No. 22-5926

In the Supreme Court of the United States

CHARLES CHITAT NG,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the record supported the trial court's decision to terminate petitioner's self-representation.

2. Whether the record supported the trial court's decision to restrain petitioner by using a stun belt that was not visible to the jury.

3. Whether the Confrontation Clause was violated by the admission of prior testimony from an unavailable witness who had been subject to extensive cross-examination by petitioner's counsel at petitioner's contested extradition hearing in Canada.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

In re Ng, No. S275330 (pending).

People v. Ng, No. S080276 (judgment entered July 28, 2022) (this case below).

Ng v. Superior Court, No. S073475 (review denied Oct. 2, 1998).

People v. Superior Court, No. S068695 (review denied April 15, 1998).

People v. Superior Court, No. S068702 (review denied April 15, 1998).

Ng v. Superior Court, No. S068054 (review denied April 15, 1998).

Ng v. Superior Court, No. S063023 (review denied Aug. 27, 1997).

Ng v. Superior Court, No. S055680 (review granted and transferred to California Court of Appeal Sept. 18, 1996).

Ng v. Superior Court, No. S046615 (review denied July 20, 1995).

Ng v. Superior Court, No. S042283 (review denied Sept. 29, 1994).

Ng v. Superior Court, No. S040193 (review denied Aug. 18, 1994).

Gomez v. Superior Court, No. S031963 (review denied April 2, 1993).

California Court of Appeal, Third District:

Ng v. Superior Court, No. C019185 (petition denied Sept. 9, 1994).

Ng v. Superior Court, No. C018325 (petition denied May 19, 1994).

Gomez v. Superior Court, No. C015515 (petition denied March 30, 1993).

California Court of Appeal, Fourth District

Ng v. Superior Court, No. G025613 (petition denied July 13, 1999).

McClatchy Newspapers, Inc. v. Superior Court, No. G025158 (petition denied May 4, 1999).

Ng v. Superior Court, No. G024185 (petition denied Oct. 13, 1998).

Ng v. Superior Court, No. G024025 (petition denied Sept. 9, 1998).

People v. Superior Court, No. G023004 (petition denied March 5, 1998).

People v. Superior Court, No. G023003 (petition denied March 5, 1998).

Ng v. Superior Court, No. G022900 (petition denied Feb. 10, 1998).

Ng v. Superior Court, No. G021785 (petition denied July 14, 1997).

Ng v. Superior Court, No. G021677 (petition denied July 14, 1997).

Ng v. Superior Court, No. G020239 (petition granted Feb. 14, 1997).

Ng v. Superior Court, No. G019953 (petition denied June 27, 1996).

Ng v. Superior Court, No. G018019 (petition denied July 27, 1995).

Ng v. Superior Court, No. G017743 (petition denied May 11, 1995).

Orange County Superior Court:

People v. Ng, No. 94ZF0195 (judgment entered June 30, 1999) (this case below).

Calaveras County Superior Court:

People v. Ng, No. 3124 (transferred April 8, 1994).

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STATEMENT

1. During 1984 and 1985, petitioner Charles Ng, together with Leonard Lake, murdered at least nine adults and two children in Northern California. Pet. App. 1-2. The spree came to an end when a police officer found Lake in possession of property belonging to some of the victims, leading Lake to commit suicide and petitioner to flee to Canada. *Id.* at 2-3.

Officers later discovered additional items belonging to the victims at Lake's property in rural Wilseyville, California. Pet. App. 3-4. They also discovered a bunker with two hidden rooms, one of which was behind a door that could not be opened from the inside. *Id.* at 4. Officers unearthed human remains and a videotape recording of petitioner and Lake threatening to sexually abuse two of the victims. *Id.* at 4, 11-14. A search of petitioner's apartment uncovered more property belonging to the victims, plus photographs of the bunker while it was under construction. *Id.* at 4. In July 1985, petitioner was arrested in Canada for shoplifting and shooting a security guard. *Id.* at 5, 85. Following a contested evidentiary hearing, the Canadian government extradited petitioner to the United States in 1991. *Id.* at 2, 15, 24,

2. A jury convicted petitioner of 11 counts of special circumstance murder, and set the penalty at death. Pet. App. 1, 26. His petition concerns three aspects of his trial.

a. Petitioner's first question presented concerns the trial court's decision to revoke petitioner's self-representation. After petitioner was extradited, he expressed a desire to be represented by two particular attorneys from the San

