

No. _____

IN THE
Supreme Court of the United States

THOMAS GAFFNEY WALKER,

Petitioner,

v.

CHRISTOPHER PIERCE, Warden, et. al.,

Respondents.

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

PETITIONER'S APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 27 2026

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

THOMAS GAFFNEY WALKER,

Petitioner - Appellant,

v.

WARREN L. MONTGOMERY, Warden
and XAVIER BECERRA,

Respondents - Appellees.

No. 24-5585

D.C. No.

8:21-cv-00626-SSS-JPR

Central District of California,
Santa Ana

MANDATE

The judgment of this Court, entered March 10, 2026, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to
Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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D.C. No.

8:21-cv-00626-SSS-JPR

Central District of California,
Santa Ana

ORDER

Before: TALLMAN and OWENS, Circuit Judges, and MONTENEGRO, District Judge.*

The panel has voted to deny the petition for panel rehearing. Judge Owens voted to deny the petition for rehearing en banc, and Judges Tallman and Montenegro so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

* The Honorable Ruth Bermudez Montenegro, United States District Judge for the Southern District of California, sitting by designation.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 10 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
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D.C. No.

8:21-cv-00626-SSS-JPR

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Sunshine Suzanne Sykes, District Judge, Presiding

Argued and Submitted February 18, 2026
El Centro, California

Before: TALLMAN and OWENS, Circuit Judges, and MONTENEGRO, District Judge.**

California state prisoner Thomas Gaffney Walker (“Walker”) appeals from the district court’s denial of his 28 U.S.C. § 2254 habeas petition challenging his

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

** The Honorable Ruth Bermudez Montenegro, United States District Judge for the Southern District of California, sitting by designation.

2017 convictions for burglary, sex offenses, and other related crimes. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. As the parties are familiar with the facts, we do not recount them here. We affirm.

The California Court of Appeal’s (“CCA”) denial of Walker’s *Faretta* request was neither “contrary to, [n]or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). The Supreme Court in *Faretta v. California*, 422 U.S. 806, 835 (1975), clearly established that a self-representation request made “weeks before trial” is timely. *See Burton v. Davis*, 816 F.3d 1132, 1141 (9th Cir. 2016) (quoting *Faretta*, 422 U.S. at 835–36); *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005). But the CCA’s determination that Walker’s *Faretta* request—made fifteen days before trial—was untimely does not meet the requirements of § 2254(d)(1).

A state court decision is “contrary to” clearly established law if the state court applies a rule that contradicts controlling Supreme Court authority or “if the state court confronts a set of facts that are materially indistinguishable from a decision” of the Supreme Court but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000). The CCA did not apply a rule contradicting *Faretta* when it noted Walker’s “lack of legal training” and “lack of knowledge regarding the charges” in denying his self-representation waiver, as

these were not the grounds for denying the request. Instead, the CCA denied the request because it was untimely. This case is also not materially indistinguishable from *Faretta*, as the defendants submitted their requests for self-representation at vastly different times—*Faretta* the day after charges were filed and Walker over four years after charges were filed. Brief for Respondent at 6 *Faretta v. California*, 422 U.S. 806 (1975) (No. 73-5772), 1974 WL 186114, at *6.

Nor was the CCA’s decision “objectively unreasonable.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (noting that an unreasonable application of clearly established federal law must be “objectively unreasonable, not merely wrong” (internal quotation marks and citation omitted)). The inherent ambiguity in *Faretta*’s “weeks before trial” rule makes it reasonable for the CCA to conclude that Walker’s request, made fifteen days before trial, was not timely. *See Clark v. Broomfield*, 83 F.4th 1141, 1151 (9th Cir. 2023) (noting that the Supreme Court never “delineated the ‘precise contours’ of *Faretta*’s timeliness requirement” (citation omitted)); *Marshall*, 395 F.3d at 1061 (“[W]e still do not know the precise contours of [*Faretta*’s timing] element.”).

Our decisions in *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997), *overruled on other grounds by, Williams*, 529 U.S. at 412, and *Tamplin v. Muniz*, 894 F.3d 1076, 1089 (9th Cir. 2018), do not dictate otherwise because our respective analyses under the Antiterrorism and Effective Death Penalty Act of

1996 (AEDPA) were dicta. *Moore*'s AEDPA analysis was irrelevant to the result because the pre-AEDPA rules controlled based on when the habeas petition was filed. *See Lindh v. Murphy*, 521 U.S. 320, 322–23 (1997) (holding that AEDPA's amendments did not apply to habeas applications "that were already pending when the Act was passed"). *Tamplin*'s analysis was irrelevant to the result because the case was decided on *de novo* review, 894 F.3d at 1086, and our AEDPA discussion was in the context of a counterfactual hypothetical. *Id.* at 1088–89.

AFFIRMED.

JS-6

THOMAS GAFFNEY WALKER,

Petitioner,

V.

PATRICK COVELLO, Warden,

Pursuant to the Order Accepting Magistrate Judge's Report and Recommendation, **IT IS HEREBY ADJUDGED** that the petition is **DENIED** and this action is dismissed with prejudice.

DATED: August 15, 2024

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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10
11 THOMAS GAFFNEY WALKER,
12
13 Plaintiff,
14
15 v.
16 WARREN MONTGOMERY, et al.
17 Defendant.

Case No. 8:21-cv-00626-SSS-LAL

**ORDER DECLINING TO ADOPT
THE REPORT AND
RECOMMENDATION AND
DENYING FEDERAL HABEAS
RELIEF [DKT. 18]**

18 On March 30, 2021, Petitioner Thomas Gaffney Walker (“Petitioner”)
19 filed a Petition for Writ of Habeas Corpus (the “Petition”). [Dkt. 1]. Petitioner
20 seeks relief from his state court convictions on either of two alternative grounds:
21 (1) that the state court’s denial of his motion to represent himself at trial violated
22 his Sixth Amendment right as articulated in *Faretta v. California*, 422 U.S. 806
23 (1975), (“Claim One”) and (2) that his trial counsel was ineffective (“Claim
24 Two”). [Dkt. 18 at 5].

25 Before the Court is Magistrate Judge La Mothe’s report (the “Report”),
26 concluding Claim One supports Petitioner’s requested relief under 28 U.S.C. §
27 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act (“AEDPA”)
28

1 and recommending this Court grant Petitioner habeas relief. [Dkt. 18].¹

2 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Report,
3 and the Respondent's Opposition to the Report. [Dkt. 1; Dkt. 18; Dkt. 25].

4 For the reasons set forth below, the Court respectfully **DECLINES TO**
5 **ADOPT IN PART** the Report, **ISSUES** a certificate of appealability as to
6 Petitioner's *Faretta* claim, and **RECOMMITS** the matter to Judge La Mothe
7 for further consideration of the Petitioner's second claim. [Dkt. 18]. Moreover,
8 Petitioner's Writ of Habeas Corpus as to his *Faretta* claim is **DENIED**.

9 **I. BACKGROUND**

10 This habeas proceeding arises out of Petitioner's convictions in two
11 partially consolidated criminal trials in Orange County Superior Court. *Id.* at 2.²

12 Petitioner's *Faretta* claim, Claim One, pertains to his attempt to invoke
13 his right to self-representation during pretrial proceedings for the two partially
14 consolidated criminal trials in Orange County Superior Court. On September
15 13, 2017, Petitioner moved to represent himself. *Id.* at 8. At this point, both
16 cases were set for trial on September 28, 2017. *Id.* Thus, Petitioner sought to
17 dismiss his attorney and represent himself fifteen days before the start of his
18 trials. *Id.* at 8, 9. The trial court held a hearing on Petitioner's *Faretta* motion
19 and denied his request as untimely. *Id.* at 13.

20 Petitioner was represented by counsel at both trials and sentenced to an
21 aggregate state prison term of 75 years to life plus 18 years. *Id.* at 2. The
22 California Court of Appeal affirmed the trial court's *Faretta* ruling on direct
23 appeal. *Id.* at 2–3. The California Supreme Court declined review. *Id.*

25 ¹ Because the Report finds Claim One provides an adequate basis on which to
26 grant habeas relief, it does not address Plaintiff's ineffective assistance of
27 counsel argument. [Dkt. 18].

28 ² Judge La Mothe's Report contains a recitation of the facts of Petitioner's
cases. [Dkt. 18].

1 In his Petition, Petitioner argues, in part, the California Court of Appeal
2 erred under AEDPA by upholding the trial court's denial of his *Faretta* motion
3 on timeliness grounds. [Dkt. 18 at 5]. After careful review of the Petitioner's
4 arguments, Judge La Mothe recommended this Court grant Petitioner federal
5 habeas relief because of the trial court's improper denial of the Petitioner's
6 *Faretta* motion. *Id.* at 5 n.10.

7 **II. LEGAL STANDARD**

8 Under AEDPA, a federal habeas court may grant a writ of habeas corpus
9 to a state prisoner only if the claim was decided by the state court on the merits,
10 and the state court's decision was "contrary to, or involved an unreasonable
11 application of, clearly established Federal law, as determined by the Supreme
12 Court of the United States." 28 U.S.C. § 2254(d)(1).

13 The "'clearly established Federal law' in § 2254(d)(1) 'refers to the
14 holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the
15 time of the relevant state-court decision.'" *Carey v. Musladin*, 549 U.S. 70, 79
16 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "A state court
17 decision is 'contrary to' clearly established federal law if it either applies a rule
18 that contradicts the governing Supreme Court law, or reaches a result that differs
19 from the result the Supreme Court reached on 'materially indistinguishable'
20 facts." *Leibel v. Cal. Dep't. of Corr. and Rehab.*, No. 2:22-cv-04270-JLS-JDE,
21 2022 WL 18542401, at *10 (C.D. Cal. Dec. 16, 2022) (quoting *Brown v.*
22 *Payton*, 544 U.S. 133, 141 (2005)).

23 While a district court may not look to circuit precedent to "refine or
24 sharpen a general principle of Supreme Court jurisprudence," a district court can
25 utilize circuit precedent to "ascertain whether [the circuit] has already held that
26 the particular point in issue is clearly established by Supreme Court precedent."
27 *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

28

1 At issue in this case is the holding of *Faretta v. California*, 422 U.S. at
2 835–836. In *Faretta*, the Supreme Court found a violation of the Sixth
3 Amendment where the trial court denied the defendant’s request to represent
4 himself and the request was made “weeks before trial.” *Id.* The Supreme
5 Court’s decision in *Faretta* has since been construed to require not only the
6 request for self-representation be made “weeks before trial,” but also that the
7 request must be “unequivocal, as well as voluntary and intelligent.” *U.S. v.*
8 *Hernandez*, 203 F.3d 614, 620 (9th Cir. 2000) (citations omitted); *Godinez v.*
9 *Moran*, 509 U.S. 389, 399–400 (1993) (“In *Faretta*, we held that a defendant
10 choosing self-representation must do so ‘competently and intelligently[.]’”). The
11 Ninth Circuit recognizes the “timeliness element in a *Faretta* request is ‘clearly
12 established Federal law, as determined by the Supreme Court.’” *Marshall v.*
13 *Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005) (quoting *Moore v. Calderon*, 108
14 F.3d 261, 265 (9th Cir. 1997)).

15 In accordance with 28 U.S.C. § 636, the Court conducts a *de novo* review
16 of the Report.

17 **III. DISCUSSION**

18 Judge La Mothe recommends federal habeas relief be granted because the
19 California Court of Appeal’s affirmance of the denial of Petitioner’s *Faretta*
20 motion as untimely was contrary to clearly established federal law. [Dkt. 18 at
21 19–20]. In so finding, Judge La Mothe rests her decision on Ninth Circuit
22 opinions finding *Faretta* motions made approximately two weeks before trial
23 timely under *Faretta*. *Id.*; see also *Moore*, 108 F.3d at 264 (finding a request
24 made 16 days before trial timely under *Faretta*); *Tamlin v. Muniz*, 894 F.3d
25 1076, 1088–89 (9th Cir. 2018) (finding a request made two weeks before trial
26 timely under *Faretta*); *Burton v. Davis*, 816 F.3d 1132, 1141 (9th Cir. 2016)
27 (“the Supreme Court had clearly established that a request to proceed *pro se* is
28 timely if made ‘weeks before trial’ [italics added]).

1 Because Judge La Mothe recommends granting relief based on the
2 *Faretta* issue alone, the Court need not address Petitioner’s second claim for
3 relief. [Dkt. 18 at 5 n.10].³

4 **A. The Requirements of *Faretta***

5 A district court may look to its circuit’s precedent to determine if the
6 circuit has held the point at issue is clearly established by the Supreme Court.
7 *Marshall v. Rodgers*, 569 U.S. at 64. Regarding the requirements of *Faretta*,
8 the Ninth Circuit has found a court should permit a defendant to proceed *pro se*
9 so long as their request for self-representation is (1) timely, (2) not for purposes
10 of delay, (3) and is unequivocal, voluntary, and intelligent. *Hernandez*, 203
11 F.3d at 620. At issue in the Report is whether the California Court of Appeal’s
12 affirmance of the denial of Petitioner’s *Faretta* motion, made 15 days before
13 trial, as untimely was contrary to clearly established federal law.

