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Mitigating Evidence After Deere: Will a Defendant Proceeding In Propria Persona Be Required to Present Mitigating Evidence During the Penalty Phase of a Capital Trial?

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COMMENTS

Mitigating Evidence After *Deere*: Will a Defendant Proceeding *In Propria Persona* Be Required to Present Mitigating Evidence During the Penalty Phase of a Capital Trial?

INTRODUCTION

Presently, thirty-seven states have enacted death penalty statutes.[1] Cases carrying a potential death penalty are tried in two separate phases. First, the defendant's guilt is determined. The defendant may plead guilty, or the trier of fact may find the defendant guilty of first degree murder.[2] Then, the determination as to whether to impose the death penalty is made during a separate penalty phase. During the penalty phase the court may consider any matter relevant to aggravation or mitigation.[3]

Let us suppose that a suspect is charged with committing multiple murders of a particularly heinous nature. Further suppose that he waives his right to counsel and elects to represent himself during both the guilt and penalty phases of his trial.[4] The trial judge

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1. Those states with death penalty statutes are: Alabama, Arizona, Arkansas, California, CAL. PENAL CODE §§ 190.1 - 190.5 (Deering 1985 & Supp. 1986); Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming.

2. CAL. PENAL CODE § 189 (Deering 1985) provides in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, . . .is murder of the first degree.

3. CAL. PENAL CODE § 190.3 (Deering 1985) provides in pertinent part: "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to . . . the defendant's character, background, history, mental condition and physical condition." *See also* Lockett v. Ohio, 438 U.S. 586, 604 (1978).

4. This has occurred in Alabama, Arizona, Florida, Illinois, Maryland, Mississippi, Nevada and South Carolina. Like California, these states have legislation which provides for an automatic appeal of a sentence of death. Alabama, ALA. CODE §§ 13A-5-40 - 13A-5-53 (1975 & Supp. 1986); Arizona, ARIZ. REV. STAT. ANN. § 13-703 - 13-1105 (1956 & Supp. 1986); Florida, FLA. STAT. ANN. § 921.141 (West Supp. 1986); Illinois, ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1968 & Supp. 1986); Maryland, ANN. CODE OF MD.

appoints standby counsel to aid the defendant. The defendant does not enlist the aid of standby counsel and presents no evidence at the guilt phase of his trial.[5]

Subsequently, the defendant is found guilty of first degree murder. During the penalty phase, he presents no evidence in mitigation of his guilt. He addresses the court and expresses remorse for his crimes and states that he deserves to die. His standby counsel urges him to present available mitigating evidence during the penalty phase, but the defendant decides not to do so. This could be a tactical decision on the part of the defendant or perhaps the defendant just wants to die. Either way, when this scenario, or one very much like it, occurs in California, what will be the likely result?

In California, every capital case must be reviewed by the supreme court and no death penalty judgment may be imposed unless that court affirms the sentence.[6] The appeal is taken automatically, without any action on the part of the defendant or his counsel,[7] and the defendant may not waive this appeal.[8] The California Supreme Court has held that the failure of counsel to present mitigating evidence in the penalty phase of a capital trial, without adequate investigation, deprives a defendant of effective assistance of counsel.[9] Defense counsel may choose not to present any mitigating evidence but that choice must be the result of an informed, *tactical* decision, within the range of reasonable competence, even if that decision is made in conjunction with the defendant's instruction not to present any such evidence.[10] In *People*

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§§ 99-19-101 - 99-19-105 (1973 & Supp. 1986); Nevada, NEV. REV. STAT. §§ 177.055 - 177.552 (1985); South Carolina, S.C. CODE ANN. § 16-3-20 - 16-3-25 (Law. Co-op, 1985).

5. A defendant proceeding *in propria persona* may not plead guilty to a crime which carries a potential death penalty. CAL. PENAL CODE § 1018 (Deering 1983). This section provides in pertinent part:

> Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel.

6. CAL. CONST. art. VI, § 11 provides that the Supreme Court has appellate jurisdiction when judgment of death has been pronounced.

7. CAL. PENAL CODE § 1239 (b) (1982).

8. People v. Stanworth, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969). Here, the court held that a defendant could not waive his right to the automatic review of his penalty determination. The court reasoned that this right was not one conferred upon the defendant for his sole personal benefit, and that while a "defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally." *Id.* at 834, 457 P.2d at 898-99, 80 Cal. Rptr. at 58-59.

