No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD KENNETH DJERF,
Petitioner,

vs.

DAVID SHINN,
Director of the Arizona Department of Corrections, et al.,
Respondents.

****CAPITAL CASE****

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

PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTION PRESENTED

In a state capital murder case, the state prosecutor and trial court recognized on the record that trial counsel were not properly investigating and preparing the case for trial. Despite this, and in the face of notice from Mr. Djerf that he wanted to proceed *pro se* because his trial counsel were not properly preparing his case for trial and had not met with Mr. Djerf to discuss his case for approximately seven months, the trial court informed him during the waiver of counsel colloquy that he could proceed to trial with the same incompetent counsel who currently represented him or he could proceed to trial *pro se*. The trial court did not inform Mr. Djerf that he had a right to be represented by constitutionally adequate counsel at trial, nor did it properly inquire into Mr. Djerf's reasons for waiving counsel to ensure that he was not being forced to choose between incompetent counsel and proceeding *pro se*.

The question presented is:

> Did the panel of the Ninth Circuit Court of Appeals contravene this Court's precedents and create a split with other circuits when it affirmed the district court's decision that a trial court is not required to inquire, in a waiver of counsel colloquy, whether a defendant is being forced to choose between incompetent counsel and proceeding *pro se* when there is ample evidence in the record suggesting so?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

RELATED PROCEEDINGS

Minute Entry: Waiver of Counsel, *State v. Djerf*, CR-93-07792 (Maricopa Cty. Super. Ct. Feb. 23, 1995), ROA 119

Minute Entry: Plea, *State v. Djerf*, CR 93-07792 (Maricopa Cty. Super. Ct. Aug. 16, 1995), ROA 194

Special Verdict, *State v. Djerf*, CR 93-07792 (Maricopa Cty. Super. Ct. May 22, 1996), ROA 274

Minute Entry: Sentencing, *State v. Djerf*, CR 93-07792 (Maricopa Cty. Super. Ct. May 22, 1996), ROA 276

Opinion: Convictions and Sentences Affirmed, *State v. Djerf*, CR-96-0296-AP (Ariz. May 21, 1998), Doc. 31

Order: Petition for a Writ of Certiorari Denied, *Djerf v. Arizona*, 98-6277 (Nov. 30, 1998)

Minute Entry: Post-Conviction Relief Denied, *State v. Djerf*, CR 93-07792 (Maricopa Cty. Super. Ct. June 14, 2001)

Order: Petition for Review Denied, *State v. Djerf*, CR-01-0293-PC (Ariz. Feb. 12, 2002), Doc. 6

Memorandum of Decision and Order: Amended Petition for Writ of Habeas Corpus Denied, *Djerf v. Schriro*, 02-cv-00358-PHX-JAT (D. Ariz. Sept. 30, 2008), ECF No. 95

Judgment, *Djerf v. Schriro*, 02-cv-00358-PHX-JAT (D. Ariz. Sept. 30, 2008), ECF No. 96

Minute Entry: Successive Notice of Post-Conviction Relief Dismissed, *State v. Djerf*, CR 93-07792 (Maricopa Cty. Super. Ct. Apr. 3, 2009)

Order: Petition for Review Denied, *State v. Djerf*, CR-09-0116-PC (Ariz. Sept. 22, 2009), Doc. 9

Order: Motion for Limited Remand Granted, *Djerf v. Ryan*, 08-99027 (9th Cir. Aug. 19, 2014), ECF No. 62

Order: Remanded Claims Denied, *Djerf v. Ryan*, 02-cv-00358-PHX-JAT (D. Ariz. Apr. 4, 2017), ECF No. 128

Opinion: District Court's Denial of Federal Habeas Petition Affirmed, *Djerf v. Ryan*, 08-99027 (9th Cir. July 24, 2019), ECF No. 122-1

Order: Petition for Panel Rehearing and for Rehearing En Banc Denied, *Djerf v. Ryan*, 08-99027 (9th Cir. Oct. 2, 2019), ECF No. 128

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Kenneth Djerf respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the denial of his petition for writ of habeas corpus in this death penalty case, and specifically denying Mr. Djerf's claim that his waiver of counsel was invalid because he was forced to choose between being represented by incompetent counsel or proceeding *pro se*.

OPINIONS BELOW

The order of the Ninth Circuit denying panel rehearing and suggestion for rehearing en banc is attached hereto as Appendix A. The panel opinion of the Ninth Circuit denying relief is reported at *Djerf v. Ryan*, 931 F.3d 870 (9th Cir. 2019). A copy of this opinion is attached hereto as Appendix B. The memorandum of decision and order of the district court denying Mr. Djerf's federal habeas petition is reported at 2008 U.S. Dist. LEXIS 89565, and is attached hereto as Appendix C. The opinion of the Arizona Supreme Court affirming Mr. Djerf's conviction is reported at *State v. Djerf*, 959 P.2d 1274 (Ariz. 1998), and is attached hereto as Appendix D.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition is timely filed. A panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of Mr. Djerf's petition for writ of habeas corpus in an opinion dated July 24, 2019, and denied Mr. Djerf's petition for panel rehearing

and suggestion for rehearing en banc in an order dated October 2, 2019. On December 19, 2019, Justice Kagan extended the time within which to file this petition for writ of certiorari to and including February 28, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments, and is governed by the Antiterrorism and Effective Death Penalty Act of 1996, codified in relevant part at 28 U.S.C. § 2254.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . 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." U.S. Const. amend. XIV.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) provides:

> 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

This is a capital case. After waiving representation by court-appointed counsel, due to counsel's failure to properly investigate and prepare his case for trial, Mr. Djerf self-negotiated a guilty plea to four counts of first-degree murder without an agreement to remove the death penalty as a sentencing option, and was sentenced to death in the Maricopa County Superior Court in May of 1996.

