18-8639
No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ANTHONY FRANKLIN

Petitioner,

VS.

ADMINISTRATOR OF EAST JERSEY STATE PRISON
ATTORNEY GENERAL OF NEW JERSEY

Respondents,

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

Anthony Franklin
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East Jersey State Prison
Lock Bag R
Rahway, New Jersey 07065

QUESTIONS PRESENTED

Whether the district court err in denying a Writ of Habeas Corpus to Petitioner, and by Holding that Petitioner's multiple interjections did not amount to a clear, unequivocal request to proceed *pro se*, violated Petitioner's rights under the Sixth Amendment, to Equal Protection and Due Process of Law recognized by this Court in Faretta v. California, and its progeny, and Conflict with Third Circuit Law Recognizing that the trial court's failure to conduct a Faretta hearing after a defendant assert his right to self-representation run afoul of the Sixth Amendment guarantees.

Whether the district court correctly agreed that, "the record supports petitioner's submission that he may not have been explicitly informed of his sentence exposure for the aggravated manslaughter charge?" If so, whether the district court err in concluding that, "trial counsel's deficient performance did not prejudice petitioner" within the meaning of Lafler v. Cooper, 132 S. Ct. 1376 (2012)?

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A. 7

The Decision of the district court below that Petitioner's multiple interjections did not amount to a clear, unequivocal request to proceed *pro se* is directly contrary to the holding of the Third Circuit Court in Buhl v. Cooksey, 233 F.3d 783 (3d Cir. 2000).

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LIST OF PARTIES

The petitioner is Anthony Franklin, a prisoner at East Jersey State Prison in Rahway, New Jersey. The respondents are James Slaughter, the Administrator of East Jersey State Prison, and the Attorney General of the State of New Jersey.

OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey appears at Appendix – A to the petition and is unpublished. The order of the United States Court of Appeals for the Third Circuit denying petitioner's application for a certificate of appealability appears at Appendix – B to the petition and is unpublished. The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for rehearing *en banc* appears at Appendix – C to the petition and is unpublished.

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Jersey had jurisdiction over petitioner's petition for a writ of habeas corpus under the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), since he is serving a prison term pursuant to a judgment of a New Jersey state court and his habeas petition alleged that he is being held in violation of the Constitution of the United States. 28 U.S.C. § 2254.

On July 6, 2018, the district court denied petitioner's petition for a writ of habeas corpus. (Appendix – A) On December 14, 2018, the United States Court of Appeals for the Third Circuit denied petitioner's request for a certificate of appealability. (Appendix - B). A timely petition for rehearing *en banc* was denied by the United States Court of Appeals for the Third Circuit on January 29, 2019, and a copy of the order denying rehearing appears at (Appendix – C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecution, 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; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

United States Constitution, Amendment XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 16, 2005, petitioner asserted his right to self-representation when he declared, "to release my attorney, [because] . . . he's incompetent." (10T 49-5 to 9). On January 3, 2006, defendant again addressed the court directly and explained that he wished to proceed *pro se*. The following occurred on the record:

> [THE DEFENDANT]: Your Honor, under the Sixth Amendment, Article 1, Paragraph 10 of the New Jersey Constitution confers that the right to represent himself in the courtroom, however unschooled in the law or ill suited he was to do so. I believe that is State v. Castafi [sic]. Part of the Sixth Amendment is that the defendant has the right to have his voice heard apart from counsel. And it is the defendant who goes to jail and does the time, not counsel, your Honor.
>
> [THE COURT]: Right. But I'm going to hear from your attorney Mr. Franklin, since you are represented by an attorney. I can't speak personally to you. And I understand about the Sixth Amendment very well.

(11T 14-13 to 15-1).

The following day, counsel for defendant addressed the court and repeated defendant's concerns about representing himself.

> [TRIAL COUNSEL]: Your Honor, there's been recurring issue in these proceedings probably from the status conference but more specifically from the other pre-trial conferences that we have had. There's been a recurring issue with regard to Mr. Franklin, I hesitate to say, representing himself and I would rather couch it in terms of Mr. Franklin's opportunity to speak on his own behalf.

(12T 9-17 to 12-21).

