No. _____

IN THE

Supreme Court of the United States

DALRAY KWANE ANDREWS,

Petitioner,

v.

W.L. MONTGOMERY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

HILARY POTASHNER
Federal Public Defender
RAJ N. SHAH*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Raj_Shah@fd.org

Attorneys for Petitioner
**Counsel of Record*

QUESTIONS PRESENTED

This Court held in *Faretta v. California,* 422 U.S. 806 (1975), that the Sixth Amendment guarantees criminal defendants the right to self-representation at trial. Critically, however, the Court did not explicitly specify when a criminal defendant must invoke this right.

At a trial readiness hearing in California state court three days before his jury was impaneled, Petitioner Dalray Kwane Andrews made a clear and unequivocal request to represent himself under *Faretta*. The state trial court denied Andrews' request as untimely. The trial court then forced Andrews to proceed to trial with appointed counsel. On direct appeal, the state appellate court affirmed the trial court's decision, agreeing that Andrews' request was untimely and additionally holding that it was dilatory.

On federal habeas review, the Ninth Circuit concluded the state appellate court's denial of Andrews' request on these two grounds was not unreasonable under 28 U.S.C. § 2254(d). Speaking to the timeliness of Andrews' request, the Ninth Circuit held *Faretta* "clearly established," for purposes of 28 U.S.C. § 2254(d)(1), that Andrews had to make his request at least a few weeks before trial. The questions presented here are:

(1) Did the Ninth Circuit err in holding that *Faretta* "clearly established," for purposes of 28 U.S.C. § 2254(d)(1), that a request for self-representation must be made at least a few weeks before trial?

(2) Did the Ninth Circuit err in holding the California Court of Appeal reasonably concluded Andrews' request for self-representation was dilatory?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dalray Kwane Andrews petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the Ninth Circuit Court of Appeals affirming the district court's denial of Andrews' petition for writ of habeas corpus was not published; the opinion is attached as Appendix A.[1] The Ninth Circuit's order granting a Certificate of Appealability ("COA") as to the questions presented in this petition is attached as Appendix B. The district court's orders denying a COA, entering judgment, and adopting the magistrate judge's report and recommendation are attached as Appendix C, D, and E, respectively. The magistrate judge's report and recommendation to dismiss the petition is attached as Appendix F.

The unreasoned summary denial by the California Supreme Court of Andrews' state petition for writ of habeas corpus is attached as Appendix G. The California Court of Appeal's opinion affirming judgment on direct appeal, which is

[1] Cites to the Petitioner's Appendix begin with the document letter followed by the bates number of where in the overall appendix the specific citation can be found.

the last reasoned opinion addressing the claim at issue in this petition, is attached as Appendix H.

JURISDICTION

The Ninth Circuit granted Andrews a COA in *Andrews v. Montgomery*, Case No. 16-56630, on June 13, 2017. Pet. App. B. The Court affirmed the district court's judgment on September 5, 2018. Pet. App. A. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Cons. Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Andrews was convicted of first degree murder, attempted second degree murder, and assault with a semiautomatic firearm following a jury trial in California Superior Court. Pet. App. F at 26. He received a total sentence of forty-eight years to life. Pet. App. F at 26.

A. Trial Court Proceedings

Andrews was tried for the first degree murder of Joshua Huizar, and the attempted second degree murder and assault with a semiautomatic firearm on Huizar's girlfriend, Viridiana Sanchez. Pet. App. F at 26-30.

Andrews first appeared in the trial court on April 21, 2011. Pet. App. F at 53. On October 25, 2012, a pretrial hearing was held in Andrews' case. Pet. App. K. During the pretrial hearing, the trial court set a trial date of December 10, 2012, as well as a trial readiness hearing date of December 7, 2012. Pet. App. K. Andrews was not personally present in court during the pretrial hearing that took place on October 25, 2012, and had no opportunity to be heard with regard to the proposed trial readiness hearing or trial dates. Pet. App. K. In fact, Andrews' last appearance before the trial court had been more than two months prior on September 28, 2012. Pet. App. L. Moreover, a speedy trial waiver had been granted at the September hearing through February 3, 2013. Pet. App. L (stating "[t]ime waived to 11/05/2012; plus 90 days").