The Waiver of Counsel

A grand jury indicted Mr. Djerf on eighteen criminal counts, including four counts of first-degree murder arising from the homicides of Albert Luna, Sr., his wife Patricia, and their children, Rochelle and Damien, in their Phoenix home. (ER 211.) Following the withdrawal of the public defender's office due to a conflict of interest, the court appointed attorneys Michael Vaughn and Alan Simpson. (ER 519.)

Given the gravity of the charges against Mr. Djerf and the prosecution's intent to seek the death penalty against him, the months immediately following his indictment were crucial to the investigation and preparation of Mr. Djerf's case for trial. Counsel's obligations were heightened, however, by Mr. Djerf's emotional fragility. Mr. Djerf's mental health declined significantly following his arrest and he was transferred to the jail's psychiatric unit in October 1993 after attempting suicide by slitting his wrists. (ER 245, 323, 460.)

Despite this, in the fifteen months that Vaughn and Simpson represented Mr. Djerf prior to his waiver of counsel, they did little for him that bore resemblance to adequate legal representation. From December 1993 through February 1995, they requested fourteen continuances because they had not begun investigation or preparation of the case for trial, were in trial in other courtrooms for other clients, were unable to work at all due to serious health issues or illness, or were on vacation. (ER 470, 473-474, 478, 483, 487, 489, 492-493, 497, 502, 505, 508-509, 511-512, 514, 516.) Between July 1994 and February 1995, a period of approximately seven months, lead counsel Vaughn failed to visit Mr. Djerf at the jail or otherwise inform him of the progress of his case.[1] (ER 405.) Both attorneys failed to return Mr. Djerf's telephone calls or answer his letters inquiring about the status of his case. Mr. Djerf had no information about any aspect of his case: he was unaware of the state of investigation, the prosecution's evidence against him, what defense theories would be put forth at trial, or whether counsel had developed any mitigation themes for sentencing. (ER 396-404.)

In August 1994, although defense counsel had been appointed to the case for close to one year, all parties acknowledged during a status conference that the defense was not ready for trial. Vaughn told the court that a trial date in September 1994 was "not realistic." (ER 492.) He explained that he needed a continuance because "there

[1] The record reflects that Simpson had not visited Mr. Djerf for three months preceding his February 1995 motion for change of counsel. (ER 405.)

are several witnesses, not the least of which are several experts, that still need to be interviewed . . . ." (ER 493.) The prosecutor informed the court that "essential witnesses have not been interviewed" and "essential materials have not been gathered at this point by the defense." (ER 494.) The prosecutor also noted that there was "a tremendous amount of evidence [still] to be reviewed [by the defense]." (ER 494.) Notably, the trial court, itself, acknowledged counsel's lack of preparation the previous summer and observed that if it forced counsel to proceed to trial in September 1994, "any conviction, if there is one . . . would [not] survive an appeal." (ER 495.)

It was in this context that Mr. Djerf sought to remove Vaughn and Simpson as his counsel and proceed *pro se*. In a February 1995 letter to the trial court, Mr. Djerf informed the court that he did not believe his counsel were properly representing him. (ER 464.) Specifically, he stated that he had barely spoken to counsel since July 1994, and that, although his trial was scheduled to commence in only two weeks, he had absolutely no idea what his attorneys' trial strategy would be. (ER 464.)

Mr. Djerf's letter to the court read:

> The reason that I am writing this letter is because I want it on the record that I don't believe that I am being properly represented by my defense councel [sic] of Michael Vaughn and co-councel [sic] Alan Simpson.
>
> Since July the only time Vaughn and I have talked is, briefly, over the phone and at court. The last few times I've been to court, he's been more interested in talking with the prosecuter [sic], than with myself.

> I've made my feelings known to Vaughn and Simpson, in letters (copies attached) mailed from the jail, on January 20, 1995, and still I wait!
>
> My trial is scheduled to start March 1st, 14 days untill [sic] my life goes on trial. 14 days and I haven't the faintest idea what route Vaughn and Simpson plan, for my defense. Apparently anything I may have of help with my defense, isn't important or just doesn't matter. They haven't asked me anything, concerning the case, so, apparently, everything they've learned from interviewing the witness' [sic], must have satisfied them, [illegible] is not acceptable!
>
> This is a capitol [sic] case, which directly involves me and the DEATH PENALTY, therefore, I believe, I should be completely involved, in all aspects, of this matter.
>
> I will no longer sit back and allow anybody to do as they please with my life, and that includes my defense councel [sic]!
>
> Thank you, for taking the time, to listen, to my problem.
>
> Sincerely,
>
> Richard K. Djerf

(ER 464-465.)

The day after writing this letter, Mr. Djerf filed a *pro se* "Motion for Change of Counsel." (ER 471.) The pre-printed motion required Mr. Djerf to write in the name or names of the counsel he wished withdrawn and the name of the "attorney" he wished to have substituted as his counsel. (ER 471.) Given that the public defender's office was conflicted off of his case (ER 519), and because he presumably was unfamiliar with any other attorneys whom the court could appoint, Mr. Djerf wrote

his own name in as substitute counsel.[2] (ER 471.)

