No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM

_____ ◆ _____

EDGAR GOMEZ,
PETITIONER

v.

RAYMOND MADDEN, Warden
RESPONDENT

_____ ◆ _____

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

_____ ◆ _____

Jan B. Norman
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Monterey, CA 93940
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Attorney for Petitioner
EDGAR GOMEZ

QUESTIONS PRESENTED

(1) Was Petitioner's denied his right to self-representation pursuant to *Faretta v. California*, 422 U.S. 806 (1975) when the trial court denied the request made before the presentation of any evidence?

(2) Were Petitioner's Sixth Amendments rights violated by finding that his *Faretta* request was untimely?

LIST OF PARTIES

All parties appear on the caption of the case on the cover page.

LIST OF PROCEEDINGS

1. United States Court of Appeals for the Ninth Circuit - *Gomez v. Madden*, Case No. 18-55722, unpublished memorandum - opinion issued on June 4, 2020 (docket no. 36);

2. United States District Court for the Central District of California - Order Accepting Findings and Recommendations of United States Magistrate; Judgment; and Order Denying Certificate of Appealability, *Gomez v. Madden*, Case No. 2:17-cv-04678-SJO-AFM (United States District Court for Central California, May 3, 2018)(docket nos. 22-24);

3. United States District Court for the Central District of California - Report and Recommendation - *Gomez v. Madden*, Case No. 2:17-cv-04678-SJO-AFM (United States District Court for Central California, February 7, 2018)(docket no. 19);

4. *People v. Gomez*, Case No. S231983, denial of Petition for Review (California Supreme Court, February 24, 2015); and

5. *People v. Gomez*, Case No. B257511, convictions for kidnapping and for carjacking reversed, judgment otherwise affirmed (California Court of Appeal, Second District, Division 7, December 14, 2015).

INDEX TO APPENDICES[1]

APPENDIX A

Order affirming denial of habeas petition - United States Court of Appeals for the Ninth Circuit - *Gomez v. Madden*, Case No. 18-55722, unpublished memorandum - filed June 4, 2020.

APPENDIX B

Orders Accepting Findings and Recommendations of United States Magistrate; Judgment; and Order Denying Certificate of Appealability - United States District Court for the Central District of California - *Gomez v. Madden*, Case No. 2:17-cv-04678-SJO-AFM, filed May 3, 2018.

APPENDIX C

Report and Recommendation - United States District Court for the Central District of California - *Gomez v. Madden*, Case No. 2:17-cv-04678-SJO-AFM, filed February 7, 2018.

APPENDIX D

Denial of Petition for Review - California Supreme Court - *People v. Gomez*, Case No. S231983, filed February 24, 2015.

APPENDIX E

Unpublished Opinion reversing convictions for kidnapping and for carjacking reversed, judgment otherwise affirmed - California Court of Appeal, Second District, Division 7 - *People v. Gomez*, Case No. B257511, filed December 14, 2015)May 3, 2018)(docket nos. 22-24);

[1] The appendices are filed concurrently under separate cover.

TABLE OF CONTENTS Page

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES CONSTITUTION

STATUTES

UNITED STATES SUPREME COURT RULES

No. _____

_____ ◆ _____

IN THE

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OCTOBER 2020 TERM

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EDGAR GOMEZ,
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v.

RAYMOND MADDEN, Warden
RESPONDENT

_____ ◆ _____

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The memorandum opinion of the Ninth Circuit Court of Appeals appears at Appendix ("App.") A to this petition and is unpublished. The orders accepting findings and recommendations of United States Magistrate; judgment; and order denying certificate of appealability appear at App. B and are unpublished. The report and recommendation of the Magistrate Judge appears at App. C to this petition and is unpublished. The denial of the petition for review appears at App. D and is unpublished. The California court of appeal opinion

reversing the convictions for kidnapping and for carjacking, judgment otherwise affirmed appears at App. E and is unpublished.