14 **1. Clearly Established Federal Law: Timeliness of a *Faretta***
15 **Motion**

16 For this Court to grant federal habeas relief, it must find the California
17 Court of Appeal’s affirmance of the denial of Petitioner’s *Faretta* motion
18 contrary to clearly established federal law. 28 U.S.C. § 2254(d)(1). For the
19 reasons set forth below, the Court respectfully disagrees with Judge La Mothe’s
20 Report and finds the trial court’s denial of Petitioner’s *Faretta* motion not
21 contrary to clearly established federal law.

22 A state court decision is contrary to clearly established federal law if the
23 decision “applies a rule that contradicts the governing law as set forth in [the
24 Supreme Court’s] cases” or if the decision confronts a set of facts

25
26 ³ The Court does find Judge La Mothe properly applied 28 U.S.C. § 2254(d)(2)
27 to uphold the California Court of Appeal’s determination that the trial court
28 denied Petitioner’s *Faretta* motion as to both of his pending criminal trials.
[Dkt. 18 at 16–17]. As such, the Court adopts that portion of the Report. *Id.*

1 indistinguishable from a decision of the Supreme Court and nevertheless arrives
2 at a different conclusion. *Williams*, 529 U.S. at 405–06. “[C]learly established
3 Federal law’ under § 2254d(1) is the governing legal principle or principles set
4 forth by the Supreme Court at the time the state court renders its decision.”
5 *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

6 Here, Judge La Mothe finds *Faretta* clearly establishes the rule that a
7 *Faretta* motion made at least 14 days before trial is timely. [See Dkt. 18 at 19–
8 20 (“[D]enial of a *Faretta* motion two or more weeks before trial on the ground
9 that the motion is untimely is contrary to *Faretta*”)]. After careful review of
10 *Faretta*, and relevant Ninth Circuit opinions, the Court finds *Faretta* does not
11 provide courts with such a bright-line 14-day rule.

12 First, as to *Faretta* itself, the opinion does not delineate a bright-line 14-
13 day rule for a *Faretta* motion’s timeliness. In *Faretta*, the Supreme Court stated
14 only that Faretta’s request for self-representation was made “[w]ell before the
15 date of trial[]” and “weeks before trial.” 422 U.S. at 807, 835. Such statements
16 do not indicate, let alone clearly establish, how many weeks before trial a
17 *Faretta* motion must be made for the motion to be timely. Thus, because the
18 above temporal phrases from *Faretta* are ambiguous, *Faretta* does not clearly
19 establish that a request made at least two weeks before trial is *per se* timely.⁴

21
22 ⁴ The Court further notes the Petition could also be denied because the facts of
23 *Faretta* appear to indicate Petitioner’s habeas claim should fail. On June 22,
24 1972, Faretta filed a “Petition to Proceed *Propria Persona*” with the Los Angeles
25 Superior Court. See Resp’t Br. at 6, *Faretta v. Cal.*, 422 U.S. 806 (1975)
26 (No.73-5772), 1974 WL 186114, at *6. The trial court denied Faretta’s request
27 to represent himself on July 13, 1972. *Id.* Thus, given how long it took the trial
28 court to deny Faretta’s request, it is clear Faretta’s request was made *at least 21*
days before trial. Because Faretta made his request at least 21 days before trial,
the Court finds the phrases “well before the date of trial[]” and “weeks before
Faretta, 422 U.S. at 807 & 83. Thus, *Faretta*, when read in light of its facts,

1 Second, the Court also finds the Ninth Circuit’s jurisprudence regarding
2 *Faretta*’s holding as to timeliness to be murky at best. In the Report, Judge La
3 Mothe relies on Ninth Circuit opinions that found *Faretta* motions made
4 approximately two weeks before trial timely under *Faretta*. *Id.*; *see also Moore*,
5 108 F.3d at 264; *Tamlin*, 894 F.3d at 1088–89. While the above cases remain
6 good law, other Ninth Circuit cases hold *Faretta* establishes a much more
7 flexible timeliness standard. *See e.g., Faulty v. Allison*, 623 Fed. App’x. 315,
8 316 (9th Cir. 2015) (“*Faretta* does not articulate a specific time frame pursuant
9 to which a claim for self-representation qualifies as timely[.]”) (quoting *Stenson*
10 *v. Lambert*, 504 F.3d 873, 884 (9th Cir. 2007)); *Marshall v. Taylor*, 395 F.3d
11 1058, 1061 (9th Cir. 2005) (“[A]fter *Moore*, we know that *Faretta* clearly
12 established some timing element, but we still do not know the precise contours
13 of that element.”). Because the Ninth Circuit precedent regarding *Faretta*’s
14 timeliness requirement is unsettled, the Court finds it is not clear as a matter of
15 circuit precedent that a *Faretta* motion made at least 14 days before trial is *per*
16 *se* timely under *Faretta*. As such, the Report improperly concludes, as a matter
17 of Ninth Circuit precedent, that *Faretta* stands for a clear 14-day rule.

18 Thus, because the Court finds *Faretta* does not clearly establish that a
19 *Faretta* motion is timely if it is made at least 14 days before trial, the Court
20 respectfully **DECLINES IN PART TO ADOPT THE REPORT.**⁵

21
22
23
24 does not clearly establish a *Faretta* motion made at least 14 days before trial is
per se timely.

25 ⁵ The Court notes that had AEDPA not applied, it very well might have reached
26 a different conclusion regarding the Petition’s success. The Supreme Court
27 itself has stated “[i]f this standard [2254(d)] is difficult to meet, that is because it
28 was meant to be.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011). In passing
AEDPA, Congress erected a near insurmountable bar to federal habeas relief for
many petitioners, and the Court is bound to AEDPA’s exacting standards.

1 **B. Denial of Petition [Dkt. 1]**

2 Having respectfully declined to adopt the Report in part, the Court must
3 now determine if the Petition should be granted. For the reasons set forth
4 below, the Court **DENIES** Petitioner's Petition. [Dkt. 1].

5 A federal habeas court may grant a petitioner relief only if the state
6 court's decision was (1) "contrary to, or involved an unreasonable application
7 of, clearly established Federal law, as determined by the Supreme Court of the
8 United States," or (2) "based on an unreasonable determination of the facts in
9 light of the evidence presented in the State court proceeding." 28 U.S.C. §§
10 2254(d)(1–2). Section 2254(d) preserved a court's authority to issue "the writ
11 in cases where there is no possibility fair-minded jurists could disagree that the
12 state court's decision conflicts with [the Supreme Court's] precedents."
13 *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

14 First, the Court finds the California Court of Appeal's decision does not
15 run afoul of the requirements of 2254(d)(1). As discussed above, *Faretta* did
16 not clearly establish a *Faretta* motion made at least 14 days before trial is *per se*
17 timely. *See Faultry*, 623 Fed. App'x. at 316. Thus, because *Faretta* does not
18 "articulate" a specific time frame for a *Faretta* motion to be timely, the
19 California Court of Appeal's decision is not contrary to, nor does it involve an
20 unreasonable application of, clearly established federal law. *Id.*; *Lockyer*, 538
21 U.S. at 75 ("The 'unreasonable application' clause requires the state court
22 decision to be more than incorrect or erroneous.").

23 Second, the Court finds the California Court of Appeal's decision does
24 not violate 2254(d)(2). "Under 28 U.S.C. 2254(d)(2), a 'state court factual
25 determination is not unreasonable merely because the federal habeas court
26 would have reached a different conclusion in the first instance.'" *Ochoa v.*
27 *Davis*, 15 F.4th 1314, 1325 (9th Cir. 2020) (citations omitted). Federal habeas
28 courts are "required to afford state courts due respect by overturning their

1 decisions only when there could be no reasonable dispute that they were
2 wrong.” *Woods v. Donald*, 575 U.S. 312, 316 (2015). Here, for the reasons set
3 forth in Judge La Mothe’s report, the Court cannot find the California Court of
4 Appeal’s decision was based on an unreasonable determination of the facts. 28
5 U.S.C. § 2254(d)(2); [Dkt. 18 at 17; Dkt. 18 at 17 n. 39].

6 Thus, because the California Court of Appeal’s decision does not meet
7 the exceptions of 28 U.S.C. §§ 2254(d)(1) or (2), the Court **DENIES**
8 Petitioner’s Petition. [Dkt. 1]. *Ochoa*, 16 F.4th at 1325 (“AEDPA bars the
9 relitigation of any claim adjudicated on the merits by a state court unless one of
10 two narrow exceptions set forth in 28 U.S.C. § 2254(d)(1) or (2) applies.”)
11 (citing *Harrington*, 562 U.S. at 89).

12 **C. Certificate of Appealability**

13 Under 28 U.S.C. § 2253(c)(2), a court may issue a certificate of
14 appealability “only if the applicant has made a substantial showing of the denial
15 of a constitutional right.” A substantial showing of the denial of a constitutional
16 right includes showing if reasonable jurists could debate whether the petition
17 should have been resolved differently or that the issues presented are “adequate
18 to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S.
19 473, 484 (2000) (citations omitted). “Where a district court has rejected the
20 constitutional claims on the merits, ... , the petitioner must demonstrate
21 reasonable jurists would find the district court’s assessment of the constitutional
22 claims debatable or wrong.” *Id.* at 484.

23 Here, the Court finds Petitioner’s *Faretta* claim meets the standards of 28
24 U.S.C. § 2253(c)(2). Reasonable jurists could disagree about the timeliness and
25 constitutional implications of Petitioner’s *Faretta* motion as evidenced by Judge
26 La Mothe’s Report, *Moore*, and *Tamlin*. See e.g., *Moore*, 108 F.3d at 264;
27 *Tamlin*, 894 F.3d at 1088. As such, the Court **GRANTS** a certificate of
28 appealability as to Petitioner’s *Faretta* claim.

1 However, the certificate of appealability shall be **STAYED** until the
2 report and recommendation regarding Petitioner's second claim has been
3 reviewed by the Court.

4 **IV. CONCLUSION**

5 In accordance with the opinion above, the Court respectfully **DECLINES**
6 **IN PART** to adopt the Report. [Dkt. 18]. Further, because reasonable jurists
7 could disagree about the result of the Petition, the Court hereby **ISSUES** a
8 certificate of appealability pursuant to 28 U.S.C. § 2253(c) regarding
9 Petitioner's *Faretta* claim. However, the certificate of appealability shall be
10 **STAYED** until the report and recommendation regarding Petitioner's second
11 claim has been reviewed by the Court.

12 Under 28 U.S.C. § 636, the Court may "recommit the matter to the magistrate
13 judge with instructions." Because Judge La Mothe declined to reach
14 Petitioner's second claim for habeas relief, the Court hereby **RECOMMITS** the
15 matter to Judge La Mothe for consideration of Petitioner's second claim. [Dkt.
16 18 at 5 n. 10].

17
18 **IT IS SO ORDERED.**

19
20 DATED: January 26, 2024



SUNSHINE S. SYKES
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS GAFFNEY WALKER,

Petitioner,

v.

PATRICK COVELLO¹, Warden,

Respondent.

Case No. SACV 21-626-SSS (LAL)

**REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE
TO GRANT PETITION FOR WRIT OF
HABEAS CORPUS**

This Report and Recommendation is submitted to the Honorable Sunshine Suzanne Sykes, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

As detailed below, Petitioner was charged and convicted on overwhelming evidence of grievous offenses. Attempting to ensure Petitioner received a fair opportunity to defend against the serious charges, the trial court denied Petitioner's request to represent himself made two weeks and one day before trial was scheduled to begin. Because Petitioner made his request for self-representation weeks before trial, the state courts' determination that the request was untimely is contrary to clearly established United States Supreme Court precedent.

Accordingly, this Court recommends that habeas relief be granted.

¹ According to the California Department of Corrections and Rehabilitation's online inmate locator, Petitioner is housed at Mule Creek State Prison. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this Court substitutes Patrick Covello, the current warden at Mule Creek State Prison, as the proper Respondent.

I.

PROCEEDINGS

On March 30, 2021, Thomas Gaffney Walker (“Petitioner”) filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. On May 17, 2021, Respondent filed an Answer. On June 16, 2021, Petitioner filed a Reply. Thus, this matter is ready for decision.

II.

