Case No. 24-5929 ORIGINAL

SUPREME COURT OF THE UNITED STATES

David Fink,

Petitioner.

VS.

State of California,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

CHALLENGING THE SUPREME COURT OF CALIFORNIA

David Fink, BR6598

POB-4000, A2-121

Vacaville Ca. 95696-4000

In Propria-Persona

IMPORTANT QUESTIONS OF LAW PRESENTED

During an evidentiary hearing into eavesdropping on privileged calls, "Petitioner" ("Pet.") filed written objections to the court ordering an adjournment (without notice) twice in the heat of adversarial examination (CT: 4643-44). The People represented that a paragraph blacked-out by a felt marker, contained the following disparaging remark (CT: 4734):*

> "[T]he court in all of its wisdom, had to have known [the witness] was in deep trouble, and it it had halted the hearing, it 'could' allow the prosecution to coach him."

This caused the court to revoke Pet.'s Faretta rights without notice, nor opportunity to be heard (without representation)(11/4/2020 Trs, 5:28-6:4), but forgot the offending remarks, and asked the People for a copy of their papers (containing their representation of the crossed out statement) and read the People's words into the record (Id, at 2:1-3:13) to revoke Pet.'s right of self-representation:

(1. The People have no standing to interject between an accused and his right of self-representation. When the court permits them to do so, does it undermine Faretta by encouraging prosecutors who cannot win fairly, to win by instigating revocation, as here?

(2. Did the court err by permitting the People's representation of evidence to be the sole cause as the loss of self-representation? (Carillo v. County of Los Angeles, 798 F.3d. 1210, 1220 (9th Cir. 2015)(appointing the prosecutor to act as the arbiter of relevant evidence is tantamount to "appoint[ing] the fox as henhouse guard.")).

(3. Does "[t]he right to be heard before being condemned to suffer grievious loss of any kind" (Mathew v. Eldridge, 424 US 319, 323 (1976)) apply to Faretta revocation?

(4. Can a deleted statement be the sole cause of the loss of the right of self-representation?

(5. Has the substantial Sixth Amendment right of self-representation been been reduced to a farce or a sham?

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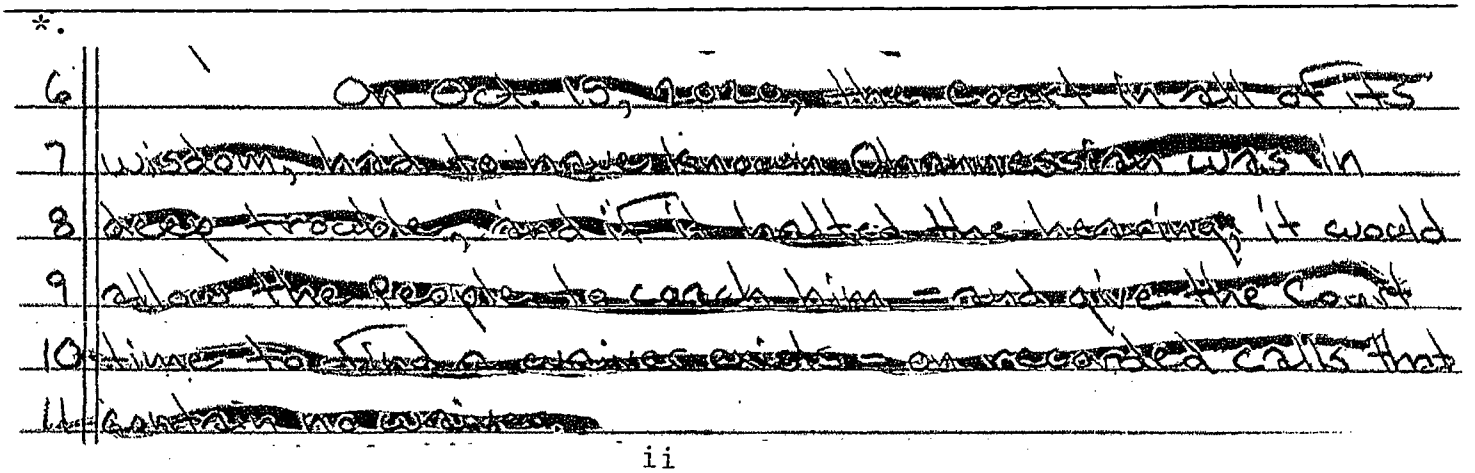

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TABLE OF AUTHORITIES

I.

