Case No. A163972

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

OXANE "GYPSY" TAUB,
Defendant and Appellant.

Appeal from a Judgment of the Alameda Superior Court, Case No. 19-CR-010394:

Hon. Judge Mark McCannon
(Superior Court Judge – Judgment Issued November 5, 2021)

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES **PAGE(S)**

RULES **PAGE(S)**

CONSTITUTIONAL PROVISIONS **PAGE(S)**

I.

INTRODUCTION

The prosecution of Gypsy Taub began in July of 2019. Over the course of the next two years, Taub repeatedly raised the issues presented in this petition, often on her own behalf. Yet despite never waiving her right to a speedy felony trial, Taub was not tried until August of 2021, at which point she was denied some of her most fundamental constitutional and statutory rights, including her right to represent herself at trial. By way of these violations, Taub was denied her right to be the master of her own fate and that fate was instead sealed on her behalf. She suffered twenty convictions, many of which were themselves constitutionally infirm or unsupported by sufficient evidence. She was sentenced to a significant term of imprisonment, only further lengthening the wrongful pretrial incarceration she had endured for many months before her sentence was imposed.

Taub now comes before this Court a woman free of her literal shackles, but still very much confined by the injustices she endured. She appeals in part because she continues to suffer the opprobrium of sex offender registration. She appeals in part because her record carries unwarranted convictions sustained by way of illegal procedures. But perhaps most of all, Taub appeals because no criminal defendant should have to suffer a blatant denial of rights afforded them by the constitutions

and statutes enacted in furtherance thereof. That is what happened to Taub, and that is the wrong she now seeks to right.

II.

STATEMENT OF APPEALABILITY

The judgment from which Taub appeals followed a jury trial, is final (Cal. Rule of Court 8.204(a)(2)(B)), and is appealable pursuant to Cal. Pen. Code §1237(a).[1]

III.

STATEMENT OF THE CASE

A. Pretrial Procedural History

1. Initial Proceedings

Taub was initially charged by way of a misdemeanor complaint on July 10, 2019. (1 CT 18.) Through a series of amended complaints and, ultimately, an information filed followed a preliminary hearing, Taub was charged with the following:

- Count 1: attempted child abduction (§278)
- Count 2: stalking (§646.9(b))
- Count 3: child abuse (§273a(b))
- Count 4: child molestation (§647.6(a)(1))
- Count 5: violating a restraining order (§273.6)

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

- Count 6: violating a restraining order (§273.6)
- Count 7: violating a restraining order (§273.6)
- Count 8: violating a restraining order (§273.6)
- Count 9: violating a protective order (§166(c)(1))
- Count 10: violating a restraining order (§273.6)
- Count 11: violating a protective order (§166(c)(1))
- Count 12: violating a restraining order (§273.6)
- Count 13: violating a protective order (§166(c)(1))
- Count 14: violating a restraining order (§273.6)
- Count 15: violating a protective order (§166(c)(1))
- Count 16: violating a restraining order (§273.6)
- Count 17: violating a protective order (§166(c)(1))
- Count 18: violating a restraining order (§273.6)
- Count 19: violating a protective order (§166(c)(1))
- Count 20: attempting to dissuade a witness (§136.1(a)(2))
- Count 21: attempting to dissuade a witness (§136.1(a)(2))

(8 CT 2386.) Once the case was assigned to a trial department, the People dismissed Count 3. (1 RT 6.)

2. *Faretta* History

From the outset of the case, Taub consistently and repeatedly made clear her desire not to have counsel appointed to her, but rather, to be

represented by competent counsel whom she believed she could trust to render assistance in which she would have confidence.[2] If she could not procure counsel satisfactory to her, Taub was willing to represent herself instead. At Taub's very first appearance in the case, on August 12, 2019, she indicated as much, requesting to proceed *pro se* and noting that she would consider hiring private counsel.[3] (1 CT 29.) On September 11, 2019, Taub completed a *Faretta* waiver form, indicating in writing her desire to represent herself unless and until she could retain satisfactory counsel. (1 CT 70-74.) The court accepted her waiver and granted her request to proceed *pro se*.[4] (1 CT 68-69.)

Taub continued to appear *pro se* on September 23, 2019 (1 CT 115); September 30, 2019 (1 CT 121); October 3, 2019 (1 CT 127); October 24, 2019 (1 CT 131); October 31, 2019 (1 CT 137); November 14, 2019 (1 CT 140); December 5, 2019 (1 CT 142); December 19, 2019 (1 CT 150); January 2, 2020 (2 CT 340); January 3, 2020 (2 CT 342); January 13, 2020 (2 CT 344); February 10, 2020 (2 CT 354); February 13, 2020 (2 CT 360);

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[2] Over the course of the proceedings, Taub repeatedly made known her distrust of any attorney who might be appointed to her by the court and funded by the state.

[3] Although Taub requested augmentation of the record with the transcript of the August 12, 2019 proceedings, the county clerk informed this Court and the parties that the proceedings were unreported.

[4] Although Taub requested augmentation of the record with the transcript of the September 11, 2019 proceedings, the county clerk informed this Court and the parties that the proceedings were unreported.

and February 27, 2020 (2 CT 371). After that date, the COVID-19 pandemic began in force, and Taub retained counsel to represent her in her efforts to secure her release from custody.

On July 6, 2020, Taub's counsel moved to withdraw from her case, citing Taub's desire to proceed without counsel. (3 CT 754.) Taub also filed a declaration in which she requested to proceed *pro se* "If I am able to appear in court myself," noting that she was making use of retained counsel only so long as she was in quarantine at Santa Rita and unable to handle her own court appearances. (3 CT 752.) On July 7, 2020, Taub's counsel's motion to withdraw was granted. (1 CT 758.)

On August 17, 2020, Taub appeared for a plea and requested additional time to retain counsel for her trial. (8/17/20 ART 3-5.) On that date, Taub requested the prosecutor provide a bill of particulars, as without such, Taub would be unable to "understand the nature of my charges." (8/17/20 ART 4.)

On September 3, 2020, the court terminated Taub's *pro se* status, declared a doubt as to Taub's competence, and appointed counsel for further competency proceedings.[5] (4 CT 999.) On February 1, 2021, the court found Taub competent. (4 CT 1001.) Relying on the evaluations of

[5] Although Taub requested augmentation of the record with the transcript of the September 3, 2020 proceedings, the county clerk informed this Court and the parties that the date's court reporter could not be contacted and a transcript of the proceedings could not be prepared.

two appointed experts who concurred regarding Taub's ability to understand the proceedings, both parties' arguments in favor of a finding of competency, and its own independent determination that Taub had been "consistent and rational" in prior proceedings, the court held not only that Taub was competent, but that it was "not sure [the competency proceedings] necessarily should have been started" in the first place. (2/1/21 ART 9.)

On February 10, 2021, following the reinstatement of proceedings, Taub confirmed her continued desire to remain in *pro se* status unless and until she could retain satisfactory counsel to represent her. (2/10/21 ART 10.) On February 23, 2021, the court referred Taub to court-appointed counsel, as Taub had refused to fill out the full Alameda *Faretta* waiver form. (2/23/21 ART 5-10.) As Taub explained on that date, her resistance to signing the *Faretta* waiver form was her wish not to waive her right to counsel for all future proceedings, including any future trial, but rather, only to proceed *pro se* until she retained satisfactory private counsel to represent her. (*Ibid*.) Signing the waiver form, she believed, would relinquish her future right to have counsel represent her at trial, a premature step to which she was not yet willing to commit.

On March 4, 2021, Taub moved in writing to represent herself for pretrial proceedings and unless and until she could retain private counsel

for trial. (5 CT 1277.) When further proceedings occurred without her motion being heard, Taub re-filed the motion on March 15, 2021. (7 CT 2112.) On that same day, Taub endeavored once again to orally explain her position to the court, only to be shut down entirely:

> THE DEFENDANT: Well, what I'm saying is I'm looking for private counsel, which has been a very difficult thing to do, too. I'm looking for private counsel and I'm not wanting to represent myself at trial, because I don't have the education to do that. I am considering that [*sic*] possibly doing that in the future, maybe if I can be released and do more research, but right now I don't have the knowledge to represent myself. I'm not [*sic*] looking continually for private counsel and in the meantime represent myself until I find private counsel. And without private counsel, I won't go to trial. . . .
>
> THE COURT: That presents a little bit of a dilemma, Ms. Taub, in the sense that you are represented currently by counsel, but you say you don't want to represent yourself. And I note in the motion that you filed today on Page 3 you indicate pretty clearly that you believe that there's some judges that have tried to pressure you into signing a Faretta waiver form which you don't want to do. And you do not want to give up your constitutional right to counsel, which is perfectly understandable and perfectly acceptable, so I cannot really entertain a motion to represent yourself with those statements made in your motion as part of the record. . . .
>
> THE DEFENDANT: I want to represent myself temporarily.
>
> THE COURT: We have to get a Faretta form and have a Faretta hearing and you have to waive your right –

THE DEFENDANT: That means that I would be giving up my right to counsel at trial and I –

THE COURT: Ms. Taub, either you fill out a Faretta form and we have a Faretta hearing where I discuss with you the legal issues that I'm obligated to discuss with you, or you can seek private counsel while you are -- there's nothing precluding -- nothing preventing you from trying to seek private counsel as we sit here today. . . .

THE DEFENDANT: Excuse me, Your Honor. It says right here in my papers you can restore my pro per status until I find private counsel of my own choice because I can't go on with this useless lawyer that you guys give me and the Court has no authority to force an attorney on me, because I'm competent to stand trial. I'm competent and I'm allowed to proceed in pro per until I find private counsel. It's my choice to go pro per. And actually I have read about the Faretta waiver, but if I don't, if I prefer to wait to represent myself at trial, I have more time to make that decision. I can sign a Faretta waiver later in the process for the trial, but it can be later.