PROCEDURAL HISTORY

In November 2017, Petitioner underwent separate jury trials on cases that otherwise largely had been consolidated for pretrial proceedings in the Orange County Superior Court. On November 2, 2017, Petitioner was convicted in case number 13CF0710 (“the Santa Ana case”) of one count of first degree residential burglary of an inhabited dwelling,² one count of kidnapping,³ and one count of second degree robbery.⁴ (CM/ECF Dkt. No. 10-2 at 50, 52-53, 168.) On November 21, 2017, Petitioner was convicted in case number 13WF2533 (“the Costa Mesa case”) of one count of forcible oral copulation,⁵ two counts of assault with intent to commit a sexual offense during the commission of first degree burglary,⁶ and two counts of burglary of an inhabited dwelling with intent to commit a sexual offense.⁷ (CM/ECF Dkt. No. 10-2 at 168; CM/ECF Dkt. No. 10-7 at 92, 94-97, 143.) On January 19, 2018, the trial court sentenced Petitioner in both cases together to an aggregate state prison term of 75 years to life plus 18 years. (CM/ECF Dkt. No. 10-2 at 168-69; CM/ECF Dkt. No. 10-7 at 143-44.)

Petitioner appealed his convictions in the consolidated actions to the California Court of Appeal. (Lodgments 8-10.) On January 7, 2020, the California Court of Appeal affirmed Petitioner’s convictions, but ordered the trial court to strike Petitioner’s six prison prior findings

² Cal. Penal Code §§ 459-460(a), 667.5(c)(21).

³ Cal. Penal Code § 207(a).

⁴ Cal. Penal Code §§ 211, 212.5(c).

⁵ Cal. Penal Code § 288a(c)(2)(A).

⁶ Cal. Penal Code § 220(b).

⁷ Cal. Penal Code §§ 459-460(c).

1 for purposes of sentencing and modify the judgment accordingly. (Lodgment 11.) Petitioner
2 filed a petition for rehearing in the California Court of Appeal (Lodgment 12), which the court
3 denied on January 29, 2020 (Lodgment 13).

4 Next, Petitioner filed a petition for review in the California Supreme Court. (Lodgment
5 14.) On April 15, 2020, the California Supreme Court denied review. (Lodgment 15.)

6 Petitioner then filed a habeas corpus petition in the Orange County Superior Court.
7 (Lodgment 16.) On October 28, 2020, the superior court denied the petition in a reasoned
8 opinion. (Lodgment 17.)

9 Petitioner next filed a habeas corpus petition in the California Court of Appeal.
10 (Lodgment 18.) On January 6, 2021, the California Court of Appeal denied the petition without
11 comment or citation to authority. (Lodgment 19.)

12 Finally, Petitioner filed a habeas corpus petition in the California Supreme Court.
13 (Lodgment 20.) On March 10, 2021, the California Supreme Court denied the petition without
14 comment or citation to authority. (Lodgment 21.)

15 III.

16 SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

17 This Court has independently reviewed the state court record. Based on this review, this
18 Court adopts the factual discussion of the California Court of Appeal's opinion on direct appeal
19 in this case as a fair and accurate summary of the evidence presented at trial:⁸

20 On January 27 and February 13, 2013, [Petitioner] entered two homes in
21 Costa Mesa and committed sex offenses. On February 25, [Petitioner] entered
22 two homes in Santa Ana and committed other crimes. The prosecution filed two
23 separate cases.

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28 ⁸ "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary" *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the state appellate court under 28 U.S.C. § 2254(e)(1). *See, e.g., Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted).

1 *The Costa Mesa Case (13WF2533)*

2 On January 27, 2013, Patricia lived in a Costa Mesa apartment with her
3 four children. At about 10:00 p.m., she went to sleep. Patricia awoke in her bed
4 to find [Petitioner] lying behind her. [Petitioner] grabbed Patricia's hair and was
5 trying to take off her shorts. As Patricia struggled, [Petitioner] got on top of
6 Patricia and raped her. Patricia got away, ran into the bathroom, and tried to close
7 the door, but [Petitioner] was able to get in. [Petitioner] sodomized Patricia in the
8 bathroom. Patricia was able to get out of the bathroom and call the police, but
9 [Petitioner] ran away.

10 On February 13, 2013, Jenny lived in a Costa Mesa home with her parents,
11 brother, and sisters. That evening, after changing into her pajamas, Jenny went
12 downstairs, entered the bathroom, and turned on the lights. As she was closing
13 the door, [Petitioner] turned off the lights and told her to be quiet. [Petitioner]
14 held a knife to Jenny's throat. Jenny orally copulated [Petitioner] as he pulled on
15 her hair. After [Petitioner] left, Jenny went upstairs and told her parents what
16 happened.

17 Fingerprint evidence linked [Petitioner] to Patricia's home. DNA
18 evidence linked [Petitioner] to both Costa Mesa homes.

19
20 *The Santa Ana Case (13CF0710)*

21 On February 25, 2013, Ana lived with her family in a Santa Ana
22 apartment on Lyon Street. At about 6:30 a.m., Ana was getting ready for high
23 school when she saw [Petitioner] entering the living room. [Petitioner] had a beer
24 in his hand and appeared to be under the influence. [Petitioner] came towards
25 Ana, who walked backwards. [Petitioner] got within a foot of Ana, put his hands
26 on her waist, and looked at her with an intense stare. Ana was able to alert other
27 family members. [Petitioner] fled as the police were being called.

1 On February 25, 2013, Norma lived with her husband and children in a
2 Santa Ana apartment on Lyon Street. At about 9:00 a.m., Norma was alone when
3 she saw [Petitioner] walking down the stairs within her apartment. Norma tried to
4 leave, but [Petitioner] blocked her. [Petitioner] told Norma to keep quiet because
5 the police were outside. Hours later, [Petitioner] eventually fled on a stolen
6 bicycle.

7 Ana and Norma, as well as other percipient witnesses, positively identified
8 [Petitioner] as the intruder in the Santa Ana homes.

9 (Lodgment 11 at 2-4.)

10 IV.

11 PETITIONER'S CLAIMS

12 Petitioner raises the following claims for habeas corpus relief:

- 13 (1) The trial court improperly denied Petitioner's request to represent himself at trial
14 pursuant to Faretta v. California⁹; and
15 (2) Petitioner's trial counsel rendered ineffective assistance.¹⁰

16 V.

17 STANDARD OF REVIEW

18 A. 28 U.S.C. § 2254

19 The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as
20 amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

- 21 (d) An application for a writ of habeas corpus on behalf of a person in custody
22 pursuant to the judgment of a State court shall not be granted with respect to any
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25 ⁹ 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

26 ¹⁰ Because this Court recommends granting relief on Claim One, it does not address Petitioner's remaining Claim
27 Two. See Blazak v. Ricketts, 971 F.2d 1408, 1413 (9th Cir. 1992) (when federal habeas relief is granted, "requiring
28 the district court to resolve at one time all the issues raised in the petition could actually delay the proceedings
unnecessarily and waste the district court's scarce judicial resources"); see also Medley v. Runnels, 506 F.3d 857,
860 n.1 (9th Cir. 2007) (en banc) (declining to consider additional claim where habeas relief was granted); Fowler v.
Sacramento County Sheriff's Department, 421 F.3d 1027, 1044 n.10 (9th Cir. 2005) (same).

1 claim that was adjudicated on the merits in State court proceedings unless the
2 adjudication of the claim—

3 (1) resulted in a decision that was contrary to, or involved an
4 unreasonable application of, clearly established Federal law, as determined by the
5 Supreme Court of the United States; or

6 (2) resulted in a decision that was based on an unreasonable
7 determination of the facts in light of the evidence presented in
8 the State court proceeding.

9 28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be.
10 As the United States Supreme Court stated in Harrington v. Richter,¹¹ while the AEDPA “stops
11 short of imposing a complete bar on federal court relitigation of claims already rejected in state
12 proceedings[,]” habeas relief may be granted only “where there is no possibility fairminded
13 jurists could disagree that the state court’s decision conflicts” with United States Supreme Court
14 precedent. Further, a state court factual determination must be presumed correct unless rebutted
15 by clear and convincing evidence.¹²

16 **B. Sources of “Clearly Established Federal Law”**

17 According to Williams v. Taylor,¹³ the law that controls federal habeas review of state
18 court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court
19 decisions “as of the time of the relevant state-court decision.” To determine what, if any,
20 “clearly established” United States Supreme Court law exists, a federal habeas court also may
21 examine decisions other than those of the United States Supreme Court.¹⁴ Ninth Circuit cases
22 “may be persuasive.”¹⁵ A state court’s decision cannot be contrary to, or an unreasonable
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24 ¹¹ 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).

25 ¹² 28 U.S.C. § 2254(e)(1).

26 ¹³ 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000); Hoyos v. Davis, 47 F.4th 1016, 1024 (9th Cir. 2022).

27 ¹⁴ Deck v. Jenkins, 814 F.3d 954, 978 n.3 (9th Cir. 2016) (citing Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999)); LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).

28 ¹⁵ Duhaime, 200 F.3d at 600.

1 application of, clearly established federal law, if no Supreme Court decision has provided a clear
2 holding relating to the legal issue the habeas petitioner raised in state court.¹⁶

3 Although a particular state court decision may be both “contrary to” and an
4 “unreasonable application of” controlling Supreme Court law, the two phrases have distinct
5 meanings under Williams.

6 A state court decision is “contrary to” clearly established federal law if the decision either
7 applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs
8 from the result the Supreme Court reached on “materially indistinguishable” facts.¹⁷ If a state
9 court decision denying a claim is “contrary to” controlling Supreme Court precedent, the
10 reviewing federal habeas court is “unconstrained by § 2254(d)(1).”¹⁸ However, the state court
11 need not cite or even be aware of the controlling Supreme Court cases, “so long as neither the
12 reasoning nor the result of the state-court decision contradicts them.”¹⁹

13 State court decisions that are not “contrary to” Supreme Court law may be set aside on
14 federal habeas review only “if they are not merely erroneous, but ‘an unreasonable application’
15 of clearly established federal law, or based on ‘an unreasonable determination of the facts.’”²⁰
16 Accordingly, this Court may reject a state court decision that correctly identified the applicable
17 federal rule but unreasonably applied the rule to the facts of a particular case.²¹ However, to
18 obtain federal habeas relief for such an “unreasonable application,” a petitioner must show that
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22 ¹⁶ Stenson v. Lambert, 504 F. 3d 873, 881 (9th Cir. 2007) (“Where the Supreme Court has not addressed an issue in
23 its holding, a state court adjudication of the issue not addressed by the Supreme Court cannot be contrary to, or an
24 unreasonable application of, clearly established federal law.”); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S.
25 Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect
26 of spectators’ courtroom conduct, the state court’s decision could not have been contrary to or an unreasonable
27 application of clearly established federal law).

28 ¹⁷ Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S.
at 405-06); Anderson v. Gipson, 902 F.3d 1126, 1132 (9th Cir. 2018).

¹⁸ Williams, 529 U.S. at 406.

¹⁹ Early, 537 U.S. at 8.

²⁰ Id. at 11 (citing 28 U.S.C. § 2254(d)).

²¹ See Williams, 529 U.S. at 406-10, 413.

1 the state court’s application of Supreme Court law was “objectively unreasonable.”²² An
2 “unreasonable application” is different from merely an incorrect one.²³

3 Where, as here with respect to Claim One, the California Supreme Court denied a claim
4 without comment, the state high court’s “silent” denial is considered to be “on the merits” and to
5 rest on the last reasoned decision on the claims.²⁴ Accordingly, this Court looks to the grounds
6 the California Court of Appeal stated in its decision on direct review of Claim One.²⁵

7 VI.

8 DISCUSSION

9 A. Background

10 In Claim One, Petitioner argues the trial court erred by denying his request to represent
11 himself pursuant to Faretta v. California.²⁶ (Petition at 6-16.)²⁷

12 At a pretrial hearing on September 13, 2017, Petitioner’s jury trials in both the Costa
13 Mesa and Santa Ana cases were set for September 28, 2017. (CM/ECF Dkt. No. 10-4 at 18-19;
14 see CM/ECF Dkt. No. 10-4 at 80-81).²⁸ Also on September 13, 2017, Petitioner moved to
15 represent himself pursuant to Faretta in both the Costa Mesa and Santa Ana cases. (CM/ECF
16 Dkt. No. 10-1 at 158-60; CM/ECF Dkt. No. 10-4 at 21; CM/ECF Dkt. No. 10-6 at 146-48.)
17 Before the trial court was able to question Petitioner about his Faretta request, the prosecutor

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19 ²² Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144 (2003) (“Under §
20 2254(d)(1)’s unreasonable application clause, then, a federal habeas court may not issue the writ simply because that
21 court concludes in its independent judgment that the relevant state-court decision applied clearly established federal
22 law erroneously or incorrectly. Rather, that application must be objectively unreasonable.” (internal quotation
23 marks and citations omitted)); Woodford v. Viscotti, 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

24 ²³ Williams, 529 U.S. at 409-10.

