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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>FELIPE ZAMUDIO,<br>Defendant and Appellant. | E070088<br>(Super.Ct.No. RIF1701955)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed.

Richard Jay Moller, 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, Michael Pulos, Teresa Torreblanca and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

## FACTUAL AND PROCEDURAL HISTORY

### A. PROCEDURAL HISTORY

On January 8, 2018, a second amended information charged defendant and appellant Felipe Zamudio with one count of assault by means of force likely to produce great bodily injury under Penal Code[1] section 245, subdivision (a)(4).[2] The information also alleged that, in the commission of the offense, defendant personally inflicted great bodily injury under sections 12022.7, subdivision (a), and 1192.7, subdivision (c)(8). The information further alleged that defendant served a prior prison term under section 667.5, subdivision (b)/

On June 14, 2017, the trial court held a hearing on defendant's petition to proceed in propria persona. After argument by defendant, the trial court denied his petition. Two days later, on June 16, 2017, defense counsel expressed doubt as to defendant's competence to stand trial. On June 20, 2017, the trial court appointed two medical examiners to evaluate defendant and to determine his competency under sections 1368 and 1370. On July 20, 1017, the trial court read and considered the reports of the medical examiners. One examiner concluded that defendant was incompetent to stand trial. The other examiner concluded that defendant would have great difficulty representing himself but was competent to stand trial.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] The felony complaint on this case was initially filed on June 5, 2017.

On August 22, 2017, the parties stipulated to the appointment of a third medical examiner to evaluate defendant. The third examiner concluded that defendant was competent to stand trial. The examiner, however, rendered no opinion as to defendant's ability to represent himself.

On October 10, 2017, the trial court found that defendant was competent to stand trial and resumed the criminal proceedings against defendant.

On October 19, 2017, defendant again petitioned to represent himself. The court denied defendant's petition again.

On January 9, 2018, a jury found defendant guilty of assault by means of force likely to produce great bodily injury. The jury, however, found not true the allegation that defendant personally inflicted great bodily injury. On February 2, 2018, the trial court dismissed the prison prior allegation at the People's request. Thereafter, the court sentenced defendant to prison for three years.

On March 2, 2018, defendant filed his notice of appeal.

B. FACTUAL HISTORY

On June 1, 2017, at about 1:30 p.m., Darnell W. (the victim) stopped at a gas station in Corona. The station was crowded so the victim backed into an open spot next to a pump; he had to make a three-point turn. As the victim backed his car into the spot, defendant walked behind the car and stopped. When the victim opened his car door, defendant said, "You almost fucking hit me." The victim responded, "Get the fuck out of the way." Defendant then quickly approached the victim. When the defendant was about two inches away from the victim, the victim told defendant to "get the fuck out" of his

face. Defendant then punched the victim with a closed fist on the throat. Defendant punched the victim again on the left side of his face around the cheek. A fight ensued between the victim and defendant. After defendant and the victim exchanged punches, defendant ran across the street. Defendant then returned to the gas station and asked the victim, "You like that? You want some more?" The victim told defendant that he was calling the police, paid for his gas, and followed defendant down the street before calling the police.

After speaking to the police, the victim went to a hospital. He received treatment for a broken pinkie finger on his left hand. The victim was unable to work for a week because he had difficulty talking due to the pain in his throat caused by the punch to his throat.

## DISCUSSION

### A. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S PETITION TO REPRESENT HIMSELF

Defendant contends that the trial court erred in denying his two petitions to represent himself. We need not consider defendant's first petition because the court properly denied defendant's second petition.

#### 1. *LEGAL BACKGROUND AND STANDARD OF REVIEW*

A criminal defendant has the right to self-representation (*Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*)), but the right is not absolute (*Indiana v. Edwards* (2008) 554 U.S. 164, 171). In *Edwards*, the United States Supreme court recognized the existence of "gray-area" defendants, who are mentally competent to stand trial but suffer

from severe mental illness rendering them incompetent to conduct trial proceedings by themselves. (*Id.* at pp. 174, 177-178.) Observing the question of competence to stand trial is distinct from the question of competence to represent oneself, the court concluded states may require a higher level of mental capacity for self-representation. (*Id.* at pp. 177-178.) The court declined to articulate a specific competency standard for self-representation but concluded "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (*Ibid.*) The court further noted "the trial judge . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (*Id.* at p. 177.)

In *People v. Johnson* (2012) 53 Cal.4th 519, the California Supreme Court adopted the limitations on self-representation set forth in *Edwards*, concluding the appropriate standard for self-representation "is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Johnson*, at p. 530.) The *Johnson* court also declined to adopt a more specific standard but cautioned: "Criminal defendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly. A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides." (*Id.* at p. 531.) "The trial court's determination regarding a defendant's

competence must be upheld if supported by substantial evidence." (*Ibid.*) Therefore, we defer to the trial court on the issue of whether defendant suffered a mental illness, and we will uphold its determination if supported by substantial evidence. We review for abuse of discretion. (*Ibid.*)

2. *THE COURT'S JUNE 14, 2017 ORDER*

On June 14, 2017, the trial court held a hearing on defendant's *Faretta* motion to represent himself. At the hearing, the following transpired between the trial court and defendant:

"THE COURT: And you want to be your own attorney; is that correct?

"THE DEFENDANT: Yeah.

"THE COURT: You're going to shoot yourself in the foot. Do you want to do that. What's going to happen, every time there is a pro per first, the case expands by ten times so a lot of people when they first get here, they're uptight, 'I want to get out. I ain't waiving time.' And the minute you become a pro per, it happens in every single case, at least ten time longer than it would take you if you had an attorney. If you want to do that, that's ok. [¶] I'm going to ask you some more questions. Is that really what you want to do?

"THE DEFENDANT: The paper says something different that was already said.

"THE COURT: You want to be your own attorney?

"THE DEFENDANT: This one, it just—just an argument."

The court then went on to tell defendant that it was going to ask questions about defendant's ability to read, write, think and focus, and about any mental of emotional

issues. Defendant interrupted the court and stated that he was "perfectly capable." The court then warned defendant that he needed to know "when to be quiet and when to talk, otherwise he [couldn't] be [his] own attorney," and that if it was not his turn to talk, he had to be quiet.

When the trial court asked defendant about his mental health, defendant admitted that he had been "to a mental health department before" about a year and a half prior to the hearing. When the court asked defendant why he had to go to the hospital, defendant responded that he "was hearing voices." The court then asked defendant if he believed it was a good idea to represent himself because he has "to be a real cool, calculated person who has a good grip on reality not on imaginary things," defendant responded: "It shouldn't be a felony, should be like a misdemeanor . . . I have to press charges too."