During the trial readiness hearing that took place on December 7, 2012 (a Friday), Andrews' counsel, Gina Kershaw, informed the court that Andrews "wishes to go pro per." Pet. App. I at 75. Kershaw stated that she told Andrews that the trial court was inclined to "start trial next week," and that Andrews indicated there was "some important information that he really wants to go over with [Kershaw] and doesn't want to do that in court." Pet. App. I at 75. Kershaw then asked for a continuance to go see Andrews at the jail, which the trial court promptly denied. Pet. App. I at 75-76.

As had been previously discussed during an in-chambers conference, for "timing purposes," the trial court's intent was to hear motions the following Monday morning, and then start jury selection that Monday afternoon. Pet. App. I at 75-76. The trial court stated that jury selection was likely to finish on Tuesday, and that the first witness would be called on Wednesday. Pet. App. I at 76. Kershaw then requested that Andrews be allowed to address the Court about his *pro per* status. Pet. App. I at 76. The following discussion took place on the record:

> The Court: Mr. Andrews?
>
> [Mr. Andrews]: Yes. I cannot go pro per? I'm trying to go pro per to defend my own case. Ms. Kershaw, she was a good lawyer. I just want to go – I want to take my own trial, sir.
>
> The Court: Okay. We're on for assignment calendar. You ready to start on Monday?
>
> [Mr. Andrews]: I mean, can I – if I go pro per, can I look at my case? Can I study it for a minute?
>
> The Court: What do you mean for a minute?

[Mr. Andrews]: A couple of months?

The Court: No, sir. We've been – just do a quick recitation here. Date of offense is April 10th, 2011. The arraignment on the Information was April 21st of 2011. Public Defender was on the case for one or two appearances and conflicted off. And for the Conflict Panel, Ms. Kershaw has been on it since at least May of 2011. Several continuances on the preliminary hearing calendar. Went to preliminary hearing on August 31st of 2011 and held to answer. The arraignment on the Information was September 8th, 2011. That's over a year ago. There's been, estimating, at least ten appearances since then. No prior request to go pro per. So the request to go pro per today on the date of assignment calendar, the Court finds untimely. Are the People ready to start next week?

[Deputy District Attorney Kyung Kim]: With the discussion we had with regard to the coroner not being available next week, but he will be available the week after.

The Court: Right. With that, the People ready?

Mr. Kim: Yes.

The Court: And Ms. Kershaw, the defense ready to go next week?

Ms. Kershaw: Yes.

The Court: So the Court finds the request to go pro per is untimely and that is denied.

[Mr. Andrews]: Could you file a motion that – saying that I wasn't ready for trial?

The Court: Well, what you said and what Ms. Kershaw has said regarding what you wanted to talk about is on the record. There's certainly going to be a time to talk to you before the trial starts on Monday and before witnesses are called on Wednesday. There will be time for you to have a discussion with her about – I don't want you to tell me what you want to talk about because that's

> between you and Ms. Kershaw, but there will certainly be time for discussion. Of course there's been, in the Court's opinion, time for discussion for the last year and a half as well.

Pet. App. I at 76-77.

The minutes of the hearing reflect that the trial court denied the motion as "UNTIMELY," and that a jury panel was ordered later that day. Pet. App. J. Andrews' case proceeded to jury trial the following Monday, and ended with a conviction on all three counts. Pet. App. F at 26-30.

B. Relevant Appellate and Post-Conviction Proceedings

On appeal, Andrews challenged the trial court's decision to deny his request for self-representation under *Faretta*. In an unpublished opinion, the California Court of Appeal affirmed the judgment and the trial court's denial of Andrews' *Faretta* request. Pet. App. H at 69-72. The appellate court agreed with the trial court that Andrews' request was untimely. Pet. App. H at 70-71.

