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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF STANISLAUS

9 PEOPLE OF THE STATE
10 OF CALIFORNIA,

11 Plaintiff,

12 vs.

13 FRANK CARSON, et al.,

14 Defendant.

CASE NO.: 1490969

**DEFENDANT'S MOTION
TO BE RECOGNIZED AS
CO-COUNSEL IN HIS DEFENSE**

Date:
Time:
Dept: 26

17 On the above date and time or as directed by the court, the defendant will move for
18 recognition by the court as attorney co-counsel in his defense of himself. The defendant will
19 show this is desired by him, that he is capable, that his status as co-counsel was previously noted,
20 that the ends of justice will be served, the conduct of the court's business will not be hindered,
21 and is in fact entirely appropriate.

22 This is not an effort to supplant defendant's present counsel but supplement counsel in a
23 complex case of massive proportion.

24 This motion adopts and incorporates defendant's previous pleading pertaining to witness
25 Hampton's waiver of the attorney-client privilege.

26 /////

27 /////

1 Since the appropriateness of acting as co-counsel derives from the right of self-
2 representation, it is useful to briefly explore the underlying logic of that premise.

3
4 The *Faretta* decision explores at length the history and underpinnings of this recognition
5 of self-representation as a fundamental right.

6 In the federal courts, the right of self-representation has been protected by statute since
7 the beginnings of our nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 provided
8 that “in all the courts of the United States, the parties may plead and manage their own causes
9 personally or by the assistance of . . .counsel. . .” The *Foretta* court noted the right as codified in
10 28 U.S.C. 1654.

11 *Snyder v. Massachusetts* at 291 U.S. 97, 106 is referenced in recognizing that a
12 defendant’s presence and assistance “. . .to give advice or suggestion or even to supercede his
13 lawyer altogether and conduct the trial himself.”

14 *United States v. Plattner* 330 F.2d 271, 274 recognized “the absolute and primary right to
15 conduct one’s own defense in propria persona” ad “the right of the accused personally to manage
16 ad conduct his own defense in a criminal case”

17 The *Faretta* court noted in reaching it conclusions:

18 “. . .It is not inconceivable that in some rare instances, the
19 defendant might in fact present his case more effectively by
20 conducting his own defense. Personal liberties are not rooted in
21 the law of averages. The right to defend is personal. The
22 defendant, and not his lawyer or the State, will bear the personal
23 consequences of a conviction. It is the defendant, therefore, who
24 must be the one personally to decide whether in his particular case
25 counsel is to his advantage. And although he may conduct his own
26 defense ultimately to his own detriment, his choice must be
27 honored out of ‘that respect for the individual which is the
28 lifeblood of the law.’ *Illinois v. Allen*, 397 U.S. 337, 350-351.”

1 As the language of the cases makes clear, the basis of a defendant's right of
2 representation is to "be assisted by counsel" and "to manage and conduct his own defense." The
3 right is not necessarily exclusive of the assistance of a lawyer. In fact it is commonplace to
4 provide counsel to assist a defendant in his self-representation. As a general rule, appointment of
5 advisory counsel to assist a pro per defendant is usually permitted and sometimes strongly urged.
6

7 II.

8 THE RIGHT OF SELF-REPRESENTATION APPLIES 9 AT THE PRELIMINARY EXAMINATION

10 Besides *Faretta* for the basic underlying right, see also *People v. Matthews* (1986) 183
11 CA3d 458, 461; *Curry v. Superior Court* (1977) 75 CA3d 221, 229. Even a defendant initially
12 represented by counsel may invoke this right midway through a proceeding; if the defendant does
13 so, the court on its own motion must inquire into the defendant's reasons and may weigh any
14 ensuing disruption or delay. *People v. Windham* (1977) 19 C3d 121, 128. Thus the magistrate
15 may not summarily deny as untimely a request for self-representation made midway through the
16 preliminary examination, particularly when defendant is not requesting a continuance (*Moon v.*
17 *Superior Court* (2005) 134 CA4th 1521).

