No. 19–7856

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD KENNETH DJERF,
PETITIONER,
-vs-

DAVID SHINN, et al.,
RESPONDENTS.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the state court reasonably determine that after a year and a half of appointed representation, Djerf voluntarily waived trial counsel and exercised his constitutional right to self-representation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

In retribution for a petty theft committed by Albert Luna Jr., Petitioner Richard Djerf murdered four other members of Albert's Jr.'s family—his mother, father, teenaged sister, and young brother—over the course of several hours in their home. After exercising his right to self-representation, Djerf pled guilty to four counts of first-degree murder in exchange for the State dropping several other non-capital counts, because he did not want a jury to hear the horrific facts of his crimes.[1] At the conclusion of an aggravation/mitigation hearing,[2] a judge sentenced Djerf to death for each first-degree murder.

Now, in this case governed by the Anti-terrorism and Effective Death Penalty Act (AEDPA), Djerf alleges that the Arizona Supreme Court unreasonably determined that he voluntarily waived counsel after eighteen months of appointed representation, and that the Ninth Circuit erred by concluding otherwise. Djerf complains that the trial court did not consider whether his counsel had been constitutionally effective during those eighteen months and simultaneously criticizes the Ninth Circuit for finding that assigned counsel was, in fact, constitutionally effective during that period. Djerf has given this Court no compelling reason to grant certiorari. Djerf has not shown that the Ninth Circuit has entered a decision in conflict with another United States court of appeals on the same matter, or that it decided an important federal question in a way that conflicts with a decision by a state court of last resort or with relevant decisions of this

[1] Pet. App. 101a, n. 6.

[2] Djerf rescinded his waiver and accepted representation for sentencing proceedings. Pet. App. 89a.

Court. U.S Sup. Ct. R. 10. Instead, he asks this Court to engage in routine error correction. This Court should decline to do so.

STATEMENT OF THE CASE

Djerf and Albert Luna, Jr. met and became friends while working as night custodians at a Safeway supermarket. Pet. App. 82a, ¶ 2. In January 1993, Luna unlawfully entered Djerf's apartment and stole several items, including some electronic equipment and an AK-47 assault rifle. *Id.* Djerf reported Luna's crime to police; however, several months later, Djerf became frustrated and angry at police inaction and determined to take revenge. *Id.*

In the late morning hours of September 14, 1993, Djerf went to the Luna family home, taking his 9mm Beretta handgun, a knife, latex gloves, handcuffs, red fuse cord, and artificial flowers in a vase to use as a ruse to gain entry. Pet. App. 82a–83a, ¶ 3. Luna's mother, Patricia, answered the door to receive the flowers, and Djerf pushed his way into the house, showing her his gun. *Id.* Djerf bound Patricia, letting her five-year-old son, Damien, run free. *Id.* Later, while holding Damien hostage, Djerf freed Patricia and forced her to place several items of the Lunas' property into the Luna family car. *Id.* Next, Djerf took Patricia and Damien into the kitchen and bound them to chairs with rope and black electrical tape. *Id.* Djerf repeatedly asked Patricia whether she or Damien should die first, and if she knew the whereabouts of her son, Albert Jr. *Id.*

Around 3:00 p.m., Patricia's daughter, eighteen-year-old Rochelle, came home. Pet. App. 83a–84a, ¶ 4. Djerf took Rochelle to her bedroom, gagged her with tissue paper and tape, tied her wrists to the bed, cut and removed her clothes with a

knife, and raped her. *Id.* Then he repeatedly stabbed Rochelle in the chest and slit her throat, killing her. *Id.* Djerf also inflicted multiple shallow knife wounds to the back of Rochelle's head while she was alive, and one, probably postmortem, superficial stab wound to her right temple. *Id.* Additionally, Rochelle's earring had been torn through the earlobe, and, at some point while still alive, she vomited behind the gag and aspirated the vomit. *Id.* Djerf then informed Patricia he had raped and killed her daughter. *Id.*

Around 4:00 p.m., Albert Luna, Sr. arrived home from work. Pet. App. 84a, ¶ 5. Djerf handcuffed him, forced him to crawl to the master bedroom, and placed him face down on the bed; Djerf then struck him in the back of the head multiple times with an aluminum baseball bat, inflicting three large lacerations and spattering blood throughout the room. *Id.* The hemorrhaging from these wounds was potentially fatal. *Id.* Djerf removed the handcuffs from Albert, taped his hands and wrists together, and left him for dead. *Id.* He then walked to the kitchen and told Patricia that he had killed her husband. *Id.*

Next, Djerf turned his attention to Damien, attempting to snap the child's neck by twisting his head abruptly from behind, "like he had seen in the movies." Pet. App. 84a, ¶ 6. Djerf "turned [Damien's head] all the way around and nothing happened," so he tried to electrocute Damien by cutting an electrical cord from a lamp in the kitchen, stripping the insulation from the wires, and taping it to the skin on Damien's calf. *Id.*