The court then looked at the police report regarding defendant's offense and noted the responding officer thought that defendant was under the influence and was not "quite in your right mind." The court told defendant, "That is not a good recipe for being an attorney to help yourself. I'm not going to let you be your own attorney. I think letting you be an attorney for yourself would be a mockery of the system of justice that would lead to your inevitable downfall, and that you would suffer serious—." Defendant interrupted the court and said, "I was not under the influence." The court told defendant that whether defendant was under the influence remained to be proven, but that the court was not going to let defendant represent himself. After being interrupted by defendant, the court admonished defendant again that he needed to stop talking out of turn in court.

The court told defendant that his interruptions confirmed the court's thinking that defendant was not mentally fit to be his own attorney.

We need not make a ruling on defendant's first petition because, as will be discussed *post*, the trial court properly denied defendant's second *Faretta* petition. Therefore, any alleged error in denying defendant's first petition was nonprejudicial.

3. *THE TRIAL COURT'S ORDER ON OCTOBER 19, 2017, IS SUPPORTED BY SUBSTANTIAL EVIDENCE*

On October 19, 2017, defendant filed a second petition to represent himself. Again, the trial court denied defendant's petition. We discern no abuse of discretion in the court's denial of defendant's second petition.

Two days after the trial court denied defendant's first petition to represent himself on June 16, 2017, defense counsel declared a doubt as to defendant's competency to stand trial. The court suspended the proceedings and referred defendant to mental health court where a hearing and appointment of medical examiners would occur.

Two appointed psychiatrists evaluated defendant. Dr. Jennifer Bosch concluded that defendant was not competent, but that competence could be achieved if defendant agreed to take anti-psychotic medication. She noted that a mandated medication order would likely be needed for compliance and stabilization. Dr. Bosch also noted that defendant's jail mental health records showed that he had admitted to experiencing auditory hallucinations and that he often presented with paranoia. Defendant had also requested to see a doctor because he felt like there was "something moving in [his] head." When Dr. Bosch asked defendant if he felt trial competent, he said, "Some." Defendant

denied that he suffered from severe mental illness, but admitted to hearing voices and experiencing hallucinations. Defendant, however, refused to be on medication because "[t]hat is for crazy people." Dr. Bosch concluded that defendant's "rigidity and paranoia appears to be impacting his ability to understand and take guidance from his lawyer, not trusting her to represent him, wanting at this juncture to represent himself."

Dr. Robert Suiter concluded that it was "clear" defendant would have "great difficulty representing himself," but that he was trial competent. Dr. Suiter explained that defendant appeared to be "unclean" and "somewhat disheveled." Defendant reported that he had two psychiatric hospitalizations and that he was "hearing stuff." When prescribed an antipsychotic drug during his second hospitalization, defendant refused to take it because he believed the medicine made "people crazy." Defendant indicated that in one instance, he believed that someone was talking to him through a radio. When asked further questions on the matter, defendant could not recall the instance. Dr. Suiter concluded that there was some data to suggest that defendant had a severe mental disorder but that he was unable to elicit psychotic symptoms from defendant during the interview.

On August 22, 2017, the trial court indicated that it had read and considered the doctors' reports; the parties stipulated to the appointment of a third doctor to examine defendant. Dr. Gene Berg concluded that defendant did not have a major mental disorder and that he was able to assist counsel in a rational manner in the development of his legal defense. Dr. Berg indicated that he reviewed the medical documentation that was provided. The records indicated that defendant was placed in a safety cell upon detention

and there was some concern that he was a danger to himself. The records also noted that defendant had made references to "things moving in his head." Dr. Berg explained defendant indicated that he wished to work closely with defense counsel and that his public defender would defend him in court. Dr. Berg did not discuss defendant's competence to represent himself.

Two months later, on October 29, 2017, defendant filed the second petition to represent himself. At the hearing, the court confirmed with defense counsel that defendant had just been through proceedings regarding his competency. When the court asked defendant why he wanted to be his own attorney, he responded, "It's a pretty simple case . . . not a hard case. It was his fault. Nothing happened to him. He didn't press charges on me. He did not pursue it. He never got hurt." Defendant then went on to state, "I can state in a letter, and I can address one to that attorney and one to you, and you can look it up, and we'll call the couple, call that guy, if he wants to press charges on me. It's that simple. That's how I see it." The court then explained to defendant that the prosecutor is the one who files the charges and, even if the victim does not want to press charges, the prosecutor still has discretion to do so. Defendant again responded, "Nothing happened," and the court stated that defendant had a "totally unrealistic vision of how the system works," and it did not think that defendant should represent himself. Thereafter, the court denied defendant's motion and explained that defendant was not ready and did not "really understand the system."

Although the evidence showed that defendant could have technical difficulty representing himself, a defendant's "technical legal knowledge, as such, [is] not relevant

to an assessment of his knowing exercise of the right to defend himself." (*Faretta, supra,* 422 U.S. at p. 836.) However, in this case, there was substantial evidence to support the court's ruling on defendant's petition. Here, two doctors clearly opined that defendant would have difficulty representing himself. Defendant heard voices and had hallucinations even though he indicated that he did not have a mental illness. At the second hearing, the trial court was aware of defendant's struggle with mental illness and the prior proceedings to determine defendant's competency. Moreover, the court was able to observe defendant when he gave nonsensical responses to the court's questions. On a cold record, we cannot evaluate a defendant's demeanor. We thus give great deference to the trial court's exercise of discretion in determining whether the defendant is mentally competent to represent himself, and the decision will be upheld if supported by substantial evidence. (*People v. Johnson, supra,* 53 Cal.4th at p. 531.) Here, the court's denial of the petition is supported by the evidence presented at defendant's competency hearing and the at the hearing on the petition.