18 No continuance is being requested here.
19

20 III.

21 A DEFENDANT AS CO-COUNSEL

22 While a defendant has no constitutionally guaranteed right as such to act as co-counsel,
23 the court has discretion to permit a defendant to participate in the defense. *People v. Kirkpatrick*
24 (1994) 7 CA4th 988; *People v. Crabtree* (2009) 169 CalApp4th 1293, 1310.

25 The reservations, if any of allowing co-counsel status of a defendant are rooted in a lay
26 non-lawyer defendant situation hampering the judicial process. Any such concern here is
27 misplaced.

28 A variety of special circumstances has produced cases where defendants have acted as co-

1 counsel with their attorneys. Judges have the discretion to grant requests by defendants to shape
2 the presentation of their defense. See examples *United States v. Williams*, 534 F.2d 119 (8th Cir.
3 1976); *United States v. Klee*, 494 F.2d 394 (9th Cir. 1974).

4 For example, in *Bayless v. United States* 381 F.2d 67, 71 (9th Cir. 1967) the defendant
5 proceeded pro se with a retained advisory counsel during the pretrial period. For the trial the
6 defendant noted that “he wanted counsel to fully represent him, except that he himself was to
7 have the right, after his counsel had cross-examined witnesses, to himself further cross-examine
8 them.” The trial court’s acceptance of this arrangement was affirmed on appeal, the Ninth
9 Circuit noting that the defendant was permitted to proceed pro se to the exact extent he desired.

10 The People have cited *Duke v. United States* to warn of proceedings being turned into “a
11 Roman Holiday” by allowing co-counsel status to an obstructionist client.

12 In *Duke v United States*, 255 F2d 721 (9th Cir. 1958), the defendant, Duke, an attorney,
13 asked to proceed pro se for preliminary motions, but with counsel for trial. The court agreed.
14 At a pretrial conference Duke told the court he wanted Fitzgerald (his counsel) “as an associate.”
15 After some discussion the court and Duke agreed that Fitzgerald would be “counsel,” but that
16 Duke would be allowed to examine witnesses and argue objections or motions. A request at trial
17 by Duke to make an opening statement was denied. A request to proceed completely pro se was
18 also denied. The Ninth Circuit, in an opinion evincing exasperation with the defendant, affirmed
19 Duke’s conviction, holding that hybrid representation was not required and that Duke’s behavior
20 constituted a waiver of his right to proceed pro se. It is arguable, however, that the trial court’s
21 limitations on the ability of Duke to proceed partially pro se vitiated the pretrial “agreement” and
22 any supposed waiver of pros se rights. Also, although the fickleness of Duke was significant, a
23 last minute request to make the opening statement hardly placed a significant impediment into
24 the trial process.

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IV.

**ANY POTENTIAL CONFLICTS BASED ON ATTORNEY-CLIENT
RELATIONSHIP HAVE BEEN WAIVED AS TO
WOODY AND HAMPTON**

Robert Woody's counsel, Bruce Perry has, on the record, indicated Mr. Woody's waiver of any attorney client privilege between he and Mr. Carson in addition to Mr. Woody's having constructively done so in the multiple interviews that Mr. Woody has done with investigators wherein he discussed his conversations with Carson.

As to Patrick Hampton, both in his testimony in this hearing and in his earlier January 30, 2015 interview with investigators, he repeatedly waived the attorney-client privilege between he and Carson in their handling of his criminal case. See counsel Martinez's brief on this subject attached.

V.

**THE PEOPLE'S OBJECTIONS ARE MISPLACED
AND SHOULD BE OVERRULED**

It has been asserted in opposition to the defendant's constitutional right to conduct his own defense that he should be denied a most fundamental due process right because he previously had an attorney-client relationship with a witness or co-defendant; that he had forfeited his right to represent himself against charges that the witness might make against him. Obviously on its face such a notion is incorrect and objectionable.

Just as Mr. Woody, or any of the other multiple co-defendants, has the right to represent himself or herself pro per, so does Carson.

Apparently the People would have the court prohibit Mr. Carson acting in his own attorney capacity for fear he might divulge a privileged confidence of a former client.

The People would have the court believe necessary and adopt an absurd fiction that a confidence is assured as long as defendant Carson is prohibited from addressing the court proceedings himself. It must first be remembered that Carson is an officer of the court like his

1 counsel and the prosecutor. The trial court in these proceedings has repeatedly relied on the
2 assurances of veracity and proper behavior of the officers of the court before her. There's no
3 reason here to suppose differently of attorney Carson.

