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COUNTY OF STANISLAUS
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF STANISLAUS**

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11 THE PEOPLE OF THE STATE OF CALIFORNIA,) CASE NO.: 1490969
12 Plaintiff,)
13 vs.) **MOTION TO BAR DEFENDANT**
14) **CARSON'S APPOINTMENT AS**
15) **COCOUNSEL OR COUNSEL IN**
16) **PROPRIA PERSONA ON THE**
17) **BASIS OF CONFLICTS OF**
18) **INTEREST WITH A**
19) **CODEFENDANT AND**
20) **WITNESSES**
21) Date: September 14, 2015
22) Time: 10:00 a.m.
23) Dept: 8
24) The Honorable Barbara Zuñiga
25)

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21 Comes now the People of the State of California, by and through their attorney, BIRGIT
22 FLADAGER, Stanislaus County District Attorney, MARLISA FERREIRA, Chief Deputy
23 District Attorney, and respectfully submits the following points and authorities in support of its
24 motion to bar defendant Carson's appointment as cocounsel or counsel in propria persona on the
25 basis of conflicts of interest with a codefendant and prosecution witnesses.

26 **STATEMENT OF RELEVANT FACTS**

27 Defendant Frank Clifford Carson is charged in Complaint No. 1490969 with murder
28 (Pen. Code, § 187(a); count I) with the special circumstance of lying in wait (Pen. Code, §

an

1 190.2(15)); conspiracy to obstruct justice (Pen. Code, § 182(a)(5); count II); and perjury (Pen.
2 Code, § 118(a); count IV.)

3 Defendant Frank Clifford Carson has been a practicing member of the State Bar of
4 California since 1988. (CBN 136261.) Defendant Carson has served as counsel for
5 codefendant Robert Lee Woody and prosecution witness Patrick Hampton.

6 LAW AND ARGUMENT

7 I.

8 **“HYBRID” FORMS OF REPRESENTATION ARE NOT CONSTITUTIONALLY** 9 **GUARANTEED.**

10 “[N]one of the ‘hybrid’ forms of representation, whether labeled ‘cocounsel,’ ‘advisory
11 counsel,’ or ‘standby counsel,’ is in any sense constitutionally guaranteed.” (*People v. Bloom*
12 (1989) 48 Cal.3d 1194, 1218.) The California Supreme Court has held that “[w]hile the Sixth
13 Amendment guarantees both the right to self-representation and the right to representation by
14 counsel, a defendant who elects representation by counsel does not have a constitutionally
15 protected right to appear as cocounsel and a defendant who elects self-representation does not
16 have a constitutional right to choreograph special appearances by counsel.” (*Bloom, supra*, at
17 p. 1218, citing *People v. Hamilton* (1988) 45 Cal.3d 351, *People v. Moore* (1988) 47 Cal.3d 63,
18 77; *People v. Miranda* (1987) 44 Cal.3d 57, 75, and *McKaskie v. Wiggins* (1984) 465 U.S. 168,
19 183.)

20 Although not controlling, *Duke v. United States* (9th Cir.1958) 255 F.2d 721 is
21 instructive. In *Duke*, the court likewise held that while an accused has the right either to appear
22 in propria persona or to be represented by counsel, he has no right to a hybrid of the two rights.
23 The court explained that “[t]here have been examples of split representation whereby a lawyer
24 defendant was enabled to use associate counsel as a shield while he engaged in offensive tactics
25 himself.” (*Id.* at p. 727.) The *Duke* court stated that it “[s]aw] no reason why the trial court
26 should have been compelled to allow Duke to turn th[e] proceeding into a Roman holiday, with
27 the other defendants and government witnesses and the public officials as the victims.” (*Ibid.*)

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II.

THE RIGHT OF SELF-REPRESENTATION IS NOT ABSOLUTE.

In *People v. Faretta* (1975) 422 U.S. 806, the Court held that if a request for self-representation is unequivocally asserted within a reasonable time before the commencement of the trial, and if the assertion is voluntarily made with an appreciation of the risks involved, the trial court has no discretion to deny it. However, the Supreme Court has recently observed that “*Faretta* itself and later cases have made clear that the right of self-representation is not absolute.” (*People v. Butler* (2009) 47 Cal.4th 814, 831, citing *Indiana v. Edwards* (2008) 554 U.S. 164, 171.) “A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.” (*People v. Marshall* (1997) 15 Cal.4th 1, 23.)

In *Martinez v. Court of Appeal California* (2000) 528 U.S. 152, the appellate court explained that while *Faretta* correctly concluded that there is centuries-long support for the right to self-representation, “the original reasons for protecting [the right to self-representation] do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need—although not always the desire—for self-representation.” (*Id.* at p. 158.) Therefore, “an individual’s decision to represent himself is no longer compelled by the necessity of choosing self-representation over incompetent or nonexistent representation[.]” (*Ibid.*)

“It is the trial judge who is assigned the ultimate responsibility for thwarting transparent and manipulative tactics of the defendant while at the same time ensuring that there is good cause for the defendant’s complaints about counsel and that the defendant’s waiver of counsel is voluntary.” (*U.S. v. Welty* (3d Cir. 1982) 674 F.2d 185, 194.) “To exercise the power of judicial discretion [in ruling on motion to relieve retained counsel], all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision.” (*People v. Lara* (2001) 86 Cal.App.4th 139, 165.)