Notwithstanding, defendant argues that because the trial court failed to give specific reasons to supports its denial of defendant's *Faretta* motion, the trial court's ruling is not supported by the record. In support of this argument, defendant relies on *People v. Becerra* (2016) 63 Cal.4th 511. *Becerra*, however, does not apply to this case. In *Becerra,* the California Supreme Court overturned a death sentence on a *Faretta* issue. The appellate court overturned the matter because the record of the trial court's ruling on the *Faretta* motion was "bereft of information to support the trial court's [denial] of defendant's pro per status." (*Becerra*, at p. 520.)" Here, the record amply supports the

trial court's ruling on the motion. In fact, given the doctors' opinions regarding defendant's mental state and the responses given by defendant at the hearing on the petition, it may have been an abuse of discretion for the court to grant defendant's petition to represent himself. On appeal, we must presume that the trial court read all three doctors' reports. (*See* ***People v. Montgomery*** (1955) 135 Cal.App.2d 507, 514-515 [when the record is silent, it will be presumed that the trial court has read and considered the report of the probation officer]; and *People v. Black* (2007) 41 Cal.4th 799, 818, fn. 7.) Here, at the hearing on October 19, the trial court knew about defendant's underlying mental health issues and the doctors' evaluations. The court stated: "So in June the attorney who was assigned to you was concerned about your mental health status and referred you out for proceedings pursuant to Section 1368 of the Penal Code, which is for people who have trouble understanding what's going on around them. The doctors evaluated you, and they decided that, yes, that was appropriate, and sent you to Patton, or the Liberty subset of Patton. Then you were returned as being okay to understand what was going on around you and to reinstate proceedings, and that's where we are right now. [¶] You want to be your own attorney. The problem is that I've been doing this for a long time. The underlying mental problems which causes the attorneys to be concerned about you haven't disappeared. You have just learned how to cope with them." Based on these statements by the trial court, we can safely presume that the court had read and considered the doctors' reports evaluating defendant's mental health even though the court did not explicitly refer to the reports when denying defendant's *Faretta* petition. (*People v. Montgomery*, *supra*, at pp. 514-515.)

Therefore, we hold that the trial court's denial of defendant's second petition to represent himself was a proper exercise of the court's discretion.

**DISPOSITION**

The judgment is affirmed.

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MILLER
J.

I concur:

McKINSTER
Acting P. J.

[E070088, *People v. Zamudio*]

RAPHAEL, J., Dissenting.

Defendant and appellant Felipe Zamudio was found competent to stand trial after a psychiatric examination. Before *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), this would have meant he also maintained his constitutional right to represent himself.

In *Edwards*, however, the court allowed states to deny the right of self-representation to so-called "gray area" defendants who are competent to stand trial but not competent to represent themselves. (*Edwards*, *supra*, 554 U.S. at p. 172.) A defendant falls into this gray area only if he "suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*People v. Johnson* (2012) 53 Cal.4th 519, 530 (*Johnson*).)

Here, the trial court denied Zamudio's request to represent himself, yet never expressly found he suffered from "severe mental illness," nor did it refer to this standard. (*Johnson*, *supra*, 53 Cal.4th at p. 530.) Rather, the court repeatedly indicated it was denying self-representation for efficiency, or because it thought an attorney could do a better job for Zamudio than he could do for himself. However, "[a] court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides." (*Id.* at p. 543.)

In fact, while there was reason to evaluate Zamudio for his mental competency, the record does not support a finding that he had a "severe mental illness." (*Johnson*, *supra*, 53 Cal.4th at p. 530.) Nor does it demonstrate that, for any reason, Zamudio

lacked the cognitive or communicative ability to "carry out the basic tasks needed to present the defense without the help of counsel." (*Ibid*.) Indeed, in his most recent of three psychiatric examinations, the doctor found that he had no "major mental disorder," was "mentally and emotionally clear" and "clear in his thinking and [his] ability to communicate." The earlier two psychiatrists did not make affirmative findings that were so definitive, but their reports also did not support a finding that Zamudio is a gray-area defendant.

Because I think the trial court erroneously denied Zamudio's constitutional right to self-representation under applicable law, I respectfully dissent.

I

THE "SEVERE MENTAL ILLNESS" STANDARD

AND GRAY-AREA DEFENDANTS

The Sixth Amendment to the United States Constitution "grants to the accused personally the right to make his defense." (*Faretta v. California* (1975) 422 U.S. 806, 819 (*Faretta*).) The right cannot be denied by a trial court even if the trial court concludes that the defendant "may conduct his own defense ultimately to his own detriment." (*Id.* at p. 834.)

The test for competency to *stand trial* has been established since *Dusky v. United States* (1960) 362 U.S. 402 (*Dusky*). A defendant is competent to stand trial if he or she has "'a rational as well as factual understanding of the proceedings against him'" and "'sufficient present ability to consult with his lawyer with a reasonable degree of rational

understanding.'" (*Ibid.* [*per curiam*].) Before *Edwards*, a defendant who was mentally competent to stand trial also was competent to exercise his or her *Faretta* right to represent himself or herself.

In *Edwards*, the United States Supreme Court held that even if a defendant meets the *Dusky* standard, nevertheless "the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." (*Edwards, supra*, 554 U.S. at p. 174.) The court's holding was based in part on the fact that mental illness does not mean the same thing in all cases. (*Id.* at p. 175 ["Mental illness itself is not a unitary concept. . . . It interferes with an individual's functioning at different times in different ways."].) That is, it is possible that a mentally ill defendant may "satisfy *Dusky*'s mental competence standard" but still be "unable to carry out the basic tasks needed to present his own defense without the help of counsel." (*Id.* at pp. 175-176.) The court was concerned that allowing such defendants to represent themselves at trial could create a "spectacle" that is "humiliating" and thereby both undermine the state's attempt to provide a fair trial, and display a trial that does not appear fair. (*Id.* at p. 176.) Consequently, the court held in *Edwards* that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Id.* at p. 178.)

Our Supreme Court in *Johnson* adopted the authority *Edwards* authorized. The court, however, recognized the difficult task courts face in determining whether a defendant falls into the gray area. The court discussed two "thoughtful" law review articles that contained detailed discussions of the particular effects of a severe mental illness that could identify a gray-area defendant who satisfies *Dusky* yet nevertheless is unable to represent himself. (*Johnson, supra,* 53 Cal.4th at p. 529.) The court described the standards in these articles as "plausible" and "helpful to the extent they suggest relevant factors to consider." (*Id.* at p. 530.) But the court held that it would require only that trial courts apply the general standard articulated in *Edwards*: "[w]hether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Johnson, supra,* at p. 530.)

Our Supreme Court then provided some procedural admonitions for trial courts in applying that fairly general standard. First, the court warned against finding the *Edwards* standard met absent a professional examination of the defendant. (*Johnson, supra,* 53 Cal.4th at pp. 530-531 ["To minimize the risk of improperly denying self-representation to a competent defendant, 'trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation, though the judge's own observations of the defendant's in-court behavior will also provide key support for an incompetence finding and should be expressly placed on the record.' [Citation.]"].)