25 ²⁴ See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Wilson v. Sellers,
26 ___ U.S. ___, 138 S. Ct. 1188, 200 L. Ed. 2d 530 (2018).

27 ²⁵ See Ylst, 501 U.S. at 803-06. Had this Court considered the merits of Claim Two, it would have deferred to the
28 decision of the Orange County Superior Court on habeas review of that claim. Cannedy v. Adams, 706 F.3d 1148,
1156-59 (9th Cir. 2013) (holding that “look through” practice continues to apply on AEDPA review of California
Supreme Court summary denials of habeas petition).

²⁶ 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

²⁷ Because Petitioner did not number each of the pages of the Petition, for clarity this Court refers to the page
numbers applied to the Petition by the electronic docketing system.

²⁸ On September 28, 2017, the trial court swore in a jury panel for trial in the Costa Mesa case and, over Petitioner’s
objection, continued the Sana Ana case until the following month. (CM/ECF Dkt. No. 10-4 at 81-82.)

1 asked to trail the matter until the following day in order to file a response to Petitioner's motion.
2 (CM/ECF Dkt. No. 10-4 at 21-23.) The trial court trailed the matter until September 14, 2017
3 for consideration of Petitioner's Faretta motion. (CM/ECF Dkt. No. 10-4 at 23-24.)

4 On September 14, 2017, the prosecutor filed with the trial court a response to Petitioner's
5 Faretta motion, arguing that Petitioner's request should be denied because the attorneys had
6 announced ready for a September 28, 2017 trial date, witness testimony would be "complex and
7 protracted," the victims were reluctant witnesses but were cooperating with the current trial date,
8 some witnesses had retired but were cooperative in appearing for the current trial date, the case
9 was generally complex, and Petitioner made his request more than four years after the charges
10 were filed and could have made his request earlier. (CM/ECF Dkt. No. 10-6 at 149-58.) Before
11 the trial court proceeded with the hearing on Petitioner's motion, Petitioner confirmed his desire
12 to represent himself. (CM/ECF Dkt. No. 10-4 at 27.) The trial court then conducted the
13 following hearing:

14 THE COURT: Which case is going to trial that we are talking about? Is it
15 the burglary with the forced oral copulation?

16 [THE PROSECUTOR]: It is the first one, your Honor, the case ending in
17 2533.

18 [DEFENSE COUNSEL]: That one.

19 THE COURT: That's the one I'm referring to. Do you know what your
20 maximum sentence is on that?

21 [PETITIONER]: Yes.

22 THE COURT: Do you know what it is?

23 [PETITIONER]: Life sentence.

24 THE COURT: It is two life, right?

25 [PETITIONER]: Yeah.

26 THE COURT: What is the minimum?

27 [PETITIONER]: I just know it is life. That's the -- anything, any
28 minimum is not relevant to me, your Honor.

1 THE COURT: Have you had a chance to look at that, [defense counsel]?

2 [DEFENSE COUNSEL]: I haven't figured that out.

3 [PETITIONER]: He doesn't have much information on that one.

4 THE COURT: If you were to represent yourself, you're the one who's
5 going to have to figure that out. [Defense counsel] is not going to be around to
6 help you.

7 [PETITIONER]: I will definitely do that. . . .

8 . . .

9 THE COURT: This case is, what, over three and a half, four-years old?

10 [THE PROSECUTOR]: Yes, your Honor.

11 THE COURT: It has gone through the system. The preliminary hearing
12 took quite awhile. It has been set for trial quite a few times. There have been
13 DNA experts appointed, a lot of DNA evidence evaluated. I understand there are
14 hundreds of pages of discovery.

15 How familiar are you with the issues that deal with DNA?

16 [PETITIONER]: He has told me that I'm more familiar with it than he is.
17 So, apparently, pretty good. I do agree. So, yeah, there's a lot of discovery that I
18 haven't seen. It is still missing.

19 THE COURT: You haven't seen all the discovery?

20 [PETITIONER]: I haven't seen all the discovery. We have been waiting
21 for the discovery three years now. We are waiting for the District Attorney to
22 turn this over, we are waiting for this, waiting on that. I got this. Come time to
23 find out he doesn't have that.

24 THE COURT: From what I understand, [defense counsel] has all the
25 discovery at this point and everybody is going to be ready for trial on the 28th of
26 September.

27 [PETITIONER]: I would like to see my own discovery to know what I am
28 dealing with. It is my life, not his. I have been trying to relieve him several,

1 several times, to exhaust it, only to have to -- if that's the only way to defend
2 myself and fighting for myself, then, so be it.

3 I don't think what I'm facing has anything to do with it. I'm sure there are
4 serial killers and serial rapists that represent themselves. So, what's so difficult
5 for me to represent myself?

6 THE COURT: How long do you think it is going to take you to be ready
7 to represent yourself?

8 [PETITIONER]: That would depend on the discovery. I haven't had a
9 chance to review any discovery.

10 THE COURT: Are you going to be ready on the 28th of September?

11 [PETITIONER]: If you're dumping it on my lap and asking me to be
12 ready -- I don't even think at this time you could be ready, judge, for that amount
13 of time, to be honest.

14 THE COURT: Well, [defense counsel] has had the case awhile and he is
15 ready.

16 [PETITIONER]: So, I can try to be -- yeah, I can try to.

17 THE COURT: What is the People's position, do wish to be heard any
18 further?

19 [THE PROSECUTOR]: No, your Honor.

20 [PETITIONER]: I can try to be ready.

21 THE COURT: At this stage, the case has been around for over three years.
22 It has been through a lot of procedures and there's a lot of discovery you are not
23 familiar with.

24 [PETITIONER]: There is a lot I am familiar with, but there is a lot that
25 hasn't been turned over to me.

26 THE COURT: Do you have any education regarding DNA?
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1 [PETITIONER]: I don't think education has anything to do with
2 representing myself. It is if I am competent to stand trial, then, I am competent to
3 waive counsel and represent myself at trial.

4 [DEFENSE COUNSEL]: I will indicate, if it is helpful, he not only has the
5 DNA reports, but he has all the raw data, and he has been discussing that with me
6 in some detail for several months.

7 THE COURT: Anything else you want to tell me? Why you are waiting
8 until the last minute?

9 [PETITIONER]: I have exhausted every other opportunity I have to get
10 new counsel. They won't appoint it for me. There is clearly a communication
11 breakdown between me and [defense counsel]. There has been, it has not just
12 popped up, but for a couple of years now continuously --

13 THE COURT: All right. So, it is not that you want to represent yourself,
14 you just don't want [defense counsel] to represent you.

15 [PETITIONER]: I would rather represent myself. It is my life in my
16 hands. If I'm going to fall by the wayside with two life sentences, I would rather
17 it be on me than him at this point.

18 THE COURT: Okay. But if you were appointed another attorney, then,
19 you wouldn't want to represent yourself; is that right?

20 [PETITIONER]: I would still want to represent myself.

21 THE COURT: Why is that?

22 [PETITIONER]: Because I don't trust any counsel appointed to me. Like
23 I said yesterday, it is going to be ineffective assistance of counsel, wanton
24 misconduct, moral turpitude, and everything else. My best interest is not in his
25 hands. I tried to explain that to several judges and everyone else, but apparently,
26 it is not getting me anywhere.

27 THE COURT: Do you think you will be able to cross-examine the DNA
28 expert?

1 [PETITIONER]: Yes, I can. Yes, your Honor.

2 THE COURT: Have you had any education on DNA?

3 [PETITIONER]: No, just what I've read.

4 THE COURT: You have just read the reports?

5 [PETITIONER]: I don't have any professional training on DNA evidence.

6 THE COURT: Do you have any reports from your expert, the experts
7 appointed to represent you?

8 [PETITIONER]: I have some information. I don't know what it all entails
9 because I don't have what he has.

10 THE COURT: [Defense counsel], anything else you want to add?

11 [DEFENSE COUNSEL]: He has everything I have.

12 [PETITIONER]: Well, it should be easier and quicker for me.

13 THE COURT: And everybody will be ready for trial on the 28th?

14 [THE PROSECUTOR]: Yes, your Honor.

15 [DEFENSE COUNSEL]: God willing.

16 THE COURT: At this point, you don't even have all the discovery or you
17 haven't been over all the discovery. The case has been around for three and a half
18 years. Your request to represent yourself is not timely at this point on the eve of
19 trial. Both counsel are ready and have had years to prepare for this case.

20 I'll deny your motion based on an untimely request.

21 [PETITIONER]: Excuse me. You said if I would be ready to represent
22 myself on the 28th, and I said, yeah, and you deny me?

23 THE COURT: I don't believe you would.

24 . . .

25 THE COURT: . . . The request is untimely, so I'm going to deny your
26 request to represent yourself at this point.

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1 [PETITIONER]: Okay. Well, what about as far as Faretta versus Moon.
2 He was able to represent himself at the last minute. I can't represent myself? I
3 thought it was my constitutional right to represent myself.

4 THE COURT: Well, at this point --

5 [PETITIONER]: The Fourth Amendment, the Fourteenth.

6 THE COURT: -- the years it has taken to get to this point, plus the fact it
7 is on the eve of trial --

8 [PETITIONER]: That's a delay by my counsel and the District Attorney.

9 THE COURT: It is the Court's discretion at this point and I'm going to
10 deny your motion to represent yourself.

11 (CM/ECF Dkt. No. 10-4 at 27-35.)²⁹

12 **B. Legal Standard**

13 The United States Supreme Court in Faretta interpreted the right to counsel to encompass
14 the right of the accused to represent himself at trial, and thus waive the right to counsel. The
15 Supreme Court explained in Faretta:

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18 ²⁹ Petitioner again moved to represent himself on September 28, 2017. (CM/ECF Dkt. No. 10-4 at 39.) However,
19 because this Court recommends that the Petition be granted as to the September 13, 2017 Faretta motion, it does not
20 address the later motion. Yet this Court notes with respect to the September 28, 2017 motion that the trial court
21 denied Petitioner's Faretta request based exclusively on a finding that Petitioner lacked sufficient knowledge and
22 expertise to adequately represent himself at trial and, thus, was incompetent to represent himself. (CM/ECF Dkt.
23 No. 10-4 at 44-59.) Although the trial court may have been well-intentioned, this is an improper inquiry. See
24 Godinez v. Moran, 509 U.S. 389, 399-400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) ("[T]he competence that is
25 required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the
26 competence to represent himself. [Accordingly, a] 'defendant's 'technical legal knowledge' is 'not relevant' to the
27 determination whether he is competent to waive his right to counsel," and "although the defendant 'may conduct his
28 own defense ultimately to his own detriment, his choice must be honored'" (emphasis in original) (quoting
Faretta, 422 U.S. at 834, 836)); see also Tamplin v. Muniz, 894 F.3d 1076, 1083 (9th Cir. 2018) ("The Court
nonetheless held that when a criminal defendant—even one lacking in the 'skill and experience of a lawyer'—is
'made aware of the dangers and disadvantages of self-representation,' he must be permitted to represent himself.")
(quoting Faretta, 422 U.S. at 835). Nevertheless, the California Court of Appeal likely was reasonable in finding
that Petitioner's September 28, 2017 Faretta request was untimely (Lodgment 11 at 13), as it was made on the day
set for trial. See Marshall v. Taylor, 395 F.3d 1058, 1061 (9th Cir. 2005) (state courts reasonably concluded request
made on the first day of trial was untimely). This Court notes, however, that had Petitioner been granted the right to
represent himself he was ready to proceed to trial that day without delay. (CM/ECF Dkt. No. 10-4 at 52, 55, 57-58.)
This Court further notes that the prosecutor appeared to have recognized by that point in pretrial proceedings that the
denial of Petitioner's Faretta motion based on a finding of incompetence likely was error and strenuously urged the
trial court to reconsider its denial of Petitioner's motion. (CM/ECF Dkt. No. 10-12.)

1 The Sixth Amendment does not provide merely that a defense shall be made for
2 the accused; it grants to the accused personally the right to make his defense. . . .

3 The right to defend is personal. The defendant, and not his lawyer or the State,
4 will bear the personal consequences of a conviction. It is the defendant, therefore,
5 who must be free personally to decide whether in his particular case counsel is to
6 his advantage. And although he may conduct his own defense ultimately to his
7 detriment, his choice must be honored out of “that respect for the individual
8 which is the lifeblood of the law.”³⁰

9 While the trial judge may be skeptical about the quality of the representation that a defendant
10 will provide for himself, the defendant must be allowed to exercise his right to self-
11 representation so long as he knowingly and intelligently waives his right to counsel and is
12 willing and able to comply with the rules of procedure and courtroom protocol.³¹

13 The right to self-representation, however, is neither automatic nor without qualification.
14 To properly invoke his rights under Faretta, a defendant’s request must be timely, not for
15 purposes of delay, unequivocal, and knowing and intelligent.³² The Supreme Court has not
16 articulated when a Faretta motion will be considered “untimely,” but has found that a motion
17 made “weeks before trial” is properly presented.³³

18 Faretta’s rules concerning self-representation are considered clearly established federal
19 law for purposes of AEDPA review.³⁴ However, because the Supreme Court has not clearly
20

21 ³⁰ Faretta, 422 U.S. at 819-20, 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 25 L. Ed. 2d
353 (1970) (Brennan, J., concurring)).