The appellate court also supplied additional reasons supporting the trial court's denial that the trial court itself did not rely upon. The appellate court noted Andrews had stated his counsel "was a good lawyer." Pet. App. H at 70. The court inferred from this that Andrews conceded "he had no quarrel with her performance" when he made his request. Pet. App. H at 70. The Court of Appeal also concluded "it is clear that the defendant was just trying to delay the inevitable (or perhaps build error into the case)," Pet. App. H at 67, and that "[Andrews'] request was prompted solely by a desire to put off the trial date." Pet. App. H at 71. Based on

these additional grounds, the court affirmed the trial court's denial of Andrews' request.

Andrews did not file a petition for review of this decision in the California Supreme Court. Pet. App. F at 27. But Andrews did file a state habeas corpus petition in the California Supreme Court re-asserting his *Faretta* claim. Pet. App. F at 27, 57. The petition was summarily denied with citations to *In re Clark,* 5 Cal. 4th 750, 767-69 (1993), *People v. Duvall,* 9 Cal. 4th 464, 474 (1995), and *In re Waltreus,* 62 Cal. 2d 218, 225 (1965). Pet. App. G.

C. Federal Court Proceedings

On January 15, 2016, Andrews filed a timely *pro se* federal petition for writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254(a), re-asserting his *Faretta* claim and a number of other claims. Pet. App. F at 25, 32. With regard to the *Faretta* claim, the magistrate judge determined that the last reasoned state court decision was the California Court of Appeal opinion on direct appeal, and concluded the decision "was not unreasonable in concluding that the first-time, eve-of-trial self-representation request by a defendant who professed satisfaction with his counsel and requested a two-month continuance in a case over a year old betrayed the fact that the defendant's request was a tactic to secure delay." Pet. App. F at 62. The magistrate judge therefore concluded that the California Court of Appeal's rejection of Andrews' *Faretta* claim was not contrary to, or an objectively unreasonable application of, any clearly established federal law as determined by the United States Supreme Court, under 28 U.S.C. § 2254(d)(1). Pet. App. F at 63.

Notably, the magistrate judge did not consider or decide whether the California Court of Appeal's decision rested on an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). Based on these findings, the magistrate judge concluded Andrews was not entitled to federal habeas relief under 28 U.S.C. § 2254.

The district court adopted the magistrate judge's findings, entered judgment denying Andrews' petition, and denied Andrews a COA. Pet. App. C, D, E.

On appeal, after granting a COA as to the denial of Andrews' *Faretta* claim, the Ninth Circuit affirmed the district court's judgment in an unpublished memorandum disposition. Pet. App. A. The Ninth Circuit held the state courts' finding that Andrews' request was untimely did not contravene *Faretta*, as required for habeas relief by 28 U.S.C. § 2254(d)(1). Pet. App. A at 2. The Ninth Circuit also found the California Court of Appeal's other, *post hoc* rationale for denying Andrews' claim—that Andrews' request was dilatory—did not unreasonably apply *Faretta*, for purposes of 28 U.S.C. § 2254(d)(1). Pet. App. A at 2. Finally, the Ninth Circuit concluded the California Court of Appeal did not unreasonably apply *Faretta*, *see* 28 U.S.C. § 2254(d)(1), or engage in an "unreasonable determination of the facts," *see id.* § 2254(d)(2), by considering Andrews' reported satisfaction with his appointed counsel at the *Faretta* hearing; the Ninth Circuit found this fact confirmed Andrews' dilatory motive. Pet. App. A at 2-3. Consequently, the Ninth Circuit affirmed the district court's denial of Andrews' federal habeas petition. Pet. App. A at 3.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit affirmed the denial of Andrews' *Faretta* claim on two grounds. First, the Ninth Circuit concluded the state courts did not contravene *Faretta*, as required for relief under 28 U.S.C. § 2254(d)(1), by denying Andrews' request for self-representation as untimely; according to the Ninth Circuit, *Faretta* clearly established that Andrews had to make his request at least a few weeks before his trial. Second, the Ninth Circuit held the California Court of Appeal's conclusion that his request was dilatory was not unreasonable under either 28 U.S.C. § 2254(d)(1) or 28 U.S.C. § 2254(d)(2).