As part of his petition for Post-Conviction Relief (PCR), petitioner contended that he was denied his Sixth Amendment right to represent himself at trial. The PCR court in denying petitioner relief held:

> Petitioner alleges that his constitutional rights were violated when the court denied his right to discharge his attorney and proceed with the trial pro-se. Specifically, because Judge Marmo did not conduct the appropriate colloquy as outlined in Faretta v. California, 422 U.S. 806 (1975). Under Faretta, the Court stated that a defendant "should be made aware of the dangers and disadvantages of

self-representation." Id. at 836. However, there is nothing in Faretta that states a judge **must** allow a defendant to proceed in a pro se manner.

(PCR Court op. at 11). The district court in denying petitioner's habeas relief, erroneously held:

> The state court's application of established federal law was not unreasonable. The state repeatedly mentioned in its oral and written PCR decision that Petitioner's multiple interjections did not amount to a clear, unequivocal request to proceed pro se. See *Brown v. Wainwright,* 665 F.2d 607, 609-10 (5th Cir. 1982)(holding that defendant waived right to self-representation by failing until the third day of trial to renew a pre-trial request to proceed *pro se* and by accepting the services of counsel until that time). Moreover, this Court agrees that Petitioner's statements demonstrate, at best, Petitioner's desire to supplement the record with additional legal arguments and motions. For these reasons, Petitioner's Sixth Amendment rights were not violated and habeas relief is not warranted on this ground.

(Appendix – A; at page 12)

On March 17, 2006, plea negotiations occurred off-the-record. The Prosecutor inquired if defendant was interested in a plea bargain. Defendant requested a plea offer of "time served" for a lesser include offense. (28T 68-24 to 69-28). The State agreed but stated that it would have to confirm the offer with its Superior before such offer could be made, the prosecutor further stated that he would contact petitioner through counsel in one week. (28T 69-9 to 23)

Approximately, one-week later, petitioner called counsel to find out if the plea offer had been confirmed. Counsel informed petitioner that the plea offer had been changed to a 12-year sentence. At that time, defendant declined the plea offer with no further discussion with counsel. (28T 69-24 to 70-7).

At no time during plea negotiations did trial counsel inform defendant of his penal consequences if he was convicted of aggravated manslaughter. Franklin v. Nogan, Appendix – A; at page 18.

On December 7, 2011, an evidentiary hearing was conducted regarding petitioner's contention that counsel was ineffective during plea negotiations, petitioner testified that had plea

counsel correctly advised him during plea negotiations, he would have accepted the State's plea offer. (28T 70-9 to 13).

On December 19, 2011, trial counsel Constantine Loukedis testified regarding this issue as follows:

> [PCR COUNSEL]: And did you discuss the range of penal consequences he faced, the various sentencing scenarios with him?
>
> [LOUKEDIS]: You know, it would be very easy to say I do that with every client. In this particular case [pcr counsel], **I don't believe I ever did tell him the ranges;** except I do have a note that I took that I -- that says if he went to trial, he would be maybe 95 when he got out of prison. Did I communicate that to him? I don't know.
>
> [PCR COUNSEL]: Isn't it your responsibility to do so? Aren't you required to do that?
>
> [LOUKEDIS]: Yeah, I think it would be an obligation on my part to do so. My feeling was throughout this matter representing Mr. Franklin right from the outset -- although this does not relieve me of the responsibility -- it was my feeling that he had no interest whatsoever in a plea-bargain. That does not relieve me of my responsibility of explaining it to him.

(29T 17-13 to 21-15).

On December 21, 2011, in its oral decision, the PCR court concluded that this issue was without merit. The PCR court in its written opinion, reasoned in pertinent part:

> Petitioner alleges that he was not advised of the potential consequences he was facing. He alleges that he was not made aware, until after the trial that he faced an extended term. He alleges that Judge Marmo did not address these issues in a pre-trial conference. However, there is no merit to this claim. Petitioner was advised on the record by Judge Marmo and his trial counsel, during the first trial, of the potential penal consequences. The petitioner was questioned extensively by trial counsel and Judge Marmo regarding the charges he was facing and the fact that he did not want to be tried with lesser-included offenses.

(PCR court's op. at 9).