22 ³¹ See McKaskle v. Wiggins, 465 U.S. 168, 173, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

23 ³² McCormick v. Adams, 621 F.3d 970, 976 (9th Cir. 2010). Notably, the California Court of Appeal here did not
24 find, and the parties do not argue now, that Petitioner’s February 13, 2017 Faretta motion was equivocal,
unknowing, or unintelligent. This Court finds no basis upon which to conclude otherwise. Accordingly, below this
Court discusses only the timeliness of Petitioner’s motion and whether he made it for the purpose of delay.

25 ³³ See Faretta, 422 U.S. at 835.

26 ³⁴ See Burton v. Davis, 816 F.3d 1132, 1141 (9th Cir. 2016) (“Because we viewed the timing element as essential to
27 the Court’s holding in Faretta, we determined in Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir. 1997) that,
after Faretta, the Supreme Court had clearly established that a request to proceed pro se is timely if made ‘weeks
28 before trial.’”); Marshall, 395 F.3d at 1061 (“[A]fter Moore, we know that Faretta clearly established some timing
element, but we still do not know the precise contours of that element. At most, we know that Faretta requests made
‘weeks before trial’ are timely.”).

1 established when a Faretta request made less than “weeks before trial” is untimely, “[s]tate
2 courts are free to determine when Faretta motions become untimely as long as their standards
3 comport with” Faretta.³⁵

4 **C. Analysis**

5 **1. Applicability of the Trial Court’s Denial to the Costa Mesa Case and**
6 **the Santa Ana Cases**

7 First, Petitioner argues that the trial court denied his request for self-representation in the
8 Costa Mesa case only and, thus, erred by failing to consider Petitioner’s Faretta motion in the
9 Santa Ana case. (Petition at 13-14.) Accordingly, this Court must consider the California Court
10 of Appeal’s conclusion that the trial court denied Petitioner’s Faretta motion as to both the Costa
11 Mesa and Santa Ana cases.³⁶ The California Court of Appeal addressed this issue on direct
12 review of Petitioner’s claim, as follows:

13 In his opening brief, [Petitioner] notes that: “DNA evidence was
14 presented in case number 13WF2533 [the Costa Mesa case] where there was no
15 conclusive eye-witness identification of [Petitioner], but not in case number
16 13CF0710 [the Santa Ana case].” [Petitioner] contends that because the court’s
17 inquiries during the *Faretta* motions concerned the DNA evidence in the Costa
18 Mesa case (13WF2533), the court “did not address his motion as to case number
19 13CF0710 [the Santa Ana Case].” Therefore, [Petitioner] argues that the:
20 “Failure to conduct a *Faretta* hearing in case 13CF0710 [the Santa Ana case]
21 requires reversal.” We disagree.

22 The trial court appointed [defense counsel] to represent [Petitioner] in both
23 cases very early in the proceedings, before the preliminary hearings. After the
24

25 ³⁵ Rogers v. Giurbino, 619 F.Supp.2d 1006, 1013 (S.D. Cal. 2007) (citing Marshall, 395 F.3d at 1061); Faretta, 422
26 U.S. at 835).

27 ³⁶ See Lujan v. Garcia, No. CV 04-1127-MMM (RCF), 2008 WL 7674923 (C.D. Cal. Sept. 15, 2008) (applying
28 AEDPA deference to find state court’s preliminary finding reasonable before determining habeas relief was
warranted as to subsequent step of state court’s analysis), report and recommendation adopted as modified on other
grounds, No. CV 04-01127 MMM (RCF), 2010 WL 1266422 (C.D. Cal. Mar. 30, 2010), aff’d in part, vacated in
part on other grounds, remanded, 734 F.3d 917 (9th Cir. 2013).

1 prosecution filed informations in the superior court, the court then routinely called
2 both cases together for calendaring, and other nontrial matters. Therefore, we
3 interpret the court's denials of [Petitioner]'s two *Faretta* motions to be denials as
4 to both the Costa Mesa case (13WF2533) and the Santa Ana case (13CF0710). If
5 [Petitioner] desired a separate ruling as to the Santa Ana case it was his
6 responsibility to press the trial court for such a ruling and the issue is therefore
7 forfeited on appeal. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 984
8 [a defendant's "failure to press for a ruling waives the issue on appeal"].)
9 (Lodgment 11 at 13-14.) As explained below, this was not an unreasonable determination of the
10 facts.

11 In considering whether a state court decision was based on an "unreasonable
12 determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable
13 "merely because the federal habeas court would have reached a different conclusion in the first
14 instance."³⁷ The "unreasonable determination of the facts" standard may be met where: (1) the
15 state court's findings of fact "were not supported by substantial evidence in the state court
16 record"; or (2) the fact-finding process was deficient in some material way.³⁸

17 The minutes of the trial court proceedings in both the Costa Mesa and Santa Ana cases
18 conclusively establish that the trial court's September 14, 2017 denial of Petitioner's Faretta
19 motion applied to both cases. Specifically, the minutes for both cases reflect that Petitioner filed
20 his Faretta motion on September 13, 2017 and the trial court denied that motion in both cases on
21 September 14, 2017. (CM/ECF Dkt. No. 10-1 at 52-53; CM/ECF Dkt. No. 10-6 at 46-47.)³⁹

22
23 ³⁷ *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010).

24 ³⁸ *Pizzuto v. Yordy*, 947 F.3d 510, 533 (9th Cir. 2019) (citing *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012)).

25 ³⁹ Even if the trial court minutes had not established the denial of Petitioner's motion as to both cases, the
26 remaining record supports the California Court of Appeal's finding that the trial court denied Petitioner's Faretta
27 motion as to both the Costa Mesa and Santa Ana cases. To summarize, the record establishes that the pretrial
28 proceedings in the Costa Mesa and Santa Ana cases, including Petitioner's representation by counsel and waiver of
that representation, were handled concurrently. (CM/ECF Dkt. No. 10-4 at 18-19; see CM/ECF Dkt. No. 10-4 at 80-
81). In fact, on Petitioner's Faretta waiver form, he explicitly identified each of his pending matters, including the
Costa Mesa and Santa Ana cases, as being subject to his motion. (CM/ECF Dkt. No. 10-1 at 158-60; CM/ECF Dkt.
No. 10-4 at 21; CM/ECF Dkt. No. 10-6 at 146-48.) A copy of Petitioner's Faretta waiver form was then included in
the Clerk's Transcripts related to both the Costa Mesa and Santa Ana cases. (CM/ECF Dkt. No. 10-1 at 158-60;

1 **2. Denial of Faretta Motion**

2 Next, this Court must consider the state courts' finding that the trial court did not err
3 when it rejected Petitioner's Faretta motion. The California Court of Appeal affirmed the trial
4 court's Faretta ruling⁴⁰ on direct review, explaining:

5 The trial court found [Petitioner]'s *Faretta* motions to be untimely.

6 Because the motions were made over three years after the cases had been filed,
7 this finding was not beyond the bounds of reason. Both motions were also made
8 virtually on the eve of trial. Given [Petitioner]'s lack of legal training, and lack of
9 knowledge regarding the charges, it appears that "the disruption or delay which
10 might reasonably be expected to follow" if the *Faretta* motions had been granted
11 would have been considerable.^[41] (See *People v. Burton*, *supra*, 48 Cal.3d at pp.
12 852-853.) In short, the court weighed the relevant factors and made a rational
13 judgment. Thus, we find no abuse of discretion.

14 (Lodgment 11 at 13.)

15 ///

16 ///

17
18 CM/ECF Dkt. No. 10-6 at 146-48.) The transcript of the trial court's September 14, 2017 hearing also confirms that
19 Petitioner had multiple matters pending at that time and the trial court was considering the Faretta motion as to both
the Costa Mesa and Santa Ana cases. (CM/ECF Dkt. No. 10-4 at 26-28.)

20 ⁴⁰ In its decision, the California Court of Appeal addressed both Petitioner's September 13 and September 28, 2017
Faretta motions. Again, because this Court concludes that Petitioner is entitled to habeas relief based on his
September 13, 2017 motion, it does not consider Petitioner's later motion.

21 ⁴¹ This finding by the California Court of Appeal regarding Petitioner's lack of legal training and knowledge of the
22 charges causing a delay in the proceedings appears to springboard off the trial court's inquiry at both the hearings on
Petitioner's September 13 and September 28, 2017 Faretta motions into whether Petitioner had sufficient knowledge
23 and expertise to represent himself. (See CM/ECF Dkt. No. 10-4 at 27-35; 44-59.) Again, this Court notes that this
is an impermissible inquiry. See *Godinez*, 509 U.S. at 399-400; see also *Tamplin*, 894 F.3d at 1083. Ultimately, the
24 state court apparently used the issue of timeliness and delay as a cloak for the improper finding that Petitioner did
not have sufficient knowledge and training to adequately defend himself at trial. But Faretta does not permit courts
25 to use a purported finding of untimeliness or delay as a disguise for the actual, albeit improper, reliance on a
defendant's lack of legal expertise. Even the state court authority cited by the California Court of Appeal in its
26 decision on Petitioner's direct appeal does not permit such an analysis. (See Lodgment 11 at 11 (citing *People v.*
Burton, 48 Cal.3d 843, 853 771 P.2d 1270 (1989) (noting that, under state law, a trial court may consider "quality of
27 counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the
request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to
28 follow the granting of such a motion" as factors to be considered in the timeliness analysis, but not enumerating
knowledge or expertise as an appropriate factor to consider)).

1 **a. Timeliness**

2 The only clearly established United States Supreme Court precedent regarding the
3 timeliness of a request for self-representation is the Faretta decision itself. In Faretta, the
4 Supreme Court did not separately analyze the timing of motions for self-representation, stating
5 only that the defendant in that case had moved to represent himself “weeks before trial” and
6 “well before the date of trial.”⁴² Based on this finding, the Ninth Circuit has concluded that
7 Faretta “clearly established” a rule of law regarding the timeliness of a self-representation
8 request. As the Ninth Circuit has explained:

9 In Faretta, the Court twice described the timing of Faretta’s request to represent
10 himself: it was made “weeks before trial” and “well before the date of trial.” The
11 Court’s acknowledgment of the timing of Faretta’s request was neither a
12 recitation of the background facts of the case nor obiter dictum; instead, it is
13 mentioned not only in the opening paragraphs, but also in the very breath with
14 which the Court announced its decision. It is properly considered necessary to the
15 Court’s decision, and therefore is a holding of the Court. As such, it is “clearly
16 established Federal law, as determined by the Supreme Court of the United
17 States.”⁴³

18 Therefore, the timeliness of a Faretta motion should be evaluated in relation to the trial date.⁴⁴
19 The Ninth Circuit has held that it is error to deny a Faretta motion as untimely where the motion
20 is made “weeks before trial” was scheduled to begin.⁴⁵ Accordingly, denial of a Faretta motion
21 two or more weeks before trial on the ground that the motion is untimely is contrary to Faretta.⁴⁶

22 _____
23 ⁴² Faretta, 422 U.S. at 807, 835.

24 ⁴³ Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir. 1997), as amended (Mar. 20, 1997), overruled on other
25 grounds in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

26 ⁴⁴ Faretta, 422 U.S. at 807, 835 (concluding that a motion for self-representation should have been granted where it
27 was made “well before the date of trial” and “weeks before trial”).

28 ⁴⁵ Moore, 108 F.3d at 265.

⁴⁶ See Tamplin, 894 F.3d at 1089 (petitioner’s Faretta motion was timely where he filed the motion “exactly two
weeks before the scheduled trial”); Lacy v. Lewis, 123 F.Supp.2d 533, 549 (C.D. Cal. 2000) (finding motion for
self-representation was timely under Faretta because it was made 13 days before trial commenced and since the
motion was not made for purposes of delay habeas relief was warranted).

1 Here, the California Court of Appeal held that Petitioner’s Faretta motion was properly
2 denied because it was untimely. (Lodgment 11 at 13.) Specifically, the state court explained
3 Petitioner’s motion had been made three years after the case had been filed, it came “virtually on
4 the eve of trial,” and it would have caused disruption or delay. (Lodgment 11 at 13.) The state
5 court’s determination was based on California law, which allows a trial court to deny a Faretta
6 motion that is not made “within a reasonable time” before trial. (Lodgment 11 at 11.) Under the
7 state law relied upon by the California Court of Appeal, a number of factors may be considered
8 in determining whether a defendant had filed his Faretta motion within a reasonable time before
9 trial, including the length and stage of the proceedings and the disruption or delay that may result
10 from granting the motion. (Lodgment 11 at 11.)