PETITION FOR WRIT OF CERTIORARI

"Petitioner" ("Pet.") petitions the Court to review a judgment of the California Supreme Court on writ of certiorari.

II.

JURISDICTION & OPINIONS BELOW

(a. Jurisdiction:

A void exists in an accused's Sixth Amendment right of self-representation under Faretta that allows a prosecutor who cannot win fairly, to win underhandedly, by instigating the cause to terminate the right of self-representation, though a prosecutor has no standing to do so:

(1. On Nov. 3, 2020, Pet.'s right of self-representation was revoked in this manner, and the court read the People's words into the record as cause (Carillo v. County of Los Angeles, 798 F.3d. 1210, 1226 (9th Cir. 2015)(allowing the prosecutor to act as the arbiter of relevant evidence is tantamount to "appointing the fox as henhouse gurad")) without notice, opportunity to be heard, or legal representation of any kind (Mathews v. Eldridge, 424 US 319, 323 (1976)).

(2. After trial, Pet. was sentenced to 40 years 4 months for low-level felonies. As an appellant has no right of self-representation (Martinez v. Cal. COA, 528 US 152 (2000)), the appeal was reduced to a farce or a sham by appointed counsel's refusal to communicate with his client, or bring the best substantial claims on appeal (Fink v. California, 24-5436 (pending)) which subjects Pet. to a procedural bar for failing to bring the claim in an appeal where the Pet. has no voice or control.

(3. Appellate counsel intentionally watered down the two less substantial claims he did bring to ensure denial (Faretta & speedy trail).

(b. Orders/Opinions Below:

(1. June 24, 2024 opinion of the Second Appellate District, Division Seven on the watered down less substantial claims brought by an ineffective appellate counsel forced upon Pet. against his will (75 pages) (B317362).

(2. Aug. 28, 2024 Supreme Court denial, which states (S285627): "The petitions [plural] for review are denied."

(3. Pet. was never served with this order. Appellate counsel has never visited Pet., accepted one telephone call from him, or responded to correspondence. So whom is he representing? The client he has never communicated with, or the COA who appointed him?

WHY REVIEW SHOULD BE GRANTED

(a. Faretta Revocation During Eavesdropping Evidentiary Hearing:

1. The problems in this case arose by a technical glitch in the jail telephone vender's recording system. In United States v. Carter, 429 F.Supp. 3d. 788, 793-98, fn.281, fn.298, fn.371 (D. Kan. 2019), the Court found: (1. 197,757 attorney-client calls were recorded; (2. the warning advisements do not always work; (3. attorneys were told the warning advisements do not apply to privileged calls; (4. 9,430 attorney-client calls in the non-record were none-the-less recorded anyway (meaning there was no warning advisement that would alert the caller the call was being recorded); and (5. the warning advisement (if played), fell short of a Sixth Amendment waiver.

2. As there are no Cal. State cases depicting this problem, it means prosecution teams routinely eavesdrop on privielged calls, and use the ill-gotten gain at trial, as here. This Court should put a stop to this practice.

3. The telehone vernder's audit records can determine who logged on to eavesdrop on specific calls. During the evidentiary hearing, it was established:

(1. Jail policy prohibited the recording or monitoring of any call made to an attorney or defense investigator from the inmate's housing unit (CT: 3887-88).

(2. Judge Frimpong (now a federal judge in the Central District of Cal.) issued a stipulated order that all calls Pet. made from jail to an attorney or defense investigator were privileged (8/3/2018 Order, at 14:17-18 [this order was part of the abundance of missing records from the appellate record out-lined in pending petition B338076 in this Court]).

(3. Audit records showed a supervising prosecutor eavesdropped on 32 calls Pet. made to attorneys (CT: 5230, 5238-39, 5250-51).

(4. "Chief Deputy Sheriff Sarkis Ohannessian" (the "Chief") testified that he eavesdropped on 20 calls made to a defense investigator because: (A. he could; (B. "nobody said it was illegal"; and (C. "there were no penal codes governing me" (8/5/2020 Trs, 85:24-86:8 [RT: Vol.3]).

(5. Audit records showed the Chief eavesdropped on 8 calls made to Idaho attorney Doug Phelps from the San Bernardino jail (CT: 5267-70).