9. People v. Frierson, 25 Cal. 3d 142, 164-67, 599 P.2d 587, 599-601, 158 Cal. Rptr. 281, 292-94 (1979).

10. People v. Miranda, 44 Cal. 3d 57, 120-22 (1987).

v. Deere,[11] the court announced that defense counsels' compliance with defendant's order not to present mitigating evidence during the penalty phase of a capital trial mandated reversal.[12] In *Deere*, the evidence was withheld at the request of the defendant and *not* as a result of a *tactical* decision by counsel.[13]

While the court decided *Deere* on the basis of ineffective assistance of counsel,[14] the reasoning used could be extended to a case where the defendant is proceeding *in pro per*,[15] or *pro per* with standby counsel. In such a case, the issue then becomes whether the interest of the state in determining the propriety of the death penalty should take precedence over the defendant's sixth amendment right to self-representation.[16]

This Comment focuses on the conflict between the interest of the state and the rights of the individual demonstrated in *Deere*. First, the Comment defines the interest of the state in the penalty phase of a capital trial. Part II discusses and contrasts the state interest with the individual's right to self-representation, and concludes which should prevail. Finally, this Comment offers a solution which protects the individual right to self-representation and still provides the court with a means to determine the appropriateness of the death penalty.

I. THE STATE INTEREST

The California Supreme Court must examine the complete record[17] of any case on automatic appeal of a death judgment[18] in order to determine the propriety of the penalty. The automatic review upon judgment of death is taken for two reasons: first, to safeguard the rights of those upon whom the death penalty is im-

11. 4 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985).
12. *Deere*, 41 Cal. 3d at 368, 710 P.2d at 934, 222 Cal. Rptr. at 23.
13. *Id.* at 364, n.3, 710 P.2d at 931, 222 Cal. Rptr. at 20.
14. *Deere*, at 364, 710 P.2d at 931, 222 Cal. Rptr. at 20. This Comment will not address the issue of ineffective assistance of counsel. For a discussion of this issue see Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983).
15. The term *in propria persona* means in one's own proper person. Also referred to as '*pro per*' and '*pro se*' it is a term of art used when referring to one who represents himself. BLACK'S LAW DICTIONARY 712, 1099 (5th ed. 1979).
16. U.S. CONST. amend. VI. This amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The right to self-representation is implied in this amendment. Faretta v. California, 422 U.S. 806 (1975).
17. People v. Stanworth, 71 Cal. 2d 820, 833, 457 P.2d 889, 898, 80 Cal. Rptr. 49, 58 (1969).
18. CAL. PENAL CODE § 1239(b) (1982).

posed;[19] and second, because society needs to be able to rely upon the determination that death is an appropriate punishment. This public interest in assuring that the adversary system functions properly was addressed by the California Supreme Court when it held that a defendant who wants to plead guilty in a capital case must be represented by counsel who consents to this plea.[20]

In *Deere*,[21] the defendant originally pleaded not guilty, but later withdrew his plea and pleaded guilty to each count of murder.[22] In addition, the defendant admitted the truth of the multiple-murder special circumstance allegation.[23] The defendant waived a jury trial and the court found him guilty of one count of first degree murder and two counts of second degree murder.[24]

The defendant also waived a jury trial on the penalty issue[25] and insisted that no mitigating evidence be presented at the penalty phase.[26] Although defense counsel realized that some mitigating evidence could have been presented in the form of testimony from the defendant's family regarding the good things he had done in his life, the defendant insisted that this not be presented.[27] The defendant argued that the presentation of this evidence "would cheapen his relationship with his family and remove the last vestige of dignity he ha[d]."[28]

Counsel for the defendant addressed the court and explained why he agreed to forego presenting mitigating evidence. He said that he argued with defendant over this issue, but finally came to appreciate and agree with the defendant's point of view.[29] Defense counsel thereupon argued to the court that the record supported

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19. People v. Bob, 29 Cal. 2d 321, 175 P.2d 12 (1946).