Jurisdiction

The district court had jurisdiction of Petitioner's habeas corpus petition under 28 U.S.C. § 2254. The district court denied a Certificate of Appealability. The Ninth Circuit issued a Certificate of Appealability and had jurisdiction under 28 U.S.C. § 2253(c)(1). The Ninth Circuit judgment was entered on October 21, 2019. App A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Statement of the Case

A. Statement of Proceedings

Appellant was charged with robbery (Penal Code section 211)[2], assault with a deadly weapon (Penal Code section 245(a)(1)), kidnapping (Penal Code section 207(a)), carjacking (Penal Code section 215(a)), and kidnapping during the commission of a carjacking (Penal Code section 209.5(a)). The information further alleged that certain offenses were committed for the benefit of a gang (Penal Code section 186.22 (b)(1)c). On the first day of jury selection, before the jury was impaneled, appellant moved to represent himself. The trial court denied the request as untimely.

The jury acquitted appellant of the robbery charge, but returned guilty verdicts and true findings on the remaining charges and the gang allegations. Appellant was sentenced to an aggregate term of 16 years, 4 months to life.

Appellant appealed and argued that his sentence violated the Sixth Amendment by the trial court's cursory denial of his *Faretta v. California,* 422 U.S. 806 (1975)("*Faretta*") motion. Appellant also argued that his convictions for kidnapping and carjacking were lesser-included offenses of kidnapping during the commission of a carjacking. The California court of appeal reversed appellant's convictions for kidnapping and carjacking and affirmed the rest of the convictions in an unpublished opinion, filed December 14, 2015. Appellant's petition for review by the California Supreme Court was denied on February 24, 2016.

Appellant filed his petition for writ of habeas corpus ("petition") in the United States District Court for the Central District of California on June 26, 2017. Respondent filed an

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[2] All future references are to the California Codes unless otherwise indicated.

answer on December 1, 2017. In this federal habeas petition, appellant's only claim was that his Sixth Amendment right to represent himself had been violated by the trial court's hasty denial. As a consequence, his convictions must be reversed.

Magistrate Judge MacKinnon issued his Report and Recommendation on February 7, 2018. Appellant's objections to the Report and Recommendation were filed on March 5, 2018. The Order Adopting the Report was filed on May 3, 2018. On that same day, the Judgement was entered dismissing the petition with prejudice and a certificate of appealability was denied.

The Ninth Circuit granted a certificate of appealability on the issue of "whether appellant was denied his Sixth Amendment right to self-representation pursuant to *Faretta v. California,* 422 U.S. 806 (1975) where he unequivocally asserted his constitutional right to do so on the first day of trial but was peremptorily denied that right without being given any opportunity whatsoever to explain his reasons for his request." Ninth Circuit Order, filed March 1, 2019.

The Ninth Circuit subsequently affirmed the denial of relief on the grounds that lower courts could determine what is timely as long as it comported with this Court's finding that a request made "weeks before trial" is timely. As a result, the denial of petitioner's claim by the California Court of Appeal was not unreasonable.

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B. Statement of Facts from State Trial[3]

1. Prosecution Evidence

A. Assaults on April 28, 2012

Around 3:45 a.m. on April 28, 2012, Rico Hayes, Raymel Turner, and Jerry Garnett — all of whom are African-American — waited for a bus on Pico and West. Mr. Garnett went around the corner to make a phone call. Shortly after, appellant and another man exited a van and asked where Mr. Garnett was from. When Mr. Garnett responded that he did not gang bang, the men swung a knife at him. Mr. Garnett ran towards Mr. Hayes and Mr. Turner, screaming for help.

Appellant chased Mr. Garnett and approached Mr. Hayes and Mr. Turner. Appellant stated that he was from the 18th street gang, and attempted to punch and kick Mr. Turner. Two other males with appellant approached the group. Appellant shouted "fuck slobs." When Mr. Hayes said that they do not gang bang, appellant replied, "well, fuck niggers." Mr. Hayes responded, "[w]ell, fuck Mexicans." Mr. Turner also told appellant that they were gay, and did not gangbang.