On July 6, 2018, in affirming the state court's ruling, the district court erroneously held:

> This Court finds that Petitioner has not demonstrated that the state court decision was unreasonable. *Matteo v. Superintendent*, 171 F.3d 877, 891 (3d Cir. 1999). **The record supports Petitioner's submission that he may have not been explicitly informed of his exposure for the aggravated manslaughter charge**. However, the 2003 charge conference, where Petitioner unequivocally rejected any lesser included offenses of murder, prompted the concerned judge to repeatedly stress the consequences of that decision. **While neither the trial judge nor counsel explained Petitioner's potential exposure for every lesser included offense of murder,** they did explain it for a few. The charge conference colloquy establishes that Petitioner understood that his sentence exposure was potentially significant, even if he was not convicted of murder. For example, his counsel explained that he faced up to twenty years of incarceration if he was convicted of the unlawful possession of a weapon certain persons charge. Moreover, the trial court stressed that his prior record would have a significant effect on his sentence even if he were convicted of a lesser included offense. Therefore, Petitioner, who had the benefit of a thorough charge conference before the close of his first trial coupled with the experience of having been convicted of murder and receiving a more severe sentence than the one he now contests, undermines his claim that he was ignorant of his possible sentence exposure if he went to trial a second time.
>
> Even if this Court were to determine that retrial counsel's performance was deficient, the record of the 2003 charge conference and retrial counsel's testimony about Petitioner's resistance to a twelve-year plea offer reflects that Petitioner was aware of his sentence exposure and was not prejudiced by counsel's supposed deficiency. *Afolabi v. United States,* No. 13-3396, 2016 WL 450118 at *7 (D.N.J. Feb. 4, 2016)("Because it is clear from counsel's testimony that Petitioner had no intention of accepting the plea agreement which was offered by the Government, Petitioner is incapable of showing that she was prejudiced by counsel's advice in regards to the plea.")(citations omitted).
>
> Therefore, Petitioner is not entitled to federal habeas relief on this claim.

(Appendix – A; at pages 18-19)

On December 14, 2018, the United States Court of Appeals for Third Circuit denied petitioner's request for a certificate of appealability. (Appendix - B). A timely petition for rehearing en banc was denied by the United States Court of Appeals for the Third Circuit on January 29, 2019, and a copy of the order denying rehearing appears at (Appendix – C)

REASONS FOR GRANTING THE WRIT

POINT I

A PETITION FOR CERTIORARI MUST BE GRANTED BECAUSE THE DISTRICT COURT'S HOLDING THAT PETITIONER'S MULTIPLE INTERJECTION DID NOT AMOUNT TO A CLEAR, UNEQUIVOCAL REQUEST TO PROCEED *PRO SE* -- VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT, TO EQUAL PROTECTION AND DUE PROCESS, REPUDIATES FUNDAMENTAL PRINCIPALS RECOGNIZED BY THIS COURT IN FARETTA V. CALIFORNIA, 422 U.S. 806 (1975), AND ITS PROGENY, AND CONFLICTS WITH THIRD CIRCUIT LAW RECOGNIZING THAT FAILURE TO CONDUCT A FARETTA HEARING RUN AFOUL OF THE SIXTH AMENDMENT GUARANTEE.

A. The Decision of the district court below that Petitioner's multiple interjections did not amount to a clear, unequivocal request to proceed *pro se* is directly contrary to the holding of the Third Circuit Court in Buhl v. Cooksey, 233 F.3d 783 (3d Cir. 2000).

In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court examined the historical underpinnings of the right to self-representation, and ruled that a court cannot "compel a defendant to accept a lawyer he does not want" if he voluntarily and intelligently chooses to represent himself. Id. at 833. This Court also held in McKaskle v. Wiggins, 465 U.S. 168, 176 n. 8 (1984), that, "violations of the right to self-representation constitutes structural error."

The United States Court of Appeals for the Third Circuit has set forth an extensive analysis to determine whether or not a defendant was denied his constitutional right to self-representation in Buhl v. Cooksey, 233 F.3d 783, 791 (3d Cir. 2000). First, the court must determine whether the defendant clearly invoked his right to self-representation. Id. at 792-94. Second, the court must determine whether the defendant timely invoked his right. Id. at 794-98. Next, the court must determine whether the defendant waived his right to self-representation. Id. at 800-803.