Francisco Bay Area. Pet. App. 24. Because of those attorneys' scheduling conflicts, however, the court appointed other experienced attorneys who practiced elsewhere in Northern California instead. *Id.* Petitioner responded over the next few months by filing 14 motions seeking appointment of his preferred attorneys; he then sued his appointed attorneys, causing them to seek to withdraw due to conflicts of interest. *Id.* at 26-27. After petitioner moved for a change of venue due to pretrial publicity, the case was transferred to the Orange County Superior Court, and the Orange County Public Defender was appointed to represent him. *Id.* at 27. Petitioner moved for the public defender to be removed as counsel and replaced. *Id.* After that motion was granted, petitioner sought the public defender's reinstatement but his request was denied. *Id.* After an appellate court (at petitioner's urging) directed the trial court to grant petitioner's motion for reinstatement, petitioner sought to have the public defender removed again. *Id.* This time, petitioner asked for the public defender to be replaced by one of his original preferred Bay Area attorneys. *Id.* The court agreed, and set a September 1, 1998, trial date in deference to that lawyer's schedule—but the attorney refused to accept the appointment due to a disagreement about compensation. *Id.*

On March 31, 1998, petitioner filed a motion for self-representation. Pet. App. 27. The court denied it, finding that petitioner did not actually wish to represent himself and that his real purpose was to obstruct justice and delay the proceeding. *Id.* When petitioner again moved for self-representation, the

court denied the motion on the same ground. *Id.* When petitioner filed a third motion on May 15, however, he promised to try his best to be ready on the scheduled trial date, and stated that he would accept any attorney as "advisory" counsel. *Id.* at 27-28, 38. His motion was granted, and the public defender was appointed as both advisory and "standby" counsel. *Id.* On May 26, however, petitioner filed a motion to remove the public defender from those roles, which the court denied. *Id.*

Finally, on August 5, with the September 1 trial-date fast approaching, petitioner moved to continue the trial to March 1999. Pet. App. 28. He identified certain tasks that he wanted to complete, but he did not explain why he needed six months to complete them. *Id.* at 39. For example, when the court asked how long it would take him to complete pretrial motions, petitioner said he did not know. *Id.* The court found that petitioner was not actively preparing for trial and was in fact "doing everything to avoid trial in the near future," describing petitioner as playing "'games within games within games.'" *Id.* at 29, 39, 42. The court noted that every time petitioner received an adverse ruling he made "'unfavorable comments'", and that the court had the power to revoke pro se status for failure to follow the court's rules. *Id.* at 39. The court revoked petitioner's pro se status, but ordered that petitioner be allowed to retain his pro-se preparation materials at the jail. *Id.* The court explained that if petitioner was ready to proceed on the scheduled trial date and made a good faith motion to renew self-representation at or after the beginning of trial,

the court was willing to revisit the issue. *Id.* Petitioner did not make such a motion, and he was represented by the public defender throughout the trial. *Id.* at 33.

b. Petitioner's second issue concerns the court's use of a stun belt to restrain him during trial. When petitioner first appeared in Orange County Superior Court, he was wearing a stun belt, waist chain, and ankle chain. Pet. App. 83. The court ordered the ankle chain removed, and at a subsequent proceeding the stun belt was absent also, leaving petitioner restrained only by the waist chain. *Id.* Defense counsel asked for the waist chain's removal, saying that it was uncomfortable. *Id.* The prosecution argued that petitioner had been found on multiple occasions with items that could be used as handcuff keys, and that he had been so desperate to avoid his original arrest in Canada that he had pulled a gun on security guards there. *Id.* The court ordered the use of the stun belt, finding that there was a "'manifest need'" for some restraint and that the stun belt would be "'effective'" and "'not visible to anybody.'" *Id.*

During jury selection, petitioner renewed his objection to the stun belt. Pet. App. 83-85. The court denied the objection in a written ruling. The court noted that petitioner had previously escaped from custody when he was arrested during military service in Hawaii, and following that escape he had remained at-large for five months. *Id.* at 85-86. More recently, to evade capture for the murders that he was now charged with, petitioner had fled to

Canada after Lake's arrest; and he had not only fought with Canadian security guards who tried to arrest him for shoplifting, but had shot one of them. *Id.* at 85. In addition, when petitioner was imprisoned in Canada, he had discussed escaping with another inmate, and had mentioned an intent to "bust[] another inmate out" as well. *Id.* While in custody in California on the murder charges, he had been found with a metal object that could be used to pick handcuff locks *Id.* And those who guarded him in Canada and California noted his attempts to brush up against them to determine if they were armed, and his surveillance of and attempts to manipulate his guards. *Id.* Moreover, there was reason to be concerned about petitioner's ability to escape because he appeared to be proficient in martial arts, and a coworker had once seen him climb an elevator shaft at work. *Id.* The court therefore ordered the use of the stun belt as an alternative to other restraints.