(6. The Chief testified that he eavesdropped on one call to Pet.'s attorney's law office one minute and 15 seconds after the call was answered

saying "law office" te ensure: (A. the law office wasn't criminals; (B. the legal assistant was not Pet. girlfriend; and (C. the attorney was Pet. counsel (8/5/2020 Trs, 25:27-26:7 [RT: Vol.3], 10/15/2020 Trs, 93:1-94:4 [RT: Vol.4]).

(7. Evidence Code 623 precluded the People from inquery that would undermine the privilege they had already stipulated existed (People v. Chatman, 38 Cal.4th 344, 379-80 (2006)("[i]ts misconduct for a prosecutor [to] intentionally illicit inadmissible testimony.")), so the court did it on the People's behalf.

(8. The court queried the eavesdroppers if there was a warning advisement on the call that would alert the caller the call was being recorded? The eavesdroppers responded that there was suppose to be one, but had no personal knowledge if it was played here (7/17/2020 Trs, 87:1-12, 74:5-17 [RT: Vol.3], 8/5/2020 Trs, 6:3-13 [RT: Vol.3], 9/10/2020 Trs, 21:11-20, 44:2-45:5, 73:7-74:17 [RT: Vol.4]),

(9. The court then misstated the testimony: "I don't see why you keep referring to as privileged calls ... when your told its subject to being monitored, it loses its privileged status." "[Y]ou've got a big problem ... the fact that any of these calls were privileged ... where [there is] a warning." (7/17/2020 Trs, 87:13-17 [RT: Vol.3], 9/10/2020 Trs, 75:23-27 [RT: Vol.4]).

(10 A supervising prosecutor had ordered IAD to halt its investigation of the Chief over the privileged calls. The letter specifically states: "In no way can further investigation be done" "as a result of listening to the calls" (CT: 4490). The Chief then destroyed the investigator calls absent production (8/5/2020 Trs, 17-30, 87-90, 94-95 [RT: Vol.3]), which was the subject of the IAD investigation.

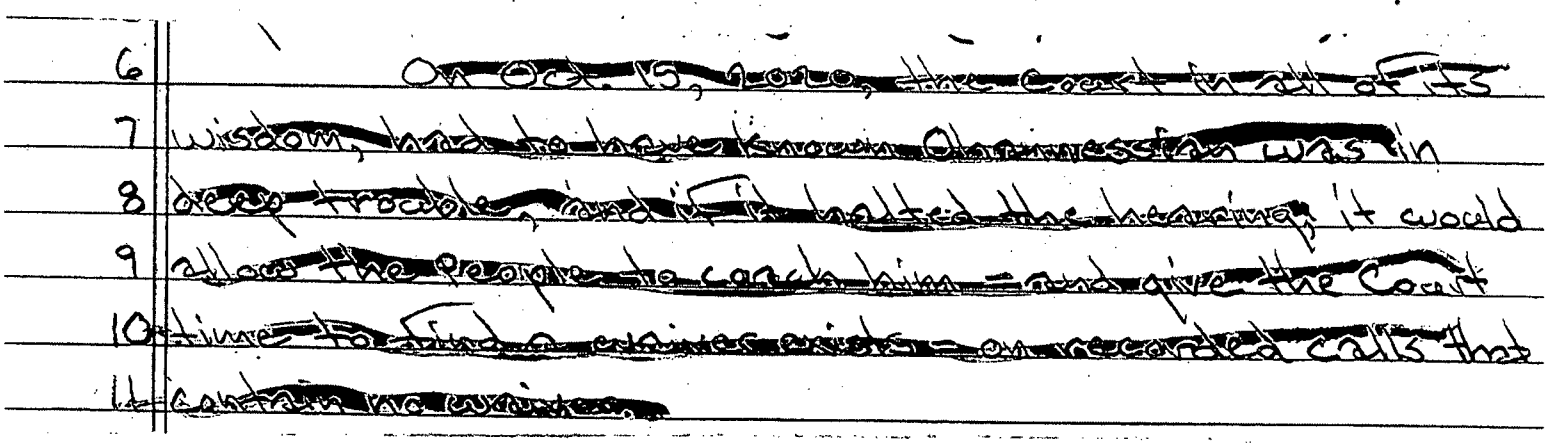
4. The COA quoted the court: "The burden is on you [Mr. Fink] to show the material [in the jail calls] is privileged. If you do that, the burshifts to the People to show ... that there is no damage." (COA Opinion, 20) without commenting that the court had misrepresented clearly defined law of California (Costco v. Superior Court, 47 Cal.4th 725, 733 (2009)).