As the two groups fought, a minivan came around the corner and two more Hispanic males exited. Someone handed appellant a knife.

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[3] This statement of facts is taken from the summary of facts in Appellant's Opening Brief filed in state court. Use of this summary does not constitute any admissions by appellant.

Appellant swung the knife at Mr. Hayes. At this point, Mr. Hayes and his friends ran.

B. Kidnapping, carjacking and kidnapping for carjacking on June 7, 2012

Around 12:15 p.m. on June 7, 2012, authorities followed a Toyota in an effort to arrest appellant on an outstanding warrant. The Toyota stopped at a tunnel near the 10 freeway. Appellant exited the car and began running. Officers chased appellant but were unable to apprehend him.

Around 1:00 p.m., as Miriam Sheriff was sitting in traffic on an exit lane of the 10 freeway, appellant jumped through her front passenger window and landed on the floor of her car. Appellant pushed her left foot on the accelerator and told her to go. When she stated "[p]lease don't hurt me," he responded that he wasn't going to hurt her. At appellant's direction, Ms. Sheriff drove over an island to return to the freeway. Appellant directed her to a Carl's Jr. at Vermont and King. Appellant exited the car and gave Ms. Sheriff $30 in gas money. When he left, she thanked him for the gas money. Appellant thanked her.

Ms. Sheriff and appellant chatted during the 15 to 20 minute car ride to the Carl's Jr. She did not feel threatened by him during the journey. She was not afraid of appellant and did not call the police. She maintained that he did not tell her not to call the police, nor did she remember stating that she feared for her safety or believed that appellant had her license plate. But

according to authorities, when interviewed at her home later that day, Ms. Sheriff indicated that she did not contact police about the incident because appellant told her not to contact the police, and she feared for her safety.

C. Appellant's arrest

Around 10 p.m. on January 26, 2014, authorities responded to 2222 Thurman Avenue, where they observed multiple males, including appellant and 18th street gang member Jonathan Delgadillo, talking loudly. Both Mr. Delgadillo and appellant were arrested. Appellant provided a false name to authorities.

D. Alleged robbery of Geovanni Manjarrez

Mr. Manjarrez alleged that around 7:20 p.m. on April 25, 2012, appellant and an unidentified second individual confronted him on Cochran Avenue, near Venice Boulevard. Appellant asked Mr. Manjarrez, "where are you from" which Mr. Manjarrez understood as a gang challenge. Although Mr. Manjarrez responded that he was not gang affiliated, appellant nevertheless punched him several times. Appellant and his companion also took Mr. Manjarrez' cell phone and black LA Kings hat.

E. Gang evidence

Officer Edgar Muro testified that the 18th Street gang is a criminal street gang. There are 4000 members in the Los Angeles area. Rivals of the gang included the Blood and Crip gangs.

The primary activities of the l8th street gang are murder, attempted murder, robberies, vandalism, possession of narcotics and possession of weapons. Three 18th street gang members have sustained the following convictions: in 2012, Sergio Gomez was convicted of robbery; in 2009, Johnny Diaz was convicted of assault; and in 2008, Pedro Espinoza was convicted of murder.

According to Officer Muro, appellant is an 18th street gang member. Appellant has multiple gang related tattoos, including a BK with a line through the B, which means "Blood Killer," as well as a "GK," which means Geer Crip Killer. A cell phone recovered from appellant after his arrest contained multiple 18th street gang related photographs. Furthermore, appellant admitted to Officer Muro that he was an 18th street gang member.

Based on a hypothetical that mirrored the facts of the assault, Officer Muro opined that the crimes were committed in association with and for the benefit the gang. By defending their territory from incursions from perceived rival gang members, a gang maintains and bolsters its reputation as well as instills fear in rival gangs and members of the community.