Although badly injured, Albert Sr. freed himself from the tape around his wrists, went to the kitchen, and charged Djerf with a pocketknife, wounding him

seriously. Pet. App. 84a–85a, ¶ 7. During the ensuing struggle, Djerf stabbed Albert Sr. with enough force to drive a knife through Albert Sr.'s right arm and into his torso. *Id.* Djerf pulled his gun from his belt and shot Albert Sr. six times. *Id.* Albert Sr. fell at the feet of his wife and son. *Id.* Djerf then asked Patricia, "Do you want to watch your kid die, or do you want your kid to watch you die?" *Id.* at 85a, ¶ 8. Djerf then shot both Patricia and Damien in the head at close range. *Id.*

Before leaving, Djerf splashed gasoline on the bodies and throughout the house, turned on two of the kitchen stove burners, and placed an empty pizza box and a rag on the stove. Pet. App. 85a, ¶ 9. Djerf then drove to his apartment in the Luna family car with the stolen property inside, where he met his girlfriend, Emily Boswell at about 6:00 p.m. *Id.* He told Boswell that he had been stabbed by two men who tried to rob him; and he later went to the hospital where he was admitted for treatment. *Id.*

The pizza box and rag failed to ignite the gasoline. Pet. App. 85a–86a, ¶ 10. Albert Jr. had not gone to his home the night of September 13, and he did not return until 11:45 p.m. the day of the murders, September 14, when numerous unanswered calls to the house had made him anxious. *Id.* When Albert Jr. entered the home and discovered the bodies of his parents and brother in the kitchen, he immediately left and called the police. *Id.*

The next day, September 15, Djerf told Boswell that he had murdered four members of the Luna family and described to her how he had done it. Pet. App. 86a, ¶ 11. Djerf told Boswell that the blood dripping from Patricia's gunshot wound was "really awesome" and "you should have been there." *Id.* In the ensuing days,

Djerf told other friends about his murders of four members on the Luna family. *Id.* On September 18, Phoenix police executed search warrants on Djerf's motel room, car, and apartment, where they recovered the items Djerf took to the Luna home and used during the murders, along with the items he stole from the Luna home. *Id.* at ¶ 12.

On August 16, 1995, Djerf entered a plea agreement with the State, pleading guilty to four counts of first-degree murder for the deaths of Albert Sr., Damien, Patricia, and Rochelle Luna with no limits on sentencing for the murder counts. Pet. App. 88a, ¶ 17. In exchange, the State agreed to dismiss the remaining non-capital counts. *Id.*

On May 22, 1996, following a lengthy aggravation/mitigation hearing, the trial court rendered a special verdict, finding that the State had proved beyond a reasonable doubt that all four murders were committed for pecuniary gain, in an especially heinous, cruel or depraved manner, and during the commission of one or more other homicides, and additionally that Damien was under the age of 15 while Djerf was an adult. Pet. App. 89a, ¶ 19. The trial court further found that Djerf had failed to prove any statutory mitigating factors or the non-statutory mitigating factors of post-arrest conduct, disadvantaged childhood, psychological disorder, remorse, adjustment to confinement, and acceptance of responsibility. *Id.* The court therefore sentenced Djerf to death for each of the four counts of first-degree murder. *Id.*

On automatic direct appeal, the Arizona Supreme Court rejected Djerf's claims of trial error and affirmed his convictions.[3] Pet. App. 114a, ¶ 68. The supreme court further determined that the aggravating circumstances the trial court found were established beyond a reasonable doubt and affirmed the death sentences. Pet. App. 104a–108a and 113a–114a, ¶¶ 45–58, 67–68.

Following his unsuccessful direct appeal, Djerf filed a petition for post-conviction relief in state court, which the post-conviction court dismissed because no claims were colorable or otherwise meritorious. The Arizona Supreme Court denied review in 2002. Djerf subsequently filed a federal habeas petition in the United States District Court for the District of Arizona, raising a number of claims. In 2005, the district court dismissed several of Djerf's habeas claims as procedurally barred or non-cognizable. In September 2008, the district court denied the remainder of Djerf's claims, and granted a certificate of appealability on one issue. In October 2008, the district court issued a second order denying Djerf's subsequent motion to alter or amend the court's judgment and expanding the certificate of appealability to include a second issue. In 2009, Djerf filed a second petition for post-conviction relief, which the post-conviction court dismissed, and review of which the Arizona Supreme Court denied.

This case was fully briefed in the Ninth Circuit in February of 2011. However, following issuance of this Court's opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Ninth Circuit remanded the case for reconsideration of three claims in the district court. In 2017, the district court denied relief under *Martinez* on all

[3] *State v. Djerf*, 959 P.2d 1274 (Ariz. 1998).

three claims. Resp. App. 34. After re-briefing and oral argument, the Ninth Circuit affirmed the district court ruling denying habeas relief, finding that "[t]he State's aggravation case stands out as one of, if not the, strongest we have reviewed in recent years."[4] Pet. App. 27a, 29a–30a.