20. People v. Chadd, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981). Here, the court noted that the statutory language of CAL. PENAL CODE § 1018 was unambiguous, and held that a capital defendant may not plead guilty against the advice of his attorney. In addition, a defendant may not discharge his attorney, proceed *pro per*, and plead guilty. The court explained that section 1018 was "an integral part of the Legislature's extensive revision of the death penalty laws in response to the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972) . . . to eliminate the arbitrariness that Furman found inherent in the operation of prior death penalty legislation." *Chadd*, 28 Cal. 3d at 750, 621 P.2d at 843, 170 Cal. Rptr. at 804. The court in *Chadd* went on to explain that requiring counsel's consent to guilty pleas in capital cases serves as a further independent safeguard against erroneous imposition of a death sentence. *Id. See also* Massie v. Sumner, 624 F.2d 72 (9th Cir. 1980); People v. Massie, 40 Cal. 3d 620, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985).

21. 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985).

22. *Id.* at 357, 710 P.2d at 926, 222 Cal. Rptr. at 15.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 370-71, 710 P.2d at 929, 222 Cal. Rptr. at 25.

27. *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 18.

28. *Id.*

29. *Id.*

only a penalty of life without possibility of parole, and moved the court to modify its penalty decision.[30]

The court sentenced the defendant to death.[31] On appeal,[32] the California Supreme Court reversed as to the penalty and affirmed in all other respects.[33] The court reasoned that to allow a capital defendant to prevent the introduction of mitigating evidence on his behalf "withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated."[34]

The court further noted that the state has a strong interest in reducing the risk of mistaken judgments in a capital case and that without mitigating evidence, a significant portion of the evidence of the propriety of the penalty is missing.[35] Also, to permit a defendant to bar his counsel from introducing mitigating evidence at the penalty phase because the defendant wants to die would violate the fundamental public policy against misusing the judicial system to commit a state aided suicide.[36] Thus, when the state, acting to ensure its interest in preventing a state aided suicide, requires a *pro per* defendant to present mitigating evidence in the penalty phase of his trial, even where the defendant does not want to present such evidence, the interest of the state directly conflicts with the individual's right to self-representation.

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30. *Id.* at 371, 710 P.2d at 936, 222 Cal. Rptr. at 25. CAL. PENAL CODE § 190.4(e) provides that:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings. The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239.

31. 41 Cal. 3d at 357, 710 P.2d at 926, 222 Cal. Rptr. at 15.

32. CAL. PENAL CODE § 1239(b).

33. *Deere*, 41 Cal. 3d at 369, 710 P.2d at 934, 222 Cal. Rptr. at 23.

34. *Id.* at 364, 710 P.2d at 931, 222 Cal. Rptr. at 20.

35. *Id.* at 363, 710 P.2d at 930, 222 Cal. Rptr. at 19.

36. *Id.*

II. THE RIGHT TO SELF REPRESENTATION

In *Faretta v. California*,[37] the United States Supreme Court held that the sixth and fourteenth amendments of the United States Constitution permit a criminal defendant to waive the right to counsel.[38] A state may not constitutionally force a lawyer on a defendant who insists on his right of self representation.[39] The Court reasoned that to allow a state to do so would be contrary to the defendant's basic right to defend himself.[40] *Faretta* concluded that unless the accused agreed to representation by counsel, "the defense presented is not the defense guaranteed him by the Constitution, for in a very real sense, it is not his defense."[41] Thus, under *Faretta*, a defendant in a state criminal trial has a constitutional right to proceed without counsel when the defendant voluntarily and intelligently elects to do so.[42]

The holding in *Faretta* was based on the language, structure and spirit of the sixth amendment.[43] The defendant must be informed of the nature and cause of the accusation,[44] and there is an implied right that the defendant be allowed to conduct his own defense at what is "his, not counsel's trial."[45]

In *People v. Joseph*,[46] the defendant's timely motion to proceed *in propria persona* was denied because the charges carried a possible death penalty. The trial court appointed an attorney for the remainder of the proceeding, reasoning that the defendant was not able to effectively represent himself due to the nature of the charge.[47] The defendant subsequently was convicted and sen-

37. Faretta v. California, 422 U.S. 806 (1975).

38. In *Faretta*, the Court likened defense counsel to a tool which is provided as an aid to a willing defendant. The Court reasoned that when a defendant chooses to have a lawyer represent him, law and tradition allocate to counsel the power to make binding decisions of trial strategy. *Id.* at 821. This allocation is only justified when the defendant consents at the outset to accept counsel as his representative. *Id.* The Court noted that a defendant who exercises his right to self-representation must comply with relevant rules of procedural and substantive law, and if the defendant deliberately engages in serious and obstructionist misconduct, the trial judge may terminate the defendant's self-representation. *Id.* at 834.