5. On October 15, 2020, Pet. filed "material defense objections" (CT: 4518-34), showing the court the Costco opinion (CT: 4519), extensive authority on privileged telephone calls, and what amounts to a waiver (CT: (CT: 4520-23), and objected to the court's partisan embroilment (CT: 4522-23).

6. The COA noted that: "[T]he court on its own motion ordered de-

fendant's witness to produce evidence if the warning prompts were operational" (COA Opinion, 27), while failing to acknowledge that this amounts to partisan advocacy. As the calls had been destroyed, the court wanted the telephone vender to "speculate." In Romero v. Securus, 331 FRD 391, 410-14 (S.D. Cal. 2018), the same vender was precluded by the court from speculating whether recorded attorney-client calls that had been destroyed contained a warning advisement, holding that the party seeking the privileged (which in this case was the court) had to produce the calls for an in court inspection.

7. On October 22, 2020, Pet. filed "Second Material Defense Objections" (CT: 4634-51), objecting to: (A. the court's disparaging remarks in making it difficult to admit exhibits, then admitting the entire stack of the People's exhibits that had not been shown to Pet., nor had witnesses identified them, because the exhibits contained the telephone vender's speculation (CT: 4642-43); (B. the court's partisan questioning of witnesses amounting to embroilment (CT: 4522-23); (C. ordering witness to produce evidence beneficial to the People amounted to partisan advocacy (CT: 4641-42); (D. threating to revoke Pet.'s Faretta rights for referring to a document by the caption (of the document) when Pet. attempted to use it to refresh a witnesses testimony (CT: 4642); and (E. ordering adjurnment for the day in the heat of adversarial examination, twice (CT: 4643-44). On page CT: 4644:6-11 there is a paragraph blacked out by a felt marker:



8. The People opposed the objections (CT: 4725), and represented that the crossed-out portion stated:

> "[T]he court in all of its wisdom, had to have known [the Chief] was in deep trouble, and if it halted the hearing, it 'could' allow the People to coach him" (CT: 4734).

9. The COA changed this representation into a more egregious form by removing the word: 'could' (changing a possibility into a reality) by asserting that Pet. alleged: "the court ... ended the hearing early to 'allow' the People to coach him" (COA Opinion, at 34), when the trial court admitted at a hearing on Nov. 6, 2020 that this was not the case (See 11/6/2020 Trs).

10. On November 4, 2020, the court said that he intended to revoke Pet.'s Faretta status because the objection offended him, but forgot the content of the objection, and asked the People for a copy of their opposition (containing they're representation of the statement), and the court read the People's words into the court record (11/4/2020 Trs, 2:1-3:13), while Pet. was not permitted to be heard, speak, or utter a word (11/4/2020 Trs, 5:28-6:4). In other words, the crossed-out portion in Pet.'s objection did not offend the court, only the People's representation of what had been crossed-out. The COA **NEVER** considred these facts, even though Pet. sought to replace his appellate attorney for not presenting it (B338076 at Pg.33 [review pending in this Court]).

11. The COA went on a "truffle hunt" to find additional warnings and admonishments by the court, and found that Pet. continually impuned the court's integrity, fabricated or misrepresented facts (Opinion, at 32), which is simply not the case. For instance, the Court found that the Chief testified he immediately hung-up (which is impossible to do when listening to a recording) after the call was answered saying: "law office" (COA Opinion, at 19), when the Chief actually testified he had a "duty" to listen to the call one minute and 15 seconds after it was answered saying "law office" (8/5/2020 Trs, 25:27-26:7 & 10/15/2020 Trs, 93:1-94:4 (which was when the court halted the hearing without notice). The COA noted that the court admonished Pet. for saying the supervising prosecutor halted the IAD investigation of the Chief (COA Opinion, at 20-21), which is precisely what the last paragraph of his letter to the IAD states (CT: 4490). The COA has cited nothing, and is misstating the record.

(b. State & Federal Speedy Trial Claim Under Sixth Amendment:

12. On May 11, 2021, Judge Fidler (the pretrial court) commenced a triple defendant murder trial (People v. Contraras, BA396138). Judge Hall (the trial court) was also in trial (RT: 9:7-9).