At the hearing on Mr. Djerf's motion to remove Vaughn and Simpson, the trial court conducted a routine waiver of counsel colloquy, asking Mr. Djerf his age, educational level, whether he had consumed any drugs or alcohol in the past twenty-four hours, and whether he was currently receiving psychiatric or medical care. (ER 190-192.) The court also informed Mr. Djerf of the charges against him and the possible penalties. (ER 194-199.) While the court was aware that Vaughn and Simpson had not met with Mr. Djerf in several months, the court asked counsel if they had any concerns with respect to Mr. Djerf's competency. (ER 192.) Both counsel said they did not. (ER 192-193.) The court then informed Mr. Djerf of the dangers of self-representation, and asked if he wanted to proceed despite these requirements. (ER 193.) He did. (ER 193.)

At the time of the colloquy, the court was aware of Mr. Djerf's concerns about Vaughn and Simpson because it was in possession of the letter from Mr. Djerf. (ER 464-465.) The court was also aware of the deficiencies in trial counsel's investigation and preparation for trial because it noted these deficiencies on the record in August of 1994. (ER 495.) However, rather than informing Mr. Djerf that in proceeding with the waiver he was giving up his right to be represented by constitutionally effective counsel, the court asked Mr. Djerf, "Do you understand, sir, that you are telling me

[2] Mr. Djerf later explained his request to proceed *pro se* in a letter to Vaughn, stating, "I didn't want to proceed pro-per but I felt I had no choice." (ER 409.)

that you want to give up your right to have Mr. Vaughn and Mr. Simpson, who are two extremely experienced attorneys, represent you and that you want to represent yourself . . . .?" (ER 193.) The court then asked Mr. Djerf, "Why don't you briefly tell me why you want to do this." (ER 199.) Mr. Djerf again informed the court that Vaughn and Simpson had not been communicating with him and had not been advising him of developments in the case. (ER 199.) Mr. Djerf concluded, "So I just assume I can do this myself." (ER 199.)

Despite knowing about counsel's lack of diligence in preparing the case for trial and counsel's failure to keep Mr. Djerf informed about the progress of his case, the court chided Mr. Djerf for his concerns, telling him that his attorneys were "doing a lot of work" on the case, and that to have his attorneys "run down to the county jail every night and tell [him] what they have done [was] not a very good use of their time." (ER 199-200.) When Mr. Djerf responded that Vaughn had not been to the jail to see him in seven months, the trial court cut him off: "Well, you may not be happy with the number of times they come down and see you, but I want to tell you that I have been monitoring this case. They have been advising me of what they have been doing, and they have been doing a lot of work on your behalf." (ER 200.)

The trial court then found that Mr. Djerf had "knowingly, intelligently and voluntarily" waived his right to counsel, and that the waiver was "not the result of any force, threats, promises or coercion." (ER 206-207.) Then, despite being aware of the complete breakdown of the attorney-client relationship between Mr. Djerf and his

attorneys, the court appointed Vaughn and Simpson as advisory counsel. (ER 207.)

Although the trial court unquestioningly accepted Mr. Djerf's waiver of his constitutional right to counsel in a complex capital case, the prosecution, to its credit, recognized that his decision to proceed *pro se*, coupled with his previous suicide attempt, suggested that Mr. Djerf might not be competent to make such a serious – and potentially disastrous – decision. The prosecution asked that Mr. Djerf's competency be evaluated, noting that his "decision to represent himself in the face of highly technical, complex evidence which will be elicited from expert witnesses does not appear to be logical or well founded." (ER 459.)

In response to the prosecution's request, the trial court ordered only that a "prescreening" report be prepared to determine whether a complete competency determination was warranted. (ER 458.) The court further ordered counsel to provide the psychiatrist assigned to prepare the report with copies of police reports, previous mental health reports, and any other appropriate material for the prescreening examination, and it scheduled a hearing to consider the prescreening report and determine whether a more thorough mental health evaluation was warranted. (ER 458.) Four days before the scheduled hearing, however, Dr. Jack Potts, the psychiatrist assigned to conduct the prescreening evaluation, informed the court that, despite his requests and the court's previous order, Vaughn and Simpson had failed to provide him with any information concerning Mr. Djerf. (ER 457.) Potts requested additional time to complete the prescreening report, stating in his letter, "I ask

defense counsel to provide me with all mental health evaluations that were conducted on Mr. Djerf. This is an important case and the more information I have, the better prepared I will be to form an accurate opinion." (ER 457.)

In his subsequent report, Potts informed the court that he had "briefly discussed the case" with Simpson and from that discussion understood that Vaughn and Simpson "do not have any doubts regarding the defendant's present competency to continue with the legal proceedings against him or to enter a plea of guilty if he should wish to do so." (ER 454, 455.) Potts concluded, "*There is no evidence provided* that would preclude [Djerf] from exercising his constitutional right" to represent himself. (ER 456 (emphasis added).) He repeated, "No information that I have reviewed or that has been provided to me would, I believe, rise to a level of precluding the defendant's Pro Per status." (ER 456.) Potts noted, however, that due to Mr. Djerf's "past proclivity towards depressive reactions," the court and counsel would need to monitor him to determine whether he was "effectively continuing with his Pro Per status." (ER 456.) Potts concluded, "This does not mean that I believe that what Mr. Djerf is doing is a wise or intelligent choice. It is a competent one." (ER 456.)

Relying on Potts's prescreening report, and making no note of the doctor's evident concern about the limits of the information provided to him by Mr. Djerf's counsel, the trial court promptly found no reasonable grounds to order a full mental health or competency evaluation. (ER 449, 452-453.) Therefore, the trial court, once again, ignored trial counsel's inadequacies and allowed its acceptance of the waiver

of counsel to stand.