Based on a hypothetical the mirrored the facts of the alleged robbery of Mr. Manjarrez, Officer Muro opined that the crime was committed in association with and for the benefit of the gang. A challenge to a rival benefits the gang. In addition, the proceeds from a robbery can be used for weapons

or drugs. And a robbery committed near the border of a gang's territory will be perceived as defending their territory. Moreover, such crime instills fear in the community and thus, emboldens the gang to commit more crimes.

2. Defense Evidence

Appellant testified on his own behalf and maintained that he was not a current 18th street gang member. He also insisted that he was not involved in the robbery of Mr. Manjarrez. Although he admitted that he jumped in Ms. Sheriff's car on June 7, 2012, he maintained that he did not know that he was being pursued by police. He also insisted that he never threatened Ms. Sheriff.

Appellant acknowledged that he participated in the incident involving Mr. Hayes and his friends. But he explained that he had jumped out of the minivan and ran towards the other men only `because everyone in his group was doing so. He admitted that he stated "fuck slobs" and waved around a knife, but asserted that he only did so because the other group scared him. Although he waved the knife to scare them away, he did not intend to hurt them.

According to Officer Allen Zhao, Ms. Sheriff did not display any fear when she identified appellant in a lineup. In addition, when questioned about the incident at home, Ms. Sheriff appeared "calm, like nothing happened." But she also appeared nervous when interviewed.

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3. Prosecution Rebuttal

According to Officer Muro, on January 26, 2013, appellant admitted that he was an 18th street gang member with a monikers of "Silent" and "Kor Killer." In addition, Officer Muro overheard Mr. Gomez shout "18 Rifa BK," which means "we're the baddest gang," to another 18th street gang member in a holding cell.

C. The State Court of Appeal, United States District Court Decisions and the Decision of the Ninth Circuit

The California Supreme Court summarily rejected appellant's *Faretta* claim in an order denying his petition for writ of habeas corpus. The denial did not provide any reasons or explanations for the decision. Ninth Circuit case law directs a federal habeas court to "'look through' [an] unexplained California Supreme Court decision[] to the last reasoned [state court] decision" for purposes of applying the deference due state courts by federal habeas courts. *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001), *citing*, *Ylst v. Nunnemaker*, 501 U.S. 797, 803-804 (1991); *see also, Parle v. Runnels,* 505 F.3d 922, 926 (9th Cir. 2007).

In appellant's case, the last reasoned decision was in the California court of appeal. The unpublished opinion of the California Court of Appeal found that appellant's *Faretta* request to represent himself was untimely. The state appellate court also found that because the *Faretta* request was untimely, the appellate court reviewed the decision for harmless error. The appellate court concluded that any error was harmless because representing oneself is a mistake and the evidence of appellant's guilty was overwhelming.

The district court addressed appellant's *Faretta* claim in the Report and Recommendation of United States Magistrate Judge, filed February 7, 2018. The report found that the California Court of Appeal opinion on untimeliness was objectively reasonable. The district court relied upon Ninth Circuit cases holding that under *Faretta,* a request for self-representation is timely if made "weeks before trial." The California Court of Appeal's determination was also objectively reasonable because the state court considered the fact that appellant's counsel was ready to proceed, and appellant was not. The trial court also took into consideration the fact that appellant could have made his request earlier.

The district court next turned to the question of whether or not appellant had a federally protected right to a hearing on his *Faretta* request. After finding that a *Faretta* request was untimely, a hearing is required under California state law. The district court held that this hearing requirement applied under California state law, but not under federal law. As a result, the district court correctly concluded that appellant's claim that the trial court failed to conduct a hearing required under state law was not cognizable on federal habeas review.

The Ninth Circuit affirmed the district court's dismissal with prejudice of petitioner's habeas petition. In an unpublished memorandum, the Ninth Court found that the United States Supreme Court had not established when a *Faretta* claim is timely. Consequently, lower courts could determine what is timely as long as it comported with the Supreme Court's finding that a request made "weeks before trial" is timely. As a result, the denial of petitioner's claim by the California Court of Appeal was not unreasonable.

