Attachments: # 1 Envelope) (dhmS, COURT STAFF) (Filed on 5/18/2016) (Entered: 05/19/2016)
05/31/2016	34	Request for Judicial Notice filed by Randall Pierce. (dhmS, COURT STAFF) (Filed on 5/31/2016) (Entered: 06/03/2016)
06/08/2016	35	Received Document: Micro-Mini Exhibits submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 6/8/2016) (Entered: 06/15/2016)
06/15/2016	37	Received Document: Mini Exhibits submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 6/15/2016) (Entered: 06/27/2016)
06/20/2016	36	Response to Order to Show Cause *Answer to Order to Show Cause* byStuart Sherman. Traverse due by 8/1/2016. (Attachments: # 1 Memorandum of Points and Authorities in Support of Answer, # 2 Notice of Lodging Exhibits with the Court, # 3 Exhibit 1 CT VoL 1_Part 1, # 4 Exhibit 1 CT VoL 1_Part 2, # 5 Exhibit 1 CT Vol 2, # 6 Exhibit 2 Augmented CT, # 7 Exhibit 3 RT Vol. 1, # 8 Exhibit 3 RT Vol. 2, # 9 Exhibit 3 RT Vol. 3, # 10 Exhibit 3 RT Vol. 4, # 11 Exhibit 3 RT Vol. 5, # 12 Exhibit 3 RT Vol 6, # 13 Exhibit 3 RT Vol 7, # 14 Exhibit 3 RT Vol 8, # 15 Exhibit 4 Aug. RT Vol 1-4, # 16 Exhibit 5-11, # 17 Certificate/Proof of Service)(Chung, Hanna) (Filed on 6/20/2016) (Entered: 06/20/2016)
06/20/2016	38	Received Document: Submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 6/20/2016) (Entered: 06/27/2016)
06/20/2016	39	Received Document: Submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 6/20/2016) (Entered: 06/27/2016)

06/21/2016	40	Received Document: submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 6/21/2016) (Entered: 06/27/2016)
07/08/2016	41	Received Document submitted by Randall Pierce. (dhmS, COURT STAFF) (Filed on 7/8/2016) (Entered: 07/08/2016)
07/08/2016	42	Nonchalant Doctoring of Controlled Documents by Randall Pierce (dhmS, COURT STAFF) (Filed on 7/8/2016) (Entered: 07/08/2016)
11/21/2016	43	Received Document submitted by Randall Pierce. (Attachments: # 1 Envelope) (dhmS, COURT STAFF) (Filed on 11/21/2016) (Entered: 11/21/2016)
12/22/2016	44	Received Document Submitted by Randall Pierce. (Attachments: # 1 Envelope) (srnS, COURT STAFF) (Filed on 12/22/2016) (Entered: 12/29/2016)
01/31/2017	45	Received Document submitted by Randall Pierce. (Attachments: # 1 Envelope) (dhmS, COURT STAFF) (Filed on 1/31/2017) (Entered: 01/31/2017)
02/13/2017	46	**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; GRANTING CERTIFICATE OF APPEALABILITY Re 1 Petition for Writ of Habeas Corpus, filed by Randall Pierce. Signed by Judge Lucy H. Koh on 02/13/2017. (Attachments: # 1 Certificate/Proof of Service)(iym, COURT STAFF) (Filed on 2/13/2017) (Entered: 02/14/2017)**
02/13/2017	47	**JUDGMENT entered in favor of respondent. Petitioner shall take nothing by way of his petition. The Clerk shall close the file. Signed by Judge Lucy H. Koh on 02/13/17. (Attachments: # 1 Certificate/Proof of Service)(iym, COURT STAFF) (Filed on 2/13/2017) (Entered: 02/14/2017)**
03/23/2017	48	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Randall Pierce. Appeal of Judgment, 47 (IFP Request was previously e-filed with the Court and Granted on 3/15/2016). (Attachments: # 1 Envelope)(dhmS, COURT STAFF) (Filed on 3/23/2017) (Entered: 03/23/2017)
03/24/2017	49	USCA Scheduling Order as to 48 Notice of Appeal, filed by Randall Pierce. The schedule is set as follows: Appellant Randall Pierce opening brief due 07/03/2017. Appellee Stuart Sherman answering brief due 08/03/2017. Appellant's optional reply brief is due 14 days after service of the answering brief. bwS, COURT STAFF) (Filed on 3/24/2017) (Entered: 03/27/2017)
03/27/2017		USCA Case Number **17-15539** USCA for 48 Notice of Appeal, filed by Randall Pierce. (bwS, COURT STAFF) (Filed on 3/27/2017) (Entered: 03/27/2017)
08/03/2017	50	ORDER of USCA as to 48 Notice of Appeal, filed by Randall Pierce. Appellants motions for appointment of counsel in this appeal from the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus are granted. Pursuant to the representations, Charles R. Khoury, Esq., is appointed. The motion for vision impaired materials is denied without prejudice to renewal by counsel. The opening brief and excerpts of record are due November 1, 2017; the answering brief is due December 1, 2017; and the optional reply brief is due within 21 days after service of the answering

		brief. (dhmS, COURT STAFF) (Filed on 8/3/2017) (Entered: 08/04/2017)

PACER Service Center			
Transaction Receipt			
04/21/2018 11:54:32			
PACER Login:	charliekhouryjr:2524508:0	**Client Code:**	pierce
Description:	Docket Report	**Search Criteria:**	5:15-cv-05568-LHK
Billable Pages:	4	**Cost:**	0.40

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECM system.