THE COURT: No, you're mistaken. You're mistaken, because right now if you are making the motion to the Court to represent yourself, that is a Faretta motion, which would involve you signing a Faretta waiver and me going over the Faretta waiver with you and all the different legal issues that are involved in a Faretta waiver.

THE DEFENDANT: Okay. So what should I do if I want to seek private counsel to represent me at trial? In the meantime, I want to proceed representing myself until I find private counsel. What kind of motion should I file for this?

THE COURT: You are not willing to sign a Faretta waiver or go through the Faretta process, so I can't tell you what to do. . . .

[THE COURT:] I am hearing from you that you do not want to go through or sign a Faretta waiver, or go through the Faretta hearing process. If that's the case, that's fine, but if you want to seek private counsel, that's fine as well. So I'm telling you, you need to get on the phone and make the effort that you can make to see if you can find an attorney to represent you. And if you can, that's fine, that attorney can come into the case and represent you, okay. So –

THE DEFENDANT: I would like to go pro per until then and I have the right to do that.

THE COURT: Ms. Taub, you tell me in your papers you do not want to waive your right to counsel and you do not want to fill out a Faretta form. I cannot do that.

THE DEFENDANT: That's for trial.

THE COURT: No, it's not.

THE DEFENDANT: We're not in trial yet.

THE COURT: Ms. Taub, it's not for trial. You either represent yourself or you don't. There are pretrial proceedings that cannot -- if you want to represent yourself, then we go through this process, as I told you, but you don't want to go through it, so I can't help you with that.

THE DEFENDANT: Temporarily, until I find counsel. And I've been pro per before.

THE COURT: Are you prepared to sign the Faretta form and go through a Faretta hearing?

THE DEFENDANT: What does Faretta hearing mean? Does that mean that I have to sign it –

THE COURT: Yes. Yes.

> THE DEFENDANT: Well, that means I won't have counsel at trial and I'm not giving that up. I'm just looking for private counsel. And in the meantime –
>
> THE COURT: Ms. Taub, we're having a failure to communicate because you keep saying over and over again that you want to seek private counsel and I'm telling you you are free to do that.

(3/15/21 ART.) In the absence of the signed *Faretta* waiver form, the court refused to permit Taub to represent herself or even to inquire into Taub's competency to do so.

On April 6, 2021, Taub filed a renewed motion to represent herself. (8 CT 2112.) She made her *pro se* request abundantly clear:

> I refuse to be represented by public defenders and by court-appointed attorneys. I insist on exercising my constitutional right to be represented by counsel of my choice. I'm in the process of looking for a private attorney to represent me at my trial. I'm looking for an honest and affective [*sic*] attorney who will sign my contract and defend all my rights. Until I secure counsel of my own choice I insist on proceeding in propria persona.
>
> Being represented by council [*sic*] is a right, not an obligation. I can appear with or without counsel as a matter of right.
>
> Please, remove Mr. Steven Alpers from my case and, please, reinstate my pro pre [*sic*] status.

(8 CT 2116-17.) In connection with the motion, and in response to the court's comments on March 15, Taub submitted a modified version of the

Faretta waiver form that made clear her intent to represent herself for pretrial proceedings without waiving her future right to counsel at trial. (7 CT 1797.) The record does not indicate that Taub's April 6 motion was ever addressed, and a preliminary hearing was held not long thereafter.

Finally, on July 6, 2021, the eve of trial, Taub made her last attempt to convince the trial court to allow her to represent herself. (1 RT 62.) The trial court denied the request with the following reasoning:

> THE COURT: Okay. I have read Ms. Taub's motion that she filed,[6] and her request to represent herself has been denied on multiple occasions. I've read that motion and at this time I do not find her qualified or able to represent herself at this time.
>
> Part of my job is to save individuals from themselves. And if you were to represent yourself, I think that you would be doing yourself a great injustice because you have not gone to law school. Okay? And based on your actions in court, it is clear that you do not understand the legal system as an attorney would and I don't think that you can represent yourself. It's already been said that you don't understand the charges that have been alleged against you.
>
> So based on your own conduct here and the motion that you filed and refusing to come to court, I'm going to deny that Faretta request at this time.

[6] The record does not otherwise indicate to which motion the court referred. Taub's last recorded *Faretta* motion had been filed three months prior, before the preliminary hearing and while Taub was still represented by appointed counsel. No more recent motion appears lodged in the record.

(1 RT 62-63.)

3. Speedy Trial History

As with her right to represent herself, Taub also consistently asserted her right to a speedy trial, starting at the outset of her case. Taub was originally charged by way of misdemeanor complaint on July 10, 2019. (1 CT 18.) On December 19, 2019, the state filed, and Taub was arraigned on, a Third Amended Complaint. (*See* 1 CT 144, 150.) This complaint, the first to include felony charges, elevated Taub's case from a misdemeanor to a felony and entitled her to a timely preliminary hearing in accordance with §859b.

For well over a year, however, no preliminary hearing took place. On February 10, 2020, the state filed a Fourth Amended Complaint. (2 CT 350.) Taub was not arraigned on that fourth amended complaint until July 7, 2020, nearly five months later. (*See* 3 CT 758.) As previously noted, on September 3, 2020, the court declared a doubt as to Taub's competence. (4 CT 999.) On February 1, 2021, the court found Taub competent to proceed and reinstated proceedings. (4 CT 1001.)

A Fifth Amended Complaint was filed on February 24, 2021. (5 CT 1270.) Taub was arraigned on, and entered a not guilty plea to, that complaint on March 19, 2021. (6 CT 1584.) Finally, on April 26, 2021, a preliminary hearing was held. (8 CT 2162.)

After the conclusion of the preliminary hearing, Taub was arraigned on, and entered a plea to, the subsequently-filed information on May 10, 2021. (9 CT 2396.) On June 29, 2021, her case was assigned out to a trial department, which discussed with Taub the prosecution's plea offer; no trial proceedings actually took place on that date. (*See* 1 RT 4-11.) Jury selection did not begin in Taub's case until July 7, 2021, within 60 days of Taub's arraignment on the information. (9 CT 2588.) After a mere two days of proceedings, however, the trial court adjourned proceedings for over a month, resuming jury selection on August 9, 2021. (*See* 9 CT 2592.) It explained the reasons for its extended break:

> THE COURT: We will starting picking a jury that [July 6] and the rest of the week and hopefully we'll have a jury by then. The following week [of July 12] is there some scheduling issues?
>
> MS. MULLINS: Yes, your Honor. I will be on a pre-planned vacation. . . .
>
> [MR. DOBBINS:] We have a number of scheduling conflicts as well that week, your Honor. Three depositions we're doing.
>
> THE COURT: Okay. So you need to tell me now, what are your issues?
>
> MR. DOBBINS: We have three depositions, Mr. Urick and myself, on -- two on Tuesday, July 13th, and one on Thursday, July 15th.
>
> THE COURT: All right. So Ms. Mullins is not available, so we will not be in session that whole week [of July 12]. The following week [of July

> 19] I am in San Mateo finishing up a jury trial that I handled for the San Mateo courts and then I am on vacation. So, we will start picking the jury and then we will recess, but we'll -- so it looks like it will probably be the first week of August is when we will start with opening statements and evidence. Okay? . . . .
>
> We are going to pick a jury within her speedy trial rights. We have done motions. And then we will continue after that short delay. I am not going to interrupt anyone's vacation or your need to do your depositions. I still believe that we are providing her with a speedy trial.
>
> Is there anything further?
>
> MS. MULLINS: Your Honor, so I do have two more vacation days, the 5th and 6th of August.
>
> THE COURT: Okay. . . .
>
> In fact, that whole week [of August 2] -- I believe that we will start on the 9th, August 9th[.] I will be gone, and this is all pre-planned months ago. So I will be gone, so we will start back on the 9th of August.

(1 RT 50-52.) In short, apart from two days requested by the defense for counsel's depositions, the trial court adjourned proceedings for four straight weeks to accommodate the vacations of the prosecutor and the court, as well as the court's ongoing trial in San Mateo County.

After the trial court announced its month-long break in the proceedings, but before jury selection began, on July 2, 2021, the parties appeared before the court at defense counsel's request. Taub, however, was

not transported. (1 RT 56.) Nevertheless, the impact of the scheduled break on her speedy trial rights was raised:

> [MS. MULLINS:] I'd like to talk about the no time waiver status.
>
> THE COURT: Yes.
>
> MS. MULLINS: In talking to some people in my office over the last 24 hours or so, my concern is if we don't have a stipulation that we are effectively in trial, for purposes of Ms. Taub maintaining her speedy trial rights, that I'm concerned that we might not be able to take such a long break in between picking a jury and starting evidence.
>
> My understanding, in talking to Mr. Dobbins, is that the defendant is not willing to enter into that stipulation, so --
>
> THE COURT: Well, Ms. Taub's actions today contributed to the delays. All right? so we'll see on Tuesday. we will bring a jury in on Wednesday and we will swear a panel on Wednesday and we will start. But it's Ms. Taub's own actions in delaying this process.
>
> Ms. Taub, or through Mr. Dobbins, in an email, is requesting that we add this case on today so that we could discuss the case, and it was my understanding that there was a potential resolution in this case.
>
> And also, in another email I received from you, you informed me that there was some other potentially -allegations coming or some misconduct that you recovered recently. Is that correct?