The California Supreme Court has warned that “serious and obstructionist misconduct,” such as witness intimidation, may occur when a defendant acts as his own attorney. In *People*

1 v. *Carson* (2005) 35 Cal.4th 1, the California Supreme Court opined that such misconduct
2 “compromises the factfinding process and constitutes a quintessential subversion of the core
3 concept of a trial.” (*Id.* at p. 9.) The *Carson* court further explained that witness intimidation is
4 only one type of misconduct that may warrant termination of self-representation. Where a
5 defendant exploits or manipulates his in propria persona status to engage in such acts, wherever
6 they may occur, the trial court does not abuse its discretion in determining he has forfeited the
7 right of continued self-representation. (*Id.* at p. 10.)

8 Whenever ‘deliberate dilatory or obstructive behavior’ threatens to subvert ‘the
9 core concept of a trial’ or to compromise the court’s ability to conduct a fair
10 trial, the defendant’s *Faretta* rights are subject to forfeiture. Each case must be
11 evaluated in its own context, on its own facts[.]

12 (*Carson, supra*, at p. 10; citations and quotations omitted.)

13 Likewise, in *Teerlink v. Municipal Court* (1972) 25 Cal.App.3d 1138, the appellate court
14 rejected an attorney defendant’s obstructive behavior. There, an experienced attorney defendant
15 claimed that he had not been advised of his speedy trial rights because his question, “Doesn’t
16 he?” after the speedy trial advisement went unanswered. The court stated:

17 The record, beyond any question, shows an arrogant and protracted effort on the
18 part of Teerlink to avoid a speedy trial or any trial, and that his instant
19 protestations to the contrary are not made in good faith. Certainly an attorney
20 defendant, an officer of the court, will not be permitted to mislead the court into
21 assuming that he does not wish an early trial and then, 30 days having run,
22 demand the action’s dismissal.

23 III.

24 **FORMER REPRESENTATION OF A CODEFENDANT AND TWO PROSECUTION 25 WITNESSES BAR THE DEFENDANT’S SELF-REPRESENTATION.**

26 “Conflicts of interest broadly embrace all situations in which an attorney’s loyalty to, or
27 efforts on behalf of, a client are threatened by his responsibilities to another client or to a third
28 person or by his own interests.” (*People v. Bonin* (1989) 47 Cal.3d 808, 833.) When the trial
court knows, or reasonably should know, of the possibility of a conflict of interest on the part of
defense counsel, it is required to make an inquiry into the matter, whether the issue is raised by
the prosecution or the defense. (*Wood v. Georgia* (1981) 450 U.S. 261, 272-273 [“Any doubt
as to whether the court should have been aware of the problem is dispelled by the fact that the

1 State raised the conflict problem explicitly and requested that the court look into it.”].)

2 The trial court is obligated not merely to inquire but also to act in response to the results
3 of its inquiry. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 484.) In fulfilling its obligation, the
4 court may, of course, make arrangements for representation by conflict-free counsel. (*Ibid.*)
5 Conversely, the court may decline to take any action if it finds that the risk of a conflict is too
6 remote. (*Ibid.*; [judge failed either to appoint separate counsel or take adequate steps to
7 ascertain whether risk of a conflict of interest was too remote to warrant separate counsel].)

8 In *People v. Peoples* (1997) 51 Cal.App.4th 1592, the appellate court explained that trial
9 courts have broad discretion to recuse an attorney facing a conflict regardless of a defendant’s
10 desire to waive his right to conflict-free counsel:

11 [T]rial courts must recognize a presumption in favor of [defendant’s] counsel of
12 choice, but that presumption may be overcome not only by a demonstration of
13 actual conflict but by a showing of a serious potential conflict. The evaluation
of the facts and circumstances of each case under this standard must be left
primarily to the informed judgment of the trial court.

14 (*Peoples, supra*, at p. 1597, citing *Wheat v. United States* (1988) 486 U.S. 153, 164.)

15 When a trial court removes a defense attorney because of a potential conflict of interest,
16 the court is seeking to protect the defendant’s right to competent counsel. In such
17 circumstances, there is no violation of the right to counsel guaranteed by article I, section 15 of
18 the state Constitution, notwithstanding the defendant’s willingness to waive the potential
19 conflict. (*People v. Jones* (2004) 33 Cal.4th 234, citing *People v. McDermott* (2002) 28 Cal.4th
20 946, 990 [a trial court may refuse to accept a waiver of the right to be represented by conflict-
21 free counsel].)