39. *Id.* at 817.

40. *Id.* at 807.

41. *Id.* at 821.

42. *Id.* at 835. *Faretta* requires that a defendant makes a knowing and intelligent decision before he will be allowed to represent himself. This does not mean that he be able to conduct his defense as well as appointed counsel would. By knowing and intelligent, the Court means that the defendant is aware of the dangers and disadvantages of self-representation "so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* at 835.

43. McKaskle v. Wiggins, 465 U.S. 168, 174 (1984).

44. *Id.* at 174.

45. *Id.*

46. 34 Cal. 3d 936, 671 P.2d 843, 196 Cal. Rptr. 339 (1983).

47. *Id.* at 942, 671 P.2d at 848, 196 Cal. Rptr. at 342.

tenced to death.[48]

However, on appeal, the California Supreme Court reversed, holding that once a defendant voluntarily and intelligently proffers a timely motion to represent himself, "the trial court must permit an accused to represent himself without regard to the apparent lack of wisdom of such a choice and even though the accused may conduct his own defense ultimately to his own detriment."[49] The court further held that the erroneous denial of a timely *Faretta* motion is reversible error *per se*.[50]

In *Joseph*, the Court reasoned that the primary motivation for allowing a defendant to proceed *pro per* is respect for the accused's freedom of choice to personally conduct his own defense as he sees fit.[51] The right to proceed *pro per* "is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process."[52] *Joseph* held that the nature of the charge is irrelevant to the decision to grant or deny a timely *Faretta* motion, even when the punishment may be death.[53]

III. Penalty Phase *Pro Per* Representation in Capital Cases

Section 987(b) of the California Penal Code provides that in a capital case, the defendant must be represented by counsel at all stages of the preliminary and trial proceedings. This statute does not, however, mean that counsel must be forced on an unwilling defendant. This issue was addressed in *Thomas v. Superior*

48. *Id.* at 936, 671 P.2d at 844, 196 Cal. Rptr. at 339.

49. *Id.* at 943, 671 P.2d at 845-46, 196 Cal. Rptr. at 342-43. *Joseph* holds that the only determination a trial court must make when presented with a timely Faretta motion is whether the defendant "has the mental capacity to waive his constitutional right to counsel with a realization of the probable risks and consequences of his action." *Id.*

50. *Id.* at 948, 671 P.2d at 850, 196 Cal. Rptr. at 346.

51. *Id.* at 946, 671 P.2d at 848, 196 Cal. Rptr. at 344.

52. *Id.* at 946, 671 P.2d at 849, 196 Cal. Rptr. at 345 (quoting United States v. Dougherty, 473 F.2d 1113, 1128 (1972)). *See also* Chapman v. United States, 553 F.2d 886, 891-92 (1977).

53. *Joseph*, 34 Cal. 3d at 945, 671 P.2d at 848, 196 Cal. Rptr. at 344. *See also* People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979). In *Teron*, the court held that no valid death penalty statute applied to the defendant's 1975 crime. Thus, it did not decide whether the trial court erred in allowing the defendant to proceed *pro per* in the penalty determination. However, the court did note that "The trial court's decision to permit defendant to represent himself in the special circumstance and penalty phases presents additional considerations not present at the guilt phase." *Id.* at 115 n.7, 588 P.2d at 779, 151 Cal. Rptr. at 639. The court then noted its interest in the accuracy of the penalty determination, citing People v. Stanworth, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969). It is this interest which conflicts with the individual's right to self-representation.