Second, the court emphasized the need for trial courts to proceed carefully so as not to deny the *Faretta* rights of a defendant who did not meet the *Edwards* standard. The standard must be applied "cautiously," and self-representation not "denied lightly," nor out of expediency. (*Johnson, supra,* 53 Cal.4th at p. 531 ["Trial courts must apply this standard cautiously. The *Edwards* court specifically declined to overrule *Faretta*. [Citation.] Criminal defendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly. A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where *Edwards* permits it."]; see also *People v. Becerra* (2016) 63 Cal.4th 511, 519 [a trial court that terminates a defendant's *Faretta* rights must specify the precise misconduct on which it based that decision; in such a context "it is incumbent upon the trial court to create a record that permits meaningful review of the basis for its rulings"].)

II

THE TWO HEARINGS AT WHICH THE COURT DENIED

ZAMUDIO'S SELF-REPRESENTATION REQUESTS

Judge Hernandez, whose rulings are at issue, arraigned Zamudio on June 5, 2017, and appointed counsel for him. Thereafter, that judge handled only two other brief hearings in the case, on June 14, 2017, and October 19, 2017. At each of these, the court

denied Zamudio's request to represent himself. In between the two hearings, other judges oversaw a process that determined, after three psychiatric examinations, that Zamudio was competent to stand trial.

*A. The June 14, 2017, Hearing*

Nine days after he was arraigned, Zamudio appeared in court to ask to represent himself. He arrived having executed the two-page Riverside Superior Court form "Petition to Proceed In Propria Persona" and having initialed the six advisements that warned him of the dangers of self-representation.. Among other things, the form informed him that it was the advice of the court that he not represent himself; that he will be responsible for following the many technical rules of criminal law, procedure, and evidence without a lawyer; that he will be opposing a prosecution attorney; that he will need to handle, without an attorney, a list of eight trial duties, including (among other things) picking a jury, subpoenaing and presenting witnesses, cross-examining witnesses, preparing jury instructions, and presenting opening and closing argument. He certified that he understood the advisements yet nevertheless wished to represent himself.

In a hearing where the transcript spans barely more than four pages, the trial court denied his self-representation request.. The first half of the hearing consisted of Zamudio persisting in his request despite the trial court's warning him of the dangers of self-representation, as well as his telling the court that he was "perfectly capable" of reading, writing, focusing, and thinking; that he had a "perfect" ability to read and write; and that he could follow court rules.

Zamudio then frankly admitted that, a year and a half earlier, he had been to a hospital because he was "hearing things.". Zamudio nevertheless would not back down from his request to represent himself, telling the court that he believed his case should be a misdemeanor rather than a felony because there was no serious bodily injury. (Zamudio's belief, as it turns out, later was confirmed in the sense that the jury in his case rendered a verdict rejecting the prosecution's allegation that the person he fought suffered great bodily injury.)

The trial court did not expressly rely on the hospital visit. Rather, the court asked for the discovery in the case. Upon reviewing the discovery, the court based its ruling on the fact that Zamudio might have been intoxicated (or otherwise mentally affected) at the time of the offense:

"THE COURT: I have glanced at the police report and you got into a confrontation with a guy at the gas station when you were standing in front of the pumps . . . and the officer thought you were under the influence, and that you were not quite in your right mind.

"That is not a good recipe for being an attorney to help yourself. I'm not going to let you be your own attorney. I think letting you be an attorney for yourself would be a mockery of the system of justice that would lead to your inevitable downfall, and that you would suffer serious —

"THE DEFENDANT: I was not under the influence.

"THE COURT: That remains to be proved. I'm not letting you be your own attorney. I don't think you can think straight. I am not going to let you be your own attorney.

"THE DEFENDANT: I did drink a beer afterwards in order to relax, but before that I did not —

"THE COURT: I'm not going to let you be your own attorney. I'll appoint the public defender."

Lastly, the trial court stated that the fact that Zamudio keeps "talking out in court . . . confirms my thinking that [he is] not mentally fit to be [his] own attorney."

B. *The Examination for Competency to Stand Trial*

Two days after the June 14, 2017, hearing where Zamudio disclosed that he had been "hearing things" a year and a half earlier, defense counsel made an oral motion to have Zamudio evaluated for his competency to stand trial. Judge Hernandez did not handle any hearing related to this request, nor did he make the trial competency determination.

Other judges initially appointed two doctors, Dr. Jennifer Bosch and Dr. Robert L. Suiter, to examine Zamudio. Later, after the recommendations conflicted, the court appointed a third doctor, Dr. Gene Berg, to examine him. In all cases, the court's appointment orders asked the doctors to provide a written report geared toward competency to stand trial (i.e., the *Dusky* test), not competency to represent himself. Dr. Berg concluded unequivocally that Zamudio was competent to stand trial. Ultimately, on

October 12, 2017, counsel for both sides stipulated that Zamudio was competent to stand trial, and the court deemed him competent.

C. *The October 19, 2017, Hearing*

On October 19, 2017, Zamudio once again came to court with a completed two-page form petition in which he initialed all the advisements, and he requested to represent himself. Judge Hernandez then presided in the case for the first time since he denied the same request four months earlier. Once again, in a brief hearing with the matter spanning only six transcript pages, the court denied Zamudio's request.

The court began the hearing by asking counsel how long ago the trial competency proceedings were, and then indicated to Zamudio that the mere fact that his attorneys were concerned about his competency counseled in favor of his not representing himself:

"THE COURT . . . You want to be your own attorney. The problem is that I've been doing this for a long time. The underlying mental problems which cause[d] the attorneys to be concerned about you haven't disappeared. You have just learned how to cope with them. To let you be your own attorney could turn out to be a mockery of justice. . . .

"I'm just worried that you are going to make a fool out of yourself and cause yourself to be convicted and sent for some pretty serious incarceration time. . . "

The court explained that the charges were "sophisticated stuff" and that "[w]henever a person is his or her own attorney, it always makes the case last ten times

longer tha[n] it would have otherwise lasted." After this introduction, the court asked Zamudio why he wanted to represent himself and received the following answer:

"THE DEFENDANT: It's a pretty simple case, first of all. It's not a hard case. It was his fault. Nothing happened to him. He didn't press charges on me. He did not pursue it. He never got hurt. It was his fault. He's the one that — what's it called? His approach, his demeanor toward me made me do that. But everything that happened was his fault and nothing happened to him."