c. Last, petitioner challenges the admission at his criminal trial of certain testimony from his Canadian extradition hearing. While serving a term in Canadian prison, petitioner befriended fellow inmate Maurice Laberge. Pet. App. 14-15. Petitioner discussed his crimes with Laberge and drew for him four cartoons. *Id*. at 14, 89-90. The cartoons showed the disposal of a body, depicted petitioner videotaping the whipping of one of his victims while she was nude, and made various references to other identified victims. *Id.* at 88-90. Laberge testified against petitioner at petitioner's contested extradition hearing, where petitioner cross-examined him at length. *Id*. at 15,

88, 96 (noting 165-page cross-examination transcript). The Supreme Court of Canada ultimately upheld the Minister of Justice's decision to surrender petitioner. *Reference Re Ng Extradition*, [1991] 2 SCR 858 (Can.).

By the time of petitioner's California trial, however, Laberge had died. Pet. App. 88-89. The prosecution sought to introduce the extradition hearing testimony. *Id.* The court noted that petitioner's incriminating cartoons would have been admissible even without Laberge's testimony. *See id.* at 97-98 (observing that petitioner's writing on the cartoons had been authenticated by a handwriting expert). But the court also ruled that Laberge's testimony was admissible since the extradition hearing "appeared very similar to a preliminary hearing" and petitioner's extradition counsel had subjected Laberge to "'very extensive'" cross-examination. *Id.* at 89.

3. On direct appeal, the California Supreme Court affirmed. Pet. App. 1-133. With respect to petitioner's claims here, the court first upheld the decision to terminate petitioner's self-representation. *Id.* at 37-43. Recounting the proceedings at length, the court concluded that the record supported the trial court's conclusion that petitioner was engaging in "dilatory tactics with the intent to delay trial." *Id.* at 40; *see id.* at 40-42 (noting that by the time of the self-representation ruling petitioner's repetitive motions had already delayed trial for seven years after his extradition; that petitioner had been overheard telling a fellow prisoner that a good way to delay trial was by filing repetitive challenges to one's attorneys; and that on multiple issues, petitioner had a

pattern of first filing a motion and then, after the court issued an order granting the motion, seeking the order's reversal).

The court also upheld the trial court's use of the stun belt as a restraint. Pet. App. 83-88. "Ample evidence showed that [petitioner] had a history of escape or attempted escape." *Id.* at 86; *see id.* (describing petitioner's escape from military custody and extended evasion while facing military justice charges, his attempt to access a handcuff key while in Canadian custody, his interrupted effort to escape his shackles, and his being found with a metal clasp that could unlock his handcuffs while in custody in California). The court reasoned that the trial judge, after noticing petitioner's discomfort wearing chains, did not abuse his discretion in resorting to the stun belt as an alternative. *Id.* at 88.

Finally, the court concluded that there was no error in the admission of Laberge's testimony from the extradition hearing because petitioner's counsel at the extradition hearing had an adequate motive and opportunity to cross-examine. Pet. App. 87-98. Petitioner's counsel cross-examined Laberge at length, attempting to impeach his credibility as part of an effort to challenge the evidence implicating petitioner in the murders. *Id.* at 96. In any event, the court continued, any error in the admission of the prior testimony would be harmless beyond a reasonable doubt, since the cartoons would have been admissible even without the testimony and there was "overwhelming evidence of guilt." *Id.* at 97-98.

ARGUMENT

Petitioner seeks this Court's review on three issues. As to each, however, the California Supreme Court's decision was correct under this Court's precedents, and petitioner points to no disagreement among lower court authorities or any other consideration that would justify further review.

1. Petitioner first seeks review of the trial court's decision to terminate his self-representation under *Faretta v. California*, 422 U.S. 806 (1975). Pet. 4-7. Under *Faretta,* a defendant "has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." 422 U.S. at 807. But "the right to self-representation is not absolute." *Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000). "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* A court may terminate self-representation "if necessary," *id.*—for instance, if the defendant "deliberately engages in serious and obstructionist misconduct," *Faretta*, 422 U.S. at 834 n.46. And self-representation is not ""a license to abuse the dignity of the courtroom" or to disregard "relevant rules of procedural and substantive law." *Id.*