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Reason for Granting the Petition

This Court Should Grant the Petition Because the Ninth Circuit has Decided an Important Question of Federal Law that Has Not, But Should Be, Settled by This Court

A. Introduction

Appellant's convictions were obtained in violation of his Sixth Amendment right to represent himself recognized in *Faretta v. California,* 422 U.S. 806 (1975)("*Faretta*"). Prior to the start of jury selection, appellant indicated that he wanted to represent himself. The trial court summarily dismissed this request. The trial court erred in refusing to even consider or to conduct any hearing on appellant's *Faretta* motion. The California appellate court did not apply the correct *Faretta* requirements in affirming the state trial court by finding both that the *Faretta* request was untimely and that no hearing was required.

The district court erred in finding that the California Court of Appeal opinion on untimeliness was objectively reasonable. The district court correctly found that the trial court failure to conduct a hearing required under state law was not cognizable on federal habeas review. However, the district court neglected to address whether or not the *Faretta* hearing requirements were met by the trial court. The trial court never questioned appellant about whether appellant understood "the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation" or asked questions designed to obtain this understanding. *McCormick v. Adams*, 621 F.3d 970, 977 (9th Cir. 2010); *United States v. Farias*, 618 F.3d 1049, 1052 (9th Cir. 2010).

The Ninth Circuit found that given the lack of specific guidance from this Court, timeliness was up to the individual lower courts. The only limitation identified by the Ninth

Circuit was that the lower court decision must comport with this Court's finding that a request made "weeks before trial" is timely.

This Court should grant this petition and decide when a *Faretta* motion is timely. The open ended nature of the current law allows for inconsistency among circuits and district courts.

B. A *Faretta* Claim May Be Made At Any Time in the Trial or Sentencing Proceedings

The right to self representation in a criminal trial was recognized by this Court in the seminal case of *Faretta, supra,* 422 U.S. 806. The Sixth Amendment to the United States Constitution encompasses this right to self representation within the constitutional right to present a defense. *Id.*, at 821, 836. The erroneous denial of this right is reversible per se. *McKaskle v. Wiggins,* 465 U.S. 168, 177, fn. 8 (1984)("*McKaskle*").

Under California law, the right to self representation, however, is not absolute. The request must be unequivocal. "To invoke the constitutional right to self-representation, a criminal defendant must make an *unequivocal* assertion of that right in a timely manner. *People v. Roldan,* 35 Cal.4th 646, 683 (2005).

Under California law, trial courts have the discretion to deny a *Faretta* motion that is untimely. "Although a defendant has a federal constitutional right to represent himself (*Faretta v. California* (1975) 422 U.S. 806), in order to invoke an unconditional right he must assert it ' "within a reasonable time prior to the commencement of trial." *People v. Clark,* 3 Cal.4th 41, 98-99 (1992).

As discussed above, the California appellate court applied the California law in denying appellant's motion. California law is not binding on an analysis of a *Faretta* claim.

"Clearly established Federal law," for purposes of Section 2254(d)(1) review, "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); see also *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

The Ninth Circuit has found that under *Faretta*, "clearly established law" means that a *Faretta* request was timely if made "'weeks before trial,' *422 U.S. at 835*, and 'well before the date of trial,' *id. at 807*." *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997), *abrogated on other ground as recognized by Baker v. City of Blain*, 221 F.3d 1108, 1110, fn.2 (9th Cir. 2000)("*Moore*").