> MS. MULLINS: It is, your Honor. In doing more research, there's -- the People are not filing additional charges.
>
> THE COURT: Okay. So we'll see what happens Tuesday. But we'll go we'll bring a jury in Wednesday. It just really depends on Ms. Taub. But if she is contributing to the delays, then I don't think that that will have a negative effect on this case in terms of her no time waiver status.

(1 RT 57-58.) When the parties reconvened before the court on July 6, 2021, the court commented further on Taub's absence the previous Friday:

> THE COURT: And I just want to make clear on the record that I received communications from [Dobbins] that said you wanted to add this case on Friday because, after further thought, Ms. Taub wanted to discuss the case, which indicated to me that she was possibly going to entertain or take the prosecution's offer.
>
> Then on Friday we were all here. Ms. Taub refused to come to court, which delayed this case, and then I had to cancel the Jury. So we'll bring a jury in on Wednesday. We'll start picking on Wednesday.

(1 RT 62.)

B. Trial Evidence

At trial, the state presented evidence of Taub's alleged contacts with John Doe, a minor. Some of these contacts took the form of emails sent to John Doe by email accounts which the prosecution argued, by way of circumstantial evidence, were controlled by Taub. (*See*, *e.g.*, 2 RT 124-126; 5 RT 341-343.) Other alleged contacts went through intermediaries who

would, for example, provide John Doe with phones and notes. (*See*, *e.g.*, 5 RT 356-357.) Still other "contacts" were not direct contacts at all, but rather, comprised public blog posts that discussed John Doe or Taub's ongoing case. (*See*, *e.g.*, 2 RT 145-151.)

These blog posts were used by the state to support Taub's charges for Counts 7, 16, 17, 18, and 19, all of which pertained to violations of a protective or restraining order. (*See* 9 RT 1332, 1342-1343.) In connection with those counts, no contact other than the public blog posts was alleged or shown.

Taub was ultimately convicted on all twenty counts[7] (9 CT 2635) and sentenced to a total term of 7 years and 2 months of custody (10 CT 2873). She is required to register as a sex offender pursuant to §290.

IV.

QUESTIONS ON APPEAL

This appeal presents the following questions of constitutional and statutory law:

1. Did the trial court improperly deny Taub her constitutional right to self-representation by denying her final *Faretta* request made at the outset of trial?

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[7] Count 3, the violation of §273a(b), was dismissed during trial.

2. Did the magistrate deny Taub her constitutional and statutory right to a speedy trial by delaying her preliminary hearing for over a year following her arraignment?

3. Did the trial court deny Taub her constitutional and statutory speedy trial right by holding only two days of jury selection before breaking proceedings for over a month in order to accommodate planned vacations and the court's own ongoing trial in another county?

4. After the Supreme Court's holding in *Counterman v. Colorado* (2023) ___U.S.___ [143 S.Ct. 2106, 2113], are §§ 646.9(b) and 647.6(a)(1) facially overbroad due to their lack of a requisite subjective intent element?

5. After the Supreme Court's holding in *Counterman v. Colorado* (2023) ___U.S.___ [143 S.Ct. 2106, 2113], were §§ 646.9(b) and 647.6(a)(1) overbroad as applied to Taub due to their criminalization of speech without requiring the requisite subjective intent element announced in *Counterman*?

6. Was the jury erroneously instructed on Taub's charges under §§ 646.9(b) and 647.6(a)(1) where they were not instructed to acquit in the absence of the requisite subjective intent element?

7. Did Taub's public blog posts constitute sufficient evidence to support her convictions for violating a restraining and protective order in Counts 7, 16, 17, 18, and 19?

V.

ARGUMENT

A. By Denying Taub's *Faretta* Request at Trial, the Trial Court Denied Taub Her Constitutional Right to Represent Herself at Trial.

Although Taub quarreled with the court below regarding her *Faretta* rights multiple times throughout the pre-preliminary hearing proceedings, it is the trial court's ultimate decision to prevent her from proceeding *pro se* at trial that most blatantly and egregiously violated her constitutional rights, and it is from this decision that Taub appeals. The trial court, which summarily denied Taub's *Faretta* request without a hearing, inquiry, or reasoned analysis, denied Taub a fundamental right under the Sixth Amendment, requiring reversal of her conviction.

1. Legal Standard

> Almost a decade ago, the United States Supreme Court held that under the Sixth and Fourteenth Amendments, a criminal defendant who is competent may waive the right to counsel and represent himself. That holding was premised on the nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.

> Once a defendant proffers a timely motion to represent himself, the trial court must proceed to determine whether he voluntarily and intelligently elects to do so. If these conditions are satisfied, 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.
>
> 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. It is not, however, essential that defendant be competent to serve as counsel in a criminal proceeding; his technical legal knowledge, as such, is not relevant to an assessment of his knowing exercise of the right to defend himself. One need not pass a mini-bar examination in order to exhibit the requisite capacity to make a valid Faretta waiver.
>
> This court has held that once a motion to proceed pro se is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be.

(*People v. Joseph* (1983) 34 Cal.3d 936, 943 (cleaned up).)

2. Standard of Review/Prejudice

On appeal, the reviewing court reviews the entire record de novo to determine whether a *Faretta* request should have been granted or denied. (*People v. Marshall* (1997) 15 Cal.4th 1, 24.) Where the trial court erroneously denies a defendant's timely request to represent herself, a per

se rule of reversal applies and no prejudice need be shown. (*Joseph*, *supra*, 34 Cal.3d at 948.) However, when a defendant makes a purportedly untimely *Faretta* request, the trial court's denial thereof is instead reviewed for an abuse of discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 129.)

3. The Court's Denial of Taub's Request to Represent Herself at Trial Was Error.

Throughout the pretrial proceedings, Taub made several requests to represent herself. While she was at times permitted to do so, making motions on her own behalf, the court also frequently denied her requests to be heard *pro se* and to submit filings and materials on a *pro se* basis. Often, the court's refusal to allow Taub to proceed *pro se* was a result of its own misunderstanding of Taub's position and request, and rarely did the court clearly elucidate the reasons for proceeding in the manner it did. However, it was Taub's request to represent herself at trial that was most clearly and unequivocally stated, and it is the one request to which the court responded with a clearly explained denial. That denial, unfortunately, was unsupported by fact and law and was erroneous.

In denying Taub's *Faretta* request, the trial court articulated three bases for its decision.[8] Each was inadequate, and Taub takes each in turn now.

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[8] This Court should decline to probe the record for some other alternative grounds, not cited by the trial court, that would have supported denying Taub's *Faretta* request. A reviewing court cannot uphold a *Faretta* denial

a. Taub's purported lack of legal sophistication was no basis for denying her constitutional right.

The first of the bases cited by the trial court in denying Taub's *Faretta* request, and the only basis which the court set forth in any level of detail, was its view regarding Taub's ability to conduct trial proceedings with the same degree of sophistication as a licensed attorney (*Faretta v. California* (1975) 422 U.S. 806):

> Part of my job is to save individuals from themselves. And if you were to represent yourself, I think that you would be doing yourself a great injustice because you have not gone to law school. Okay? And based on your actions in court, it is clear that you do not understand the legal system as an attorney would and I don't think that you can represent yourself. It's already been said that you don't understand the charges that have been alleged against you.

(1 RT 63.) This basis for the trial court's decision was plainly improper.

The law is clear that a defendant's right to self-representation may not be denied "simply because he does not know as much law as an attorney." (*People v. Addison* (1967) 256 Cal.App.2d 18, 24):

> The proper test was announced in *In re Connor*, 16 Cal.2d 701, 709 [108 P.2d 10]: "A defendant who, *with an intelligent conception of the consequences of his act*, declines the aid of counsel prior to or at the commencement of his

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on the basis of discretionary findings not actually made (or discretionary grounds not actually cited) by the trial court. (*People v. Best* (2020) 49 Cal.App.5th 747, 762-763.) And in any event, there is no alternative grounds that would have been sufficient to support the trial court's ruling here.

> trial, is not entitled thereafter to interrupt and delay the hearing at any stage he deems advantageous merely to interpose a demand for legal assistance." (Italics added.) This statement was quoted with approval in *People v. Thomas*, 58 Cal.2d 121, 131-132 [23 Cal.Rptr. 161, 373 P.2d 97].
>
> An "intelligent conception of the consequences" of proceeding without counsel is not negatived by a lack of knowledge of particular rules of law or procedure. If the defendant wants to venture into the unknown, he must be allowed to do so, if he is aware of the dangers that lurk therein. He need not demonstrate that he can meet them.

(*Ibid*.)

The California Supreme Court has explained further:

> 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. It is not, however, essential that defendant be competent to serve as counsel in a criminal proceeding; his technical legal knowledge, as such, is not relevant to an assessment of his knowing exercise of the right to defend himself. One need not pass a mini-bar examination in order to exhibit the requisite capacity to make a valid *Faretta* waiver.

(*Joseph*, *supra*, 34 Cal.3d at 936 (cleaned up).)

Taub was not required to have "gone to law school" or to "understand the legal system as an attorney would." She was required only to be "mentally competent," "fully informed of [her] right to counsel," "literate," and understanding of "the dangers of self-representation."

(*People v. Silfa* (2001) 88 Cal.App.4th 1311, 1322.) "Nothing more was required." (*Ibid*.) And judging by the various *pro se* motions and petitions for writs of mandate Taub had filed over the course of her case (motions and petitions which had become only more legally sound and sophisticated over time), Taub was fully capable of representing her interests, even if not as well as an experienced attorney would have.