Court.[54] There, the court noted that statutes and case law which required representation in capital cases were superseded by *Faretta*,[55] and held that a defendant accused of a capital offense has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.[56] So long as the defendant is fully aware of the probable risks and consequences of his action[57] the trial court must allow him to proceed *pro per*.[58]

Defendants who proceed *pro per* in capital cases raise complex issues involving how and when counsel may participate. Both the federal and California courts have endorsed the appointment of advisory counsel to advise and aid defendants who proceed *pro per*. In *Mayberry v. Pennsylvania*,[59] Chief Justice Burger in a concurring opinion praised "the wisdom of the trial judge in having counsel remain in the case even in the limited role of a consultant."[60] Even in *Faretta*, the Court noted that a state may "even over objection by the accused - appoint a 'standby counsel' to aid the accused if he should change his mind and request assistance."[61]

The Supreme Court has held that the *pro per* defendant must be allowed to control the organization and content of his defense.[62] The very core of the *Faretta* right is the *pro per* defendant's actual control over the case he chooses to present.[63] If standby counsel substantially interferes with any significant tactical decisions made by the defendant, the *Faretta* right is eroded.[64]

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54. 54 Cal. App. 3d 1054, 126 Cal. Rptr. 830 (1976).
55. *Id.* at 1057, 126 Cal. Rptr. at 831.
56. *Id.* at 1058, 126 Cal. Rptr. at 832.
57. *Joseph*, 34 Cal. 3d at 945, 671 P.2d at 848, 196 Cal. Rptr. at 344.
58. *Id.*
59. 400 U.S. 455 (1971).
60. *Id.* at 467. The California Supreme Court has also addressed this issue. Recently, it held that when a defendant proceeding *pro per* requests advisory counsel, it is reversible error *per se* for a trial court to fail to conscientiously exercise judicial discretion on the appointment of such advisory counsel. People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

A defendant who asserts the sixth amendment right to self-representation may later change his mind. At some point in the proceedings, the defendant may suddenly realize that he is incapable of presenting an adequate defense. He may then want to have counsel appointed for him who will pick up the gauntlet and take over his defense.

61. *Faretta*, 422 U.S. 806, 835, n.46 (1975).
62. McKaskle v. Wiggins, 465 U.S. 168, 178 (1984).
63. *Id.*
64. *Id.* The Court noted that there is no significant interference with the defendant's actual control over the presentation of his defense when standby counsel is appointed - even over the defendant's objection - to ensure the defendant's compliance with the basic rules of courtroom protocol and procedure. *Id.* at 184-85. However, "[i]f standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decision, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded." *Id.* at 178.

The penalty phase of a capital case, like the guilt phase, is an adversary proceeding where evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence.[65] At the conclusion of this phase, the trier of fact decides whether to impose a sentence of death.[66] Because it is the defendant who risks the penalty of death and not counsel, the imposition of counsel on an unwilling defendant is contradictory to the spirit of *Faretta.*

The right of the individual to proceed *pro per* in the penalty phase of a capital case has been addressed and recognized by the courts in seven states.[67] Several of these decisions are summarized here.

In *People v. Silagy*,[68] the defendant waived counsel during the sentencing hearing of a capital case and represented himself. He presented no mitigating evidence and was sentenced to death.[69] On appeal, the Illinois Supreme Court held that the defendant's waiver of counsel was knowing and voluntary and subsequently affirmed the judgment.[70]

In *Smith v. State*,[71] the Florida Supreme Court resolved this issue by holding that a defendant has the right to waive representation by counsel at the sentencing phase of a capital trial. The court noted that "[p]araphrasing the opinion in *Faretta*, we need make no assessment of how well or poorly appellant mastered the intricacies of the sentencing process, for his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."[72] The court held that the defendant made a knowing and voluntary waiver of counsel. It further held that the trial court properly allowed the defendant to represent himself at his sentencing hearing.[73]

In *State v. Harding*,[74] the defendant chose to represent himself in both the guilt and sentencing phase of his capital case and was convicted of first degree murder, robbery and kidnapping.[75] The

65. CAL. PENAL CODE § 190.3 (1985).
66. *Id.*
67. *See, e.g.*, State v. Harding, 137 Ariz. 278, 670 P.2d 383 (1983); Smith v. State, 407 So. 2d 894 (1981); People v. Silagy, 101 Ill. 2d 147, 461 N.E.2d 415 (1984); Grandison v. State, 305 Md. 685, 506 A.2d 580 (1986); Pruett v. Thigpen, 444 So. 2d 819 (1984); Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979); State v. Brown, 347 S.E.2d 882 (1986).
68. 101 Ill.2d 147, 461 N.E.2d 415 (1984).
69. *Id.* at 178, 461 N.E.2d at 430.
70. *Id.* at 180-84, 461 N.E.2d at 432-33.
71. 407 So. 2d 894 (1981).
72. *Id.* at 900.
73. *Id.*
74. 137 Ariz. 278, 670 P.2d 383 (1983).
75. *Id.* at 284, 670 P.2d at 389.