In the months following the trial court's decision to permit him to proceed without counsel, Mr. Djerf "on more than one occasion" expressed to his then-advisory counsel, Vaughn and Simpson, his desire to negotiate a plea agreement for a life sentence. (ER 410, 430.) Mr. Djerf explained that he wanted to negotiate a plea because he "was afraid of going to trial." (ER 410.) At one point, he telephoned both Vaughn and Simpson to schedule a meeting to discuss the possibility of a plea agreement. (ER 430.) As Mr. Djerf later recounted, "I was informed that [Vaughn and Simpson] would be down, to the jail, by the end of the week so that we could discuss this matter." (ER 430.) Despite these assurances, however, neither attorney contacted him. (ER 430.)

Without Vaughn and Simpson's assistance, Mr. Djerf eventually contacted the lead prosecutor on his own about negotiating a plea deal. (ER 421.) In his letter to the prosecutor, Mr. Djerf stated it was "a weak attempt at negotiating a plea agreement allowing me to avoid the death penalty" and admitted he had "nothing at all to offer the state, other than my willingness to accept the maximum sentences on all counts . . . ." (ER 421.) Mr. Djerf explained that pleading guilty would provide closure to the families of the victims. (ER 421.) The prosecutor informed Mr. Djerf that "[t]he State refuses to relinquish its request for the death penalty." (ER 423.) Therefore, the only plea deal the State would offer involved dropping the non-murder charges; Mr. Djerf would then plead guilty to four counts of first-degree murder with

the understanding "that the State will present an aggravation hearing in an attempt to obtain the death penalty." (ER 423.)

Mr. Djerf immediately contacted Vaughn, asking him to meet with him to discuss the prosecution's proposal and informing him that he was considering accepting the plea. (ER 411.) Only then did Vaughn meet with Mr. Djerf—for approximately fifteen minutes. (ER 411-412.) Remarkably, however, he apparently expressed no trepidation over Mr. Djerf's consideration of the prosecution's offer. (ER 412.) Several days later, Vaughn returned to the jail, bringing the plea agreement for Mr. Djerf's signature, but again expressed no reservations about Mr. Djerf's decision to enter into the plea. (ER 412.) Immediately prior to his change of plea hearing, Mr. Djerf again met with Vaughn in a holding room adjacent to the courtroom. (ER 401-402.) During this third meeting, Vaughn again expressed no concerns or reservations to Mr. Djerf regarding his decision to plead guilty. (ER 402.)

During Mr. Djerf's change of plea hearing, and only *after* Mr. Djerf admitted his guilt to the four murders, the trial court asked Vaughn if he had "any concerns." (ER 186.) For the first time, Vaughn responded that he had "concerns about the propriety" and "wisdom" of what Mr. Djerf was doing, but did not elaborate on those concerns. (ER 186-187.) Furthermore, although Vaughn had seen no reason to advise Mr. Djerf against pleading guilty to four death-eligible charges *before* Mr. Djerf pleaded guilty, following the hearing he was quick to inform a reporter that the plea was "not a good idea," and that he had "tried to dissuade Djerf from entering the plea

deal." (ER 426.) Vaughn, however, gave another reporter a conflicting (and legally inaccurate) account of his role in Mr. Djerf's guilty pleas, stating, "It was never my recommendation to do this, . . . [b]ut by law, I can't give him advice without his asking for my advice." (ER 425.)

Without dwelling on Vaughn's concerns, the trial court accepted Mr. Djerf's guilty pleas to four counts of first-degree murder. (ER 187.) After pleading guilty, and despite losing trust in Vaughn and Simpson (ER 390-391), and seeking to have them removed as advisory counsel in favor of "effective representation" (ER 396-404), Mr. Djerf withdrew his waiver of counsel in the sentencing phase and agreed to have Vaughn and Simpson represent him (ER 380, 383).

Over the course of five days in October 1995, the prosecution presented its aggravation case. After a four-month continuance, Vaughn and Simpson presented Mr. Djerf's mitigation case on February 9, 1996. Mr. Djerf's lead counsel, Vaughn, was not present that day, however, because he "had to attend to matters in another court." (ER 313.) Simpson presented only two witnesses, a jail guard and counsel's investigator, Art Hanratty. (ER 314, 338.) Following this minimal presentation of mitigation, Vaughn and Simpson received four additional continuances to investigate Mr. Djerf's mental health (ER 299-302, 305-308, 310-311, 372-375), but ultimately only presented an additional jail guard as a witness, (ER 289-291).

Simpson eventually submitted a six-page sentencing memorandum on Mr. Djerf's behalf, only two pages of which addressed mitigating circumstances. (ER 292-

297.) In contrast, the prosecution submitted a fifty-six-page memorandum addressing aggravating factors and a supplemental eleven-page memorandum refuting the minimal mitigating evidence presented on Mr. Djerf's behalf. (SER 111-166, 167-177.) The trial court returned its special sentencing verdict on May 22, 1996 (ER 141), finding four statutory aggravating factors and no mitigating circumstances whatsoever. (ER 155-160.) The trial court imposed four death sentences. (ER 160-161.)