The trial court's reference to Taub's statements regarding her inability to "understand the charges" warrants context. Taub did not profess an inability to understand the nature of the prosecution, but rather, had moved for a bill of particulars earlier in the case in order to require the prosecution to clearly delineate the factual basis for each of its charges. Such a motion did not demonstrate incompetency. Even a lack of understanding of the elements of the charged offenses or the significance of §654 (neither of which Taub professed here) is insufficient to warrant denial of a *Faretta* motion. (*Best*, *supra*, 49 Cal.App.5th at 759, citing *Silfa*, *supra*.) By using Taub's own motion for a bill of particulars to deny her *Faretta* request, the trial court placed Taub in the sort of Catch 22 that "presents an enormous strain on the concepts of fairness and due process." (*People v. Herrera* (1980) 104 Cal.App.3d 167, 175.) Taub had every right to avail herself both of a motion to narrow the prosecution's scope and of a request to represent herself going forward.

b. Taub's in-court conduct had never arisen to the level necessary to warrant denying her constitutional right.

The trial court next turned to Taub's in-court behavior, referring in the vaguest of terms to Taub's "own conduct here." (1 RT 63.) It is entirely unclear to what "conduct" the trial court was referring. A review of the record of Taub's pretrial appearances (appearances over which the trial court had not presided) certainly showed that Taub had disagreed with the court regarding the law on several occasions and had attempted on each of those occasions to explain her legal position(s). Taub had also, however, also adhered to the court's instructions, changing topics when directed to do so and attempting to answer questions as completely as possible. When asked to allow other case participants to speak, Taub had done so. When asked to raise or lower her voice, Taub had done so. At no point had Taub engaged in an outburst or refused to follow the court's instructions, and at no point had Taub interfered with court operations or meaningfully affected courtroom decorum.

Certainly, it is true that the right to self-representation may be denied where the defendant "continuously manifested an inability to conform his conduct to procedural rules and courtroom protocol." (*People v. Watts* (2009) 173 Cal.App.4th 621, 629-630.) However, Taub here had quite clearly not been "so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of

the right to self-representation." (*People v. Welch* (1999) 20 Cal.4th 701, 735.) And whatever a frustrated defendant does *after* her motion to proceed *pro se* is denied cannot be used to retroactively justify the trial court's decision to deny that motion. (*Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1530.) There is nothing in the record to demonstrate Taub's inability to conform to procedural rules and courtroom protocol. At most, the record shows that Taub disagreed with prior rulings, largely those regarding her requests for self-representation, and sought to be heard on those rulings. In so doing, Taub abided by the requests of the court and was no more disruptive than any licensed advocate would have been.

c. Taub's failure to be transported to court on one prior occasion did not warrant denying her constitutional right.

Finally, the court described Taub as "refusing to come to court," citing that as one of the bases for its decision to deny Taub's *Faretta* request. The court appeared to refer to Taub's failure to appear in court the previous Friday, July 2, 2021. Notably, however, this was *not* a scheduled day of trial proceedings, but rather, was an appearance specifically requested by Taub's counsel pursuant to a possible plea deal. Taub's failure to appear, therefore, could have been chalked up to any number of reasons, including her ignorance as to her counsel's plans or her belief that her appearance would no longer be necessary if she would not be entering a

plea. The trial court never asked Taub (or her counsel) why she had not appeared, nor did it ever obtain any reliable evidence that Taub had in fact refused transport, rather than been the subject of another, common transportation mix-up. Notably, Taub had made every other appearance in her case since October of 2019, nearly two years before her trial began, for a total of 47 court appearances.

The trial court's failure to make any inquiry into the reason for Taub's absence before using that absence as the basis to deny her *Faretta* request renders its ruling infirm. In denying a *Faretta* request, "it is incumbent upon the court to create a record that permits meaningful review of the basis for its rulings." (*People v. Becerra* (2016) 63 Cal.4th 511, 519.) The court here, however, failed to "document its decision … with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial." (*Ibid*.) Thus, there is simply insufficient factual support for the trial court's implied determination that allowing Taub to proceed *pro se* would have disrupted future trial proceedings.

The trial court undoubtedly thought it was doing Taub a favor by denying her *Faretta* request. By citing her conduct in court and reciting her lack of legal sophistication, the trial court plainly attempted to explain that Taub's preoccupation with certain aspects of her defense was likely to harm

her by distracting from others the court felt more important. The court was probably correct that Taub would be better aided by counsel than she would by her own *pro se* efforts. After all, Taub had not yet proven an effective advocate on her own behalf, and the trial court presumably recognized that. But the court's role was not to substitute its own considered judgment for Taub's. And "rambling answers" or "a lack of understanding of the law" simply do not indicate that a defendant is illiterate or otherwise unable to represent herself. (*Best*, *supra*, 49 Cal.App.5th at 760.) Taub here possessed the requisite competence to represent herself and should have been permitted to do so. On this record, the trial court had no choice but to effectuate Taub's constitutional right.

4. Taub's *Faretta* Request Was Timely, and Even if Untimely, the Denial Thereof Constituted an Abuse of Discretion.

One reason for denying Taub's *Faretta* request that was *not* cited by the trial court was its timeliness. The reason the trial court did not mention timeliness is evident: Taub's request had been repeatedly made, both orally and in writing, numerous times before trial began. Her final renewal of her request, made before jury selection had even begun, would not have required any continuance of the proceedings. Taub was in no way dilatory in asserting her Sixth Amendment rights. "The timeliness requirement serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice."

(*People v. Doolin* (2009) 45 Cal.4th 390, 454.) Plainly, Taub's request here was not intended to delay, nor would it have had the effect of delaying, further trial proceedings.

Even assuming *arguendo* that a timeliness inquiry is appropriate here, Taub notes that had the trial court purported to reject Taub's *Faretta* request on timeliness grounds, such a ruling would have constituted an abuse of discretion warranting reversal now. "[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*People v. Lynch* (2010) 50 Cal.4th 693, 724.) When exercising discretion to grant or deny a belated *Faretta* request, a court must consider "(1) The reasons for the request; (2) The quality of counsel's representation; (3) The length and stage of the proceedings; (4) The disruption and delay which might be expected if the delay were granted; (5) Defendant's proclivity to substitute counsel." (*Herrera*, *supra*, 104 Cal.App.3d at 173.) "When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required." (*Windham*, *supra*, 19 Cal.3d at 128.)

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Had the trial court assessed the *Windham* factors, it would have failed to find anything to support its denial. Taub's request was made in good faith pursuant to her constitutional right, not for some dilatory or otherwise improper purpose. Whether Taub's request was wise or her reasons for making it compelling was not for the trial court to consider. (*See Moon*, *supra*, 134 Cal.App.4th at 1529-1530.) Taub had no history of *Faretta* requests used to disrupt proceedings; in fact, her prior requests had all been with the express purpose of *expediting* proceedings, allowing motions to be promptly litigated and assisting her in retaining counsel so as to proceed to trial. Certainly, Taub requested no postponement of trial to effectuate the final *Faretta* request in question, and this Court cannot now surmise that some delay would have resulted when the defendant requested neither a continuance nor recess. (*Id*. at 1530.) There is nothing in this record, either in the form of findings from the trial court or an indication from Taub, that any delay would have resulted from granting Taub's *Faretta* request. When neither exists, a reviewing court "cannot uphold the ruling on the alternate grounds that it was untimely." (*Best*, *supra*, 49 Cal.App.5th at 763.)

Ultimately, the trial court analyzed none of the *Windham* factors, nor did it cite the timeliness of Taub's request as a basis for denying it. A record devoid of any discussion of the *Windham* factors leaves a reviewing

court to "speculate that a consideration of these factors may well have demonstrated to the trial judge reasons to exercise his discretion to allow [the defendant] to proceed in propria persona." (*Herrera*, *supra*, 104 Cal.App.3d at 174.) And here, just as in *Herrera*, there is nothing to show that Taub's motion would have been properly denied on this basis.

5. Taub's History of *Faretta*-Related Proceedings Did Not Provide a Basis to Deny Her Request to Represent Herself at Trial.

The reasons cited by the trial court for denying Taub's *Faretta* request (or for refusing to even hold a *Faretta* hearing) were inadequate. Nothing else in the record serves to bolster and thereby salvage the trial court's erroneous holding. Although the procedural history of Taub's case involved several requests to proceed on a *pro se* basis and several discussions with the court regarding those requests, that history has no bearing on Taub's final request to represent herself at trial. It is not any prior *Faretta* ruling that Taub challenges herein, but the trial court's ultimate refusal to allow Taub to represent herself at trial.

Indeed, what Taub had repeatedly discussed with the court over the course of her case was her desire to represent herself on a *pro se* basis while interviewing and attempting to retain private counsel, rather than to be represented by appointed counsel during that timeframe. At times, the court allowed Taub to proceed *pro se*, and Taub even argued several bail motions

on her own behalf. At other times, the court insisted on Taub completing the county's *Faretta* waiver form before it would allow Taub to proceed on a *pro se* basis. Taub frequently explained her disinclination to sign that form, which she believed would waive her right to counsel for *all* future proceedings, including trial. As Taub explained on numerous occasions, she was unwilling to prematurely waive her future right to counsel at trial; she noted she would likely retain counsel for that purpose, as she was not yet prepared to conduct trial proceedings herself. Taub did not wish to waive her right to counsel at trial in exchange for exercising her right to represent herself in pretrial proceedings.