In Buhl, the Third Circuit Court of Appeals held that a Sixth Amendment violation had been proven because, "[f]act that defendant who was denied his Sixth Amendment right to represent himself subsequently consented to trial judge's hybrid solution, which allowed

defendant to file his own motions and object to his attorney's actions but denied him right to represent himself at trial, did not constitute "wavier" or "abandonment" of defendant's right of self-representation, because Buhl neither requested this compromise nor withdrew his motion to proceed pro se because of it. Buhl, supra at 801. What the Third Circuit specifically pointed out in Buhl, was that the procedure the [trial] court outlined was inconsistent with the core of the constitutional right that Buhl was attempting to assert:

> "[T]he pro se defendant is entitled to preserve actual control over the case he choose to present to the jury. This is the core of the Faretta right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decision, or to control the questioning of witnesses, or any matter of importance, the Faretta right is eroded."

Id. at 802.

The Court in Buhl specifically addressed whether defendant waived his right to self-representation after his initial request to represent himself was denied by failing to repeat his request and permitting appointed counsel to represent him without demonstrating displeasure. Writing for the Court, however, (then) Circuit Judge McKee noted that, "[b]y failing to repeat his desire to represent himself, petitioner did not vacillate on the issue. He did not abandon his initial request either." Id. at 803. Circuit Judge McKee while distinguishing Buhl's case from Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982)-which the district court's decision rests on here-eloquently stated:

> "To avoid a waiver of a previously-invoked right to self-representation, **a defendant is not required continually to renew a request once it is conclusively denied or to make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal.** Moreover, in Brown, defense counsel represented to the court that he and defendant had resolved their differences. Here, the court's finding of a subsequent wavier by defendant is unsupported by such conduct and statements of the defendant and counsel."

Id. at 803.

As evident from (then) Judge McKee's analysis, the trial court denied Buhl's, Motion to proceed pro se in no uncertain terms. Judge McKee's analysis also recognizes, "[t]he court then offered the aforementioned hybrid procedures which afforded Buhl the right to file motions and object to his attorney's action, but did not permit Buhl to conduct his own defense in front of the jury. The Court's decision in Buhl, citing Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989); United States v. Lorcik, 753 F.2d 1295, 1299 (4th Cir.), cert. denied. 471 U.S. 1107, 105 S. Ct. 2342, 85 L. Ed. 857 (1985); United States v. Baker, 84 F.3d 1263, 1267 (10th Cir. 1996); and Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986), explicitly refuses to accept, for equal protection analysis, that Buhl's conduct was consider vacillation or wavier of his right to self-representation. "The right of self-representation 'would be a weak right indeed' if a defendant needed to 'risk sanctions by the court to [uphold it]." Dorman, 798 F.2d at 1367. Compare, Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982)(en banc) (finding defendant waive right when he change his mind and wanted counsel to continue his representation).

In Buhl the Court concluded:

> "Accordingly, we hold that Buhl did not waive or abandon his Sixth Amendment right of self-representation by "consenting" to the court's suggestion. The hybrid procedure the court afforded Buhl deprived him of the core of his Faretta rights."

Id. at 803.

This case squarely raises the questions addressed by the Third Circuit Court of Appeals in Buhl, i.e.: (1) whether appellant's purported assertion of his right to conduct his own defense triggered an inquiry under Faretta? (2) whether the court's inquiry was adequate? and (3) whether the defendant waived his right to self-representation?

Like Buhl, from the outset Petitioner sought only to proceed to trial with no counsel. At the hearing held on November 16, 2005, appellant stated that he wanted, "to release my attorney, [because] . . . he's incompetent." (10T 49-5 to 9). Compare Buhl: Buhl filed a written motion to dismiss counsel and proceed pro se. In an affidavit accompanying that motion Buhl stated that

he was dissatisfied with his attorney's investigation and that his lawyer was incompetent. See Buhl, Id. at 787.

On January 3, 2006, Petitioner again addressed the court directly and explained that he wished to proceed *pro se*. The following occurred on the record:

> [THE DEFENDANT]: Your Honor, under the Sixth Amendment, Article 1, Paragraph 10 of the New Jersey Constitution confers that the right to represent himself in the courtroom, however unschooled in the law or ill suited he was to do so. I believe that is State v. Castafi[1], [sic]. Part of the Sixth Amendment is that the defendant has the right to have his voice heard apart from counsel. And it is the defendant who goes to jail and does the time, not counsel, your Honor.
>
> [THE COURT]: Right. But I'm going to hear from your attorney Mr. Franklin, since you are represented by an attorney. I can't speak personally to you. And I understand about the Sixth Amendment very well.