The court then interrupted Zamudio and explained that it was skeptical because "if every guy in an orange jumpsuit said, 'Hey, it wasn't me. Let me go right now,' you know, I'm not going to do that." The court explained that the district attorney filed charges and has a "very different version" of what happened. Then the court stated: "I don't think you have the mental ability to do it. I think an attorney could really help you a lot." Zamudio responded:

"THE DEFENDANT: It's pretty simple. I can state in a letter, and I can address one to that attorney and one to you, and you can look it up, and we'll call the couple, call that guy, if he wants to press charges on me. It's that simple. That's how I see it."

The court explained that an attorney would help Zamudio because Zamudio would "have a little trouble doing that because you are in jail, in custody." The court stated that Zamudio had a "totally unrealistic vision of how the system works. I don't think you are fit to be your own attorney . . . because I think you are just going to sink your own ship. It's like sending you out on a leaky boat and you want to pull the one remaining plug to

make sure you go down. I don't want you to drown yourself. I'm not going to let you be your own attorney."

Zamudio then tried to convince the court that the time would not be a problem:

"THE DEFENDANT: It probably would be faster if I end up doing all that myself. I call the cops. I call that guy, you know. I tell my family to make sure you go up there and you state everything you heard and everything with the hospital report and everything that when I saw him he wasn't hurt."

That did not persuade the court, which stated: "I'm not going to let you be your own attorney because I don't think you are ready to be your own attorney. You don't really understand the system."

Zamudio began to say something, and the court stated: "The answer is no because I don't think you understand the system well enough. She is going to remain your attorney, and she is going to do everything you said and follow through with all of that."

The court's last comments on the matter:

"If you were your own attorney, we'd have to appoint you an investigator, and they don't grow on trees. You'd have to meet with your investigator. You'd have to give your investigator the information; your investigator would have to go out and dig up these people. [Your attorney] can do it a lot faster, believe me."

"So we're going to deny your *Faretta* motion. You are not fit to be your own attorney. It would be a mockery of justice to let you be your own attorney."

D. *The Sentencing Allocution*

Before a different judge, Zamudio was convicted at trial of violating Penal Code section 245, subdivision (a)(4), but the jury also found that he did not inflict great bodily injury on the victim, as was charged. At Zamudio's sentencing allocution, he informed the court: "I wanted to represent myself since the case began, and I was not allowed to do that." He told the court that he disagreed with his counsel's strategy at trial and had told her "over and over" that he wanted to advance a provocation argument, but that he followed her advice and did not testify.

III

THE TRIAL COURT RELIED UPON INSUFFICIENT EVIDENCE TO SUPPORT DENYING ZAMUDIO SELF-REPRESENTATION

The trial court was charged with carefully deciding "whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Johnson, supra,* 53 Cal.4th at p. 530.) There was neither sufficient evidence (a) that Zamudio had a severe mental illness nor (b) that any mental deficiency rendered him unable to carry out the basic tasks needed to present a defense.

A. *Insufficient Evidence of a "Severe Mental Illness"*

1. The First Hearing

At the June 14, 2017, hearing, the trial court's express reason for denying Zamudio self-representation was what the court learned when it "glanced at the police

report" of the altercation charged in the case. Because the officer thought Zamudio appeared to be "under the influence" and "not quite in [his] right mind" at that time, this was "not a good recipe for being an attorney to help yourself."

The police report obviously was not evidence competent to support a conclusion that Zamudio suffers from a severe mental illness. For one thing, the information that the court relied upon was an allegation rather than an established fact. (Zamudio disputed at the hearing that he was under the influence, which the trial court acknowledged "remains to be proved.") As well, the allegation was not a professional evaluation of mental competency nor of mental illness, but rather a lay witness opinion of a momentary mental state. Our Supreme Court has cautioned against finding the *Edwards* standard satisfied absent a professional competency evaluation (*Johnson, supra,* 53 Cal.4th at pp. 530-531), and there was no such evaluation at the time of the first hearing.

The other fact that the trial court briefly relied upon was that Zamudio kept "talking out in court" during the brief hearing. It is unclear whether the court was simply referring to Zamudio's vigorously pressing his self-representation argument, during which the transcript shows him interrupting the court on at least one occasion, or something else. While a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct" (*Faretta, supra,* 422 U.S. at p. 834, fn. 46), Zamudio's conduct at this single hearing could at best have warranted a warning, but not the denial of his constitutional right. To be sure, if the trial court believed that Zamudio's conduct showed an inability to constrain his behavior, that

could be one factor supporting a finding of incompetency. But this record of a quick hearing shortly after arraignment cannot rationally support a determination that Zamudio's "talking out" resulted from a severe mental illness, rather than nerves or unfamiliarity with court procedures. (*People v. Carson* (2005) 35 Cal.4th 1, 10) [factors counseling against terminating self-representation include if defendant's conduct is subject to correction and if he has not yet been warned about it].)

Zamudio volunteered at the hearing that he had been to a hospital a year and a half earlier because he had been "hearing things." Such a fact supports *evaluating* Zamudio for his mental competency. Indeed, following the hearing, Zamudio's counsel made such a referral—which ended in a determination that he was competent to stand trial. Yet the self-reported past event could not be sufficient to determine that Zamudio presently had a severe mental illness, even if the court had relied upon it.

If the events at the hearing *did* indicate to the trial court that Zamudio may have a severe mental illness, the result should have been for the trial court to refer him for an examination on at least his competency to stand trial under the *Dusky* standard, and perhaps his competency under the *Edwards* standard as well. Instead, the court effectively deemed Zamudio a gray-area defendant who has a serious mental illness that did not affect his ability to stand trial but did affect his ability to represent himself. This nuanced determination rationally could not have been made on the record of the brief hearing.

2. The Second Hearing

At the October 19, 2017, hearing, the trial court never used the word "illness," much less found that Zamudio suffered from a severe mental illness. Instead, the court used reasoning that would apply to many criminal defendants who—while not mentally ill—simply may not do as good a job as an attorney might. The court found that Zamudio did not have the "mental ability" to oppose the district attorney who has a "very different version" of events, and an attorney "could really help" him. The court stated: "I don't think you are fit to be your own attorney because I think you are just going to sink your own ship"; "I don't want you to drown yourself. I'm not going to let you be your own attorney"; and "I'm not going to let you be your own attorney because I don't think you are ready to be your own attorney." Rather than connecting Zamudio's inability to represent himself to a mental illness, the court connected it to lack of knowledge of the legal process: "You don't really understand the system"; "I don't think you understand the system well enough"; and "you have a totally unrealistic vision of how the system works."