13. Between May 21, and October 2021, Judge Fidler violated Pet.'s speedy trial rights by continuing trial five times (over very strong objections) based upon the pandemic, while admitting that the pandemic had nothing to do with the continuances, which were issued because: (A. "we've run out of courtrooms" (8/13/2021 Trs, 4:24-25); and (B. difficulty impaneling jurors (7/23/2021 Trs, 2:3-14). Impaneling jurors is an issue for the trial court, not the pretrial court (Rosales-Lopez. v. United States, 451 US 182, 189 (1981)), and the lack of "judge or courtroom availability ... does not constitute good-cause to delay defendant's trial." (People v. Engram, 50 Cal.4th 131, 138 (2010)).

14. The COA found the court had good-cause to continue the trial because of difficulty impaneling jurors (COA Opinion, 41 & 46). The pretrial mandate petition (that was never granted review [S271496/B315-496]), showed there were over 100 potential jurors in the hallway when the court made the comment (B315900/S271496), please take judicial notice. The COA NEVER made a determination as to whether the court's comments a month later (after jurors were clearly available) that "we've run out of courtrooms" (8/13/2021 Trs, 4:24-25). Maybe because this Court's Engram case required reversal (Madrid v. Gomez, 889 F.Supp. 1146, 1192-93 (N.D. Cal. 1995)(fact-finder biased when s/he "strains to find explanations however implausible")).

MEMORANDUM, POINTS & AUTHORITY

(a. Embroilment Amounting to Partisan Advocacy:

Partisan embroilment occurs when the decisionmaker acts on evidence that had not been subject to the adversarial process (Lasko v. Valley Pres. Hospital, 180 Cal.App.3d. 519, 528 (1986)), as here (Kennedy v. LAPD, 901 F.2d. 702, 709 (9th Cir. 1989)(to reverse, an accused must show the "judge's remarks and questioning witnesses projected ... an appearance of advocacy")).

A fundamental component of a fair hearing requires a neutral and unbiased decisionmaker (Goldberg v. Kelly, 397 US 554, 571 (1970)). "[A] biased decisionmaker is constitutionally unacceptable." (Withrow v. Larkin, 421 US 35, 47 (1975)). "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence is against him." (Edwards v. Balisok, 520 US 641, 647 (1997)).

"[A]n unconstitutional potential for bias exists when the same person serves both as accuser and adjudicator." (Williams v. Pennsylvania, 136 S.Ct. 1899, 1905 (2016) and In re Murchison, 349 US 133, 137 (1955)). "Judges must not assume the role of advocate for any litigant." (Nuno v. CSUB, 47 Cal.App.5th 799, 811 (2020) and Hurles v. Ryan, 752 F.3d. 768, 792 (9th Cir. 2014)(judge recused where she became personally embroiled)).

"Embroilment is a process by which the judge surrenders the role of impartial factfinder/decisionmaker, and joins the frey." (Inquery Concerning Splitzer, 49 Cal.4th CJC Supp. 254, 276 (2007)). "By doing so, he crossed the line between a neutral arbitor and advocate." (Ibid).

"[I]n order to reverse for excessive judicial intervention, the records must ... leave the reviewing court with the unbinding impression that the judge's remarks and questioning witnesses projected ... an appearance of advocacy and partiality." (Kennedy v. LAPD, 901 F.2d. 702, 709 (9th Cir. 1989), Crandell v. United States, 703 F.2d. 74, 77 (4th Cir. 1983)(judge "simply assumed the role of advocate"); Reserve Minning v. Lord, 529 F.2d. 181, 185 (8th Cir. 1986)(same); Knapp v. Kinsey, 232 F.2d. 458, 467 (6th Cir. 1956)(same); Amaral v. Ruez, 1993.US.App.Lexis.6078 (9th Cir. 1993); Little v. Kern County Superior Court, 249 F.3d. 1075 (9th Cir. 2002); United States v. Onyeabor, 649 Fed.Appx.442 (9th Cir. 2016) and People v. Perkins, 109 Cal.App.4th 1562, 1571-73 (2003)(questioning by court sought to develope and amplify prosecution evidence amounting to prejudicial misconduct)).