11 However, Petitioner made his unequivocal, knowing, and intelligent Faretta motion two
12 weeks and one day before his scheduled trial date. (CM/ECF Dkt. No. 10-1 at 158-60; CM/ECF
13 Dkt. No. 10-4 at 21; CM/ECF Dkt. No. 10-6 at 146-48 (Faretta motion filed on September 13,
14 2017); (CM/ECF Dkt. No. 10-4 at 18-19; see CM/ECF Dkt. No. 10-4 at 80-81) (trial date set for
15 September 28, 2017.) Although state law precedent may set out other factors for determining
16 when a motion for self-representation is timely, when it comes to a motion filed “weeks before
17 trial,” Faretta does not.⁴⁷ Under Faretta’s “weeks before trial” standard, Petitioner’s motion
18 made 15 days before trial was timely. Accordingly, the state courts’ denial of Petitioner’s claim
19 based upon a finding that his motion for self-representation was untimely was contrary to federal
20 law clearly established in Faretta.⁴⁸

21
22 ⁴⁷ Faretta, 422 U.S. at 835 (establishing that a motion made “weeks before trial” is properly presented without
offering further guidance as to any other factors that may be relevant to a timeliness analysis).

23 ⁴⁸ See Tamplin, 894 F.3d 1076, 1088-89 (reviewing timeliness issue de novo and, for the sake of analysis, making
24 assumptions “counterfactually,” but finding even under AEDPA deference that state court decision was “clearly
contrary to Faretta” where it found that motion for self-representation made exactly two weeks before trial was
25 untimely); see also Moore, 108 F.3d at 262-63, 265 (assuming AEDPA deference applied and concluding that state
courts’ finding that Faretta motion made 16 days before trial commenced was untimely was contrary to Faretta);
26 Pruitt v. Pliler, 178 F.App’x 752, 754 (9th Cir. 2006) (affirming district court’s grant of habeas relief and explaining
that, even though state court precedent applied a “reasonable time before trial standard,” a finding that a motion for
27 self-representation made weeks before trial was untimely was contrary to Faretta); Lacy, 123 F.Supp.2d at 549
(granting habeas relief and finding that motion for self-representation made 13 days before trial was timely under
28 Faretta); compare Guyundzhyan v. McDowell, No. CV 14-1416-VBF (JPR), 2015 WL 5159302, at *8 (C.D. Cal.
July 10, 2015) (recommending denial of habeas relief where defendant filed Faretta motion 12 days before trial,
which “could arguably qualify as ‘weeks before trial,’” but defendant was not ready to proceed to trial without a

1 **b. Purpose of Delay**

2 The California Court of Appeal did not make a clear finding that it was denying
3 Petitioner's Faretta claim based on a finding that Petitioner made his motion for self-
4 representation for the purpose of delay.⁴⁹ The California Court of Appeal found that, "[g]iven
5 [Petitioner]'s lack of legal training, and lack of knowledge regarding the charges, it appears that
6 'the disruption or delay which might reasonably be expected to follow' if the *Faretta* motions
7 had been granted would have been considerable." The state court did not find, however, that this
8 delay was the *purpose* of Petitioner's motion. (Lodgment 11 at 13.) This is insufficient to
9 support the denial of Petitioner's Faretta motion, as there must be "an affirmative showing of
10 purpose to secure delay."⁵⁰

11 Nevertheless, habeas relief still would be warranted even if this Court could conclude that
12 the California Court of Appeal denied Petitioner's claim based on a finding that he made his
13 Faretta motion for the purpose of causing a delay in his trial.

14 "In determining whether a defendant's request to defend himself is a tactic to secure
15 delay, a court must consider: 1) the effect of delay, including whether a continuance would be
16 required and whether a delay would prejudice the prosecution; 2) whether events preceding the
17 request are consistent with a good faith assertion of the *Faretta* right; 3) whether the defendant

18
19 _____
20 continuance), report and recommendation adopted, No. LACV 14-01416-VBF (JPR), 2015 WL 5156418 (C.D. Cal.
Sept. 2, 2015).

21 ⁴⁹ It is unclear whether the "purpose of delay" exception continues to apply post-AEDPA. The Ninth Circuit
22 created the "purpose of delay" exception in the context of its bright-line rule that a Faretta motion "is timely made
23 before the jury is empaneled, unless it is shown to be a tactic to secure delay." Moore, 108 F.3d at 264. However,
24 this bright-line rule created by the Ninth Circuit is not clearly established federal law for purposes of AEDPA
25 review. See id. (noting that a state court decision may not be overturned on habeas review "because of a conflict
with Ninth Circuit-based law, but rather a writ may issue only when the state court decision is 'contrary to, or
involved an unreasonable application of, an authoritative decision of the Supreme Court'"). Nevertheless, even
assuming the purpose of delay exception continues to apply post-AEDPA, Petitioner still is entitled to habeas relief,
as discussed herein.

26 ⁵⁰ Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir.1982); see also United States v. Flewitt, 874 F.2d 669, 674-75 (9th
27 Cir.1989); Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985) (holding "the district court was correct in not
28 considering the petitioner's purpose because . . . the state appellate court did not find that the motion was a tactic to
delay trial"); McNeely v. Hernandez, No. 08cv2284-BTM (CAB), 2010 WL 11475721, at *16 (S.D. Cal. July 12,
2010) (quoting Fritz's "affirmative showing" standard in post-AEDPA Faretta analysis), report and recommendation
adopted, No. 08cv2284-BTM (CAB), 2011 WL 13143682 (S.D. Cal. July 15, 2011), aff'd sub nom. McNeely v.
Cate, 542 F.App'x 619 (9th Cir. 2013).

1 reasonably could be expected to have made the motion at an earlier time; and 4) whether the
2 defendant had bona fide reasons for not asserting the Faretta right earlier.”⁵¹

3 First, the record does not establish that any delay would have resulted from granting
4 Petitioner’s Faretta motion. Although Petitioner indicated he would have preferred additional
5 time to review discovery, he made it clear that, if his ability to represent himself was conditioned
6 on his readiness to proceed to trial on the scheduled date, he would be ready for trial without
7 delay.⁵² (CM/ECF Dkt. No. 10-4 at 31, 34.) In fact, on September 28, 2017, the day Petitioner’s
8 trial was scheduled to begin, Petitioner’s trial counsel requested a continuance and Petitioner
9 refused to stipulate to the delay. (CM/ECF Dkt. No. 10-4 at 38-39, 71, 73, 76.) Instead,
10 Petitioner again sought to represent himself at trial and insisted he was ready at that time to begin
11 jury selection despite there being outstanding discovery. (CM/ECF Dkt. No. 10-4 at 39-58, 62.)
12 Likely for this reason, neither the trial court nor the California Court of Appeal made a specific
13 finding that Petitioner had filed his motion with the purpose of delaying the proceedings.

14 Second, the events preceding Petitioner’s Faretta motion are consistent with a good faith
15 assertion of his right of self-representation. The record shows that Petitioner filed his Faretta
16 motion based on his long-standing complaints about his trial counsel’s representation. (CM/ECF
17 Dkt. No. 10-4 at 30-33.) Before he filed his Faretta motion, Petitioner twice moved the trial
18 court to appoint substitute counsel, with the first motion for substitution coming almost a year
19 before Petitioner filed his Faretta motion. (CM/ECF Dkt. No. 10-1 at 44-46, 51; CM/ECF Dkt.
20 No. 10-6 at 38-39, 45.) It is clear from this record that Petitioner had long been dissatisfied with
21 trial counsel and attempted to remedy his dissatisfaction through means short of self-
22 representation. When left with the prospect of proceeding to trial with an attorney he found to be
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24
25 ⁵¹ Lacy, 123 F.Supp.2d at 549 (citing Fritz, 682 F.2d at 784-85); Avila v. Roe, 298 F.3d 750, 753 (9th Cir. 2002)
26 (citing Fritz, 682 F.2d at 784-85); see also Pruitt v. Plier, 178 F.App’x 752, 754-55 (9th Cir. 2006) (applying factors
discussed in Fritz and Avila in post-AEDPA Faretta analysis).

27 ⁵² Lacy, 123 F.Supp.2d at 550 (first factor does not weigh in favor of a finding of a purpose of delay where the
28 defendant did not request a continuance) (citing Fritz, 682 F.2d at 784 (petitioner’s request for a continuance is
“strong evidence of a purpose to delay”) and United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994) (finding a
request for self-representation was not made for the purpose of delay when petitioner “indicated a willingness to
facilitate the trial process”)).

1 unacceptable, Petitioner exercised his final available option and sought to proceed on his own, as
2 was his right.⁵³

3 As to the third and fourth factors, Petitioner could not reasonably have been expected to
4 have made his Faretta motion earlier and had a bona fide reason for not moving for self-
5 representation at an earlier time. As evidenced by the fact that Petitioner unsuccessfully moved
6 for substitute counsel immediately before filing his Faretta motion (CM/ECF Dkt. No. 10-4 at
7 21-22), Petitioner clearly preferred to proceed to trial with representation from counsel but was
8 unhappy with the performance of appointed counsel. For this reason, Petitioner delayed his
9 Faretta motion while he sought the appointment of counsel he was comfortable with, ultimately
10 making two requests for the trial court to substitute appointed counsel with alternative counsel
11 before filing his Faretta motion. (CM/ECF Dkt. No. 10-1 at 44-46, 51; CM/ECF Dkt. No. 10-6
12 at 38-39, 45.) However, the trial court denied Petitioner's requests. (CM/ECF Dkt. No. 10-1 at
13 46, 51; CM/ECF Dkt. No. 10-6 at 39, 45.) Ultimately, weeks before trial and after the trial court
14 denied Petitioner's second request to substitute counsel, Petitioner informed the trial court that he
15 would rather represent himself at trial than proceed with counsel he did not trust, whether that
16 was appointed counsel or substitute counsel. (CM/ECF Dkt. No. 10-4 at 21, 33.) On this record,
17 it is apparent that Petitioner's delay in bringing his Faretta motion simply was the result of his
18 use of proper procedures to secure substitute counsel before resorting to self-representation.⁵⁴

19 **c. Harmlessness**

20 Finally, Respondent makes a disingenuous argument that any Faretta error here was
21 harmless under the standard of Brecht v. Abrahamson.⁵⁵ (Answer at 10-14.) However, the
22 United States Supreme Court has long held that the improper denial of a criminal defendant's
23

24 ⁵³ See United States v. Hernandez, 203 F.3d 614, 621 (9th Cir. 2000) (finding there was no evidence that the
25 petitioner's Faretta request was calculated to delay the proceedings when petitioner "simply wanted to proceed pro
26 se because he did not trust his appointed counsel"), overruled on other grounds by Indiana v. Edwards, 554 U.S.
164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

27 ⁵⁴ Lacy, 123 F.Supp.2d at 550 (record did not support a finding of a purpose of delay where "the petitioner's
28 request was based on his long-standing complaints about [trial counsel]'s unresponsiveness" and the trial court
denied the petitioner's motion for substitute counsel).

⁵⁵ 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

1 Sixth Amendment right to self-representation is structural error and, thus, is not subject to
2 harmless error analysis.⁵⁶ Accordingly, this Court is not permitted to consider whether the
3 Faretta error here was harmless.

4 **D. Conclusion**

5 This Court is sympathetic to the intent of the trial court of insuring that Petitioner's trial
6 was fair and expeditious, and the attempt by the California Court of Appeal to respect the jury's
7 verdicts in this very serious case when it denied Petitioner's Faretta claim on appeal.
8 Nevertheless, when a criminal defendant makes a timely, voluntary, knowing and unequivocal
9 request for self-representation, which is not made for the purpose of delaying trial, his Faretta
10 rights do not yield to the opinions and preferences of the court, however justified or well-
11 intentioned they may be. "Faretta held, without qualification, that a defendant who makes an
12 unequivocal and timely request to represent himself has a Sixth Amendment right to self-
13 representation, and that a denial of self-representation in the face of such a request is a violation
14 of that right."⁵⁷

15 Because Petitioner's September 13, 2017 Faretta motion was timely as a matter of law,
16 and because the record does not support a finding that he made his motion merely for the
17 purpose of delaying trial, the trial court was obligated under Faretta to grant Petitioner's motion.
18 The trial court's denial of Petitioner's Faretta motion and the denial of Petitioner's Faretta claim
19 by the state courts on appeal deprived Petitioner of his constitutional right to self-representation
20 as protected by the Sixth Amendment and Faretta. Accordingly, this Court has no alternative but
21 to conclude that the state courts' denial of Claim One was contrary to the United States Supreme
22 Court's clearly established Faretta standard. Habeas relief is warranted.