Further, the trial court relied on the fact that Zamudio was in custody (rather than suffering a severe mental illness) as contributing to his difficulties, stating that he would have "a little trouble [representing himself] because you are in jail, in custody." Indeed, the court's last words on the subject before denying Zamudio's motion was a concern that the court would have to appoint Zamudio an investigator and his attorney could handle the case a lot faster.

The trial court's findings at the second hearing violated our Supreme Court's admonition that "[a] court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where *Edwards* permits it." (*Johnson*, *supra*, 53 Cal.4th at p. 531.)

B. *Insufficient Evidence that Zamudio Could Not "Carry Out the Basic Tasks" to Present a Defense*

For the denial of Zamudio's self-representation right to have been proper, he must not only have suffered from a severe mental illness. His illness also must have been one that prevented him from carrying out the "basic tasks" needed to represent himself (*Johnson*, *supra*, 53 Cal.4th at p. 530), even if it did not prevent him from having a rational and factual understanding of the proceedings, and the ability to aid his counsel, such that he could stand trial under *Dusky*, *supra*, 362 U.S. 402. For instance, a mental illness might muddle a defendant's thinking, or hamper his ability to articulate thoughts, such that a trial would be an unfortunate spectacle due to the illness.

*Edwards* no doubt leaves trial courts with a difficult determination in many circumstances as to whether a defendant's lack of skill comes from his severe mental illness (warranting a denial of self-representation) or just from inexperience with the legal system (not permitting such a denial). But here, there should have been no such difficulty. There was no apparent basis at the hearings for the trial court to determine that Zamudio would be unable to perform *any* basic tasks necessary for self-representation.

Zamudio repeatedly asserted an unchallenged ability to read and write and demonstrated an understanding of the case and the proceedings. While the trial court referenced a "mockery of justice" that could result from Zamudio's self-representation, the court tied that concept only to the fact that the court believed Zamudio would "cause [him]self to be convicted" and not to any particular task that Zamudio would be hampered in performing due to his mental state.

In my view, then, nothing that the trial court articulated at the hearings supports denying Zamudio self-representation under the applicable legal standard. My analysis of the trial court's ruling would end here. Because the majority opinion relies nearly exclusively on information from psychiatric reports from the proceeding before other judges where Zamudio was deemed competent to stand trial, I will now consider those.

## IV

## THE EVALUATION WHICH FOUND ZAMUDIO COMPETENT TO STAND TRIAL DID NOT SUPPORT DENYING HIS SELF-REPRESENTATION RIGHT

In finding defendant incompetent to represent himself at the October 19, 2017, hearing, the trial court never referred to any finding, fact, or other detail from the competency-to-stand-trial evaluation that other judges oversaw. At the start of that hearing, the trial court inquired as to when the competency proceedings occurred and who the attorney was who instituted them. When the court was told that a previous defense attorney had noted Zamudio's "mental health issues," the trial court proceeded to

tell Zamudio that "I've been doing this for a long time. The underlying mental problems which cause[d] the attorneys to be concerned about you haven't disappeared." This was the extent of the trial court's reliance on the competency evaluations, which it never indicated that it reviewed.

Those evaluations had led to an uncontested finding that Zamudio was *competent* to stand trial, and the evaluations readily supported the conclusion that at that time he had no severe mental illness at all. The most recent examiner made an unqualified finding to that effect. Another examiner was "unable to [e]licit psychotic symptoms" from Zamudio. The earliest evaluator's concern about mental illness centered around Zamudio's obstinance about working with counsel because he wanted to represent himself, not a concern that he could not perform the basic tasks necessary to do so. The evaluations include no opinion or observation that Zamudio lacked the ability to perform the basic tasks necessary for self-representation (other than the challenges faced by any defendant who is not an attorney).

There is thus no straightforward way that the evaluations support a conclusion that Zamudio was unable to represent himself under the *Edwards*/*Johnson* standard, i.e., that he had a severe mental illness that rendered him incapable of performing the basic tasks necessary for self-representation. We cannot construe the trial court here as making a silent finding that somehow marshals the data in the evaluations as support for a proper finding of a disqualifying mental illness. (See *People v. Carson, supra,* 35 Cal.4th at p. 11 [when a trial court terminates self-representation, "[m]ost critically, a reviewing court

will need to know the precise misconduct on which the trial court based the decision to terminate."].) The following is further explanation of the conclusions in the evaluations.

*Dr. Berg's Evaluation*. A trial judge appointed Dr. Berg to evaluate Zamudio after the first two evaluations conflicted on their recommendation as to whether he was competent to stand trial. Dr. Berg thus provided the most recent examination of Zamudio, having met with him during the month before Judge Hernandez denied Zamudio's second request to represent himself.

Dr. Berg concluded: "The defendant [d]oes [n]ot have a major mental disorder." Accordingly, Dr. Berg also concluded that Zamudio was both able to understand the nature and purpose of the proceedings and assist counsel in a rational manner in the development of a legal defense.

Further, though evaluating Zamudio's competency to stand trial, Dr. Berg articulated some findings generally supporting defendant's ability to perform the basic tasks necessary for self-representation. Dr. Berg stated that his "[f]indings were suggestive of adequate memory and concentration" and "[f]indings would seem to indicate that the defendant was mentally and emotionally clear." That is, "[h]e was clear in his thinking and ability to communicate, and his mood and affect were appropriate at the time of the evaluation."

Dr. Berg's various factual observations also tended to support Zamudio's capacity to represent himself, including: "He was alert and oriented to time and place"; "He did not appear to be confused or disorganized in his thinking"; "His thinking was linear and

organized"; "His speech was coherent and he speaks with a slight Mexican accent"; "His speech was of average rate and volume"; he correctly identified the California Governor and the President, as well as a news item; and "He was able to complete serial threes and serial sevens. He was also able to count backward from 100 in sevens." Dr. Berg's sole negative observations included that while Zamudio responded correctly to questions testing his reasoning, he "appeared to have some difficulties with abstracting at a higher level" with responses that were "quite global and tended to lose sight of details"; that as to one hypothetical situation he "focused on basic survival"; and that he was "somewhat concrete" in interpreting proverbs.