4 Besides, there is no practical difference than if a defendant simply told his counsel the
5 privileged confidence. This premise's logic taken further would prohibit any cross-examination
6 of a former client witness by even the defendant's counsel! Just as the court can and has guarded
7 against disclosures to preserve confidences when appropriate, the court can do the same with Mr.
8 Carson should a question arise.

9 In fact the case could be made that the experienced Carson himself would know better
10 than anyone in the courtroom what is privileged and what is not.

11
12 **VI.**

13 **EVEN WITHOUT A WAIVER OF ATTORNEY-CLIENT**
14 **PRIVILEGED CONVERSATIONS, DEFENDANT CARSON'S RIGHT OF**
15 **CONFRONTATION AND RIGHT OF SELF REPRESENTATION MUST PREVAIL**

16 Just because defendant Carson might have confidences of a witness that he is
17 professionally prohibited from disclosing does not mean he loses his right to confront supposed
18 criminal conduct that are outside the protected bounds of the attorney-client privilege.

19 The People use case authorities that advise an attorney not be a part of a case to avoid
20 potential conflicts that might exist. They are inappropriate here because Mr. Carson cannot
21 simply withdraw and not be a part of the case. Here he is a victim of false statements that may
22 involve and include those from prior clients years ago.

23 The remedy for any such concerns about prohibited breaches is simply to not allow them
24 into testimony, just like every other privileged information unless appropriate otherwise.

25 The generalized cases the People cite in opposition to self-representation discuss the
26 denials or limitations sometime imposed in situations where a typically lay defendant opts for
27 self-representation as a disruptive tactic or undue burden on the court or judicial process. These
28 scenarios are usually situations where a defendant acts out inappropriately in court or doesn't

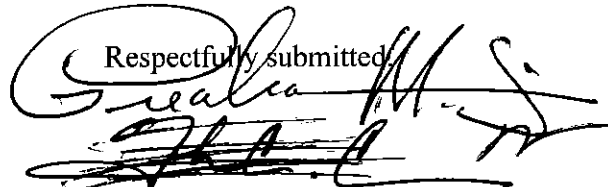
1 know court procedure; lacking on understanding of applicable law or the concepts or the rules of
2 evidence. It is also seen where just before or during jury trial a defendant demands to discharge
3 counsel and represent himself, causing or threatening a delay, continuance, or mistrial. There
4 should be no such concerns here.

5
6 **CONCLUSION**

7 The ends of justice will be served by recognition as co-counsel and the conduct of the
8 court's business would not be hindered in the least.

9 Dated: 3-7-16

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11 3-9-16

12 Respectfully submitted
13 
14 Frank C. Carson

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11 COUNTY OF STANISLAUS

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16 FRANK CARSON, et al.,

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**DEFENDANT'S SUPPLEMENTAL
MEMORANDUM RE: CO-COUNSEL
STATUS**

Date:
Time:
Dept: 26

18 The situation present here is distinguishable from most cases that have examined this
19 issue.

20 1. The defendant's status was asserted and recognized in a timely fashion.

21 Arraignment Transcript (ART) August 18, 2015 P. 209; 4-9:

22 MR. MARTINEZ: On behalf of Mr. Carson as well,

23 Mr. Carson is going to be co-counsel with me on this matter,

24 Your Honor.

25 THE COURT: Oh, he is? Okay. He's entitle to assist

26 you, of course. The logistics of that will be handled at a later

27 point in time.

28 2. Defendant's counsel is retained and consents to defendant's co-counsel status.

- 1 3. Defendant agrees, acknowledges, and stipulates that his retained counsel makes
2 the decisions in the conduct of the case other than the right for the defendant to
3 testify himself.
4
5 4. Defendant understands that any errors he himself commits will not be excused
6 based on the responsibility of primary counsel.
7
8 5. The defendant's involvement will not be disruptive or distracting.
9

10 Dated: 3-7-16
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12 Respectfully submitted,
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15 Frank C. Carson
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF STANISLAUS

11 PEOPLE OF THE STATE
12 OF CALIFORNIA,

13 Plaintiff,

14 vs.