(11T 14-13 to 15-1).

Compare Buhl v. Cooksey, 233 F.3d 783 (3d Cir. 2000). On February 25th, 1991, before the court began selecting the jury, Buhl reiterated his desire to conduct his own defense. Specifically, he stated:

> "Under state versus California, I would like to represent myself."

The judge replied: "Your application is again denied. "Id. at 793.

The trial judge's hybrid solution in petitioner's case:

> [TRIAL COUNSEL]: Along the lines of your ruling on certain issues that have been raised by the defense. Your Honor, there's been recurring issue in these proceedings probably from the status conference but more specifically from the other pre-trial conferences that we have had. There's been a recurring issue with regard to Mr. Franklin, I hesitate to say, representing himself and I would rather couch it in terms of Mr. Franklin's opportunity to speak on his own behalf. **Your**

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[1] The searching inquiry required by State v. Crisafi, 128 N.J. 499 (1992), is based on the standard set forth by the Supreme Court of the United States in Faretta, and other cases. For instance, the Crisafi court stated that on-the-record inquiry should make the defendant "'aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'" Crisafi, 128 N.J. at 510 (quoting Faretta, 422 U.S. at 835).

Honor has ruled more than once that Mr. Franklin is not be heard, that Mr. Franklin is to confer with me and I should make any arguments on his behalf. I understand that ruling and Mr. Franklin understands it.

(12T 9-17 to 10-6).

Compare Buhl:

> THE COURT: . . . [m]y feeling is to allow you to put on the record what you say represents incompetency of counsel, put it all on.
> My inclination also is to say to you is during the course of this trial if you feel that your lawyer should be doing something that he is not doing, right?
>
> BUHL: Yes, sir.
>
> * * * * * *
>
> THE COURT: We can do that during the beginning of the trial so everything that happens in the past you can lay out and make a record of it . . . before we start the trial. And if anything comes up during the trial, get a message to me through your attorney. Say look I want to talk to you. Id. at 801.

Here, no Faretta hearing was ever held in any State court, indeed the PCR court admitted at the hearing on petitioner's petition for Post-Conviction Relief that, "judge Marmo did not conduct the appropriate colloquy as outlined in Faretta v. California, 422 U.S. 806 (1975). Like Buhl, Petitioner did not request hybrid representation. Rather, from the outset Petitioner sought only to proceed to trial with no counsel. Thus, Petitioner never consented to counsel's representation, nor waived or abandon his right to self-representation.

In its conflicting and unprecedented decision, the district court erroneously held that, "Petitioner's statement demonstrate, at best, Petitioner's desire to supplement the record with additional legal arguments and motions." (Appendix – A; at page 12). A Panel on the Third Circuit Court of Appeals, in denying Petitioner's request for a certificate of appealability, agreed. "For substantially the reasons given by the District Court." (Appendix –B).

The district court's decision, besides being conflicting because the principal it adopts, it is also conflicting because of its willingness to ignore the record on Post-Conviction Relief in order to arrive at its desired result. For example, when it came to applying the unreasonable application of clearly established federal law, the district court ignored findings made by the PCR

court that, "there's nothing in Faretta, that states a judge **must** allow a defendant to proceed in a pro se manner." The district court erred in failing to apply the teachings in Faretta that held, "although a defendant may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." Id. 422 U.S. at 834.

Because there was no Faretta hearing in State court, there could not have been any State court findings of fact that were entitled to a presumption of correctness. Not only was the State court's failure to conduct a Faretta hearing contrary to clearly established federal law, but also the PCR court's conclusions were an unreasonable application clearly established federal law. Again, this is an area where the district court decision sadly misstates the record. The district court, rather than acknowledging directly that the State court failure to conduct a Faretta hearing and decision that "there's nothing in Faretta, that states a judge **must** allow a defendant to proceed in a *pro se* manner," was wrong.

Because the district court's incorrectly applied clearly established federal law, the order denying habeas corpus relief to Petitioner is grossly in error. In reaching the conclusion that it did, the district court has violated Petitioner's constitutional rights to self-representation, it has threatened the constitutional rights of future defendants requesting to proceed pro se.