22 In *People v. Harris* (2005) 37 Cal.4th 310, the California Supreme Court explained that
23 the prosecution has a right to protect itself against the existence of a possible conflict of interest
24 between an attorney and his client:

25 Whether a conflict of interest exists such that a defendant should have a different
26 attorney is a very sensitive matter. **The prosecution could legitimately be
27 concerned that if the court had not examined the question, any conviction it
received might have been doomed to reversal on appeal even before the trial
began.**

28 (*Id.* at p. 342; boldface added.) The *Harris* court found no impropriety in the People’s filing of

1 a "Motion for Hearing to Determine Conflict of Interest." "We see no impropriety in the
2 prosecution's cautiously seeking a determination before trial whether a conflict existed rather
3 than waiting for a defense challenge to a conviction after trial." (*Ibid.*)

4 In the instant case, defendant Carson is barred from self-representation as he has
5 numerous conflicts of interest, including those with both a codefendant and prosecution
6 witnesses. Defendant Carson has represented codefendant Robert Woody and witnesses Patrick
7 Hampton and Ronald Cooper. Clearly, defendant Carson as cocounsel or counsel in propria
8 persona is in a position to use these former clients' confidential information his own benefit in
9 placing blame for the current offenses upon persons other than himself. (See also Bus. & Prof.
10 Code, § 6068, subd. (e)(1) [a member of the bar shall not reveal protected information without
11 informed consent of the client].) Defendant Carson's conflict with codefendant Woody
12 represents an actual conflict; therefore, it is unwaivable.

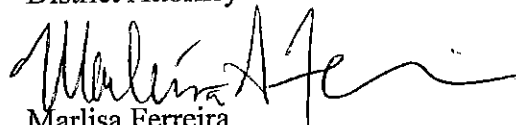
13 CONCLUSION

14 Based upon the foregoing the People respectfully request that the court deny a motion by
15 the defendant for appointment as cocounsel or counsel in propria persona.

16 Dated this 31st day of August, 2015, at Modesto, California.

17 Respectfully submitted,

18 BIRGIT FLADAGER
19 District Attorney

20 
21 Marlisa Ferreira
22 Chief Deputy District Attorney

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

STATE OF CALIFORNIA)
COUNTY OF STANISLAUS)

I, the undersigned, declare as follows:

That I am over the age of 18 years and am not a party to this action and I am employed by the Stanislaus County District Attorney's Office, 832 12th Street, Suite 300, Modesto, California.

That I served a copy of the **Motion to Bar Defendant Carson's Appointment as CoCounsel or Counsel in Propria Persona on the Basis of Conflicts of Interest with a CoDefendant and Witnesses** by placing in an envelope addressed to:

Timothy B. Rien
Law Office of Timothy B. Rien
39 S. Livermore Ave., #209
Livermore, CA 94550-3119
Attorney for Defendant Wells

Tim Allen Pori
Law Office of Tim A. Pori
521 Georgia St
Vallejo, CA 94590
Attorney for Defendant G. DeFilippo

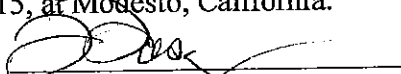
The envelope was then sealed and placed for collection and mailing on August 31, 2015, following ordinary office business practices.

That I am readily familiar with the office business practice for collection and processing of correspondence for mailing with the United States Postal Service and that in the ordinary course of business, correspondence is deposited with the United States Postal Service the same day.

That I served a copy of the **Motion to Bar Defendant Carson's Appointment as CoCounsel or Counsel in Propria Persona on the Basis of Conflicts of Interest with a CoDefendant and Witnesses** on August 31, 2015, pursuant to California Code of Civil Procedure section 1010.6(a)(6) by electronically sending a copy thereof to the offices of Timothy Rien at rienlaw@sbcglobal.net, Tim Allen Pori at tim@defense-attorney-pori.com, Martha Carlton-Magana at carltnm@hotmail.com, Preciliano Martinez at attymartinezp@yahoo.com, Hans Hjertonsson at Hans.hjertonsson@gmail.com, Alonzo Gradford at alonzogradford924@gmail.com, Larry Niermeyer at lniermeyer@aol.com, and Mary Lynn Belsher belsher@arrival.net

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August 2015, at Modesto, California.


Declarant

Case No. 1490969
People v. Carson et. al.
Hearing: 8/25/2015//Dept. 8/vav

DECLARATION OF SERVICE

I, the undersigned, say:

I was at the time of service of the attached **Motion to Bar Defendant Carson's Appointment as CoCounsel or Counsel in Propria Persona on the Basis of Conflicts of Interest with a CoDefendant and Witnesses** over the age of eighteen years and not a party to the above-entitled action. I served a copy of the above-entitled document on August 31, 2015, by serving a copy on the office of:

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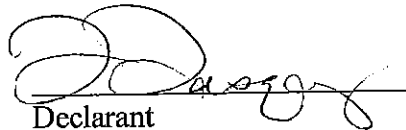
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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August, 2015, in Modesto, California.


Declarant

Case No. 1490969
People v. Carson et. al.
Hearing: 8/25/2015
Dept. 8//vav