15 FRANK CARSON, et al.,

16 Defendant.

) CASE NO.: 1490969

) **DECLARATION OF FRANK**
) **CARSON IN SUPPORT OF**
) **RECOGNITION AS CO-COUNSEL**
) **FOR HIMSELF**

) Date:
) Time:
) Dept.: 26

17 1. I have been an attorney licensed to practice law in California since 1988. I am a Certified
18 Criminal Law Specialist as recognized by the California State Bar and have been for a
19 number of years. I have tried well over 100 criminal jury trials, including a number of
20 homicide cases since approximately 1993. I have tried cases in both state and federal
21 courts. I am a past president of the Stanislaus County Criminal Courts Bar Association.

22
23 2. I unequivocally demand to act as co-counsel in my own defense. I understand the rules of
24 court and the trial process. I feel myself competent to do so and feel it is necessary in
25 defending against my charges.

26 I make this demand of my own informed free will with a full understanding of its risks,
27 limitations, and benefits.

1 3. I have learned that approximately 15,000 pages of discovery have been generated in the
2 investigation and prosecution of this case. There exists hundreds of recorded calls and
3 interviews. There are thousands of phone calls tracked and analyzed, including cell
4 phone positioning of supposed calls. The volume of material is complex and
5 overwhelming to familiarize one's self with.

6
7 4. My attorney Preciliano Martinez is a sole practitioner with a significant practice in both
8 state and federal courts. Besides his representation of me, his regular practice extends to
9 southern California and out of state, all requiring extensive travel and absences.

10
11 5. Counsel Steven Schmidt is based in San Francisco and attends the preliminary hearing
12 only infrequently. He has a civil litigation clientele as opposed to a criminal one. He does
13 not have access to the discovery in this case. He will not be available at trial.

14
15 6. The co-defendants and I have been in an ongoing preliminary hearing since October 13,
16 2015. It has been represented that there are hundreds of potential witnesses that may be
17 called in this case and thousands of pieces of evidence.

18
19 7. I have particularized training, education, and experience in several aspects of defending
20 homicide cases. I have had extensive experience cross-examining the principal
21 investigators in this case; including Kirk Bunch, Steve Jacobson, Frank Navarro, and Jon
22 Evers I have had experience opposing prosecutor Ferriera in homicide cases.

23
24 8. I have tried multiple homicide cases recently that dealt with cell phone evidence
25 extensively, including *People v. Juan Manual Tello* in June, 2015. It has been represented
26 that the telephone evidence alone in the People's case is expected to take at least 2 weeks
27 to cover this complex area. An experienced knowledgeable examiner such as myself is
28 uniquely needed to elicit the truth, understand the underlying area and issues, and finally


1 to expedite this and other hearings.

2
3 9. The limitations of my confinement and courtroom rules (writing with the stub of a pencil,
4 for example) makes it difficult, impractical, and usually impossible to effectively
5 communicate with my attorney, especially during cross examination on issues where I
6 have particular familiarity. I believe I have greater amount of expertise and experience
7 cross-examining expert prosecution witnesses than my counsel Mr. Martinez.

8
9 10. I feel my assistance as co-counsel is necessary and benefits my defense to the charges in
10 this case. I uniquely am familiar with the facts and witnesses in this case.

11
12 I certify under penalty of perjury that the foregoing is true and correct.

13
14
15 Dated: 3-7-16


16 Frank C. Carson

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PROOF OF SERVICE —

I declare that I am over the age of eighteen (18), not a party to the above-referenced action, and my business address is 1120 Fourteenth Street, Suite 5, Modesto. California 95354.

On the date shown below, I

_____ deposited in the United States Mail, or
 X personally served the following:

DEFENDANT'S MOTION TO BE RECOGNIZED AS CO-COUNSEL IN HIS DEFENSE;

FRANK CARSON;

CASE NO. 1490969

On the following parties:

STANISLAUS COUNTY SUPERIOR COURT
800 11th Street
Modesto, CA 95354

STANISLAUS COUNTY DISTRICT ATTORNEY
832 12th Street, Room 300
Modesto, CA 95354

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

Signed this 7 of March, 2016, at Modesto, California.