B. Importance of the Question Presented

This case presents a fundamental question of the interpretation of this Court's decision in Faretta v. California, 422 U.S. 806 (1975). The question presented is of great public importance because it affects criminal defendants Sixth Amendment right to self-representation in all fifty states, and hundreds of defendants awaiting criminal trials requesting to proceed *pro se*. In view of the lower court's failure to conduct a Faretta hearing, guidance on the question is also of great importance to the judiciary. In addition, the question is of great importance to similarly suited defendants, because it affects their ability to receive fair decisions, equal protection and to due process of the law.

The issue's importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted Faretta. This Court held in Faretta that "a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he insists that he wants to conduct his own defense." The Court reiterated this point in McKaskle v. Wiggins, 465 U.S. 168 (1984), and added that, "[t]he defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." Id. at 465 U.S. 179.

The common sense understanding of proceeding *pro se* is "to make one's own defense personally" is necessarily implied by the structure of the Sixth Amendment, and nothing in Faretta and McKaskle suggest otherwise. The Third Circuit acknowledged in Buhl, the procedure the [trial] court outlined was inconsistent with the core of the constitutional right that Buhl was attempting to assert:

> "[T]he pro se defendant is entitled to preserve actual control over the case he choose to present to the jury. This is the core of the Faretta right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decision, or to control the questioning of witnesses, or any matter of importance, the Faretta right is eroded."

Id. at 802.

Here, the district court's reasoning that Petitioner's multiple interjections did not amount to a clear, unequivocal request to proceed *pro se* is unconvincing. The district court relied on a case from the Fifth Circuit where a finding of a waiver was supported by counsel's statement to the trial court that "he and the defendant had worked out their differences." Counsel in Brown also stated that defendant informed him he had changed his mind and wanted counsel to continue his representation. See Brown v. Wainwright, 665 F.2d 607, 611 (5th Cir. 1982). No such claim was alleged in this case. Faretta held that "a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he insists that he wants to conduct his own defense."

The district court seriously misinterpreted Faretta by failing to distinguish between a defendant asserting his right to self-representation against a defendant waiving his right to self-representation. This Court should correct that misinterpretation and make it clear that "the state may not force a lawyer upon a criminal defendant when he insists that he wants to conduct his own defense."

For the foregoing reason, certiorari should be granted in this case.

POINT II

CERTIORARI MUST BE GRANTED BECAUSE THE DISTRICT COURT'S DECISION VIOLATES PETITIONER'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS OF LAW AS RECOGNIZED BY THE UNITED STATES SUPREME COURT IN LAFLER V. COOPER, 566 U.S. 156 (2012), AND ITS PROGENY.

Petitioner received ineffective assistance of counsel during the plea process, because his counsel did not advise him of the penal consequences of aggravated manslaughter before he rejected the State's 12-year plea offer.

On March 17, 2006, plea negotiations occurred off-the-record. The Prosecutor inquired if defendant was interested in a plea bargain. Defendant requested a plea offer of "time served" for a lesser include offense. (28T 68-24 to 69-28). The State agreed but stated that he would have to confirm the offer with his Superior before such offer could be made, the prosecutor further stated that he would contact petitioner through counsel in one week. (28T 69-9 to 23)

Approximately, one-week later, petitioner called counsel to find out if the plea offer had been confirmed. Counsel informed petitioner that the plea offer had been changed to a 12-year sentence. At that time, defendant declined the plea offer with no further discussion with counsel. (28T 69-24 to 70-7). At no time during plea negotiations did trial counsel inform defendant of his penal consequences if he was convicted of aggravated manslaughter. Franklin v. Nogan, Appendix – A; at 18.

The Sixth Amendment's guarantee of effective counsel extends to plea bargaining, Lafler v. Cooper, 566 U.S. 156 (2012), including to plea offers that were rejected, Missouri v. Frye, 566 U.S. 133 (2012). Claims of ineffective assistance during plea-bargaining are analyzed under the familiar two-part Strickland standard, requiring performance below an objective standard of reasonableness and prejudice. Lafler, at 162-63.