Appellant will be served at his place of residence.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this proof of service is executed at Del Mar, California, on April 29, 2018.

/s/Charles R. Khoury, Jr.

APPENDIX C
DENIAL OF CSC PETITION FOR REVIEW
4-15-15

APPENDIX D
(Document 36-10 Filed 06/20/16)pp. 152-153, 163-164

your name with dispatch was your history of being booked into the San Mateo County Jail.

Q Right.

A And that information showed that you had been in custody from August 27th of 2012 until September 18th of 2012. So you had been released nine days prior to us encountering one another.

Q So you were able to determine that the Defendant was free from custody for nine days, and that he was at the Travelodge for one night and the Avalon for one night; is that accurate?

A Well, by looking at the Travelodge, it looked like you were there two nights and the Avalon one night.

Q Okay. But not five?

A No.

Q Not five at the Avalon?

A Nope.

Q And the incarceration was from when, again, please? I forgot what you said.

A August 27th to September 18th.

Q Okay. Do you know the Defendant's date of birth?

A I said it before. Would you like me to say it again?

Q Please do.

A Can I refer to my report?

Q Please do.
A August 27th, 1963.
Q Oh, my. Are you sure about that? I thought I just heard you say that -- August what?
MR. JANGLA: Sorry. Objection. Vague.
Q BY MR. PIERCE: In custody when, sir? August 27th? Are you making an error there?
THE COURT: Sustained.
THE WITNESS: It was August 27th, I believe, to the 18th of September.
Q BY MR. PIERCE: And the date of birth is?
A August 27th, '63.
Q August 27th. Oh, so he was in jail from August 27th till September the 18th?
A Yes. That's what it appeared to me.
Q Find anything interesting about that date, August 27th, sir?
A Well, it appears you were booked into the County Jail on your birthday.
MR. PIERCE: Thank you, kindly. Nothing further.
THE COURT: Mr. Jangla.
MR. JANGLA: No questions.
THE COURT: Thank you, Officer.
THE WITNESS: Thank you, Your Honor.
THE COURT: Next witness.

registration paper will get filled out exactly like the previous one.

Q Okay. So within five days of their release from incarceration, they must come back and register because their birthday fell at the time when they were in custody?

A Correct.

Q Because you don't want people who have been in custody and couldn't register on their birthday. We don't want to make it unfair, so we give them time from when they're released to come back and register?

A Correct.

Q Within five days?

A Yes.

Q Let's talk about someone who is registered at an address in South San Francisco. Let's say he then becomes a transient. What is their registration obligation?

A Their obligation is to come in and unregister from the registered address, and then register as a transient, which -- as a transient, you're required to do registration every 30 days.

Q That initial deregistration, when must that occur?

A Upon leaving the previously documented residence.

Q Okay. So someone was living in South City and became transient; how many days does that person have to

deregister with South City?

A Five.

Q And these are just five days?

A Yes.

Q Not calendar days?

A Five calendar.

Q In fact, they are five calendar days?

A They're -- to be honest, I don't know exactly. The general rule of thumb that we've used forever is five days, so --

Q Is the South San Francisco Police Department open on the weekends?

A Yes, it is.

Q Can people deregister or update their registration on the weekends?

A I believe recently the registration hours changed, and based on staffing issues and cutbacks, our front office hours were modified. So I believe -- I'm not positive if Saturdays is still a day for registration or not, and Sundays they do not register. But it is posted in our front lobby all over the place the hours and days of registration.

Q So if someone, say, came in on Saturday or Sunday to register or deregister, what would happen?

A If there was an officer that happened to be working the front office at that time, the registration

APPENDIX SER
SUPPLEMENTAL EXCERPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 17-15539

RANDALL PIERCE,

Petitioner-Appellant.

v.

STUART SHERMAN, Warden

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of California
D.C. No. 5:15-cv-05568-LHK
Honorable Lucy H. Koh
United States District Judge

PETITIONER'S SUPPLEMENTAL EXCERPT OF RECORD VOLUME ONE OF ONE

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MR. PIERCE: Formally.

THE COURT: You haven't submitted one informally.

MR. PIERCE: Orally, I'm not doing that?

THE COURT: That's a motion that, generally speaking, is filed in advance of the sentencing date so that the prosecution has an opportunity to respond to it and the Judge has an opportunity to review it and consider it. It wasn't filed.

MR. PIERCE: That's correct.

THE COURT: Mr. Jangla, a question I have for you: The jury found true two prior strikes. That being the case, I don't have very many options here, regardless of what the agreement of the People is, unless you're going to take some action with respect to one of them.

MR. JANGLA: Sure. I believe there have been alleged under 1170.12(c)(2), so at this stage, it would be my motion to amend prior number 3 on the Information that is on page 4, line 6, and change the language to read within the meaning of Penal Code Section 1170.12 sub (c) sub (1).

THE COURT: I don't know that we can do that, can we? The jury has already come back and found -- can I see the verdict forms?

MR. JANGLA: Want me to read 1170.12(c)(1), which means if the Defendant has one prior felony

PSER 1

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECM system.

Appellant will be served at his place of residence.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this proof of service is executed at Del Mar, California, on January 9, 2019.

/s/Charles R. Khoury, Jr.