The first of these grounds raises a substantial federal question: whether *Faretta* "clearly established," for purposes of 28 U.S.C. § 2254(d)(1), that criminal defendants must request self-representation by a particular deadline. As set forth below, the plain language of *Faretta* does not create any such deadline, and comments in the *Faretta* decision regarding the timing of a request for self-representation constitute dicta. The Ninth Circuit's decision to the contrary—based on twenty years of erroneous circuit precedent—mistook dicta in *Faretta* for a "clearly established" holding, for purposes of 28 U.S.C § 2254(d)(1). The Ninth Circuit's decision contravened this Court's instruction that "Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). This Court should intervene and correct the Ninth Circuit's error. *See* Supreme Court Rule 10(c) (noting that a petition for a writ of certiorari may be

granted when a United States court of appeals has "decided an important federal question in a way that conflicts with relevant decisions of this Court").

Moreover, the second ground relied upon by the Ninth Circuit does not foreclose Andrews' *Faretta* claim. The California Court of Appeal's finding that Andrews' request for self-representation was dilatory, was itself the product of a defective fact-finding process. The trial court never considered whether Andrews' request was dilatory. Consequently, the California Court of Appeal's finding was made entirely on a cold record, without any opportunity for factual development. Moreover, the California Court of Appeal ignored critical facts when making this finding, and based it solely on the irrelevant fact that Andrews expressed satisfaction with his counsel at the *Faretta* hearing. For all of these reasons, the finding constituted an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

Accordingly, this Court should grant a writ of certiorari, correct the Ninth Circuit's misinterpretation of *Faretta*'s holding, and remand for further proceedings.

A. *Faretta* Clearly Establishes A Sixth Amendment Right To Self-Representation.

Under 28 U.S.C § 2254(d), to procure federal habeas relief, Andrews must show the California Court of Appeal's opinion on appeal—the last reasoned decision addressing his *Faretta* claim—"was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C § 2254(d)(1), or "was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that on federal habeas review, the court must "look through" an "unexplained decision" by a state court "to the last related state-court decision that does provide a relevant rationale" for the denial of a federal constitutional claim). "Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" *Lockyer*, 538 U.S. at 71 (quoting *Williams*, 529 U.S. at 412).

Faretta sets forth the clearly established federal law relevant to Andrews' claim. In *Faretta*, this Court considered defendant Anthony Faretta's request—made "weeks before trial"—that he be allowed to represent himself. 422 U.S. at 807, 835. This Court noted Faretta's case raised the question of whether a criminal defendant has a "constitutional right to proceed [to trial] without counsel when he voluntarily and intelligently elects to do so." 422 U.S. at 807. This Court ultimately held that Faretta did have this right, and that the Sixth Amendment "grants to the accused personally the right to make his defense." *Id.* at 820. To hold otherwise, the Court noted, would turn appointed counsel into an "organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* At the same time, the Court briefly acknowledged the right is not absolute, noting "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46.

B. The first of the Ninth Circuit's two grounds for its decision relies on a twenty-year-long misinterpretation of *Faretta*'s holding that warrants correction.