Taub's concerns regarding the waiver she would be effectuating by signing the *Faretta* waiver form were not altogether baseless. The form, which she originally attempted to modify and sign at the outset of the proceedings, repeatedly calls upon its signer to affirmatively waive her right to counsel at trial. (*See*, *e.g.*, 1 CT 71 ["I understand that if I am permitted to represent myself, it will be necessary for me, without the assistance of any attorney, to conduct my own trial . . ."]; 1 CT 72 ["I understand that in conducting the trial, I may be limited in my movements . . ."]; 1 CT 73 ["I understand that by acting as my own attorney, I am giving up any right to claim on appeal that I had ineffective assistance of counsel."]; *ibid*. ["I understand that I am giving up having an attorney

determine what post-trial motions and sentencing options I may have if I am convicted . . .”].) Not only was this – a waiver of her future right to counsel at trial – not a waiver Taub wished to entered, but it was also one Taub could not be legally compelled to enter. (*See People v. Figueroa* (2017) 11 Cal.App.5th 665, 685 [defendant cannot waive right that “had not yet accrued”].) In fact, the law is clear that a waiver of the right to counsel made before the preliminary hearing does not effectuate a waiver of the right to counsel at trial. (*People v. Crayton* (2002) 28 Cal.4th 346, 363-364.) Taub was right: the inclusion on the form of waivers of the right to counsel at trial was legally improper, as was the court’s attempts to get Taub to make those legally improper waivers before conducting a *Faretta* hearing.

In light of these objectionable components of the form, Taub eventually generated and signed her own form – modeled after the Alameda form but modified to make clear that Taub intended to represent herself only for pretrial proceedings while she secured trial counsel – and submitted the form in connection with her April 2021 request to represent herself. (7 CT 1797.) The court ignored this submission, just as it had ignored Taub’s repeated, reasonable objections to being forced to sign the Alameda form.

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Whether or not Taub was right that signing the *Faretta* waiver form would require her to make a larger waiver of constitutional rights than she was required to do, certainly it is the case that she endeavored valiantly to explain her position to the court below, which in turn made no efforts to address her concerns in order to effectuate her constitutional right to proceed *pro se*. Instead, the court, on multiple occasions, insisted that signing the *Faretta* form was a nonnegotiable prerequisite to proceeding without counsel. (*See*, *e.g.*, 3/15/21 ART.) The court's position had no basis in (and was in fact contrary to) the law, and the mere fact that Taub objected to waiving her future right to counsel at trial was no basis to deny her request to represent herself at *any* point in the proceedings, let alone at the time of trial, when it was no longer a consideration for either Taub or the court.[9]

Put simply, by the time of trial, Taub was willing to represent herself and made a timely request to do so. She did not request a continuance of the proceedings, nor did she persist in her pre-preliminary hearing request for a bill of particulars. Taub had already been deemed competent to represent herself (and capable of doing so) at least once before (1 CT 68), and under

[9] Whatever Taub's objection may have previously been to waiving her right to counsel at trial, plainly that objection, and the court's concerns therewith, was no longer relevant by the time Taub was requesting to represent herself at her trial. Indeed, Taub specifically asserted that she would sign the often-discussed *Faretta* waiver form in order to represent herself at trial. (*See* 1 RT 62.)

Cal. Evid. Code §664, it can be presumed that an "official duty ha[d] been regularly performed" by the court that granted Taub's first *Faretta* request. Despite all of this, the trial court conducted no inquiry into Taub's competency to represent herself. Instead, it rejected the request outright, apparently believing that doing so would protect Taub's interests. Whatever good intentions the trial court may or may not have had, Taub's constitutional right demanded that she be allowed to conduct trial proceedings on a *pro se* basis. The court wrongly refused her that opportunity, and reversal is required.

B. Taub's Right to a Speedy Preliminary Hearing Under §859b Was Violated.

Taub had a statutory right under §859b to a preliminary hearing within 60 days of her arraignment on the felony complaint. She was arraigned on the felony complaint on December 19, 2019, but her preliminary hearing did not occur until April 26, 2021. That 16-month delay violated §859b and compels reversal of Taub's conviction.

1. Legal Standard

Cal. Pen. Code §859b imposes two preliminary hearing deadlines on a magistrate: one requires holding the hearing with 10 court days of arraignment, and the other requires holding the hearing within 60 calendar days of arraignment. While §859b's 10-court-day deadline is subject to an exception for good cause, §859b's 60-day deadline is absolute and carries

no good-cause exception. (*See Favor v. Superior Court* (2021) 59 Cal.App.5th 984, 992-993; *Lacayo v. Superior Court* (2020) 56 Cal.App.5th 396, 399; *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 729-730.) Even if a defendant has previously waived their right to a timely preliminary hearing (or, as in this case, a timely trial), a subsequent arraignment on an amended complaint creates a new, 60-day clock that must be either honored or waived anew. (*Garcia v. Superior Court* (2020) 47 Cal.App.5th 631, 648.)

2. Standard of Review/Prejudice

A determination of whether §859b has been violated is a purely legal question subject to de novo review. (*People v. Love* (2005) 132 Cal.App.4th 276, 284.) Where, as here, the defendant objects to the delays in the commencement of her preliminary hearing and files a motion to dismiss on the basis of the violation of her speedy trial rights, dismissal is required and the defendant is not required to make a showing of prejudice.[10] (*See Ramos*, *supra*, 146 Cal.App.4th at 737; *People v. Clark* (2016) 63 Cal.4th 522, 552 [noting in dicta that *Ramos* does not apply, and

[10] Taub's objections, usually presented *pro se*, often framed the issue as a violation of her speedy trial rights, rather than a violation of her right to a speedy preliminary hearing. Although this framing was perhaps inartful, it was technically correct: The timely preliminary hearing right afforded by §859b "is supplementary to, and a construction of, the constitutional right to a speedy trial." (*People v. Standish* (2006) 38 Cal.4th 858, 870.) After all, the point of asserting one's right to a prompt preliminary hearing is to in turn effectuate one's right to a prompt trial.

a prejudice inquiry attaches, where defendant fails to object to the delay and raises the issue for the first time on appeal].) That pretrial objection which preserves the claim may be made by way of either a §995 motion or simply a motion to dismiss. (*Bullock v. Superior Court* (2020) 51 Cal.App.5th 134, 148.)

3. The Court Failed to Timely Bring Taub to a Preliminary Hearing Within 60 days of December 19, 2019, Her Arraignment on the Third Amended Complaint.

Taub's claim is simple: contrary to §859b's 60-day requirement, Taub's preliminary hearing was conducted more than 60 days after her arraignment on the Third Amended Complaint (the first to elevate her case from a misdemeanor to a felony and therefore to entitle her to a preliminary hearing on the charges). That violation of §859b requires reversal.

The People, however, are likely to argue that Taub's arraignment on the Third Amended Complaint was *not* the triggering event for §859b's preliminary hearing clock. Section 859b's clock, the argument will go, only begins to run from the date of the plea, if that plea occurs later than the date of the arraignment. Taub's plea on the felony complaint did not occur until, at the earliest, March 19, 2021, and therefore the 60-day clock did not begin running until that date. And indeed, there is some vagueness in §859b's 60-day provision, which states that the clock begins to run "from the date of the arraignment, plea, or reinstatement of criminal proceedings." The

statute does not expressly say when the clock begins to run in a case where those triggering events occur at different times. The People's position will be that the statute implicitly requires the 60-day clock to begin running from the date of the arraignment or plea, *whichever occurs later*. That is the language §859b uses when describing the 10-court-day clock, and that is the language which the People would seek to impute to the 60-day provision as well.

But §859b should be interpreted in Taub's favor, as a criminal defendant entitled to the rule of lenity. The statute says that the 60-day clock begins to run from the time of the arraignment *or* plea, and that disjunctive language should be given its natural force. Either arraignment *or* plea is a triggering event for §859b's 60-day clock. It is in fact helpful to Taub that a *different* provision of §859b carries the "whichever occurs later" language, while the provision of §859b applicable here does not. The Legislature had an opportunity to include such language, demonstrated its ability to do so in the very same statute, and yet declined to include it when setting forth the 60-day deadline.

Section 859b is not the only statute that demonstrates the Legislature's use of the "whichever occurs later" language when it intends such language to apply. For example, the speedy trial statute, §1382, also uses the "whichever occurs later" language to set the triggering event for

the running of the speedy trial clock. Evidently, the Legislature did *not* intend such language to apply to §859b's 60-day provision.

Why would the Legislature not employ this dispositive-here language in connection with the 60-day requirement? Presumably for the same reason it included a good-cause exception in §859b's 10-court-day provision while specifically excluding that good-cause exception from the 60-day provision. While the shorter 10-court-day requirement encourages expeditious proceedings and permits a defendant's pretrial release where expediency is not possible, the longer 60-day requirement sets an outer boundary on the possible time a defendant can be forced to wait for her preliminary hearing. It is reasonable for the former to be triggered only by the defendant's entry of a plea (and therefore affirmative decision to go forward with a preliminary hearing), while the latter is triggered by the defendant's arraignment and thereby establishes the maximum period of time the case can be pending before the magistrate (absent the defendant's consent to an extension).

Admittedly, the Sixth District has held otherwise. In *Figueroa*, *supra*, 11 Cal.App.5th at 681, it "conclude[d] that the 60-day rule implicitly provides the same language—'whichever occurs later'—expressly used to describe the triggering events of arraignment or plea for the presumptive 10-court-day rule." That is, the *Figueroa* court held that, although the

statute does not actually say it, the 60-day clock does not begin to run until after a plea is entered, even if the arraignment occurs before that date. To support its holding, *Figueroa* quotes similar dicta in *People v. Mackey* (1985) 176 Cal.App.3d 177, 183 and *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 731, both of which used the "whichever is later" language in their own respective descriptions of §859b's 60-day rule. As the *Figueroa* court explained, adding its preferred language to §859b despite its omission by the Legislature "makes logical and practical sense." (*Figueroa*, *supra*, 11 Cal.App.5th at 679.)