23 ///

24 ///

26 ⁵⁶ See Flanagan v. United States, 465 U.S. 259, 268, 104 S. Ct. 1051, 1056, 79 L. Ed. 2d 288 (1984); McKaskle,
27 465 U.S. at 177 n. 8; see also Frantz v. Haze, 533 F.3d 724, 734 (9th Cir. 2008) ("But, contrary to the state court's
28 assumption, Supreme Court case law establishes unequivocally that a violation of the right to self-representation
recognized in Faretta . . . is structural and thus is not susceptible to harmless error review.").

⁵⁷ Tamplin, 894 F.3d at 1085.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) granting the Petition; (3) directing that a conditional writ of habeas corpus be issued, ordering Respondent to release Petitioner from custody and discharge him from all adverse consequences of his convictions in Orange County Superior Court Case Nos. 13CF0710 and 13WF2533, unless Petitioner is brought to retrial on those matters within ninety (90) days of the date that Judgment becomes final; and (4) directing Respondent to file and serve a notice of compliance with the Order within ninety (90) days of the date that Judgment becomes final.

DATED: October 6, 2022


HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

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ID #:2701 **8:21-cv-00626-DMG (JPR)**
Lodgment No. 15

Court of Appeal, Fourth Appellate District, Division Three - Nos. G055929, G055950

S260628

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT

FILED

THE PEOPLE, Plaintiff and Respondent,

APR 15 2020

v.

Jorge Navarrete Clerk

THOMAS GAFNEY WALKER, Defendant and Appellant.

Deputy

AND CONSOLIDATED CASE

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

8:21-cv-00626-DMG (JPR)
Lodgment No. 11

Court of Appeal, Fourth Appellate District, Division Three
Kevin J. Lane, Clerk/Executive Officer
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS GAFNEY WALKER,

Defendant and Appellant.

G055929, G055950

(Super. Ct. Nos. 13WF2533,
13CF0710)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Julian W. Bailey and Cheri T. Pham, Judges. Affirmed as modified.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Elizabeth M. Kuchar, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Two separate juries in two separate trials convicted defendant Thomas Gafney Walker of multiple residential burglaries, sex offenses, and related crimes. Walker additionally had three strike priors, three serious felony priors, and six prison priors. After the first trial, the judge imposed a 93-year-to-life sentence. After the second trial, a different judge imposed a consecutive 68-year-to-life sentence. This is a consolidated appeal from both trials.

Walker contends that the superior court improperly denied three *Marsden* motions to replace his appointed counsel, and improperly denied two *Faretta* motions to represent himself.¹ We disagree and find no abuse of discretion. Walker also asks this court for a remand so the trial court can exercise its discretion to dismiss the serious felony priors. But the record clearly indicates the lower court would not dismiss the five-year sentence enhancements on remand.

Finally, Walker also asks this court to strike his six prison priors based on a recent change in the law. The Attorney General concedes the issue and we agree. Thus, we will order the trial court to strike the six prison priors and modify the abstract of judgment accordingly. In all other respects, the judgment is affirmed.

I

FACTS AND PROCEDURAL BACKGROUND

On January 27 and February 13, 2013, Walker entered two homes in Costa Mesa and committed sex offenses. On February 25, Walker entered two homes in Santa Ana and committed other crimes. The prosecution filed two separate cases.

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*); *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

The Costa Mesa Case (13WF2533)

On January 27, 2013, Patricia lived in a Costa Mesa apartment with her four children. At about 10:00 p.m., she went to sleep. Patricia awoke in her bed to find Walker lying behind her. Walker grabbed Patricia's hair and was trying to take off her shorts. As Patricia struggled, Walker got on top of Patricia and raped her. Patricia got away, ran into the bathroom, and tried to close the door, but Walker was able to get in. Walker sodomized Patricia in the bathroom. Patricia was able to get out of the bathroom and call the police, but Walker ran away.

On February 13, 2013, Jenny lived in a Costa Mesa home with her parents, brother, and sisters. That evening, after changing into her pajamas, Jenny went downstairs, entered the bathroom, and turned on the lights. As she was closing the door, Walker turned off the lights and told her to be quiet. Walker held a knife to Jenny's throat. Jenny orally copulated Walker as he pulled on her hair. After Walker left, Jenny went upstairs and told her parents what happened.

Fingerprint evidence linked Walker to Patricia's home. DNA evidence linked Walker to both Costa Mesa homes.

The Santa Ana Case (13CF0710)

On February 25, 2013, Ana lived with her family in a Santa Ana apartment on Lyon Street. At about 6:30 a.m., Ana was getting ready for high school when she saw Walker entering the living room. Walker had a beer in his hand and appeared to be under the influence. Walker came towards Ana, who walked backwards. Walker got within a foot of Ana, put his hands on her waist, and looked at her with an intense stare. Ana was able to alert other family members. Walker fled as the police were being called.

On February 25, 2013, Norma lived with her husband and children in a Santa Ana apartment on Lyon Street. At about 9:00 a.m., Norma was alone when she saw Walker walking down the stairs within her apartment. Norma tried to leave, but

Walker blocked her. Walker told Norma to keep quiet because the police were outside. Hours later, Walker eventually fled on a stolen bicycle.

Ana and Norma, as well as other percipient witnesses, positively identified Walker as the intruder in the Santa Ana homes.

Court Proceedings

In March 2013, the prosecution filed a complaint, and later an information in the Santa Ana case (13CF0710). The prosecution charged Walker with: two first degree residential burglaries, one kidnapping (Norma), and one first degree robbery (Norma). The information further alleged sentence enhancements related to the burglaries (nonaccomplices present), and multiple prior convictions (three strike priors, three serious felony priors, and various prison priors).

In August 2013, the prosecution filed a complaint, and later an information in the Costa Mesa case (13WF2533). The prosecution charged Walker with: two first degree residential burglaries, two sex offenses during a residential burglary (Patricia and Jenny), and forcible oral copulation (Jenny). The information further alleged a sex offense sentence enhancement and multiple prior convictions (three strike priors, three serious felony priors, and various prison priors).

In January 2014, the trial court heard a *Marsden* motion to replace Walker's first appointed attorney. The court granted the motion and appointed Frederick McBride to represent Walker in both cases. In October 2016 and September 2017, the court denied two *Marsden* motions by Walker to replace McBride. In September 2017, the court denied two *Faretta* motions by Walker to represent himself.

On November 2, 2017, following a five-day jury trial in the Santa Ana case, a jury returned guilty verdicts as to three of the four crimes (the jury found Walker not guilty as to one of residential burglaries). The jury found the enhancement true (nonaccomplice present). The trial court dismissed two of the prison priors and found

true the remaining prior convictions. The court imposed an aggregate prison sentence of 93 years to life.

On November 13, 2017, the trial court denied a third *Marsden* motion by Walker to replace McBride.

On November 21, 2017, following a seven-day jury trial in the Costa Mesa case, the jury returned guilty verdicts as to all alleged crimes, but did not find the one strike allegation to be true. The trial court dismissed three of the prison priors and found true the remaining prior convictions. The court declined to dismiss any of the three strike priors. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) The court imposed an aggregate prison sentence of 68 years to life. The court ordered the sentence to be served consecutive to the sentence in the Santa Ana case.

Walker filed two appeals. This court consolidated the appeals prior to briefing and oral argument.

II

DISCUSSION

Walker contends the trial court abused its discretion by denying three *Marsden* motions and two *Faretta* motions. Due to recent legislative changes, Walker also requests that his cases be remanded so the court can exercise discretion to dismiss the serious felony priors, and he asks that we strike his prison priors.

A. Motions to Replace Appointed Counsel (3)

A defendant has the constitutional right to be represented by counsel at all critical stages of the criminal proceedings. (U.S. Const., 6th Amend.) However, a defendant only has a limited right to have counsel of his or her choice when counsel is appointed by the court. (*Marsden, supra*, 2 Cal.3d 118.) A defendant who is represented by an appointed attorney may ask the court to discharge that attorney and substitute new

counsel if the defendant's right to counsel would be substantially impaired by continuing with the original attorney. (*Marsden, supra*, 2 Cal.3d at p. 123.)

““[A] *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.”” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.) The court is required to appoint new counsel if the defendant demonstrates that the failure to do so would substantially impair his constitutional right to effective assistance of counsel. (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.)

Generally, a *Marsden* motion is granted when appointed counsel is not providing adequate representation, or when counsel and the defendant have “such an irreconcilable conflict that ineffective representation is likely to result.” (*People v. Jones, supra*, 29 Cal.4th at pp. 1244-1245.) The standard of review is for an abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.) An abuse of discretion occurs only when the court has acted in an arbitrary or capricious manner, or its decision exceeds the bounds of reason. (*People v. Beames* (2007) 40 Cal.4th 907, 920-921.)

1. First Motion to Replace McBride

On October 28, 2016, Walker said that McBride had represented him for over two years, but there had “been a continuous breakdown in communications.” Walker told the court he had concerns about “discovery concerning some D.N.A.” Walker also expressed concerns about evidence he thought should be suppressed. Walker said that he had only seen McBride once in four years.

McBride told the trial court he had done between 300 to 400 trials. McBride said he had seen Walker “at least three times. Two days ago I sat down and explained the strategy on the case that we're going to go on first.” McBride said “the other day I gave him his discovery on the D.N.A. which I had only recently maybe a

month earlier had received.” McBride told the court that his investigator had “talked to Mr. Walker on several occasions. I have very lengthy notes and reports on his conversations.”

After hearing further statements, the court said: “It’s hard for me to imagine that someone with 45 years of experience who has tried over three, four hundred cases to not . . . be a competent and qualified attorney to represent you on these very serious matters.” The court ruled that: “Based on what the court has heard today, the court finds no grounds to [relieve] Mr. McBride.” Walker said: “I can’t stand him. I don’t want him. Get him away from me. He’s the antichrist.” The court responded: “Sir, I’m not relieving him.”

2. Second Motion to Replace McBride

On September 13, 2017, about two months before the first trial, McBride told the court “the whole time I have been having Mr. McBride, there is just a communication breakdown. I can’t seem to get any progress done, you know, with discovery. I have been requesting certain discovery issues that I haven’t received. [¶] He has been telling me he has been waiting for the last three years for DNA results.” Walker said “it is ineffective assistance of counsel, wanton misconduct, moral turpitude, among other things. It is just ridiculous. And I would like to replace him if possible, please.”

The court responded: “Well, I haven’t heard anything that would indicate that his performance is deficient in any way. You know, these cases are set for trial. [¶] Mr. McBride, are you ready for trial?”

McBride responded: “No. We filed a 1050 this morning before he asked for a *Marsden*.” McBride told the court, “I engaged an expert. There are two separate items of evidence and two separate instances that came up positive DNA for Mr. Walker. I engaged an expert to go through all of that. [¶] After a significant period of time, she

completed a report maintaining while she was very helpful in giving me areas of cross examination, she agreed with the Crime Lab.”

After asking additional questions about the DNA evidence, the court said:

“Okay, from what I can see, the representation is not deficient. Mr. McBride is doing everything he can as far as the DNA is concerned, and the issues that are involved.

[¶] You haven’t told me anything that affects his ability to represent you.” The court told Walker: “You have to work together. And Mr. McBride is an excellent attorney.”

Walker responded: “Since I am stuck with him, can I get a *Faretta* waiver? I would like to go pro per.” The court told Walker that he could pursue the *Faretta* motion in front of another judge and denied the *Marsden* motion.

3. *Third Motion to Replace McBride*

On November 13, 2017, after the first trial (the Santa Ana case) and as the second trial (the Costa Mesa case) began, Walker told the court that it had “been a total nightmare the whole time I’ve had him, your honor. I’ve tried to rid of the guy several times.” Walker told the court that “he doesn’t give me the discovery I want. He turns over information to the prosecution.” Walker told the court that McBride “fell completely below the standard of what should be -- attorney responsibility and obligation to protect his client.”

McBride told the court, “I’ve been engaged in exclusively in criminal law for over 40 years; tried just about every kind of case there is . . . ; and then this case, what we’ve done, a very, very significant amount of effort done on the DNA evidence. A significant amount of work was done on the DNA aspects of this case.” McBride went on to explain further details regarding the DNA evidence and the discovery issues with the prosecution.

Walker said, “I really didn’t request a hearing here. I just requested to not sit next to him during the ordeal at this trial.” The court responded: “All right. Well, I

haven't heard evidence sufficient to relieve counsel, particularly with the jury in the hallway, and I haven't heard the cross-examination of the evidence of the witnesses for the DNA. We're going to get that sometime in the future. But at this point, what I took to be a motion to relieve counsel and now you've told me is really just a motion not to sit next to him -- both of those are denied."