To reach this conclusion, the Ninth Circuit made two findings in *Moore*. First, the references to "a few weeks" was "neither a recitation of the background facts of the case nor *obiter dictum*." *Moore*, *supra*, at 265. Second, the references in *Faretta* to "a few weeks" were "properly considered necessary to the Court's decision, and therefore is a holding of the Court." *Ibid.*, *see also, Burton v. Davis* 816 F.3d 1132, 1141 (9th Cir. 2016); *Stenson v. Lambert*, 504 F.3d 873, 884 (9th Cir. (2007); *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005). However, in *Moore*, the Ninth Circuit simply stated these findings as facts. No reasoned explanation was given for these findings. The cases after *Moore* simply reiterated *Moore's* language. *See, Burton*, at 1141, *Stenson*, at 884; *Marshall*, at 1061.

Petitioner respectfully submits that the Ninth Circuit's decision in *Moore* was incorrect for two reasons. First, *Moore* incorrectly found that the *Faretta* references to "a few weeks" were not dictum. If this Court wished to establish that a timely *Faretta* request had to be made "a few weeks" before trial, this Court could have stated that holding in clear and unequivocal

terms. No such statement was made. Second, the references to "a few weeks" were not "necessary to the Court's decision" and should not be considered "a holding of the Court." The references to "a few weeks" constituted non-precedential dictum.

The issue of what is and what is not dictum has been a recurring question. In *Idaho v. Wright*, 497 U.S. 805 (1990)("*Wright*"), this Court addressed a Sixth Amendment confrontation clause argument regarding the admissibility of hearsay evidence. "This case requires us to decide whether the admission at trial of certain hearsay statements made by a child declarant to an examining pediatrician violates a defendant's rights under the Confrontation Clause of the Sixth Amendment." *Id.,* at 808. Ultimately, this Court found that the trustworthiness of offered hearsay could not be corroborated by other evidence. *Id.,* at 823.

The Ninth Circuit addressed a similar hearsay issue in *Swan v. Peterson*, 6 F.3d 1373 (9th Cir. 1993). In *Swan*, the Ninth Circuit addressed the reliability of two children in a child molestation case. *Id.,* at 1381. During the Ninth Circuit's analysis, it examined the holdings in *Wright.* The Ninth Circuit concluded that *Wright* forbade the use of other evidence to corroborate the trustworthiness of a hearsay statement, and likely forbade the use of non-corroborating evidence to establish that the hearsay statement was unreliable. *Ibid.*

In *Webb v. Lewis*, 44 F.3d 1387 (9th Cir. 1994), the Ninth Circuit again addressed the issue of hearsay statements in a child molestation case. Analyzing *Wright* again, the Ninth Circuit reiterated that *Wright* forbid the use of other evidence to corroborate the trustworthiness of hearsay offered. Then the Ninth Circuit considered whether a party could use other evidence to confirm that the hearsay statement was unreliable. The Ninth Circuit ruled that evidence could be used to confirm unreliability. The Ninth Circuit expressly found that it was not bound "by the

dictum in Swan, supra at 1391 [1381] interpreting *Wright* as suggesting the contrary." *Webb,* at 1392.

In *Swan,* the Ninth Circuit concluded that *Wright* forbid the use of corroborating evidence to confirm that a hearsay statement was unreliable. *Swan, supra,* at 1381. This statement was clearly made in *Swan,* but the Ninth Circuit found it to be non-precedential dicta because the *Swan* decision did not rely upon the statement to make a finding. *Webb, supra,* at 1392.

The same is true for the references to "a few weeks" in *Faretta.* *Faretta* held that a defendant had the right to self-representation. Nothing in that finding required *Faretta* to further find that a request for self-representation had to be made within a few weeks of the trial to be timely. *Faretta* contains no such limitation. In other words, under *Faretta,* a request for self-representation can be made at any time during the trial or sentencing proceedings.

In *McKaskle, supra,* this Court implicitly recognized that *Faretta* did not require a self-representation request be made "few weeks" before trial to be timely. In *McKaskle,* this Court examined "what role standby counsel who is present at trial over the defendant's objection may play consistent with the protection of the defendant's *Faretta* rights." *Id.,* at 170. Ultimately, this Court held that under the facts of the defendant's trial, the standby counsel's "unsolicited involvement was held within reasonable limits." *Id.,* at 184, 188.