But this Court is not bound by the reasoning in *Figueroa*. (*See Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) It is certainly not bound by the mere dicta in *Mackey* and *Ramos*. (*See McGee v. Superior Court* (1985) 176 Cal. App. 3d 221, 226 ["The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning."]; *Lockyer v. City and County of San Francisco* (2004) 33 Cal. 4th 1055, 1085, fn. 17.) Taub urges this Court to reject *Figueroa*'s holding and to affirm the plain language of §859b, language which does not allow a defendant's preliminary hearing to be postponed merely by operation of delay to her plea.

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4. No Events Following the December 19, 2019 Arraignment Served to Cure or Eliminate the §859b Violation.

If this Court rejects the ill-founded reasoning of *Figueroa*, the remedy in this case must be reversal of Taub's conviction. Taub's last day for her preliminary hearing was February 17, 2020, and the preliminary hearing was not held by that date (nor, indeed, for over a year thereafter). Nothing that transpired between Taub's arraignment on December 19, 2019 and the preliminary hearing on April 26, 2021 cured the §859b violation that occurred.

A Fourth Amended Complaint was filed on February 10, 2020, before §859b's 60-day time limit had expired. (2 CT 350.) Taub was not arraigned on that complaint, however, until July 7, 2020 (3 CT 758), well past the statutory last day that was still in place following the December 19 arraignment on the Fourth Amended Complaint. There is no argument that the mere filing of an amended complaint triggers a new, 60-day clock under §859b, not unless or until the defendant is arraigned on that amended complaint.[11] Similarly, the doubt that was declared on September 3, 2020

[11] For such an argument to have any import here, it would have to go as follows: the filing of the Fourth Amended Complaint ended the then-running 60-day clock, effectively suspending any deadlines. Only when Taub was arraigned on the Fourth Amended Complaint on July 7, 2020 did the clock begin to run again, and it started over on that date at 60 days counting down. The clock was again disrupted by the court's declaration of a doubt on September 3, 2020. Once proceedings were reinstated on February 1, 2021, a *new*, 60-day clock started (rather than a resumption of the previous one). Then, Taub's arraignment on the Fifth Amended

and the Fifth Amended Complaint that was filed on February 24, 2021 both occurred well after the §859b deadline for a preliminary hearing of February 17, 2020.

The *only* way to uphold the timeline and conviction in Taub's case is to take *Figueroa* to its logical extreme: not only does §859b's 60-day clock not begin to run until a defendant enters a plea to the complaint, but the plea can be postponed for *over 16 months* without §859b's clock beginning to run. That is a fairly extraordinary proposition to derive from statutory language that specifically declines to support the conclusion. It is not one this Court should accept, notwithstanding *Figueroa*'s holding. This Court should reverse.[12]

C. Taub's Right to a Speedy Trial Was Violated by the Trial Court's Postponement of Jury Selection for Over a Month.

Taub, who was arraigned on the information on May 10, 2021, had a right to a speedy trial within 60 days of that date. Although the trial court purported to begin trial proceedings in July of 2021 and impaneled a jury panel on July 7, 2021, it conducted only two days of jury selection before

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Complaint on March 19, 2021 restarted the clock *again*. Such a chain of reasoning requires so many legal leaps that are unsupported or directly contradicted by the law (including a rejection of *Figueroa* even more extreme than that proposed by Taub herein) that it is altogether spurious and not worthy of serious consideration.

[12] To the extent this Court disagrees with Taub's recitation of the appropriate standard of review for a violation of §859b's 60-day provision and holds that Taub is required to show prejudice, she argues prejudice from the court's speedy trial violation(s) herein, *infra*.

suspending proceedings for over a month in order to accommodate vacation schedules and its own ongoing trial in another county. That month-long break was impermissible, established that the trial had not truly begun until August of 20201, and had the effect of violating Taub's constitutional and statutory speedy trial rights.

1. Legal Standard

Both the state and federal Constitutions guarantee criminal defendants the right to a speedy trial (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1). Further, a defendant has a statutory right, pursuant to Cal. Pen. Code §1382, to have her trial begin within 60 days of her arraignment on the information. For purposes of speedy trial calculations, a trial begins "when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion." (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780.) "The court must have committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn." (*Ibid*.)

2. Standard of Review/Prejudice

On appeal following a conviction, a defendant asserting a violation of her speedy trial rights must demonstrate both the speedy trial violation and prejudice flowing from that delay. (*People v. Wilson* (1963) 60 Cal.2d 139, 152.) However, "consideration of prejudice is not limited to the

specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim." (*Doggett v. United States* (1992) 505 U.S. 647, 655.)

Taub filed her motion to dismiss pursuant to her constitutional and statutory speedy trial rights on June 16, 2021, shortly after the trial in her case was set. (9 CT 2400.) The motion was argued and denied in the trial department. (1 RT 13.) Shortly after the trial court confirmed the schedule complained of herein, the prosecution below raised an objection thereto. (1 RT 57.) The defense joined by refusing to stipulate to the parties being in trial for speedy trial purposes. (*Ibid*.)[13] The trial court rejected the contention that Taub's speedy trial rights were implicated by any delays. (*Ibid*.)

3. The Month-Long Break in the Midst of Jury Selection Violated Taub's Speedy Trial Rights.

Undeniably, jury selection in Taub's case began on July 7, 2021, less than 60 days after Taub's arraignment on the information. What followed immediately thereafter, however, was a month-long delay in the

[13] To the extent the defense had some obligation to renew its speedy trial objections again after the court announced the objectionable trial schedule, this Court should adhere to the principle that the defense is not required to make a futile objection to preserve an issue for appeal. (*See People v. Tuggles* (2009) 179 Cal.App.4th 339, 356; *People v. Perez* (2020) 9 Cal.5th 1, 8.) Clearly, there would have been no purpose served by the defense raising the very same point the prosecution had, a point on which the trial court had just ruled. And Taub's speedy trial motion to dismiss had just been denied.

proceedings ordered by the trial court to accommodate the schedules of counsel, the court's own vacation, and an ongoing trial the court was conducting in another county. Thus, although the first jury venire was sworn (and therefore the trial purportedly began) on July 7, in truth, that start date was a mere façade. The trial did not truly begin in earnest until August 9, 2021, well over 60 days after Taub had entered her plea.

This egregious delay in proceedings served to violate Taub's speedy trial rights, both constitutional and statutory. Although Taub's trial *purportedly* began within the statutory speedy trial period, Taub's trial did not *actually* begin until much later, due entirely to the court's creative scheduling and its impaneling of a jury pool for the express purpose of avoiding speedy trial issues. A trial begins only when "a case has been called for trial by a judge who is normally available and ready to try the case to conclusion." (*Rhinehart*, *supra*, 35 Cal.3d at 781.) And even where jury selection has begun, "in any given case subsequent events may disclose that the court was not in fact available or ready to process the case to conclusion without unnecessary delay." (*Sanchez v. Municipal Court for Los Angeles Judicial Dist.* (1979) 97 Cal.App.3d 806, 813.)

A court is not ready to "process the case to conclusion" where it is engaged in another trial and where it intends to break proceedings for its own vacation. As the California Supreme Court has explained, "If a trial

court could impanel a jury and delay a trial days or even weeks, then the statutory guarantee of a speedy trial would be rendered a nullity, and an accused's rights under section 1382 would be eviscerated." (*Rhinehart*, *supra*, 35 Cal.3d at 779.) For speedy trial purposes, the mere impaneling of a jury does not commence a trial where it will still be several days before evidence is presented. (*See*, *e.g.*, *Rhinehart*, *supra* [6- or 7-day delay]; *People v. Cory* (1984) 157 Cal.App.3d 1094, 1100 [1-day delay].) Here, the trial impaneled a jury venire, but after two days of voir dire, broke proceedings for 32 days. It knew it would be doing so before jury selection began, and it did so merely for the convenience of scheduling, notwithstanding Taub's assertion of her right to a speedy trial.

This delay was attributable to the trial court alone. It was the trial court that decided to accommodate both the prosecutor's vacation and its own. It was the trial court that purported to be ready to conduct Taub's trial while, in truth, being involved in an ongoing trial in another county. The request by defense counsel for accommodation for two depositions had no bearing on the trial court's decision to suspend proceedings for over a month; at most, accommodating defense counsel would have required two additional dark days, days which would have occurred after the state's case had begun. And despite the fact that the trial court cited Taub's July 2 non-appearance as contributing to the delays, Taub's non-appearance was on a

date when no trial proceedings were scheduled and the defense had merely requested to convene to discuss the plea offer. Taub's non-appearance did not delay the trial and in no way caused the 32-day break in proceedings that the trial court scheduled over the parties' objection.

"[S]ection 1382 requires more than mere lip service to the fundamental right to a speedy trial; it requires that the elements vital to undertaking a trial be present." (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1196.) The trial court here, at best, paid lip service to Taub's constitutional and statutory speedy trial rights. It did not meaningfully begin trial proceedings within the period allotted it, and its preplanned, month-long break in the midst of jury selection violated Taub's speedy trial rights.

4. Taub Was Prejudiced by the Delay.

Because Taub now raises her claim on appeal, she is required to show prejudice. She is readily able to do so. One well-recognized and well-established form of prejudice sufficient to warrant relief on a speedy trial claim is the barring of re-filing of the should-have-been-dismissed charges due to the applicable statute of limitations. (*Wilson*, *supra*, 60 Cal.2d at 152; *People v. Johnson* (1980) 26 Cal.3d 557, 574; *People v. George* (1983) 144 Cal.App.3d 956, 960; *People v. Cory* (1984) 157 Cal.App.3d 1094, 1101.) Here, by the time Taub's trial was beginning and by the time the trial court scheduled its month-long break in proceedings, over a year

had passed since every single one of Taub's misdemeanor counts had allegedly occurred. Had the trial court properly dismissed the case as required by §1382, the state would have been unable to re-file as to fifteen of the misdemeanor counts.[14] Taub could only have been tried on, and therefore only convicted of, the remaining 5 felonies and one misdemeanor whose statutes of limitations had not yet elapsed.