4. *Analysis*

In each *Marsden* hearing, the court gave Walker an opportunity to provide details regarding McBride's alleged deficient performance. Most of Walker's concerns had to do with DNA evidence. In each instance, McBride explained the state of the DNA evidence and his actions relative to that evidence. Based on McBride's explanations it appeared to each judge—as it does to this court on review—that McBride is an experienced criminal defense attorney who was thoroughly conversant in the intricacies of DNA evidence, as well of the details of the instant cases. In short, there is nothing to indicate that McBride was providing Walker with inadequate representation. (See *People v. Jones, supra*, 29 Cal.4th at pp. 1244-1245.)

While it does appear that Walker did not trust or get along with McBride, that is not the standard for the replacement of an appointed attorney in a *Marsden* motion. "In determining whether defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result, trial courts properly recognize that if a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." (See *People v. Crandell* (1988) 46 Cal.3d 833, 860, abrogated on another ground by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

There were several disagreements between Walker and McBride regarding trial tactics, particularly as to the DNA evidence. But again, a disagreement in trial tactics does not meet the legal standard in a *Marsden* motion. (See *Drumgo v. Superior Court* (1973) 8 Cal.3d 930, 935 [“Even were there evidence of a disagreement as to trial tactics . . . substitution of counsel would not necessarily be required”].)

In sum, it does not appear to us that the trial court’s rulings regarding any of Walker’s *Marsden* motions were arbitrary, capricious, or beyond the bounds of reason. Thus, we find no abuse of discretion.

Walker argues that he “was understandably frustrated about how his case was progressing with his [trial] counsel.” Walker cites *People v. Jimenez* (2008) 165 Cal.App.4th 75, as “relevant to” the DNA matters in the instant case. We disagree. In *Jimenez*, a jury convicted the defendant of a bank robbery and related crimes based largely on DNA evidence. (*Id.* at p. 77.) Over the defendant’s foundational objections, the court admitted into evidence a criminalist’s testimony that linked swabs purportedly taken from the defendant with evidence from the crime scene. (*Id.* at p. 80.) The Court of Appeal reversed defendant’s convictions based on chain-of-custody issues: “The trial court’s overruling of Jimenez’s foundational objections to the admission of the reference sample and to the criminalist’s comparison of the reference sample with the handlebar swabs was an abuse of discretion.” (*Id.* at p. 81.)

Here, Walker is not challenging the trial court’s admission of his DNA reference samples based on chain-of-custody issues. Indeed, Walker has raised no evidentiary issues whatsoever on appeal. Rather, Walker’s challenge is to the court’s denials in three of his four *Marsden* motions. Again, we find nothing in the record to indicate that the court abused its discretion in any of its *Marsden* rulings.

B. Motions for Self-Representation (2)

Although a criminal defendant has the constitutional right to be represented by counsel, a defendant may nonetheless choose to waive that right and represent himself. (*Faretta, supra*, 422 U.S. at p. 821 [“The Sixth Amendment . . . implies a right of self-representation”].) The denial of a *Faretta* motion is reviewed for an abuse of discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 128-129.)

“A trial court must grant a defendant’s request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial.” (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

“The ‘reasonable time’ requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.” (*People v. Burton* (1989) 48 Cal.3d 843, 852-853.) In evaluating whether a *Faretta* motion has been made within a reasonable time, courts generally consider such factors as “the ‘quality of counsel’s representation of the defendant, the defendant’s prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.’” (*Ibid.*)

1. First Motion for Self-Representation

On September 13, 2017—the same day the trial court denied Walker’s second *Marsden* motion—Walker filed a *Faretta* waiver form referencing both the Costa Mesa case (13WF2533) and the Santa Ana case (13CF0710). The prosecution filed an opposition arguing that both parties were ready for trial. The prosecution argued that

Walker's *Faretta* motion was untimely because it was being made about four years after the cases had been filed, and after two failed attempts to relieve appointed counsel.

On September 14, 2017, the trial court conducted a hearing. Walker said that "there's a lot of discovery that I haven't seen." The court asked Walker if he would be ready for trial on September 28. Walker responded: "If you're dumping it on my lap and asking me to be ready – I don't even think at this time you could be ready, judge, for that amount of time, to be honest." The court told Walker: "Well, Mr. McBride has had the case for a while and he is ready." Walker said: "So, I can try to be – yeah, I can try to." The court asked Walker: "Have you had any education on DNA?" Walker responded: "No, just what I've read."

After further questioning, the court said: "The case has been around for three and a half years. Your request to represent yourself is not timely at this point on the eve of trial. Both counsel are ready and have had years to prepare for this case. [¶] I'll deny your motion based on an untimely request."

2. Second Motion for Self-Representation

On Thursday, September 28, 2017, the Costa Mesa case had been sent to a courtroom for a jury trial. McBride informed the court that he was to receive some additional DNA reports the following day, and he wanted to stipulate to starting the case on Monday. Walker disagreed with McBride, refused to stipulate, and filed a second *Faretta* waiver form referencing only the Costa Mesa case number (13WF2533).

The trial court conducted a hearing. The court inquired as to whether Walker was aware of the charges and his maximum possible sentence. Walker responded that the case involved: "A knife in the commission of a burglary. A weapon." The prosecutor said: "There is no allegation regarding a knife" Walker said that his case was "probably a life case." Walker said that he had no legal training. Walker said that he was able to pick the jurors without having received all of the discovery. When the court

asked how many peremptory challenges Walker would be able to exercise, Walker said that he did not know. When asked to describe the details of the case, Walker said, “If I had my reports all in front of me, I would be able to tell you that.”

After asking additional questions, the court said: “I find that Mr. Walker is not fully informed of his exposure. He does not know the maximum exposure in this case. He does not know all of the charges against him. He does not know the full facts of the case. He refuses to waive time, but yet he doesn’t know the facts of the case. He doesn’t know what evidence [is] going to be presented by the People against him. And based on all of that, I find that he will be incompetent to represent himself at this time.” Walker responded that he wanted to have the court recused. The court denied that motion, stating: “Unfortunately, that is also untimely.”

3. Analysis

The trial court found Walker’s *Faretta* motions to be untimely. Because the motions were made over three years after the cases had been filed, this finding was not beyond the bounds of reason. Both motions were also made virtually on the eve of trial. Given Walker’s lack of legal training, and lack of knowledge regarding the charges, it appears that “the disruption or delay which might reasonably be expected to follow” if the *Faretta* motions had been granted would have been considerable. (See *People v. Burton, supra*, 48 Cal.3d at pp. 852-853.) In short, the court weighed the relevant factors and made a rational judgment. Thus, we find no abuse of discretion.

In his opening brief, Walker notes that: “DNA evidence was presented in case number 13WF2533 [the Costa Mesa case] where there was no conclusive eye-witness identification of appellant, but not in case number 13CF0710 [the Santa Ana case].” Walker contends that because the court’s inquiries during the *Faretta* motions concerned the DNA evidence in the Costa Mesa case (13WF2533), the court “did not address his motion as to case number 13CF0710 [the Santa Ana Case].” Therefore,

Walker argues that the: “Failure to conduct a *Faretta* hearing in case 13CF0710 [the Santa Ana case] requires reversal.” We disagree.

The trial court appointed McBride to represent Walker in both cases very early in the proceedings, before the preliminary hearings. After the prosecution filed informations in the superior court, the court then routinely called both cases together for calendaring, and other nontrial matters. Therefore, we interpret the court’s denials of Walker’s two *Faretta* motions to be denials as to both the Costa Mesa case (13WF2533) and the Santa Ana case (13CF0710). If Walker desired a separate ruling as to the Santa Ana case it was his responsibility to press the trial court for such a ruling and the issue is therefore forfeited on appeal. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 984 [a defendant’s “failure to press for a ruling waives the issue on appeal”].)

C. Prior Serious Felony Enhancements

Walker contends that because of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), effective January 1, 2019, his cases should be remanded for resentencing so the trial court may exercise its discretion to dismiss the five-year prior serious felony conviction enhancements. (Pen. Code, § 1385.)² We disagree; under these circumstances, a remand would be an idle act.

SB 1393 amended section 667, subdivision (a), and section 1385, subdivision (b). Courts now have discretion to dismiss or strike prior serious felony convictions for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

Walker claims SB 1393 applies retroactively since his cases were not yet final on appeal on the effective date of SB 1393. The Attorney General concedes the retroactivity issue; however, he argues that remand is unnecessary. We agree.

² Further undesignated statutory references are to the Penal Code.

Generally, a remand is required “unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) In other words, “if “the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.”” (*Ibid.*) The same rationale applies here.

In the Santa Ana case (13CF0710), Judge Cheri T. Pham sentenced Walker to a total term of 93 years to life in prison: three consecutive 25-year-to-life terms based on the strike priors; three five-year terms for the serious felony priors; and three one-year terms for the prison priors.

The court said “the nature, seriousness, and circumstances of the crime, as compared to other instances of the same conduct, is more serious because Mr. Walker entered not just one, but two residences. In the first residence, he entered in the early morning hours while the victim . . . and her family were still sleeping. In the second residence, Mr. Walker remained for hours directing the victim . . . throughout the apartment and then ultimately stealing a bicycle.” The court found the victims to be particularly vulnerable.

“As to the facts related to the defendant, the Court finds that Mr. Walker does have an extensive prior record of criminal conduct dating back to 1985 when he was a minor. As an adult, he has numerous convictions which do indicate a pattern of increasingly serious criminal conduct, including three prior serious felony convictions, all first degree residential burglaries. [¶] The court further finds that his prior performance on probation and parole was unsatisfactory and that there is strong likelihood that, if not imprisoned, Mr. Walker will be a danger to others.”

In the Costa Mesa case (13WF2533), Judge Julian W. Bailey sentenced Walker to a total term of 68 years to life in prison as follows: two consecutive 25-year-

to-life terms based on the strike priors; three five-year terms for the serious felony priors; and three one-year terms for the prison priors.³

The court said to Walker that “it’s my intention to sentence you consecutively to the sentence that was imposed by Judge Pham on the other case.” The court declined to dismiss the strike priors. (See *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497.) The court said “given the seriousness of the conduct in this case, the defendant’s prior criminal history, his character, background, and his personal circumstances, including his prospects – I note that he has three prior strike offenses that are serious felonies, and his career as a burglar, at least according to the probation report, began at about age 12. I’ve weighed and considered the issues I’ve referenced. [¶] As to the current case, the crimes were just sick and reprehensible. That gives the court significant concern, and the harm that was done is truly unspeakable. Your victims in this case will never recover completely from what you did to them, and I decline to exercise my discretion in striking any and all of the strikes.”

The court said: “The facts relating to these crimes, the nature, seriousness, and circumstances . . . when compared to other instances of the same crime, these are more serious in my opinion. [¶] In that regard, I take into consideration that children were present during the attack on Patricia and that the defendant armed himself with a knife in preparation for his attack on Jenny. The victims were particularly vulnerable; Jenny because of her age and Patricia because she was attacked in her bedroom with three very young children present.”

The court noted: “The facts as they relate to the defendant, I find him to be an extremely violent and dangerous person. He’s preyed upon vulnerable people within their homes. I don’t believe balancing is required because of the mandates of the Three

³ The court found that some of the crimes were either lesser included offenses, or they were not eligible for punishment under section 654.

Strikes law, but I’ve done so in any event and find that there are no circumstances in mitigation that would outweigh circumstances in aggravation.”

Here, given the comments by both judges at the sentencing hearings, as well as the decision not to dismiss Walker’s strike priors, the record clearly indicates to us that the court would not dismiss Walker’s serious felony priors on remand. Thus, in this case ““remand would be an idle act and is not required.”” (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425.)

D. Prison Priors

Effective January 1, 2020, the Legislature approved Senate Bill No. 136, approved by Governor October 8, 2019 (2019-2020 Reg. Sess.) ch. 590, § 1. The change in the law generally eliminates the one-year sentencing enhancement for a defendant who has served a prior prison term within five years (there is an exception for sexually violent prior offenses). (§ 667.5, subd. (b).)

Here, in both cases, the trial court imposed three one-year prison priors for crimes that were not sexually violent offenses (six years total). Walker contends that the statute is ameliorative and therefore applies retroactively. (See *In re Estrada* (1965) 63 Cal.2d 740, 744.) The Attorney General concedes the issue and we agree.

Ordinarily, we would remand the matter for resentencing. However, because the maximum allowable sentence has already been imposed in each case, a remand for resentencing ““would be an idle act and is not required.”” (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425.)

III

DISPOSITION

The trial court is directed to strike Walker's sentence enhancements for the six prison priors, modify the abstract of judgment, and forward a certified copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed as modified.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.