The Direct Appeal & State Post-Conviction Proceedings

The Arizona Supreme Court denied relief on this claim and affirmed Mr. Djerf's convictions and sentences. App. 81a-114a. The court applied the standard under *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that any waiver of the right to counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." App. 90a (quoting *Edwards*, 451 U.S. at 482). However, the court limited its review of the facts and circumstances to those within the waiver of counsel colloquy, rather than considering the entire pretrial record leading up to the hearing on the waiver of counsel. The court found that "the trial court fully informed the defendant of *his right to counsel*, the minimum, maximum, and presumptive sentences, the dangers of self-representation, and the difficulties involved in defending oneself without formal legal training." App.

92a (emphasis added). The court also found that defense counsel informed the court that they believed their client was competent, and that the trial court had found that despite Mr. Djerf's concerns, "his attorneys had been fully engaged, working on his behalf." App. 92a. The court did not, however, consider Mr. Djerf's allegations that his counsel were not properly representing him, nor did the court consider the pretrial record which is replete with evidence that counsel were not performing competently in their preparation for trial.

On February 29, 2000, the Arizona Supreme Court appointed Jamie McAlister to represent Mr. Djerf in his post-conviction proceedings. (ER 287.) On November 16, 2000, McAlister filed an amended petition for post-conviction relief that raised four issues: (1) ineffective assistance of appellate counsel; (2) ineffective assistance of sentencing counsel; (3) whether a jury was required to weigh the aggravating and mitigating factors at sentencing; and (4) the unconstitutionality of the Arizona death-penalty scheme. (ER 92-95.) Within the ineffective assistance of appellate counsel issue, McAlister alleged that appellate counsel should have challenged the trial court's inquiry into Mr. Djerf's reasons for waiving counsel, which the post-conviction court found had already been raised and denied on direct appeal. (ER 92.) The post-conviction court found the remaining issues precluded or not colorable and dismissed Mr. Djerf's amended petition for post-conviction relief on June 14, 2001. (ER 93-95.) The Arizona Supreme Court declined to review the case. (ER 90.)

Federal Court Review

The federal district court rejected Mr. Djerf's claim that his waiver of counsel was invalid because he was "forced to choose between incompetent counsel and proceeding *pro se*." App. 46a. The district court did not consider trial counsel's pretrial performance as part of the inquiry because it found that "this case is controlled by *Faretta*[3] and *Edwards*, not *Strickland*."[4] App. 47a. The district court found that "[i]n neither *Faretta* nor *Edwards* did the Supreme Court ever require or indicate that before a trial court may accept a waiver of counsel . . . it must initiate or conduct an inquiry sufficient to determine whether defendant is alleging that he is being forced to choose between incompetent counsel and proceeding *pro se*." App. 47a. The district court also found that despite Mr. Djerf's claim that counsel were performing incompetently, in reviewing the two hearings on the waiver of counsel, "the factual record and the comments from the trial judge demonstrate that [Mr. Djerf's] counsel were diligently preparing for his trial." App. 48a (citing SER 307-325, 326-347).

A panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's rejection of this claim. App. 15a. However, the panel conducted no analysis addressing the waiver of counsel, and, instead, shifted the analysis and found that under *Strickland* trial counsel's overall performance, both before and after Mr. Djerf's waiver of counsel, was not deficient. App. 13a-15a. Having determined

[3] *Faretta v. California*, 422 U.S. 806 (1975).
[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

that counsel's overall performance was not ineffective under the *Strickland* standard, the panel held that not only did Mr. Djerf's claim that he was forced to choose between representing himself or being represented by incompetent counsel fail, but also his claim that the trial court erred when it failed to inquire into Mr. Djerf's concerns about trial counsel's performance prior to accepting his waiver of counsel. App. 15a. In affirming the district court's decision, the panel improperly relied on the district court's misapplication of the constitutional standard for the waiver of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The panel later denied Mr. Djerf's petition for panel rehearing and suggestion for rehearing en banc in an order issued on October 2, 2019. App. 1a.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because the United States Court of Appeals for the Ninth Circuit Misapplied the Constitutional Standard for Determining Whether a Waiver of Counsel Has Been Validly Entered, Which Contravenes This Court's Precedents and Creates a Split With Other Circuits.

A. The Ninth Circuit panel opinion conflicts with relevant decisions of this Court.

In affirming the district court's decision, the Ninth Circuit panel relied on the district court's misapplication of the constitutional standard for the waiver of counsel. The district court determined that *Faretta* and *Edwards* do not require a court to "conduct an inquiry sufficient to determine whether defendant is alleging that he is being forced to choose between incompetent counsel and proceeding *pro se*" before accepting a waiver of counsel. App. 47a. Instead, the district court held that *Faretta*

and *Edwards* only require a "probing and thorough *colloquy* with the defendant regarding his right to counsel, the dangers of self-representation, and the difficulties in representing oneself" so that a defendant is aware of the dangers and consequences of self-representation. App. 47a (emphasis added). By focusing on the waiver of counsel colloquy, without considering "the particular facts and circumstances" of Mr. Djerf's case, including counsel's performance, the district court failed to conduct the thorough and searching inquiry required under Supreme Court law. *See Faretta*, 422 U.S. at 835; *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948).

In *Faretta*, the Court extended to the states the right of self-representation that had long been recognized by the federal courts. 422 U.S. at 817. In holding that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he "knowingly and intelligently" elects to do so, the Court relied on the "knowing and intelligent" standard required for a valid waiver established in *Johnson* and *Von Moltke*. *Faretta*, 422 U.S. at 835 (citing *Johnson*, 304 U.S. at 464-65 and *Von Moltke*, 332 U.S. at 723-24).