McKaskle is relevant to appellant's case here because this Court did **not** find any of Wiggins' self-representation requests untimely for not occurring "a few weeks" before trial.

Prior to a first trial,[4] Wiggins requested to represent himself was granted, but the trial court appointed two attorneys to act as standby counsel. About two months before the second trial, Wiggins filed a motion for appointment of counsel and rescinded his request for self-representation. *Id.,* at 171. Then, on the day before trial, Wiggins again asked to proceed *pro se. Id.,* at 172. For the remainder of the trial, Wiggins flipped back and forth between self-representation and using of standby counsel. *Id.*, at 172-173. All of Wiggins requests to proceed pro per were granted. In fact, this Court finally found that Wiggins' right to self-representation was not impaired by standby counsel because Wiggins represented himself and controlled the trial proceedings at all the critical junctions. *Id.,* at 174-175.

In *McKaskle*, this Court never raised the issue that a request for self-representation made on the day before trial or during the trial was untimely under *Faretta.* If *Faretta* stands for the proposition that a self-representation request is timely only when made "a few weeks" before trial, *McKaskle* completely disregarded that rule.

C. Appellant's Sixth Amendments Rights were Violated by Finding that his *Faretta* Request was Untimely

As discussed above, under *Faretta,* a request for self-representation may be made at any time during the trial or sentencing proceedings. Appellant unequivocally moved to represent himself on the first day of time before a jury was impaneled. Under *Faretta,* appellant's request was timely.

The California appellate court found the request untimely based upon California state law. Even if it is assumed that the California appellate court considered the timeliness issue

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[4] Wiggins' first conviction was set aside based on a defective indictment. *McKaskle,* at 170.

under *Faretta,* its conclusion was "contrary to" Supreme Court case law. The California appellate court's decision was objectively unreasonable.

The district court found that the California appellate court's untimeliness decision "comported" with *Faretta*. Since *Faretta* does not place a time constrain on making self-representation request, the California appellate court's untimeliness finding does not "comport" with *Faretta.* The California appellate court ruling was objectively unreasonable. Appellant's Sixth Amendment rights were violated by the denial of his request to represent himself.

Finally, petitioner was denied his Sixth Amendment right to represent himself by the Ninth Circuit. As discussed above, the Ninth Circuit incorrectly found that petitioner's *Faretta* request was untimely. *Faretta* did not establish that a request for self-representation had to be made at any specific time.

Conclusion

For the reasons set forth above, petitioner respectfully requests that his petition for writ of certiorari be granted.

Dated: September 1, 2020

Respectfully submitted,

By: */s/ Jan B. Norman*
JAN B. NORMAN

Attorney for Petitioner-Appellant
EDGAR GOMEZ

CERTIFICATE OF COMPLIANCE

I certify that pursuant to United States Supreme Court Rules, Rule 33.1(h)2, the attached Petition for Writ of Certiorari is proportionately spaced with a Times New Roman typeface of 12 points, contains 5497 words according to my word processing program.

Dated: September 1, 2020

Respectfully submitted,

By: */s/ Jan B. Norman*
JAN B. NORMAN

Attorney for Petitioner-Appellant
EDGAR GOMEZ

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS.
COUNTY OF MONTEREY)

I am employed in the County of Monterey, State of California. I am over the age of 18 and not a party to the within action. My business address is 71 Via Paraiso, Monterey, California 93940.

On September 1, 2020, I served the within entitled documents described as MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, PETITION FOR WRIT OF CERTIORARI and APPENDIX TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action through the electronic filing system of the United States Supreme Court and placing a true copy thereof in the United States mail enclosed in a sealed envelope with postage prepaid, addressed as follows:

David E. Madeo
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 1, 2020, at Monterey, California.

By: */s/ Jan B. Norman*
JAN B. NORMAN