

24-5485

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IN THE

SUPREME COURT OF THE UNITED STATES

ONOFRE T. SERRANO

— PETITIONER

(Your Name)

vs.

STATE OF CALIFORNIA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND DISTRICT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Onofre Serrano #BX0044

(Your Name)

480 Alta Road

(Address)

San Diego, CA, 92179

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether reasonable jurist could debate the state court of appeals conclusion that Petitioner's waiver of the right to counsel was voluntary, knowingly and intelligent?
2. Whether reasonable jurist could debate the state court of appeals conclusion that the denial of the right to counsel at a critical state(s)/preliminary hearing was harmless error?
3. Whether the Office of the Public Defender provided ineffective assistance of counsel ("IAC") at a critical stage(s) /arraignment /bail hearing /motion to suppress evidence /preliminary hearing, etc., prior to Petitioner's alleged involuntary waiver of the right to counsel?

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Serrano v California Case No. 22-6251

Serrano v United States Case No. 21-8161

Serrano v Luna Case No. CV22-4574 (CD Cal. Sept. 29, 2023)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the Second Appellate District, appeals court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was May 1, 2024. A copy of that decision appears at Appendix A.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves amendment VI to the US Constitution, which provides:

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.

(US Const., amend., VI). This case also involves amendment XIV § 1 to the US Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

(US Const., amend., XIV § 1).

STATEMENT OF THE CASE

Petitioner asserts that the Office of the Public Defender, Deputy Public Defender(s) ("DPD"), Howard S. Miller & Diana Tsang; and, standby counsel Robert S. Bolinger provided IAC. Accordingly, Petitioner's Faretta waiver(s) are involuntary. In addition, Petitioner did not understand the dangers and disadvantages of self-representation including but not limited to the potential sentencing liabilities.

Petitioner was seized by Long Beach Police Department ("LBPD") officers on Oct. 15, 2020 by arrest warrant for one (1) count of attempted murder, in violation of California Penal Code §§ 664/187(a). The named victim was D'Angelo Darby. Shortly after Petitioner's booking he was transported to Los Angeles County, Men's Central Jail ("MCJ") due to medical, complaints of pain and discomfort.

Petitioner was diagnosed at Los Angeles County-University of Southern California Medical Center ("LAC-USC") with solitary bone plasmacytoma ("SBP") and C7 spinal fracture. Petitioner's physical injuries was directly related to the pending criminal charges. Petitioner remained hospitalized for approximately forty-six (46) days and/or was unable to physically attend upon the court until Nov. 30, 2020. Hon. Tomson T. Ong, Judge continued the case until Nov. 30, 2020 and DPD Miller appearing on Petitioner's behalf abandoned¹ Petitioner during the

1. The Office of the Public Defender was appearing on Petitioner's behalf. DPD Miller or his designee did not attempt to interview Petitioner at LAC-USC hospital. DPD Miller did not communicate with Petitioner for forty-six (46) days. DPD Miller prior to Nov. 30, 2020 did not contact Petitioner while he was admitted as a patient and/or at MCJ, via visit, telephone or video teleconference. DPD Miller had no personal information from Petitioner with regard to his medical

continuance(s) of arraignment on Oct. 19, 2020, Oct. 20, 2020, Oct. 21, 2020, and Nov. 2, 2020, but appearing with Petitioner for the first time forty-six (46) days later. (CT 12-20, 1070-1085).

On Nov. 12, 2020, Hon. T. Ong, Judge continued Petitioner's arraignment without objection from DPD Miller to a zero of thirty (0 of 30) as opposed to a zero of ten (0 of 10) court days from Nov. 30, 2020. (CT 1084). Further, Petitioner moved the arraignment court (Judge Ong) with a oral Marsden motion (to substitute DPD Diana Tsang) on Mar. 16, 2020 for failure to object to the setting of the date of preliminary hearing beyond the ten (10) court day statutory time limitation (1 Augmented Reporter's Transcript ("1 art") 7-18. See also, Sealed Marsden Proceedings ("1 Marsden") at pp. 1-6). Furthermore, Petitioner was unaware at the time that DPD Miller's IAC for the first forty-six (46) days was already prejudicial.

DPD Miller counseled Petitioner to consult DPD Tsang prior to arraignment due to the alleged serious/violent charge(s). Petitioner had no knowledge of the prior four (4) scheduled court dates in which was conducted in abstentia. DPD Miller acted under a conflict of interest when he undertook to represent and/or counsel Petitioner after he had personal knowledge of the scheduled prior four (4) missed court dates and the DPD staff failing or refusing to contact Petitioner while in the hospital for approximately fifty (50) days.