The standard for termination was satisfied here. The record amply supports the trial court's finding that petitioner was engaging in dilatory tactics with the intent to delay trial. Pet. App. 40. Even before requesting self-representation, petitioner had filed "dozens of motions"—including 37 requests for substitute counsel—contributing to the significant delay between his 1991 extradition and his 1998 scheduled trial date. *Id*. at 40. Indeed, petitioner had

been overheard advising another inmate to use such motions as a tool for delay. *Id.* at 41. And in some instances petitioner had reversed his positions repeatedly: When the trial court granted petitioner's motion and replaced the public defender with substitute counsel, petitioner sought to have the public defender reappointed. *Id.* at 43. A few months later, he filed another motion to have them relieved. *Id.* The trial court later granted self-representation based in part on petitioner's assurance that "he would accept [the public defender] as advisory counsel." *Id.* at 41. But three weeks later, petitioner moved to discharge the public defender as advisory counsel, "knowing that it would take new counsel several months to get caught up on his case." *Id.*

This history supported the trial court's conclusion that petitioner was using self-representation as a way to delay his trial, and demonstrated the unacceptability of his proposal to continue the trial for six months and reconsider self-representation at that time: based on the number of times that petitioner had changed positions in the past, it was "reasonable for the trial court to believe that defendant would refuse to have [the public defender] appointed six months later and demand new attorneys, further delaying his trial." *Id.* at 43. The California Supreme Court's decision not to reverse on this issue was correct, and further review is not warranted.

2. Petitioner next asserts that he was deprived of due process because he was wearing a stun belt during trial. Pet. 7-11. This Court has established that the use of *visible* shackles is an "inherently prejudicial practice that . . .

should be permitted only where justified by an essential state interest specific to each trial." *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). Examples of essential state interests have included "physical security, escape prevention, or courtroom decorum." *Deck v. Missouri*, 544 U.S. 622, 628 (2005). Whether an essential state interest justifies visible restraints in a particular case requires "a trial court determination, in the exercise of its discretion." *Id*. at 629. This Court has not determined whether a similar analysis applies to the use of non-visible restraints such as the stun belt in this case. But the trial court's decision here would be correct under any test.

"Ample evidence showed that defendant had a history of escape or attempted escape." Pet. App. 86. For example, he had previously escaped from military custody in Hawaii. *Id*. He tried to escape from law enforcement officers in Canada by retrieving a handcuff key from his pocket. *Id*. While he was in a holding facility awaiting the extradition hearing, security personnel saw him manipulating his shackles. *Id*. "They discovered that he had spread the side of the handcuffs, and with more time, he would have been able to free the locking device and break out of his handcuffs." *Id*. Following his extradition, he concealed a metal envelope clasp that could be used to unlock a pair of standard-issue handcuffs. *Id*.

Similarly, while he was in Canada "he would 'always brush up next to his plain clothes handlers to determine whether or not they were armed.'" Pet. App. 86. And following his extradition, he "maintained 'a constant vigil as to

what's going on around him' and would 'always observe and take in where security personnel are, what they are armed with, and distances between himself and them.'" *Id.* at 86-87.

Moreover, the trial court did not abuse its discretion in weighing the choice of a stun belt against traditional restraints. When petitioner was subject to traditional restraints prior to trial, he "complained of pain from the chains, marks they left on his waist, and his inability to write notes while wearing them." Pet. App. 88. Although a psychiatrist testified that petitioner was "very preoccupied" with the stun belt, the psychiatrist "had not had the opportunity to observe defendant in court." *Id.* at 84. The trial court also noted that the psychiatrist's opinion was inconsistent with its own observations of petitioner and "failed to distinguish between restraint by chains and restraint by a hidden stun belt." *Id.* at 85.

Petitioner alleges that "federal appellate courts" have "reached conclusions incompatible with" California Supreme Court precedent on the use of stun belts. Pet. 11. But the case he discusses fails to support that assertion. Pet. 11. Petitioner argues that, in *Gonzalez v. Pliler*, 341 F.3d 897 (9th Cir. 2003), the Ninth Circuit disapproved of the use of stun belts where "the record contained no evidence of any serious disturbance by the defendant." Pet. 11. But *Gonzalez* stated that "California's and the Ninth Circuit's respective physical restraint doctrines are, despite some linguistic distinctions, largely coextensive." *Gonzalez*, 341 F.3d at 901 n.1. And the facts that led the Ninth