defendant declined to present any mitigating evidence at his sentencing hearing and the trial court found no mitigating factors to outweigh the aggravating factors.[76] Subsequently, the court sentenced the defendant to death.[77] On appeal, the Arizona Supreme Court held that the defendant made a knowing and intelligent waiver of his right to counsel.[78]

The question of whether a defendant has the right to proceed *in pro per*, in the penalty phase of a capital case has not yet been resolved in California.[79]

In *People v. Teron*,[80] the defendant represented himself at both the guilt and penalty phase of his trial[81] and chose not to introduce any mitigating evidence during the penalty phase.[82] The court did not have to reach the issue of *pro per* representation in the penalty phase to decide the case because the crime was committed prior to the effective date of the death penalty legislation. However, the court did note that the decision to permit a defendant to represent himself in the penalty phase "presents additional considerations not present at the guilt phase."[83] The court held only that the trial court did not err in permitting the defendant to represent himself at the guilt phase of his trial.[84]

This Comment argues that California should follow the lead of those states which have properly resolved this issue in favor of recognizing the right of a defendant to proceed *pro per* in both the guilt and penalty phases of a capital case.

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76. *Id.*

76. *Id.*

78. *Id.* at 287, 670 P.2d at 392.

79. The court has recognized, without resolving, the issue of *pro per* representation in a death penalty hearing. People v. Teron, 23 Cal. 3d 103, 115, n.7, 588 P.2d 733, 779 n.7 151 Cal. Rptr. 633, 639 n.7 (1979).

80. *Id.*

81. *Id.* at 109-11, 588 P.2d at 775-77, 151 Cal. Rptr. at 635-37.

82. *Id.*

83. *Id.* at 115 n.7, 588 P.2d at 779, 151 Cal. Rptr. at 639. In *Joseph*, 34 Cal. 3d 936, 948-50, 671 P.2d 843, 850-52, 196 Cal. Rptr. 339, 346-48, Justice Mosk argued that the defendant's right to self-representation is not unlimited. Since a defendant cannot plead guilty and abandon his appeal rights directly, he should not be allowed to do so indirectly by an inept performance. *Id.* This argument presumes that the court has some way of knowing when a defendant's decision is a tactical one and when it is not. This Comment suggests that the court cannot know that a defendant is subverting the system through an inept performance unless the defendant informs the court that this is his motive. At that point, his right to self-representation should be terminated. *See supra* note 38. To suggest that the defendant's right to self representation should be ended because his tactics will likely result in his conviction violates the very core of the *Faretta* decision. In *Faretta*, the Court realized that a *pro per* defendant places himself at a great disadvantage, but noted that "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970).

84. *Teron*, 23 Cal. 3d at 112-15, 588 P.2d at 776-79, 151 Cal. Rptr. at 637-40.

IV. SHOULD A DEFENDANT PROCEEDING *In Propria Persona* BE REQUIRED TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE?

The right to make tactical[85] decisions[86] is included in the right to self-representation. Unless the defendant expressly tells the court that he refuses to present mitigating evidence because he wishes to subvert the judicial system, or that he just wants to be put to death, his decision may be a tactical one.

Should the court presume that a poor decision was not a tactical decision? This approach would violate the heart of *Faretta*, which recognized that only in rare instances would a *pro per* defendant present his case as effectively, or more effectively than if he had counsel.[87] With this recognition, however, came the Court's declaration that "[p]ersonal liberties are not rooted in the law of averages."[88] The right to defend oneself is personal, and even if the decision of a defendant not to present evidence turns out to be a poor one, it remains his decision.[89]

The *pro per* defendant, untrained in the law, cannot be expected to present his case with the expertise of a lawyer. Although appearances may indicate that the defendant is presenting no defense at all in the hope of receiving the death penalty, it may in fact be a tactic designed to present the defendant as remorseful. The court cannot look into the mind of a defendant and discern what he is thinking.