Petitioner sought to exercise a Faretta waiver at the arraignment, but was denied. (CT 1043-1048). DPD Tsang at arraignment did not motion for dismissal (Pen. Code § 1385) of the case due to a failure to arraign the Petitioner within forty-eight (48) hours of arrest. Counsel at arraignment did not enter a demur

1. (cont...) condition and that the current physical injury was suspected to have been caused by aggravation (of the SBP) during the physical altercation at issue in this case.

to the felony complaint. Counsel at arraignment did not secure a hearing for a bail reduction and/or Own Recognizance ("OR") release. (CT 1068, 1091-1096, 1154-1162).

Judge Ong conducted a Marsden motion hearing on Mar. 16, 2020, whereas the factual inquiry involved appointed counsel(s) failure to object in the absence of Petitioner's body to the setting of the arraignment and/or preliminary hearing beyond statutory time limitations. Petitioner invoked the process of Marsden to insure an objection on behalf of the Petitioner was on record and record evidence that appointed counsel's failure or refusal to object to the violation(s) of statutory time limitations could not be attributed and/or with the consent of the Petitioner. Petitioner alleges the court abused its discretion to determine the competency of the attorney. Therefore, the Marsden error tainted the Petitioner's Faretta waiver, where Petitioner must choose between the right to self-representation and poor counsel and even though the court's admonitions otherwise satisfy the Faretta requirements.

Petitioner subsequently exercised a Faretta waiver due to the denial of the Marsden motion and the untimely setting of the preliminary hearing over Petitioner's objection. The court never advised Petitioner of the potential sentence he could serve if he were convicted of the charged offense(s). (1 Augmented Clerk's Transcript ("1ACT") at pp 4-7; see 1 ART at pp. 8-14). Petitioner was not aware of the thirty (30) year sentence he faced if convicted until one (1) day before trial. Further, the purpose of a preliminary hearing and a trial are vastly different and therefore the dangers and disadvantages of self-representation at the two stages are also different. The court then granted Petitioner's pro per request.

On July 12, 2021 and Aug. 9, 2021, Petitioner represented himself at the preliminary hearing. Petitioner was held to answer (CT 124-298, 302-332; see also

2. Petitioner during the preliminary hearing invoked his statutory

CT 336). Petitioner was arraigned on the felony information on Sept. 10, 2021. Petitioner filed a: 1) Notice of Demurrer (CT 350-356); 2) Motion to Quash Service/ Arrest and Dismiss Action (CCP § 418.10(a))(CT 367-375); and, 3) Motion to Set Aside Information (Pen. Code § 995). Petitioner was charged in Count 1, attempted murder, in violation of Penal Code §§ 664/187(a), special allegations of use of a deadly or dangerous weapon, to wit a knife, within the meaning of Penal Code § 12022(b)(1) and the personal infliction of great bodily injury within the meaning of Penal Code § 12022.7(a); and in Count 2, assault with a deadly weapon, to wit a bar stool and bar table, in violation of Penal Code § 245(a)(1). The prosecution also alleged that Petitioner had been convicted of a prior serious felony within the meaning of Penal Code § 667(d) and 1170.12(b) to wit, carjacking in violation of Penal Code § 215(a) and was subject to sentencing under the provisions of the Three Strikes Law, Penal Code § 667(b)-(i) and 1170.12. The prosecution additionally alleged that Petitioner had suffered eight (8) prior felony convictions, within the meaning of Penal Code § 1203(e)(4)(d). (CT 358-359).

Petitioner's Motion to set Aside the Information was denied in part on Nov. 8, 2021 (CT 1352-1372) and in full on Mar 14, 2022 (CT 889-890). Petitioner filed two (2) pretrial writ(s): 1) Petition for Writ of Mandate (Pen. Code § 999a)(CT 638-673); and, 2) Petition for Writ of Habeas Corpus (Pen. Code §§ 1473(b)(1), 1487) challenging the arraignment and/or preliminary hearing. (CT 1061-1200). (App C).

2. (cont...) right to counsel upon his cross-examination at the preliminary hearing. Here, Petitioner limited his Faretta waiver so as not to include cross-examination of himself during the preliminary hearing raised questions as to whether the Petitioner voluntarily and knowingly waived his right to counsel and/or understood the Sixth Amendment waiver and/or the dangers and disadvantages.