*Dr. Robert Suiter's Evaluation.* Dr. Suiter last evaluated Zamudio on August 16, 2017, about two months before the October 19, 2017, hearing. He also concluded that Zamudio was competent to stand trial. He stated that he "was unable to [e]licit psychotic symptoms from him" and that because he "does not present with symptoms of psychosis, there is no indication for psychotropic medications . . . .". Despite his conclusions, Dr. Suiter noted that there was "some data to suggest Mr. Zamudio does have a severe mental disorder." This data apparently was Zamudio's self-reported past psychiatric hospitalizations.

*Dr. Jennifer A. Bosch's Evaluation.* Dr. Bosch issued her report on July 3, 2017, so she evaluated Zamudio nearly four months before the October 19, 2017, hearing. She concluded that Zamudio was *not* competent to stand trial unless he took antipsychotic medications, but her primary reason for his incompetency was his inability to work with

his attorney because of his desire to represent himself. Some of her data showed Zamudio's basic mental competency. She administered the Miller Forensic Assessment of Symptoms Test, which indicated that he was not malingering psychotic illness. He answered various additional questions from her that indicated he understood court procedures. She opined that there was "no indication of any developmental delays or cognitive impairments which would impact overall competency." However, "[s]everal times" she observed him "responding to internal stimuli." This observation seemed to underlie her assumption that Zamudio had a mental illness.. However, Dr. Bosch indicated that the mental illness did not impact his basic competency to reason and communicate. She stated: "Aside from observing the defendant responding to internal stimuli the defendant's thought process was free of disorganized thinking nor did he engage in rambling speech or a loosening of associations with him oriented to time, place and person."

Zamudio insisted to Dr. Bosch that he wanted to represent himself and did not believe his attorney was doing her job.. Consequently, Dr. Bosch's overall conclusion of incompetency tied his mental illness only to his inability to work with counsel:

"The defendant has more than adequate knowledge of the judicial system. However, this examiner has concerns about his ability to work rationally with his attorney. His rigidity and paranoia appears to be impacting his ability to understand and take guidance from his lawyer, not trusting her to represent him, wanting at this juncture to represent himself. It is this same rigidity that will not allow him to discuss or accept

his mental illness . . . [or] the possibility of needing to be treated with medication to address his mental illness. It is this examiner's opinion that because of his inability to rationally aid in his defense he is incompetent to stand trial." She concluded that with a mandated medication order he would be competent.

*The Import of the Three Evaluations*. For a trial court to find Zamudio incompetent to represent himself because he had a "severe mental illness" under the *Edwards*/*Johnson* standard, it would have had to flatly reject Dr. Berg's recent finding to the effect that Zamudio had no severe mental illness. It also would have to disregard Dr. Suiter's inability to elicit symptoms of mental illness from Zamudio. A trial court could perhaps credit Dr. Bosch's assumption that Zamudio had a mental illness, but neither she (nor the other doctors) indicated that Zamudio could not perform the basic tasks necessary for self-representation and, in fact, the observations and conclusions from all three competency evaluations confirmed his basic cognitive and communicative abilities. In any event, regardless of what a trial court *could* do, we should not construe the record as somehow showing that the trial court made the required nuanced "gray area" defendant finding where the court never explained how it was viewing the expert reports nor, indeed, that it had reviewed them at all.

In *Johnson*, our Supreme Court affirmed a trial court where it revoked self-representation status "following a very careful and thorough discussion" that "cited and applied the precise standard stated in *Edwards*," personally heard testimony from three experts, and found that the defendant "has disorganized thinking, deficits in sustaining

attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illnesses which can impair his ability to play the significantly expanded role required for self-representation, even if he can play the lesser role of a represented defendant." (*Johnson*, *supra*, 53 Cal.4th at p. 532.) In contrast, the trial court here never cited the proper standard, gave no indication it read the expert reports, and did not make findings that tracked those that would be proper. The expert reports do not support the trial court's determinations here.

V

THE MAJORITY OPINION

In its opinion, the majority chooses not to discuss the findings that the trial court actually made. As to the first hearing, the majority sidesteps the trial court's inapposite reliance on Zamudio's alleged intoxication during the offense by simply not ruling on that hearing. (Maj. opn., *ante*, at p. 8.) As to the second hearing, the majority's analysis does not rely on any of the specific and problematic statements that the trial court actually articulated. Rather, it relies nearly entirely on the psychiatric examinations of defendant (Maj. opn. *ante*, at pp. 8-12), no details of which were referred to by the court at the hearing, as they were part of the trial competency evaluation that other judges handled. Judge Hernandez never indicated that he read those reports. In relying on the reports, the majority states that "[o]n August 22, 2017, the trial court indicated that it had

read and considered the doctors' reports" (Maj. opn. *ante*, at p. 9) without acknowledging that this indication came from a different trial judge.[1]

In any event, even in its discussion of the doctors' reports, the majority opinion conflates the difficulties faced by virtually *any* self-represented litigant with the required finding that a "severe mental illness" rendered Zamudio unable to perform the "basic tasks" necessary for self-representation. (*Johnson, supra,* 53 Cal.4th at p. 530.)

The majority relies heavily on its belief that "two doctors clearly opined that defendant would have difficulty representing himself." (Maj. opn. *ante*, at p. 11.) There are two obvious problems with this reliance even beyond its avoidance of the clean bill of health offered by the third and most recently engaged doctor, Dr. Berg. First, all three doctors were charged with evaluating Zamudio's competency to stand trial, not his competency to represent himself, and thus did not squarely test for, or opine on, the

[1] Other than the doctors' reports, the majority relies on only the fact that the trial court was "able to observe defendant when he gave nonsensical responses to the court's questions." (Maj. opn., *ante*, at p. 11.) The trial court's expressed a view that Zamudio's responses showed a "totally unrealistic vision of how the system works" and that he "[does] not really understand the system." This view reflects a common concern about self-represented litigants, but it does not relate to the *Edwards*/*Johnson* "severe mental illness" standard. The court did not articulate findings that connect its observations to the governing standard. (See *Johnson, supra*, 53 Cal.4th at p. 531 [trial court's observations that support an *Edwards* incompetence finding "should be expressly placed on the record."].) Our deference would be warranted in a case where the trial court articulates observations as to why a defendant has a disqualifying illness. But on this issue, "it is incumbent upon the trial court to create a record that permits meaningful review of the basis for its rulings" (*People v. Becerra, supra*, 63 Cal.4th at p. 519), and we should not defer to unarticulated trial court observations that we construe to support a finding the court never made. Here, if the majority views the trial court's statements about Zamudio's responses as an implicit finding of serious mental illness affecting Zamudio's trial skills, that silent finding would contradict all three doctors, who found no relevant deficiencies in his cognitive or communicative abilities.

matter. Second, "difficulty representing himself" is not the standard. Rather, it is a hurdle that most self-represented litigants face, even if competent. Treating mere "difficulty" as the standard eliminates the requirement of finding a severe mental illness that precludes the ability to carry out the basic tasks needed for self-representation.