Thus, Taub was plainly prejudiced by the trial court's speedy trial violation. Not only did Taub suffer fifteen wrongful convictions, but the prosecution benefitted handsomely from the illegality at trial. Those fifteen misdemeanor charges made up the bulk of the state's case and undoubtedly bolstered its case on the remaining felonies. By way of the fifteen misdemeanor counts (all of which related to Taub's purported violations of restraining and protective orders), the prosecution was able to paint for the jury a picture of a repeat offender. With those misdemeanor charges properly dismissed, Taub's trial would have proceeded much differently.

This was not the only prejudice that Taub suffered. For one, Taub spent a "prolonged" time in custody in connection with this case, a period that was only lengthened by the trial court's decision to delay trial proceedings for an extra month right after it had purported to commence them. (*See*, *e.g.*, *Craft v. Superior Court* (2006) 140 Cal.App.4th 1533,

[14] The sixteenth, Count 4, a violation of §647.6(a)(1), carried a three-year statute of limitations and could have been re-filed.

1543-1544.) Taub's trial also itself suffered from the lengthy delays, as the memories of witnesses faded and the case eventually became reduced to contextless emails and blog posts. The record demonstrates no fewer than three dozen instances of witnesses failing to remember pertinent facts regarding Taub's interactions with John Doe. (*See*, *e.g.*, 3 RT 229, 4 RT 258, 4 RT 260, 4 RT 266, 4 RT 304, 5 RT 357, 5 RT 367, 5 RT 390, 5 RT 434, 5 RT 472, 5 RT 510, 5 RT 519, 5 RT 570, 6 RT 678, 6 RT 681, 6 RT 749, 7 RT 973.)

The trial court here did not balance all of this prejudice against the justification for the delay, as it was required to do. (*See Ibarra v. Mun. Court* (1984) 162 Cal.App.3d 853, 858.) Had it done so, the scales would have clearly tipped in one direction: even if it had not deemed the prejudice to Taub particularly compelling, the justification for the delay was nothing more than convenience to the court and the parties. Yet it attempted no balancing analysis and never determined that Taub was not prejudiced by the delay. It simply minimized the delay as unimportant and, somehow, as being Taub's fault. This Court should follow the trial court's lead in one respect: it should not find an absence of prejudice where Taub was so blatantly prejudiced by the delays complained of herein.

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D. Under *Counterman v. Colorado*, Taub's Prosecution Violated the First Amendment.

Certain types of speech lie outside the protections of the First Amendment. These include true threats of violence (*see Virginia v. Black*, (2003) 538 U. S. 343, 359) and "interference [with children] by sexual offenders" (*People v. Lopez* (1998) 19 Cal.4th 282, 290). For this reason, two of the statutes under which Taub was convicted, §§ 646.9(b) and 647.6(a)(1), have historically been upheld against First Amendment challenges. (*See*, *e.g.*, *People v. Ewing* (1999) 76 Cal.App.4th 199, 206, fn. 2 [gathering examples of §646.9]; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1751.)

However, the Supreme Court recently held in *Counterman v. Colorado* (2023) ___U.S.___ [143 S.Ct. 2106, 2113] that the objective content of speech is no longer enough to satisfy First Amendment scrutiny. Rather, offenses involving unprotected speech, like stalking, require as a constitutional matter "a subjective mental-state element." (*Ibid*.) And this "ban on an objective standard" applies in a variety of "unprotected-speech" contexts. (*Id*. at 2117.) A prosecution that requires the state only to prove "that a reasonable person would understand [the defendant's] statements" as bearing the required unprotected-speech attribute violates the First Amendment. (*Id*. at 2119.) The Supreme Court's interpretation of the First Amendment's requirements render both §§ 646.9(b) and 647.6(a)(1)

constitutionally infirm, both on their face and as applied to Taub. Similarly, the manner in which the jury was instructed in connection with these two statutes cannot survive constitutional scrutiny following *Counterman*.

1. Sections 646.9(b) and 647.6(a)(1) Are Facially Overbroad.

a. Legal standard

Under the First Amendment overbreadth doctrine, a law "is facially invalid if it prohibits a substantial amount of protected speech." (*United States v. Williams* (2008) 553 U.S. 285, 292.) In the context of a free speech challenge, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (*United States v. Stevens* (2010) 559 U.S. 460, 473.) That is, "In order to protect--and to avoid 'chilling'--the legitimate exercise of constitutional rights, such a law may be found unconstitutional on its face (and hence completely invalid), even though it might be possible for it to operate constitutionally in some circumstances." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 169; *see also People v. Garelick* (2008) 161 Cal.App.4th 1107, 1120.) This free-speech "chilling" effect was the basis for the Supreme Court's opinion in *Counterman*. (*See Counterman*, *supra*, 143 S. Ct. at 2114-2115.)

Section 646.9(b) makes it a criminal offense when a person "willfully, maliciously, and repeatedly follows or willfully and maliciously

harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family." Section 647.6(a)(1) makes it a crime to "annoy[] or molest[] any child under 18 years of age." A conviction under §647.6 "requires proof of the following elements: (1) the existence of objectively and unhesitatingly irritating or annoying conduct; (2) motivated by an abnormal sexual interest in children in general or a specific child; (3) the conduct is directed at a child or children, though no specific child or children need be the target of the offense; and (4) a child or children are victims." (*People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396.)

b. Standard of review/prejudice

A reviewing court reviews the constitutionality of a statute de novo. (*McKneely v. Superior Court* (2023) 91 Cal.App.5th 1232, 1241.)

c. Both §§ 646.9(b) and 647.6(a)(1) Lack the Subjective Intent Required by Counterman.

Just as *Counterman* found the Colorado state stalking statute at issue there unconstitutionally overbroad, so too should this Court apply *Counterman* to strike down California's §646.9 under the same line of constitutional reasoning. Section 646.9 criminalizes speech in the form of "true threats," which, to satisfy the statute, must be paired with a course of harassment. The California Supreme Court has long recognized that "true threats" are measured by their objective nature, that is, how a "reasonable

person" would interpret the statement. (*In re M.S.* (1995) 10 Cal.4th 698, 710.) While this was previously the dispositive consideration when assessing the constitutional propriety of a statute penalizing speech, and while it continues to be a constitutionally necessary element of such an offense, after *Counterman*, it is no longer sufficient. That a reasonable person would deem a defendant's statement(s) threatening, and thus that the objective standard is satisfied, does not suffice to avoid the "chilling effect" that *Counterman* sought to avoid.

Under this recent Supreme Court precedent, a subjective standard must also apply, to wit, a requirement that the defendant be aware of, and intend to convey, "the threatening aspect of the message." (*Counterman*, *supra*, 143 S. Ct. at 2114.) That is not required by the language of §646.9, nor has it ever been required by any judicial interpretation thereof. To the contrary, the California Supreme Court has repeatedly come to the opposite conclusion, holding that a threat need not be made with the intent to intimidate. (*People v. Lowery* (2011) 52 Cal.4th 419, 427; *see also City of Los Angeles v. Herman* (2020) 54 Cal.App.5th 97, 104-105.) Such a criminal enforcement scheme is no longer constitutionally viable after *Counterman*, and §646.9(b), the offense of conviction here, is now facially overbroad.

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Turning to Taub's conviction for child molestation, although such an offense was not the subject of *Counterman*, the constitutional infirmity of §647.6(a)(1) following the Supreme Court's decision is perhaps even more clear. Section 647.6(a)(1) criminalizes speech that would offend a normal person, without regard to the actual effect on the minor nor the defendant's intent to offend. (*People v. Carskaddon* (1957) 49 Cal.2d 423, 426.) Indeed, child molestation under California law is expressly subject to an objective test, and a jury is not to consider either the subjective intent of the defendant (other than his prurient motives) or the subjective impact on the victim. (*People v. Tate* (1985) 164 Cal.App.3d 133, 139.) Section 647.6(a)(1), therefore, violates the First Amendment on its face, as it fails to require the subjective intent required for a statute regulating speech to pass constitutional muster.

Of course, even under *Counterman*, the level of specific intent required to survive First Amendment scrutiny varies depending on the sort of speech at issue. "When incitement is at issue," for example, the specific intent of purpose of knowledge is required. (*Counterman*, *supra*, 143 S. Ct. at 2118.) Meanwhile, in the context of a stalking prosecution, the specific intent that is constitutionally required is nothing more than recklessness. (*Id*. at 2119.) No matter the context, however, specific intent is required.

An objective standard that allows a conviction regardless of the defendant's intent is constitutionally infirm.

2. Sections 646.9(b) and 647.6(a)(1) Are Unconstitutionally Overbroad as Applied Here.

a. Legal standard

Even where a statute is not facially unconstitutional, still it may be unconstitutional as applied in a particular case. An as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

b. Standard of review/prejudice

As with a facial challenge to the constitutionality of a statute, a reviewing court also reviews an as-applied challenge using a de novo standard of review, evaluating "the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction." (*Id*. at 1084.)

c. Both §§ 646.9(b) and 647.6(a)(1) Were Applied Here Without Regard to the Subjective Intent Required by Counterman.