Circuit to hold a termination of self-representation improper in *Gonzalez* are not remotely comparable to those in this case. In *Gonzalez*, a defendant was forced to stand trial wearing a stun belt because he had "three strike" convictions, he had been "'a little uncooperative,'" and "'he had a little attitude.'" 341 F.3d at 901-902. That defendant had no history of escape, and the trial court "did not even hold an evidentiary hearing." *Id.* at 902. Petitioner, in contrast, had a history of escaping from custody, had been repeatedly caught attempting or preparing to remove his handcuffs, and had demonstrated his extreme dangerousness in multiple ways. The trial court considered this evidence, including the testimony of petitioner's witness, and explained the need for the stun belt in a reasoned order.[1]

3. Finally, there is no reason for this Court to review petitioner's claim that the trial court violated his right to confrontation by admitting prior testimony from Laberge, the Canadian witness who testified at the extradition

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[1] Nor do two cases which petitioner cites without discussion (Pet. 11) conflict with the California Supreme Court's reasoning here. In *Stephenson v. Neal*, 865 F.3d 956 (7th Cir. 2017), the Seventh Circuit sustained a claim of ineffective assistance of counsel based on a defense lawyer's failure to object to the use of a stun belt during a capital penalty phase trial. But that decision turned on circumstances that are not present here: the stun belt was "visible" to the jurors and there was "no evidence" that the defendant might act up in court. *Id.* at 958-959. Petitioner also cites *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002). But in *Durham* the defendant "was wearing leg shackles in addition to the stun belt" and the court did not explore the possibility that the shackles alone would be sufficient. *Durham*, 287 F.3d at 1308. Here, in contrast, an alternative restraint—a waist-chain—was removed at petitioner's request based on his complaint that it was causing him discomfort. *See supra* pp. 4, 11. The trial court employed the stun belt as a reasonable, more comfortable, and necessary alternative.

hearing but died prior to trial. Pet. 11-14. Under *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause generally bars the admission of testimonial hearsay; but *Crawford* explained that such hearsay is admissible if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Id*. at 59. As an example, *Crawford* cited the decision in *California v. Green*, 399 U.S. 149 (1970). *Id.* at 57. That case allowed the use at trial of an unavailable witness's prior preliminary hearing testimony, where the witness in the preliminary hearing "was under oath," the defendant "was represented by counsel," the defendant "had every opportunity to cross-examine [the witness] as to his statement," and "the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings." *Green*, 399 U.S. at 165.

Similar reasoning authorized the use of the extradition testimony here. Petitioner alludes to the fact that the extradition hearing required the Canadian government to make a prima facie showing rather than to prove his guilt beyond a reasonable doubt. Pet. 12; *see* Pet. App. 96-97. But the probable cause standard that governed the preliminary hearing in *Green* was also below the beyond-a-reasonable-doubt standard. *See* Pet. App. 96-97; *Green*, 399 U.S. at 197 (Brennan, J., dissenting).

In any event, the lesser burden of proof at the extradition hearing did not discourage petitioner from "vigorous[ly] and extensive[ly]" cross-examining Laberge. Pet. App. 96. "Cross-examination consumed approximately 165

pages of transcript," and petitioner's attorney impeached Laberge with his criminal history and prior history as an informant. *Id.* Petitioner's attorney explored how Laberge came into contact with petitioner and Laberge's note-taking of petitioner's statements. *Id.* And he examined whether Laberge could have fabricated details about petitioner's statements by reading the charges from petitioner's documents and accounts in newspapers and periodicals. *Id.* That cross-examination, moreover, disproved petitioner's argument that his attorney's strategy at the extradition hearing was focused on showing the likelihood of a death sentence rather than attacking the strength of the prosecution's case. Pet. 13. The "vigorous and extensive cross-examination of Laberge . . . supports a finding that counsel's motivation would have been to challenge the evidence implicating defendant in the California murders (and thus was not solely concerned with the fact that defendant would be subject to the death penalty upon extradition)." *Id.*

Finally, the California Supreme Court also concluded that any error in admitting Lebarge's testimony was harmless beyond a reasonable doubt under the circumstances of this case. Pet. App. 97-98. The court explained that petitioner's handwriting on the cartoons he gave Laberge had been authenticated by a handwriting expert, and that the cartoons would have been admissible even without Laberge's testimony. *Id.* at 98. Moreover, the court reasoned, "overwhelming evidence of guilt" from other sources, including a videotape of petitioner and Lake telling one of their captives that they were

about to sexually abuse her, left no reasonable possibility that exclusion of the Lebarge testimony would have made a difference. *Id.*; *see id.* at 12, 14. Because of this harmless error ruling—which petitioner does not challenge—the question on which petitioner seeks review is irrelevant to the outcome of his case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 22, 2022

Respectfully submitted,

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