In *Johnson*, the Court found that "'courts [must] indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" 304 U.S. at 464 (internal citations omitted). The Court then reasoned that in determining "whether there has been an intelligent waiver of right to counsel . . . depend[s], in each case, upon the

particular facts and circumstances surrounding that case . . . ." *Id.* Recognizing the importance of the right to counsel, the Court noted that the right to be "represented by counsel invokes . . . the protection of a trial court" and that "[t]his protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Id.* at 465.

In *Von Moltke*, the Court emphasized that the Constitution imposes a "protecting duty" upon a trial court to determine whether an accused who seeks to waive the right to counsel is making an intelligent and competent waiver of that right. 332 U.S. at 723 (citing *Johnson*, 304 U.S. at 465). The Court noted that "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand[,]" and stressed that "[t]he fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." *Id*. at 723-24. Thus, "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made *only from a penetrating and comprehensive examination of all the circumstances*" relevant to the waiver. *Id*. (emphasis added); *see also id*. at 729 (separate opinion of Frankfurter, J.) (to adequately waive the right to representation of counsel, "[t]here must be both the capacity to make an understanding choice *and an absence of subverting factors* so that the choice is clearly free and responsible" (emphasis added)).

The Court held that the trial court violated the defendant's constitutional right

to be represented by counsel when it engaged in a perfunctory colloquy with the defendant that, while technically adequate, failed to probe into the events that had led the defendant to waive her right to counsel. As the Court noted, "the slightest deviation from the court's routine procedure would have revealed the petitioner's perplexity and doubt," and would have exposed "the uncertainty which was obviously just below the surface of the petitioner's statements to the judge." *Id*. at 725.

Von Moltke is part of the jurisprudential foundation of *Faretta*, and when the Court extended the right of self-representation to the states in *Faretta* it necessarily incorporated its earlier jurisprudence interpreting that right. *Von Moltke* makes clear that in Mr. Djerf's case the trial court had an obligation beyond the perfunctory colloquy it conducted in this case, especially in light of the fact that it was in possession of the letter from Mr. Djerf indicating that his counsel were not properly representing him, had not informed him about any aspect of his case, and had had no meaningful communication with him for several months. (ER 464-465.) It was incumbent upon the court to inquire into counsel's representation of Mr. Djerf before accepting his waiver.

The trial court was also aware of the deficiencies of counsel's investigation and preparation of the case from the reports of counsel at the regularly held status conferences. The record of the status conferences demonstrates that Vaughn and Simpson were not properly investigating and preparing Mr. Djerf's case for trial. Throughout much of pretrial, they were occupied with matters unrelated to Mr.

Djerf's case. (*See* ER 388, 394-395, 445-446, 473, 484, 490, 497, 511-512.) The record also indicates that Vaughn and Simpson did not begin interviewing witnesses until June 1994, nine months following their appointment to the case and six months following Vaughn's statement to the court that the defense would commence interviews. (ER 505, 509, 512, 514, 518.) Although counsel finally commenced witness interviews in June 1994 (ER 502), they did not interview certain crucial witnesses, including a witness who the prosecution described as a "very important witness," prior to Mr. Djerf's waiver of counsel, (ER 443).

Counsel's lack of investigation and preparation became more apparent during subsequent status hearings. Although it was necessary for counsel to review discovery, which they received shortly after their appointment in 1993, before being able to direct their investigation of the case, counsel informed the court on numerous occasions that they had yet to complete their review of it. (ER 511, 516, 518.) Further, on two occasions, the prosecutor informed the court that defense counsel had not filed a notice of defenses and a list of witnesses, despite counsel's promises that they would be timely filed. (ER 498, 503.) Despite counsel having been appointed to the case more than eight months earlier, Simpson informed the court that they were unable to meet the August 1994 motions deadline and requested a continuance to file motions. (ER 500.)

In August 1994, counsel's failures became apparent to all parties. Although defense counsel had been appointed to the case for close to one year, all parties

acknowledged during a status conference that the defense was not ready for trial. Vaughn told the court that a trial date in September 1994 was "not realistic." (ER 492.) He explained that he needed a continuance because "there are several witnesses, not the least of which are several experts, that still need to be interviewed . . . ." (ER 493.) The prosecution highlighted counsel's lack of preparation, informing the court that "essential witnesses have not been interviewed" and "essential materials have not been gathered at this point by the defense." (ER 494.) The prosecutor also noted that there was "a tremendous amount of evidence [still] to be reviewed [by the defense]." (ER 494.) Recognizing that the defense was unprepared for trial, the trial judge observed that if he forced counsel to proceed to trial in September, "any conviction, if there is one . . . would [not] survive an appeal." (ER 495.)

The following month, Vaughn informed the court that the defense needed yet another continuance due to the "need for further investigation and discovery[.]" (ER 489.) In November 1994, the prosecutor informed the court that several witness interviews had to be cancelled because Vaughn was in trial and Simpson was ill. (ER 484.) Two months later, and one month before Mr. Djerf's waiver of counsel, the prosecutor informed the court that defense counsel still had not reviewed the physical evidence in the property room and that they needed to make arrangements for defense counsel to do this before trial. (ER 473.) Vaughn gave no explanation to the court for breaching this basic aspect of pretrial investigation and requested yet

another continuance of the case because he was, again, in trial in another case. (ER 473.)