Attorney Robert S. Bolinger previously standby counsel took over Petitioner's defense for trial. (RT 1.) Prior to the start of trial, the court rescinded Petitioner's pro per status due to purported disruptive vulgarism during a pre-trial hearing. (1 ART 353-355). However, Petitioner filed several Marsden motion(s): 1) written Marsden motion on Sept. 27, 2022 (CT 1871-1873). Petitioner also sought to attach as a exhibit [proffered] Memorandum of Points and Authorities in Support to Suppress Evidence; Traverse/Quash, Arrest/Search Warrant(s) and/or Felony Complaint w/Exhibits A-W³ (CT 1872). However, the trial court refused to file the exhibit. (RT 28-35);

2) oral Marsden motion on Oct. 5, 2022 (RT 1219-1222); and, a

3) written Marsden motion on Oct. 24, 2022 (CT2029-2075). Petitioner's written "Motion to Substitute Defense Counsel" indicated that Petitioner "seeks to satisfy his burden of proving substantial impairment by demonstrating that the following issues have merit but have not been raised: (CT 2032) A. Error of Law by the Trial Court (CT 2033-2036); B. Insufficiency of Evidence (CT 2037-2040); C. Prosecutorial Misconduct (CT 2041-2044); D. Newly Discovered Evidence (CT 2045); E. Arrest of Judgment (CT 2055-20558); F. Motion to Strike Prior Conviction (CT 2059-2073); and, G. Motion to Preclude Impeachment with Prior Conviction(s) (CT 2074). The trial court did not specifically address any of Petitioner's claims with standby counsel which alleged claim(s) of IAC as aforementioned. (RT 1813-1817). All four (4) of Petitioner's Marsden motion(s) was denied by the trial court.

3. Petitioner request that the court take judicial notice pursuant to California Evidence Code ("Evid. Code") § 459 in accordance with Evid. Code §§ 451(a)(e)(f); 452(a)(c)(d)(e)(g)(h) and 453 of the state court docket, pleading(s), exhibit(s), etc., in Case No. S276702, In re Serrano. Smiley v Citibank (s.D.), NA 11 C4th 138, 145 n. 2.

Following the presentation of the prosecution's case, the court granted Petitioner's Penal Code § 1118 motion for acquittal related to the attempted murder alleged in count 1. The court then granted the prosecution's motion to amend the information by adding a count 3, assault with deadly weapon, to wit a knife, in violation of Penal Code § 245(a)(1). The prosecution additionally alleged a special allegation that in the commission of the assault alleged in count 3, Petitioner personally inflicted great bodily injury upon the victim within the meaning of Penal Code § 12022.7. (CT 1938-1939, RT 1206-1212.) The jury found Petitioner guilty of count(s) 2 and 3, and found the special allegation that in the commission of the offenses Petitioner personally inflicted great bodily injury upon the victim in both counts to be true. (CT 1978-1979). The jury also found during the bifurcated portion that the prior conviction was true that Petitioner had been previously convicted of carjacking in Superior Court Case No. NA019839 (CT 1984), and additionally found the three Rules of Court sections 4.42(b)(2), 4.42(b)(3), and 4.42(b)(5) enhancing allegations to be true. (CT 1985).

The court thereafter sentenced Petitioner as follows: The court determined that Petitioner was statutorily ineligible for probation. The court declined to exercise its discretion to dismiss the prior strike allegation. (RT 1826-1827). The court selected count 3, the assault with the knife, as the principal term and after noting several factors in aggravation that had been found by the jurors, sentenced Petitioner to the high term of four years, doubled to eight because of the high term of four years, doubled to eight because of the true finding of the prior strike. (RT 1823-1825.) The court found that the assault with the bar stools and tables, for which Petitioner was convicted in count 2, and sentenced Petitioner to a consecutive term of two years, calculated as 1/3 the mid-term of three years and then doubled to two because of the strike prior. (RT 1825-1828). The court imposed an additional three years to Petitioner's sentence in count 3 for the true finding of great bodily injury allegation. The court dismissed the great bodily

injury enhancement in count 2. (RT 1827). The court dismissed the Penal Code § 667(a) five (5) year enhancement in the interest of justice. (RT 1827-1828).