Even if §646.9(b) can be read to encompass both protected and unprotected speech, the statute, as applied to Taub's case, was plainly used

to criminalize speech protected by the First Amendment. There was no evidence that Taub communicated a true intent to "commit an act of unlawful violence." (*Counterman*, *supra*, 143 S. Ct. at 2115.) During closing arguments, the prosecution conceded that Taub repeatedly disavowed such intent, focusing instead on the impact Taub's words nevertheless had on John Doe. (*See* 9 RT 1313.)

Likewise, while §647.6(a)(1) is often used to prosecute actual conduct, as opposed to speech (*Kongs*, *supra*, 30 Cal.App.4th at 1750), it does not require any physical touching and may be satisfied by mere speech alone. (*People v. La Fontaine* (1978) 79 Cal.App.3d 176, 185.) That was how the statute was used in Taub's case; the prosecution conceded that no touching occurred. (9 RT 1375.)

3. The Jury Instructions on §§ 646.9(b) and 647.6(a)(1) Were Unconstitutionally Overbroad.

a. Legal standard

A trial court must instruct on each element of a charged offense, even when the defendant does not propose a complete instruction or object to the court's failure to provide one. (*People v. Brown* (2023) 14 Cal.5th 453, 461.) "The omission of an element of an offense from a jury instruction violates the right to a jury trial under the Sixth Amendment to the United States Constitution by depriving the defendant of a jury properly instructed in the relevant law." (*Id*. at 473.)

b. Standard of review/prejudice

A reviewing court determines independently whether a jury instruction correctly stated the law. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; *People v. Posey* (2004) 32 Cal.4th 193, 218.) A claim that a jury instruction is not correct in law need not be preserved by objection in order to be considered by a reviewing court. (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) An instruction that omits an element is reversible unless the error is harmless beyond a reasonable doubt. (*People v. Chandler* (2014) 60 Cal.4th 508, 525.) In only a "narrow class of cases" will omitting an element be harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 17, fn. 2.)

c. The Jury Instructions on §§ 646.9(b) and 647.6(a)(1) Were Legally Erroneous Because They Lacked Any Requirement that the Jury Find the Constitutionally Required Subjective Intent.

The instructions given to the jury in connection with Taub's §646.9(b) charge were legally invalid. The jury here was instructed that it only need find, and was permitted to convict Taub upon a showing of, a "credible threat," defined as "one that causes the target of the threat to reasonably fear for his or her safety . . . and one that the maker of the threat appears to be able to carry out." 10 CT 2749. The jury was not instructed that a "credible threat" is one whose threatening aspect the defendant intends to convey, as *Counterman* requires. (*See Counterman*, *supra*, 143 S.

Ct. at 2114.) In fact, the jury was instead instructed that Taub's requisite intent was action taken (1) "willfully" and (2) "maliciously," that is, (1) done "willingly or on purpose" and (2) done "intentionally" *or* "with the unlawful intent to disturb, annoy, or injure."[15] Under these instructions, Taub could have been convicted for making a statement that (1) caused the victim to fear for his safety; (2) Taub appeared able to carry out; (3) Taub made willingly; and (4) Taub made intentionally. Notably missing from that list? Any specific intent to convey a threat, precisely that which *Counterman* requires to survive constitutional scrutiny.

This instructional deficiency was not cured, but rather enhanced, by the prosecution's closing arguments. Those arguments focused not on Taub's intent, but on the effect her statements had on John Doe. (10 RT 1310-1315.) Rather than concede the constitutional requirement that the jury must find Taub acted with the specific intent to convey a threat and rather than point to any evidence that Taub did so, the prosecution did the opposite, acknowledging the evidence that Taub repeatedly affirmed that she would *not* hurt John Doe. (9 RT 1313.) The prosecution, evidently not

[15] The instructions did reference an "unlawful intent to disturb, annoy, or injure" as an alternative basis for finding that Taub acted with the requisite intent. Even if such a finding would be sufficient under *Counterman*, it was not actually required by the instructions here. The prosecution emphasized in closing arguments that the jury need not find this form of intent, but rather, that it could convict even if it only determined that Taub had acted "intentionally." (*See* 10 RT 1304.)

predicting the constitutional holding that would be later issued in *Counterman*, failed to supplement the inadequate jury instructions.

In connection with Taub's §647.6(a)(1) conviction, the jury instructions were perhaps even more egregiously erroneous. The jury was specifically instructed that no specific intent was required to sustain a conviction for Count 4, described in the instructions as a general intent crime. (10 CT 2725.) The instruction specific to §647.6(a)(1) set forth an objective standard for judging the illegality of the defendant's speech. (10 CT 2751.) But an objective standard is precisely what the Supreme Court has held does not suffice under the First Amendment. (*See Counterman*, *supra*.) The §647.6(a)(1) instructions omitted any requirement that the jury determine that Taub acted with any subjective intent, and for that reason, those instructions were legally erroneous.

Indeed, in connection with neither instruction was the jury directed to consider whether the speech that formed the substance of the offense conduct was constitutionally protected. Taub undoubtedly suffered prejudice from these erroneous instructions; there was no evidence that she acted with the requisite subjective intent in connection with either §646.9(b) or §647.6(a)(1), let alone the sort of overwhelming evidence that might make the improper instructions harmless. Thus, this Court can reverse Taub's convictions without reaching the larger constitutional

questions regarding the continued viability of these statutes following *Counterman*.

E. Taub's Alleged Blog Posts Did Not Constitute Sufficient Evidence to Support Her Convictions for Counts 7, 16, 17, 18, and 19.

Fifteen of the convictions Taub suffered arise from alleged violations of either a civil restraining order issued before the case began (1 CT 294) or a criminal protective order issued following Taub's arraignment on the First Amended Complaint (1 CT 92). Of those fifteen convictions, five (Counts 7, 16, 17, 18, and 19) arose not from Taub's contact with a protected party, but from her alleged making of public blog posts that addressed John Doe and her case at large. Those blog posts did not amount to "contact" violative of the relevant order(s), and the state therefore failed to present sufficient evidence to support those charges. Further, sustaining those five convictions on the basis of public blog posts raises significant First Amendment concerns. Those five convictions must be reversed.

1. Standard of Review/Prejudice

A court reviewing a claim regarding the sufficiency of the evidence "examine[s] the entire record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Price* (1991) 1 Cal. 4th 324, 462.)

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2. Public Blog Posts Do Not Constitute "Contact."

In connection with five of Taub's counts of convictions, there is no disputing that the offense conduct consists not of emails or other direct contact with John Doe, but of public blog posts. (*See* 9 RT 1332, 1342-1343.) The question before this Court, then, is whether those public blog posts constituted "contact" prohibited by the relevant restraining and protective orders. This Court must answer that question in the negative. Neither the restraining order nor the protective order prohibited Taub from discussing the case or saying whatever she might want about John Doe. The former only barred Taub from "contact[ing]" John Doe (1 CT 295), and the latter similarly only barred her from "hav[ing] contact with" John Doe (1 CT 92). Neither order purported to prevent Taub from making public blog posts about the case, or even about John Doe himself. The conduct for which Taub was convicted fell outside the bounds of either order.

Certainly, the arena of social media and online communications has rapidly accelerated over the past decades, and it will continue to do so unabated in the future. But the rapidity of progress is no excuse for the criminal justice system to lag behind and to subject innocent defendants to unjust outcomes as a result. Taub was convicted of conduct that, in an earlier age, would have been akin to making a speech in public, criminalized only because there was a possibility a protected party would show up and hear it. To say that a restraining or protective order prohibits

such conduct is to say that such orders amount to all-encompassing gag orders, preventing their subject from speaking in almost any forum on almost any topic. Only explicitly private communications that a defendant can be confident will never be shared with a protected party would be non-criminal, and in the current technological age, even private conversations like that are increasingly difficult to come by.

Courts in other states have held that "tagging" a protected person on social media posts constitutes prohibited "contact" that can be the subject of criminal sanctions. (*See*, *e.g.*, *Boes v. State* (Tex.Ct.App. Aug. 15, 2023, No. 07-22-00204-CR) 2023 Tex. App. LEXIS 6190, at *6-8; *State v. Williams* (Ct.App. July 24, 2018, No. 2 CA-CR 2016-0345) 2018 Ariz. App. Unpub. LEXIS 1090, at *3.) Similarly, it would seem, directly messaging a protected party or including them in a list of auto-generated chat invites would likewise comprise "contact" forbidden by a protective order. But the conduct at issue here was far different. Taub's blog posts did not go directly to John Doe. His phone did not "ping" upon their posting. The only way John Doe would ever see them is if he specifically chose to seek them out. That is, the only way contact would ever occur via blog post is by John Doe's conscious and knowing choice to make the contact happen.

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Interpreting the orders to prohibit Taub from even addressing John Doe or the case against her via public blog posts would raise profound First Amendment concerns. It is well established that postings on the internet enjoy the same protections as traditional speech. (*Brown v. Entm't Merchs. Ass'n* (2011) 564 U.S. 786, 790.) To the extent that the restraining and/or protective orders in Taub's case purported to prevent Taub from addressing John Doe or her case in any forum to which John Doe might be able to obtain access, those orders were constitutionally infirm, and so too are the convictions Taub suffered as a result of their violation.

VI.

CONCLUSION

For all of the reasons stated, Taub respectfully requests this Court reverse her conviction and vacate her sentence.

Respectfully submitted,

Dated: September 7, 2023

By:/s/ David J. Cohen, Esq.
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CERTIFICATION OF WORD COUNT

I, David J. Cohen, Esq., hereby certify pursuant to Rule 8.360(b)(1) that Appellant's Opening Brief is double-spaced; was typed using a proportionally spaced, 13-point font of Times New Roman; and is 15,239 words long.

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

Dated: September 7, 2023 By: /s/ David J. Cohen, Esq.
DAVID J. COHEN, ESQ.