The Ninth Circuit's decision below was based, in part, on a misreading of what was "clearly established" by *Faretta*. The Ninth Circuit affirmed the district court's judgment partly based on its conclusion that the state courts were permitted by *Faretta* to deny Andrews' request for self-representation as untimely.[2] *See* Pet. App. A at 2. In so holding, the Ninth Circuit relied on two decades of its own precedent reading a timeliness requirement into *Faretta*. *See* Pet. App. A at 2 (citing *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005) (holding that "a timeliness element in a *Faretta* request is clearly established Federal law, as determined by the Supreme Court") (internal citation and quotation marks omitted)); *see also Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997), *as amended* (Mar. 20, 1997) (holding "[t]he [*Faretta*] Court's acknowledgment of the timing of Faretta's request was neither a recitation of the background facts of the case nor *obiter dictum*" and was in fact "a holding of the Court"), *overruled on other grounds by Tamplin v. Muniz*, 894 F.3d 1076, 1089 (9th Cir. 2018)).

These prior Ninth Circuit decisions held that because the *Faretta* Court "mentioned that Faretta's request was [made] '[w]ell before the date of trial,' and 'weeks before trial,'" it "clearly established" that a lower court could deny as

[2] As set forth in Section C, the Ninth Circuit's other stated rationale for denying Andrews' *Faretta* claim—namely, that the state courts reasonably determined Andrews made his request for self-representation for purpose of delay—was erroneous, unsupported by the record, and does not foreclose Andrews' claim.

untimely requests for self-representation made *after* this period. *Marshall*, 395 F.3d at 1061 (quoting *Faretta,* 422 U.S. at 835). Because Andrews made his request for self-representation only three days before his trial was set to begin, the Ninth Circuit applied these decisions and concluded the California state courts did not contravene *Faretta* by denying the request as untimely. Pet. App. A at 2.

The Ninth Circuit's twenty-year reading of a timing requirement in the *Faretta* decision is incorrect. The plain language and the material facts of *Faretta* do not evidence any timing requirement.[3] As Sixth Circuit Judge Bernice Bouie Donald notes, "[t]he reality is that nowhere in the *Faretta* decision did the Supreme Court explicitly state that a defendant's self-representation request must be granted if and only if it comes 'well' or 'weeks' before trial." *Hill v. Curtin*, 792 F.3d 670, 687 (6th Cir. 2015) (Donald, J., dissenting).[4] In fact, given that Faretta's request for self-representation had come "weeks before trial," this Court's comments on its timing necessarily constituted *dicta*: the Court's remarks were not "necessary" to the "result," that is, to deciding whether Faretta's request had to be honored. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996).

[3] Nor do any other decisions of this Court establish a timing requirement on requests for self-representation. As the Ninth Circuit has itself recognized, "[t]he only Supreme Court decision to discuss the timeliness of a request to proceed *pro se* is the *Faretta* decision itself." *Burton v. Davis*, 816 F.3d 1132, 1141 (9th Cir. 2016).

[4] While Judge Donald's views do not create a "circuit split" with those of the Ninth Circuit on this question, they represent a minority viewpoint that deserves consideration.

The first paragraph of the *Faretta* opinion supports this conclusion: there, this Court explicitly stated the question it sought to decide was "whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." *Faretta*, 422 U.S. at 807. This Court did not purport to decide whether Faretta's request for self-representation was timely, or whether the right to self-representation had to be timely raised. The arguments of the parties in *Faretta* also confirm this: the State of California never argued before this Court that Faretta's request was untimely. *See generally* Respondent's Br., *Faretta v. California*, 422 U.S. 806 (1975) (No. 73–5772), 1974 WL 174862. As a result, "*Faretta*'s holding cannot be that timeliness is the governing inquiry because the timeliness of Faretta's request was ancillary to the issue presented in that case." *Hill* , 792 F.3d at 687 (Donald, J., dissenting).

Given that the *Faretta* Court's comments about timeliness were dicta, they cannot be deemed to "clearly establish[]" a timeliness requirement for requests for self-representation, for purposes of 28 U.S.C § 2254(d)(1). *See Lockyer*, 538 U.S. at 71 ("Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" (quoting *Williams*, 529 U.S. at 412)). The Ninth Circuit therefore erred in concluding the state courts' denial of Andrews' request for self-representation as untimely was consistent with *Faretta*'s holding. *See* 28 U.S.C. § 2254(d)(1).