A deeper problem with the majority's view though, is that neither doctor's findings support a disqualifying illness under *Edwards* and *Johnson*. After discussing Zamudio's assertion that he wished to represent himself, Dr. Suiter stated: "It is clear to this examiner he would have great difficult[y] representing himself and would definitely risk a quite negative outcome. Nonetheless, this examiner was unable to [e]licit any indications of hallucinations or delusions." This plainly was *not* a finding of self-representational difficulties occasioned by a severe mental illness, as *Edwards* and *Johnson* require.[2]

Any reliance on Dr. Bosch's findings needs justification, as she found that Zamudio was incompetent to stand trial, and both parties and the trial court rejected that view. But in any event, her basic view of Zamudio's trial incompetency was based on "his ability to work rationally with his attorney," not his ability to perform the basic tasks of self-representation. While it is fair for the majority to infer that she believed that he would have difficulty representing himself, this was because he "admits to having no

[2] Dr. Suiter next stated: "However, it is clear Mr. Zamudio would be a difficult client for virtually any attorney." Combined with Dr. Suiter's finding that Zamudio was competent to stand trial, it is fair to read Dr. Suiter's report as opining that there would be difficulties *both* with self-representation *and* with attorney representation. Regardless, as actually relates to the applicable *Edwards*/*Johnson* standard, Dr. Suiter found that Zamudio "does not present with symptoms of psychosis."

legal experience whatsoever aside from his own personal court experiences." That is a problem that many self-represented litigants have. As to Zamudio in particular, she stated that he "has more than adequate knowledge of the judicial system" and that his "thought process was free of disorganized thinking nor did he engage in rambling speech or a loosening of associations with him oriented to time, place and person." Thus, while there is more indication from Dr. Bosch than from the other doctors that Zamudio had some degree of a mental illness, she did not conclude that he was unable to perform basic tasks of self-representation.[3]

VI

CONCLUSION

A trial judge who believes that self-representation would be unwise can (and must) stridently warn the defendant against it. Indeed, the Riverside County form petition to seek self-representation, which Zamudio twice executed, offers from the court an official recommendation against self-representation.

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[3] The majority opinion cites facts from Zamudio's frank disclosure of previous mental problems in a way that they might be misconstrued as current medical observations. For instance, it is true that Zamudio told Dr. Suiter that at some unidentified point in the past, there was "one instance" where he believed someone was talking to him through a radio. (Maj. opn. *ante*, at p. 9.) But Dr. Suiter's current observations included, among other things, that Zamudio "was oriented in all spheres," "his behavior was normal," "[h]is insight and judgment were fair," and "it did not appear he was responding to internal stimuli." Likewise, it is true that Dr. Berg stated that records showed that, at some unidentified point in the past, Zamudio made references to "things moving in his head." (Maj. opn. *ante*, at p. 10.) But Dr. Berg's current findings included that Zamudio was "mentally and emotionally clear," "clear in his thinking and ability to communicate," "logical and coherent and orderly in his thinking," and "direct and appropriate in his communications."

But a mentally competent defendant may disregard those warnings. The *Faretta* right arises from individual autonomy, not from a judicial determination of what the court believes best. "To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal." (*Faretta*, *supra*, 422 U.S. at p. 834; *Weaver v. Massachusetts* (2017) 137 S. Ct. 1899, 1908 [*Faretta* right is "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty" and "harm is irrelevant to the basis underlying the right"]). When an indigent defendant disagrees with his court-appointed lawyer's strategy, his only recourse to advance the defense of his choice may be to forgo his right to counsel. As Justice Frankfurter observed in a similar context, insisting that appointed counsel represent a competent defendant against his will is "to imprison a man in his privileges and call it the Constitution." (*Adams v. U.S. ex rel. McCann* (1942) 317 U.S. 269, 280.)[4]

*Edwards* appropriately truncates the *Faretta* right at the point where the court and public would suffer the spectacle of a hallucinatory or significantly unbalanced defendant attempting to try a case. But its "severe mental illness" standard is not designed to intrude upon the autonomy of a fundamentally rational and capable defendant. (See

[4] Self-representation may not always be foolish. In *Edwards*, the Supreme Court noted "recent empirical research" that suggested that unfair trials of self-represented defendants were "uncommon" and that the small number of state felony defendants who chose to represent themselves actually "'appear[ed] to have achieved higher felony acquittal rates than their represented counterparts in that they were less likely to have been convicted of felonies."' (*Edwards*, *supra*, 554 U.S. at p. 178, [quoting Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant* (2007) 85 N.C.L.Rev. 423, 428].)

*People v. Mickel* (2016) 2 Cal.5th 181, 207 ["[S]tate courts may only exercise the discretion to deny self-representation based on a defendant's mental state as permitted under *Edwards*."]; see also *Edwards*, *supra*, 554 U.S. at p. 189 (Opn. Of Scalia, J.) [warning that "[o]nce the right of self-representation for the mentally ill is a sometime thing, trial judges will have every incentive to make their lives easier . . . by appointing knowledgeable and literate counsel."])[5]

While the record contains a few indications that Zamudio had at times suffered what his counsel at one point referred to—appropriately vaguely—as "issues," the record does not contain evidence that might have supported a contemporaneous finding that he had a "severe mental illness" that would prevent him from performing the "basic tasks" necessary for self-representation. Moreover, the trial court never articulated that standard, and a fair reading of the record indicates that the court did not actually apply it.

I therefore respectfully dissent.

RAPHAEL

J.

[5] (See also Johnston, *Communication and Competence for Self-Representation* (2016) 84 Fordham L.Rev. 2121, 2124 ["When incompetence does not hinge on severe mental illness, such standards can operate to deprive fully rational, autonomous defendants of the right to control their defense."]; Goldschmidt, *Autonomy and "Gray Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 Nw J. L. & Soc. Pol'y 130, 177 ["imposing unwanted counsel should simply be a last resort and not a matter of course."].)