Ill-conceived as his tactics may be, the defendant has the right to pursue the strategy he deems best,[90] the "right to act *pro se* . . . is a right arising out of the Federal Constitution not the mere product of legislation or judicial decision."[91]

> Even if the defendant will likely lose the case, he has the right—as he suffers whatever consequences there may be—to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.[92]

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85. A tactic is a device for accomplishing an end, that is, designed to achieve a given purpose. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

86. Faretta v. California, 422 U.S. 806 (1975); McKaskle v. Wiggins, 465 U.S. 168 (1984); People v. Joseph, 34 Cal. 3d 936, 671 P.2d 843, 196 Cal. Rptr. 339 (1983).

87. *Faretta*, 422 U.S. at 834.

88. *Id.*

89. *Id.*

90. *Id.*

91. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

92. *Joseph*, 34 Cal. 3d at 946, 671 P.2d at 849, 196 Cal. Rptr. at 345 (1983)(quoting United States v. Dougherty, 473 F.2d 1113, 1128 (1972)).

This Comment argues that actions of a defendant proceeding *pro per* must be presumed to be tactical in nature.

Where standby counsel has been appointed by the trial court it is likely that counsel will disagree with the defendant's wish to refrain from presenting mitigating evidence in the penalty phase of his trial. Counsel will therefore request to present evidence over the defendant's objections. This issue was addressed by the Nevada Supreme Court. In *Bishop v. State*,[93] a *pro per* defendant presented no evidence in mitigation during the penalty phase.[94] Standby counsel informed the court that there was mitigating evidence which could be presented, but that defendant refused to allow its introduction.[95] The evidence was not received and the defendant was sentenced to death.[96]

On appeal, the Nevada Supreme Court held that the sentencing tribunal did not err when it did not delve into the mitigating evidence alluded to by standby counsel.[97] The right of the accused to act as his own counsel carries with it the right to make the usual choices concerning tactics and strategy.[98] Allowing standby counsel to present mitigating evidence over the objections of the defendant would be an unconstitutional interference with the defendant's right to self-representation.[99]

The California Supreme Court has described the right to proceed *pro per* as the right which ensures that a defendant will not be "deprived of his free will to make his own choice, in his hour of trial, to handle his own case."[100] The logical interpretation of that right allows that when the defendant makes a tactical decision not to present mitigating evidence, the sixth amendment right to self-representation requires that the state accept his decision.

In *Deere*, Justice Broussard in his concurring opinion, wrote that respect must be shown to both the state's need to assure fairness and reliability of the penalty determination, and the defendant's rights to personal choice and dignity.[101] A defendant may

93. 95 Nev. 511, 597 P.2d 273 (1979).
94. *Id.* at 515, 597 P.2d at 275.
95. *Id.*
96. *Id.*
97. *Id.* at 517, 597 P.2d at 276.
98. *Id.* at 518, 597 P.2d at 277. In a recent case dealing with ineffective assistance of counsel, the Ohio Supreme Court noted that the mere failure to present mitigating evidence at the penalty phase of a capital trial does not in itself establish ineffective assistance of counsel or deprivation of the accused's right to a fair trial, "as such omission, in appropriate case, could be in response to demands of accused or result of tactical, informed decision of counsel." State v. Johnson, 24 Ohio St. 3d 87, 494 N.E. 2d 1061 (1986).
99. *Bishop*, 95 Nev. at 518, 597 P.2d at, 277.
100. People v. Joseph, 34 Cal. 3d 936, 946, 671 P.2d at 849, 196 Cal. Rptr. at 345 (1983).
101. *Id.* at 369-70, 710 P.2d at 934-35, 222 Cal. Rptr. at 23-24.

rationally feel that the comparative advantage of life imprisonment is not worth the humiliation and loss of dignity concomitant with the presentation of mitigating evidence.[102] In addition, requiring counsel to present mitigating evidence over the express wishes of the defendant presents a troubling picture.[103] The confidential relationship between client and counsel could be violated if counsel was forced to take a position against his client.[104]

Justice Broussard's concurring opinion suggested that counsel might be allowed to inform the jury of the defendant's personal position or that the defendant address the jury himself.[105] He also suggested that the court could call persons with mitigating evidence as its own witnesses.[106] or appoint new counsel to call these witnesses.[107] The majority dismissed the last two suggestions as impractical.[108] The court also noted that it would be unprecedented to allow the defendant to be able to address the jury when he has counsel.[109] Because of this conflict, a means is needed by which the state's interest in a reliable penalty determination is protected, without sacrificing the individual's right to self-representation.