In sum, the Ninth Circuit has for several decades repeatedly misinterpreted *Faretta*'s holding and required criminal defendants such as Andrews to make requests for self-representation by a deadline this Court never intended to impose. This Court should intervene and correct the Ninth Circuit's error. *See* Supreme Court Rule 10(c) (noting that a petition for a writ of certiorari may be granted when a United States court of appeals has "decided an important federal question in a way that conflicts with relevant decisions of this Court").

C. The Ninth Circuit's second ground for its decision is erroneous and does not foreclose Andrews' *Faretta* claim.

The second of the two grounds the Ninth Circuit relied upon when rejecting Andrews' *Faretta* claim—namely, that the California Court of Appeal reasonably found Andrews' request for self-representation was made for purpose of delay—is also erroneous. *See* Pet. App. A at 2. This Court's precedent instructs that the California Court of Appeal's finding constituted an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). The only evidence the California Court of Appeal cited to support this finding was Andrews' statement at the *Faretta* hearing that his trial counsel Gina Kershaw "*was* a good lawyer." *See* Pet. App. H at 70-71 (emphasis added). But this statement alone could not have justified a finding that Andrews was seeking to delay his trial by proceeding *pro per*. As it was framed in the past tense, the statement likely meant Andrews *had been* satisfied with Kershaw's performance, but no longer wished to retain her services because of some new development. This would have been consistent with Kershaw's representation to the trial court at the start of the *Faretta* hearing that Andrews had discovered

new information he wished to discuss with her. Pet. App. I at 75. The California Court of Appeal's failure to adopt this interpretation of Andrews' comment constituted an "unreasonable determination of the facts," under this Court's precedent. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (holding that the state court's finding was unreasonable under 28 U.S.C. § 2254(d)(2) when it was based on a "clear factual error").

Moreover, the California Court of Appeal failed to consider pertinent facts when deciding the issue. For instance, the court failed to consider the fact that Andrews was not personally present in court during the pretrial hearing that took place on October 25, 2012, and had not been present in the trial court since September 28, 2012. *See* Pet. App. K, L. Importantly, the December 10, 2012 trial date and December 7, 2012 trial readiness hearing date were set during the October 25, 2012 pretrial hearing. Andrews' absence from the October 25, 2012 pretrial hearing would have explained why Andrews did not make his request to proceed *pro per* earlier. The court also did not take into account that a speedy trial waiver had been granted at the September hearing through February 3, 2013, and that this may have led Andrews to not act immediately on his request to proceed *pro per*. *See* Pet. App. L (stating "[t]ime waived to 11/05/2012; plus 90 days"). The California Court of Appeal's utter failure to even *consider* these facts rendered its finding unreasonable.

Finally, the California Court of Appeal's finding was also unreasonable because it was made with a cold record on appeal, without any factual development

or hint of due process. The trial court did not cite or even consider Andrews' dilatory motive as a reason for denying his request for self-representation; rather, the only ground it relied upon was the timeliness of the request. *See* Pet. App. I at 77 ("So the request to go pro per today on the date of assignment calendar, the Court finds that to be *untimely*;" "So the court finds the request to go pro per is *untimely* and that is denied.") (emphasis added); Pet. App. J (minutes of *Faretta* hearing reflecting trial court denied Andrews' request for self-representation as "UNTIMELY"). As a result, the California Court of Appeal's finding that Andrews acted with a purpose to delay was not supported by any fact-finding process. These defects in the California Court of Appeal's fact-finding process rendered its conclusion about Andrews' dilatory motive unreasonable. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The Ninth Circuit's decision to the contrary was erroneous and does not foreclose Andrews' *Faretta* claim.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: 11/30/18

By: _____
RAJ N. SHAH
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

CERTICATE OF COMPLIANCE

As required by Supreme Court Rule 33. l(h), I certify that the petition for a writ of certiorari contains 4,488 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.l(d).

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

RAJ N. SHAH