To effectively assist their clients in the plea bargaining process, counsel must provide defendants facing a potential guilty plea "enough information 'to make a reasonably informed decision whether to accept a plea offer.'" United States v. Bui, 795 F.3d at 367 (3d Cir. 2014)(quoting Shotts v. Wetzel, 724 F.3d 364, 376 (3d Cir. 2013)). "Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). This obligates counsel not only to communicate the statutory maximums and minimums, but also requires counsel "to know the Guidelines." Bui, 795 F.3d at 367(quoting United States v. Smack, 347 F.3d 533, 538 (3d Cir. 2003).

On December 7, 2011, an evidentiary hearing was conducted regarding petitioner's contention that counsel was ineffective during plea negotiations, petitioner testified that had plea counsel correctly advised him during plea negotiations, he would have accepted the State's plea offer. (28T 70-9 to 13).

On December 19, 2011, trial counsel Constantine Loukedis testified regarding this issue as follows:

> [PCR COUNSEL]: And did you discuss the range of penal consequences he faced, the various sentencing scenarios with him?
>
> [PLEA COUNSEL]: You know, it would be very easy to say I do that with every client. In this particular case [pcr counsel], I don't believe I ever did tell him the ranges; except I do have a note that I took that I -- that says if he went to trial, he would be maybe 95 when he got out of prison. Did I communicate that to him? I don't know.
>
> [PCR COUNSEL]: Isn't it your responsibility to do so? Aren't you required to do that?
>
> [PLEA COUNSEL]: Yeah, I think it would be an obligation on my part to do so. My feeling was throughout this matter representing Mr. Franklin right from the outset -- although this does not relieve me of the responsibility -- it was my

> feeling that he had no interest whatsoever in a plea-bargain. That does not relieve me of my responsibility of explaining it to him.

(29T 17-13 to 21-15).

On December 21, 2011, in its oral decision, the PCR court concluded that this issue was without merit. The PCR court in its written opinion, reasoned in pertinent part:

> Petitioner alleges that he was not advised of the potential consequences he was facing. He alleges that he was not made aware, until after the trial that he faced an extended term. He alleges that Judge Marmo did not address these issues in a pre-trial conference. However, there is no merit to this claim. Petitioner was advised on the record by Judge Marmo and his trial counsel, during the first trial, of the potential penal consequences. The petitioner was questioned extensively by trial counsel and Judge Marmo regarding the charges he was facing and the fact that he did not want to be tried with lesser-included offenses.

(PCR Court's op. at 9)

The district court agreed "[t]he record supports petitioner's submission that he may not have been explicitly informed of his sentence exposure for the aggravated manslaughter charge." Franklin v. Nogan, Appendix – A; at 18. But nonetheless concluded that trial counsel's deficient performance did not prejudice petitioner. Franklin v. Nogan, Appendix – A; at 19.

In Lafler v. Cooper, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012), this Court held that when a defendant asserts he or she was prejudiced by pleading not guilty and having to stand trial due to his counsel's ineffective assistance, he or she must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Id. accord Wheeler v. Rozum, 410 F. App'x 453, 458 (3d Cir. 2010); United States v. Day, 969 F.2d 39, 45 (3d Cir. 1992).

Under this standard, petitioner's allegations-if taken as true-would mean that counsel's performance was deficient. Petitioner contends-and the District Court agreed-that plea counsel refused entirely to communicate his likely exposure and thereby denied him the information he needed to make an informed decision whether to accept the plea deal.

The district court wrongly concluded that petitioner was not prejudice by counsel's performance. Franklin v. Nogan, Appendix – A; at 19. In this context, to show prejudice, a defendant must show a "reasonable probability" that he would have accepted the favorable offer but for the ineffective advice of his counsel, that the trial court would have accepted the plea, and that "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler, 566 U.S. at 164.

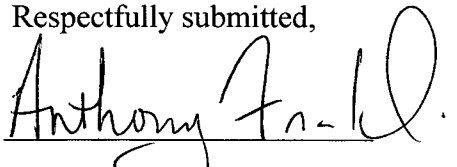
Petitioner testified at an evidentiary hearing that he would have absolutely accepted the State's plea offer had he had correct advice; there is no indication in the record that the court would not have accepted the plea, and it is clear that petitioner's ultimate 55-year sentence was more severe than the 12-year plea offer he rejected.

Like the defendant in Lafler, petitioner has proven that he was prejudice due to counsel's ineffective assistance. Accordingly, this Court should grant petitioner's request for a writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Dated: March 21, 2019

Anthony Franklin