(b. Improper Termination of Faretta Status:

"With the possible exception of 'fire!' no word is less welcome in a criminal court than Faretta." (Moon v. Superior Court, 134 Cal.App.4th 1521, 1523 (2005)). "Terminating a defendant's self-represention status should be considered as a last resort, not a first impulse." (People v. Becerra, 63 Cal.4th 511, 520 (2016)). The "decision to terminate self-representation [requires] some evidence" that the conduct "threatens the 'core' integrity of the trial." (People v. Carson, 35 Cal.4th 1, 11 (2005)), and the prosecution has no standing to cause the termination of the accused's Faretta status (Id, at fn.1). "Unsubstantiated representations, even by the prosecutor, speculation, or innuendo will not suffice." (Id, at 11), and cannot be "restricted or terminated" without "notice and hearing" (People v. Moore, 51 Cal.4th 1104, 1125-26 (2011) and Wilson v. Superior Court, 21 Cal. 3d. 816, 822 (1978)).

"The right to be heard before being condemned to suffer grievious loss of any kind ... is a principle basic to our society. The fundamental right of due process is an opportunity to be heard 'at a meaningful time in a meaningful manner.'" (Mathews v. Eldridge, 424 US 319, 323 (1976)).

Pet. had no warning, and was unable to say those were the words of the People, not him (People v. Butler, 47 Cal.4th 814, 820-21 (2009)(reversed where prosecutor played role in instigating loss of Faretta status) and Becerra, 63 Cal.4th at 519-20 (reversed after court terminated Faretta status without "giving the defendant an opportunity to be heard" or explaning how conduct violated core integrity of the trial)).

Can words stricken (crossed-out) be the cause of the loss of an accused's right of self-representation? Should the prosecutor's representation of the stricken words be trusted? (Carillo v. County of Los Angeles, 798 F.3d. 1210, 1226 (9th Cir. 2015)(rejecting argument that a prosecutor or police can or should act as the arbiter of relevant evidence, which would be tantamount to "appoint[ing] the fox as henhouse guard.")).

A Lexis-Nexis search shows the Second Appellate District (Div-7) has not granted habeas or mandate review to a pro-per in the 6 years Pet. has

before them. As they cannot say that none of these petitioners had merit, it creates a reasonable presumption that the COA has contempt or disdain for pro-pers, and should not be the COA to conduct a "truffle hunt" on behalf of the trial court, who failed to meet a procedural requirement of revocation.

CONCLUSION

Datamining privileged attorney-client calls is being used so prevelent by prosecution teams to secure convictions that no one (including many courts) wants to kill the goose laying all these golden eggs, and Pet. is simply a sacraficial lamb to that endeavor.

Pet. will be 62 next month, suffers from systematic lupus (a potentially fatal incurable autoimmune disease), turned down a time-served offer in 2020 to hold his accuser's accountable.

Evil is only permitted to exist in a criminal case where good courts do nothing (United States v. Olsen, 737 F.3d. 625, 631 (9th Cir. 2013)(en banc)). This is the most important case to be reviewed in a criminal manner in a decade. The COA appointed attorneys who would not even accept Pet.'s telephone calls, ignore him, and brought less substantial claims; yet the COA repeatedly refers to them as belonging to Pet., though he has no voice in the revocation or on appeal.

RELIEF REQUESTED

Pet. respectfully requests an order from this Court:

(1. Reversing the COA opinion.

(2. Granting full review to the important questions of law contained in this petition.

(3. Grant review of pending petition [8/20/2024] it has much stronger appeal claims, and an accused should have a voice in his own appeal.

(4. As it is improper to remand a case to an embroiled court (even if that court is a COA), the case should be remanded to another COA and trial court.

(5. As Pet. already has credit for well over 20 years, and he is only charged with low-level felonies and his health is failing, hold a hearing for release during the review process.

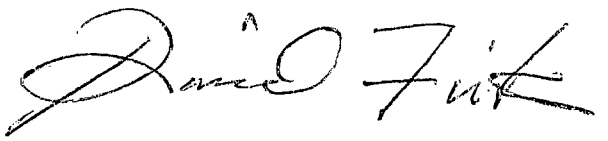
(6. Appoint new counsel of this Court's choosing.

(7. Grant relief and direct that the underlying criminal case be dismissed.

(8. Any other relief that is just.

VERIFICATION

I, David Fink, declare the foregoing facts are true and correct under penalty of perjury. Executed this . . day of . . 2024 in Vacaville California.



David Fink, Petitioner (Pro-Per)

CERTIFICATE OF WORD COUNT

I, David Fink, certify that this 10 page typed petition has no more than 3,500 words.