The record leaves no doubt that Vaughn and Simpson failed to investigate and prepare diligently for the guilt phase of Mr. Djerf's trial. Counsel's failure to devote the time necessary to developing a relationship with Mr. Djerf and to investigating and preparing his case for trial resulted in mistrust that irreparably damaged the attorney-client relationship and directly led to Mr. Djerf proceeding without the assistance of counsel. While an inquiry into counsel's performance may not always be required when determining whether a defendant is validly waiving his right to counsel, in Mr. Djerf's case, the trial court was keenly aware that trial counsel were deficient in their investigation and preparation of the case for trial. The trial court presided over all of the status conferences at which counsel reported their many deficiencies. Additionally, once the court received Mr. Djerf's letter, it was also aware that trial counsel had not informed their client about any aspect of the case for many months, and, in fact, had not informed their client that his trial had been continued.

Given the "particular facts and circumstances" of Mr. Djerf's case, it was incumbent upon the trial court to consider what effect trial counsel's deficient performance had on Mr. Djerf's decision to waive counsel. Had the trial court undertaken even the slightest probing regarding counsel's performance, it would have been apparent that Mr. Djerf was placed in the untenable position of either representing himself or proceeding with incompetent counsel.

In applying the district court's analysis, which refused to consider the effect of trial counsel's deficient performance as part of the waiver of counsel inquiry, the Ninth Circuit panel misapplied the constitutional standard set by this Court for determining the validity of Mr. Djerf's waiver of counsel. Rather than focusing on the pretrial proceedings leading up to the waiver of counsel and the effect that counsel's deficient performance had on Mr. Djerf's decision to waive counsel, the Ninth Circuit panel considered counsel's overall performance both before and after Mr. Djerf had waived counsel to find that they were not deficient. App. 13a-15a. However, counsel's performance following the waiver of counsel was not relevant to the question whether Mr. Djerf was being forced to choose between being represented by incompetent counsel or proceeding *pro se*.

Moreover, by removing any consideration of trial counsel's deficient performance from the waiver of counsel inquiry, the panel failed to address the fact that the record of the pretrial proceedings reflected that the trial court was aware of counsel's deficiencies leading up to Mr. Djerf's waiver of counsel, yet at the time of the colloquy the trial court told Mr. Djerf, "I have been monitoring this case[, and counsel] have been advising me of what they have been doing, and they have been doing a lot of work on your behalf." (ER 200.) The panel also failed to address the fact that while Mr. Djerf alerted the trial court that he had not seen his counsel for several months and that they had not informed him about any aspect of his case or the fact that his trial was being continued, the trial court dismissed Mr. Djerf's concerns by

saying that to have his attorneys "run down to the county jail every night and tell [him] what they have done [was] not a very good use of their time." (ER 200.) The trial court failed to employ the requisite "protecting duty" required to ensure that Mr. Djerf was intelligently and competently waiving his right to counsel. *Von Moltke*, 332 U.S. at 723; *see also Johnson*, 304 U.S. at 464-65.

B. The Ninth Circuit panel opinion is in direct conflict with the application of this standard in other federal Circuit Courts.

The panel's decision is in direct conflict with the decisions of other federal Circuit Courts. Both the Tenth Circuit and the Third Circuit have found that before accepting a waiver of counsel a court must be confident that a defendant is not being forced to make a choice between being represented by incompetent counsel or proceeding *pro se*.

The Tenth Circuit requires a two-step process to determine whether a waiver of counsel is voluntary, knowing, and intelligent. First, a court "must determine whether the defendant voluntarily waived his right to counsel" and, second, "determine whether the defendant's waiver of his right to counsel was made knowingly and intelligently." *United States v. Taylor*, 113 F.3d 1136, 1140 (10th Cir. 1997) (citing *United States v. Padilla*, 819 F.2d 952, 955-56 (10th Cir. 1987)). Under the voluntariness inquiry, "the trial court must inquire into the reasons for the defendant's dissatisfaction with his counsel to ensure that the defendant is not exercising a choice between incompetent or unprepared counsel and appearing *pro*

se." *United States v. Silkwood*, 893 F.2d 245, 248 (10th Cir. 1989). A trial court is to "indulge in every reasonable presumption against waiver." *Baker v. Kaiser*, 929 F.2d 1495, 1500 (10th Cir. 1991).

In *Silkwood*, the Tenth Circuit held that the trial court's cursory inquiry was insufficient to ensure that Silkwood voluntarily or knowingly waived his Sixth Amendment right to counsel. 893 F.2d at 248. The court explained that it had previously addressed the type of inquiry that is necessary to ensure that a defendant's waiver meets these standards, *id.* (citing *United States v. Gipson*, 693 F.2d 109 (10th Cir. 1982); *Padilla*, 819 F.2d 952; *and Sanchez v. Mondragon*, 858 F.2d 1462 (10th Cir. 1988)), and found that "[f]or the waiver to be voluntary, the trial court must inquire into the reasons for the defendant's dissatisfaction with his counsel to ensure that the defendant is not exercising a choice between incompetent or unprepared counsel and appearing *pro se*." *Id.* (citing *Sanchez*, 858 F.2d at 1465).