Petitioner's aggregate sentence is thirteen (13) years in state prison. (RT 1828). The court calculated Petitioner's pre-sentence custody credits as 851 days. (RT 1828, see also Augmented Clerk's Transcripts ("ACT") at pp. 8-9.)

Petitioner filed a timely notice of appeal on Oct. 24, 2022.

REASONS FOR GRANTING THE PETITION

A.

CONFLICTS WITH DECISIONS OF OTHER COURTS

Peitioner contends that the supreme court of the State of California has entered a decision in a way that conflicts with the decision of the supreme court of the State of Nevada and/or countless US Court of Appeals. Sup. Ct. Rule 10(b). This Court should take review to afford more definitive guidance to the district courts and appellate courts to settle the split of authority. See Hooks v State 124 Nev. 48, 55 n. 16 (2005); contra, People v Blair 36 C4th 686 (2005), cert. den. Blair v California 546 US 1147 (2006); People v Bush 7 CA5th 457 (1st App. 2017); contra, People v Jackio 236 CA4th 455 (3rd App. 2015). In addition circuit courts have developed various lines of questioning. See e.g., US v Booker 684 F3d 421, 426 n. 5, 428 (3d Cir. 2012)(waiver not knowing and intelligent because court failed to advise defendant of range of potential imprisonment); US v Forrester 512 F3d 500, 507-508 n. 3 (9th Cir. 2008)(waiver not knowing and intelligent because government failed to prove that defenfant understood charges and penalties against him); James v Brigano 470 F3d 636, 643-644 (6th Cir. 2006)(waiver invalid because court failed to advise defendant of specific dangers of self-representation); US v Jones 452 F3d 223, 231-232 (3rd Cir. 2006)(waiver invalid because court to identify potential problems of obtaining evidence when proceeding pro se); US v Virgil 444 F3d 447, 453-455 (5th Cir. 2006)(waiver invalid because court failed to inform defendant of dangers of self-representation); Shafer v Bowersox 329 F3d 637 647-648 (8th Cir. 2003)(waiver not knowing and intelligent because court did not comprehensively examine defendant or adequately warn him of "dangers...of self-representation"); US v Taylor 113 F3d 1136, 1140-1141 (10th Cir. 1997)(waiver invalid because court failed to inform defendant of disadvantages and consequences of self-representation, including required adherence to rules of evidence and

criminal procedure); US v Sandles 23 F3d 1121, 1128 n. 4 (7th Cir. 1994)(waiver invalid because court failed to advise defendant of specific dangers of self-representation).

Some circuit courts have articulated a three-factor test to be used in determining whether a defendant knowingly and intelligently waived the right to counsel. The defendant must be made aware of: 1) the nature of the charges against him; 2) the possible penalties; and, 3) the dangers and disadvantages of self-representation. See, e.g., US v Booker, supra, 684 F3d 421, 425-426 & n. 5 (3rd Cir. 2012).

Other circuit courts focus on whether the defendant actually understood the risk of self-representation instead of whether the judge made a searching inquiry into the defendant's understanding of the Sixth Amendment waiver. See, e.g., Akins v Easterling 648 F3d 380, 394-399 (6th Cir. 2011).

Courts disagree whether this inquiry must occur irrespective of the stage of the proceeding in which the defendant requests to proceed pro se. Compare US v Cano 519 F3d 512, 515-516 (5th Cir. 2008)(court must perform Faretta questioning though defendant asserted right to self-representation at sentencing), with Speights v Frank 361 F3d 962, 965 (7th Cir. 2004)(“Once the trial is over, the major complexities, choices, and risks are past [and] ...a simple consent to proceed without counsel suffices...on appeal.”), and Braun v Ward 190 F3d 1181, 1186 (10th Cir. 1999)(requisite depth of waiver inquiry varies with stage of criminal proceeding); and, Hooks v State, supra, 124 Nev. 48, 56-57 n. 20, 21, 22, 23 (2008) (“the purpose of a preliminary hearing and a trial are vastly different and therefore the dangers and disadvantages of self-representation at the two stages are also different”).

Hence, this Court should take review to afford more definitive guidance on the question which is of great importance to the extent to which the trial court must reasonably advise a criminal defendant of the maximum sentencing

consequences he or she may face when exercising his or her right to forego professional counsel and proceed in propria persona and to also settle the split of authority among the states and the circuit courts.

B.