V. A Solution Protecting the Rights of the Individual and the Interests of the State

In order to solve the *pro per* representation problem, a pre-sentencing report should be included in all capital cases as part of the mandatory appellate process. This report would contain all statements made on behalf of a defendant by those wishing to make them. Thus, in a case where a defendant is represented by counsel and the defendant does not want family and friends parading in front of him, depriving him of whatever dignity remains, this report can be introduced as mitigating evidence.

At present, in California, there is no requirement that a trial court refer a case to the probation officer for presentence investigation when there is no chance for probation.[110] Once this report is made mandatory, the probation officer would also automatically

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102. *Id.* at 369, 710 P.2d at 934, 222 Cal. Rptr. at 23-24.
103. *Id.* at 369, 710 P.2d at 935, 222 Cal. Rptr. at 23-24.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 368, 710 P.2d at 934, 222 Cal. Rptr. at 22.
109. *Id.* at 368, 710 P.2d at 933, 222 Cal. Rptr. at 23.
110. Cal. R. Ct. 418. Rule 418 provides: "Regardless of the defendant's eligibility for probation, the sentencing judge should refer the matter to the probation officer for a presentence investigation." Note that the word 'should' is advisory, as per Cal. R. Ct. 407.

undertake an investigation. This would involve collecting information, such as written statements from interested people, including family members, who wish to speak on behalf of the defendant.[111]

Where the defendant is represented by counsel, the report would be made available to the trial court when the defendant insists that mitigating evidence in the nature of testimony by witnesses would be too embarrassing to him and strip him of the last vestige of dignity. In a case such as this, Justice Broussard's suggestion that counsel inform the jury of the defendant's personal position would be appropriate, and the jury would then review the report.[112] Thus, the record contains that evidence necessary to determine the appropriateness of the penalty, and the dignity of the defendant is preserved.

Where a defendant is proceeding *pro per*, or *pro per* with standby counsel, this report should be made available on appeal only. This will ensure that the defendant's actual control with regard to tactical decision making is protected.[113] If a defendant would choose not to present any mitigating evidence during the penalty phase and received a sentence of death, the pre-sentence report would mandatorily be reviewed by the state supreme court.

This Comment suggests that the court would then determine whether there is a reasonable probability that the outcome would have been different if the trial court had been aware of the contents of the report.[114] If the court so finds, then the case would be remanded for a new finding as to the penalty. Where the defendant chooses not to present any evidence at the guilt and penalty phase, and received the death penalty, then this report will provide the necessary evidence for a determination by the California Supreme Court.

CONCLUSION

The conflict between the individual's right to self-representation and the interest of the state in the penalty phase of a capital case demands resolution. The state interest in a more complete record cannot and should not take precedence over the sixth amendment right to self-representation. Deciding whether mitigating evidence should be presented in the penalty phase of a capital case is a

111. CAL. R. CT. 419 (7) (ii).

112. *Deere*, 41 Cal. 3d at 369, 710 P.2d at 935, 222 Cal. Rptr. at 24. The prosecution would then have the opportunity to rebut the information contained in the report, thus ensuring a balanced presentation.

113. McKaskle v. Wiggins, 465 U.S. 168 (1984).

114. This test is adopted from Strickland v. Washington, 466 U.S. 668 (1984).

tactical decision.[115] A defendant proceeding *pro per* in a capital case does not have control over tactical decisions if the state requires him to present mitigating evidence in the penalty phase of his trial. Making a *pro per* defendant present mitigating evidence amounts to a usurpation of his sixth amendment right to self-representation. The result is that the defense presented in such a case is the state's, not that of the defendant.

The solution is a mandatory pre-sentence report. This will satisfy the state's need for a more complete record. The use of this report will reduce the chance of mistaken judgments and provide a means to determine the appropriateness of the penalty, without diluting the integrity of the individual's sixth amendment right to self-representation.

*John D. Williams**

115. Bishop v. State, 95 Nev. 511, 518 597 P.2d 273, 277 (1979).

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