The court noted that Silkwood had twice rejected the appointment of counsel "because he believed that his trial counsel had been incompetent" and "because he believed that trial counsel had spent insufficient time preparing his case and that he could represent himself more effectively than appointed counsel." 893 F.2d at 248-49. The court reasoned, "Rather than inquiring thoroughly into Mr. Silkwood's allegations of incompetence, the trial court merely attempted to persuade him that trial counsel had done an excellent job in light of the circumstances." *Id.* at 249. The court found that the trial court "failed to ensure that Mr. Silkwood was not forced to

make the Hobson's choice . . . between incompetent or unprepared counsel and appearing *pro se*." *Id.* The court concluded that Silkwood's "choice did not reach the level of voluntariness which *Faretta* and our cases require." *Id.*

As in *Silkwood*, Mr. Djerf chose to represent himself "because he believed that trial counsel had spent insufficient time preparing his case" and he felt "he could represent himself more effectively than appointed counsel." *Silkwood*, 893 F.2d at 247. While the attorney in *Silkwood* was unprepared because he had just been appointed to the case, Mr. Djerf's attorneys were unprepared because they had not diligently investigated or prepared his case for trial. Additionally, like in *Silkwood* where the trial court refused to consider Silkwood's allegations that his attorney was incompetent and, instead, "attempted to persuade him that trial counsel had done an excellent job in light of the circumstances[,]" *id.* at 249, in Mr. Djerf's case, the trial court ignored Mr. Djerf's allegations of his attorneys' incompetence, as well as the facts revealed to the court during monthly status conferences, and instead emphasized the good work counsel had done for him: "[Counsel has been] doing a lot of work on [your] case[,]" (ER 199), and although "you may not be happy with the number of times they come down and see you, . . . I want to tell you that I have been monitoring this case. They have been advising me of what they have been doing, and they have been doing a lot of work on your behalf." (ER 200.) In both cases, the trial court was aware of counsel's failures, yet nevertheless refused to consider constitutionally permissible alternatives, instead forcing the defendant to choose

between representing himself or proceeding to trial with counsel who were inadequately prepared.

Similarly, the Third Circuit requires a trial court to ensure that "the defendant is not forced to make a choice between incompetent counsel or appearing *pro se*." *Pazden v. Maurer*, 424 F.3d 303, 313 (3d Cir. 2005) (internal quotations omitted). In *Pazden*, the attorney assigned to represent Pazden was unprepared for trial and sought a continuance, which was ultimately denied. 424 F.3d at 315-16. Due to counsel's lack of preparation, Pazden moved to represent himself because he believed he was better prepared to handle the trial. *Id*. at 316. Pazden explained, "I feel I have no choice in this matter. . . . I'm selecting the lesser of two evils." *Id*. at 308, 309. The trial court admonished Pazden, stating he was better served with counsel and that he was incapable of adequately representing himself. *Id*. at 309. The trial court assured Pazden that his attorney had "put in countless hours during the week and on weekends" and he would be "hard pressed to find another attorney who would devote themselves to this case the way she has and pour over this discovery the way she has." *Id*.

On appeal, the Third Circuit recognized that forcing a defendant to choose between proceeding with incompetent counsel or no counsel at all is in essence no choice at all, and is constitutionally offensive. *Id.* at 313. The court, therefore, found that a trial court must conduct a "sufficiently penetrating inquiry to satisfy itself that the defendant's waiver of counsel is knowing and understanding as well as

voluntary." *Id.* at 314 (internal quotations omitted). The court explained that the inquiry must be a "penetrating and comprehensive examination of all the circumstances under which such a plea is rendered[,]" *id.* (quoting *Von Moltke*, 332 U.S. at 724), and that it is only "[i]n conducting this examination [that] a court can evaluate the motives behind defendant's dismissal of counsel and decision to proceed *pro se*." *Id.* at 314.

Applying these principles to Pazden's case, the court held that the record supported "Pazden's contention that his decision to proceed *pro se* was not an exercise of free will, rather it was the result of him bowing to the inevitable." *Id.* at 316 (internal quotations omitted). The court acknowledged that the trial court inquired into Pazden's decision but held that "in conducting the inquiry, the trial judge either ignored Pazden's answers or failed to realize their constitutional significance." *Id.* at 319. The court reversed because "Pazden's waiver of counsel was not voluntary in the constitutional sense." *Id.*

Like in *Silkwood* and *Pazden*, Mr. Djerf elected to represent himself because he believed Vaughn and Simpson had not been preparing his case adequately. More importantly, while the attorneys in *Silkwood* and *Pazden* had inadequately prepared the case due to being appointed shortly before trial, Vaughn and Simpson were unprepared despite being on the case for fifteen months. In all three cases, the trial court was aware of the defendant's allegations that counsel were unprepared and incompetent but nevertheless defended the work of the appointed attorneys. Due to

their impending trials and their belief that trial counsel were unprepared and incompetent, Silkwood, Pazden, and Mr. Djerf were left with no choice but to proceed *pro se* rather than be represented by incompetent counsel. Therefore, their decisions to waive counsel were not voluntary.

In Mr. Djerf's case, the Ninth Circuit panel misapplied the constitutional standard for waiver of counsel, which is in conflict with this Court's precedents and with the application of this standard by the Third and Tenth Circuits. While the district court's decision, which the panel affirmed, holds that a trial court is not required to conduct an inquiry to determine whether a defendant was choosing between incompetent counsel and proceeding *pro se*, the Court and the Third and Tenth Circuits have held that there must be a "penetrating and comprehensive examination of all the circumstances under which [a waiver of counsel] is tendered[,]" *Von Moltke*, 332 U.S. at 724, which would include an inquiry into relevant allegations of incompetent counsel. Had the panel subjected Mr. Djerf's waiver of counsel to a more "penetrating and comprehensive examination" of the voluntariness of his waiver, *id*., the panel would have concluded that Mr. Djerf's choice to proceed *pro se* was no choice at all.

CONCLUSION

For the foregoing reasons, Mr. Djerf respectfully requests this Court to grant his petition for writ of certiorari, and reverse the Ninth Circuit panel opinion denying relief on this claim.

Respectfully submitted this 28th day of February 2020.

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