IMPORTANCE OF THE QUESTION PRESENTED

This case presents a fundamental question of the interpretation of this Court's decision in Faretta v California 422 US 806, 835 (1975). The question is of great public importance because it affects the operations of the administration of justice in all fifty (50) states, the District of Columbia, etc. To proceed pro se a defendant must voluntarily, knowingly and intelligently waive the right to counsel. Godinez v Moran 509 US 389, 400-401 n. 12 (1993): see also Patterson v Illinios 487 US 285, 292 n. 4 (1988)(waiver must be voluntary); Michigan v Jackson 475 US 625, 633 (quoting Johnson v Zerbst 304 US 458, 464 (1938), overruled in part on other grounds in Edwards v Arizona 451 US 477, 482-487 (1981)(courts "'indulge every reasonable presumption against waiver of fundamental constitutional rights'" and doubts must be resolved in favor of no waiver)); Brewer v Williams 430 US 404-405 n. 10 (1977). Review of this important question of law by this Court is necessary to give guidance to the trial and appellate courts to which the trial court must ensure the waiver of counsel is voluntary when taking the defendant's Faretta waiver. The US Supreme Court has not directly addressed the question, the Court's reasoning in Iowa v Tovar 541 US 77, 88 (2004), strongly suggests that considerations of the Sixth Amendment would require "'reliable determination on the voluntariness issue satisfies the constitutional rights of the defendant'" (Boykin v Alabama 395 US 238, 242 (1969)(quoting Jackson v Denno 378 US 368, 387 (1964)(citing Carnley v Cochran 369 US 506, 516 n. 10 (1962))).

The Tovar Court explained that "the information a defendant must have to waive counsel intelligently will 'depend...upon the particular facts and circumstances surrounding the case.'" Id., 541 US at 92 (quoting Johnson v Zerbst, supra, 304

US 458, 464 (1938)). Among the case-specific factors to be considered are "the defendant's education or sophistication, the complex or easily grasped nature of the charge,, and the stage of the proceeding." Id at 88; see e.g., US v Keen 104 F3d 1111, 1115-1116 n. 6 (9th Cir. 1997)(reversal because, despite defendant's background and experience in legal matters, court did not fully inform defendant of disadvantages of proceeding pro se); Gilbert v Lockhart 930 F2d 1356, 1359-1360 n. 5 (8th Cir. 1991)(reversal because defendant's 8 prior felony convictions insufficient to create awareness of perils of self-representation and beacause court gave defendant choice to proceed with unprepared counsel or no counsel). Here, Petitioner sought to proceed pro se at arraignment and preliminary hearing. The purpose of a arraignment and/or preliminary hearing and a trial are vastly different in that prejudice to the presentation of possible defenses at trial may incur within the understanding of the Supreme Court's holding in Coleman v Alabama 399 US 1, 7-10 (1970); see also Hamilton v Alabama 368 US 52 (1961); Hooks v. State, supra, 124 Nev. 48, 56-57 (2008). Petitioner raises the Sixth Amendment claim that he received IAC prior to arraignment and/or preliminary hearing which prompted his effort to seek relief. See People v. Marsden 2 C3d 118 (1970); Pen. Code § 1487.. However, the state court(s) denied his motion(s) and/or writ(s).

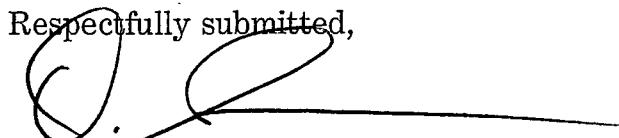
Petitioner was receiving IAC. If the Petitioner must choose between the right to self-representation and poor counsel, the choice of the former may be considered involuntary. See, e.g., People v Bergerud 223 P3d 686, 693 (Colo. 2010); Pazden v Maurer 424 F3d 303, 316 n. 15, 318-319 n. 20 (3rd Cir. 2005)(involuntary waiver when defendant given choice between poor cousel and self-representation); Crandell v Bunnell 25 F3d 754, 755 (9th Cir. 1994)(remanded to determine if attorney was incompetent, which would establish waiver was involuntary); US v Silkwood 893 F2d 245, 248-249 n. 2, 3, 4 (10th Cir. 1989)(involuntary waiver when trial court impermissibly forced defendant to choose between self-representation and poor counsel by attempting to persuade defendant of appointed counsel's adequacy instead

of conducting penetrating inquiry into decision to proceed pro se). The various state court and/or US circuit court(s) has decided this important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Onofre Serrano

Date: Aug. 1, 2024