REASONS FOR DENYING THE WRIT

This Court grants certiorari only for "compelling reasons." U.S. Sup. Ct. R. 10. Djerf has not provided any such reasons. Djerf attempts to show a circuit split on the question presented, but the opinions he cites are factually distinguishable. The state court in the instant case reasonably applied this Court's clearly established federal law, and the ensuing federal habeas review of the court's decision correctly affirmed it. This Court should deny certiorari.

THE ARIZONA SUPREME COURT REASONABLY DENIED DJERF'S CLAIM THAT HIS WAIVER OF TRIAL COUNSEL WAS INVOLUNTARY AND THERE IS NO COMPELLING REASON FOR CERTIORARI.

Djerf contends that the Ninth Circuit incorrectly applied this Court's precedent, specifically *Faretta v. California*, 422 U.S. 806 (1975), and *Edwards v. Arizona*, 451 U.S. 477 (1981), to conclude that the Arizona Supreme Court reasonably denied his claim that he did not voluntarily waive his right to counsel. On habeas review, Djerf contended for the first time that his voluntary waiver of counsel was involuntary because of appointed counsel's alleged ineffectiveness during the pretrial period. The allegation of ineffective assistance of counsel during eighteen months of pretrial proceedings was not raised in state court, and was thus procedurally defaulted, however, on limited remand from the Ninth Circuit under

[4] *Djerf v. Ryan*, 931 F.3d 870 (9th Cir. 2019).

this Court's 2012 opinion in *Martinez v. Ryan*, was evaluated by the district and found not substantial—either as a stand-alone claim, or as a retroactively asserted ground for waiving counsel—because counsel has not performed deficiently. This finding, in turn, drove the Ninth Circuit's analysis on the waiver-of-counsel issue. The Ninth Circuit correctly affirmed the district court's decision.

A. *This Court's clearly established law and the state court decision.*

A defendant has a federal constitutional right to waive counsel and represent himself. *Faretta*, 422 U.S. at 836. Self-representation is a "fundamental constitutional right." *Id.* However, a waiver of counsel must be made knowingly, intelligently, and voluntarily, "which depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards*, 451 U.S. at 482. The Court has determined that the Sixth Amendment guarantee of effective assistance "is not to improve the quality of legal representation, . . . but is simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668 (1984). The appropriate focus when evaluating a Sixth Amendment claim is on the adversarial process, not the defendant's relationship with his lawyer. *See United States v. Cronic*, 466 U.S. 648, 656–57 (1984). In fact, the Sixth Amendment does not guarantee a "meaningful relationship" between an accused and his counsel. *Morris v. Slappy*, 461 U.S. 1, 13–14 (1983).

On direct appeal, applying this Court's controlling federal law, *Edwards* and *Faretta*, the Arizona Supreme Court found that Djerf's waiver of counsel was voluntary, knowing and intelligent. Pet. App. 89a–95a, ¶¶ 20–28. The court noted

that the trial court "fully informed [Djerf] of his right to counsel, the minimum, maximum, and presumptive sentences, the dangers of self-representation, and the difficulties in defending oneself without formal legal training." *Id.* at 91a–92a, ¶ 23. Djerf's attorneys told the court that, while they did not believe it was in his best interest to do so, Djerf was competent to make the decision to self-represent. *Id.* For his part, Djerf told the court that his request to self-represent was due to insufficient communication from his appointed counsel. *Id.* The trial court pointed out to Djerf that his attorneys had been "fully engaged, working on his behalf." *Id.*

The Arizona Supreme Court also rejected Djerf's supplemental claim that his request to waive counsel and self-represent should have been interpreted as a request to change counsel because it was contradicted by the record. Pet. App. 95a–98a, ¶¶ 29–33. Citing Djerf's motion to proceed *pro se*, as well as Djerf's interactions and colloquy with the trial court, and Djerf's subsequent motions, the state court reiterated that Djerf "requested only that he be allowed to represent himself." *Id.* at ¶ 31. Consequently, because Djerf has "an absolute constitutional right to act *pro se*, the trial court correctly determined that [he] was competent and that the waiver of counsel was made voluntarily, knowingly, and intelligently." *Id.* at ¶ 32.

B. *Federal habeas proceedings.*

Applying AEDPA,[5] the district court determined that the Arizona Supreme Court had reasonably rejected Djerf's challenge to the constitutionality of his waiver of counsel under *Faretta* and *Edwards* and denied relief. Pet. App. 46a–48a.

[5] *See* 28 U.S.C. § 2254(d); *Woodford v. Garceau*, 538 U.S. 202, 204 (2003); *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

Subsequently, in the *Martinez* remand, the district court concluded that Djerf's related ineffective-assistance claim was not substantial, and that its procedural default thus could not be excused. Resp. App. 30–32. In doing so, the district court relied on *Faretta* and *Edwards*, and rejected Djerf's argument that *Johnson v. Zerbst*, 304 U.S. 458 (1938), required additional "contextual" questioning by the trial court about his relationship with his counsel. Resp. App. 31.

On appeal, the Ninth Circuit agreed that counsel was not constitutionally deficient during the pretrial proceedings, and thus that the procedural default of that issue was not excused. Pet. App. 13a. As a result, the claim that Djerf's waiver of counsel was involuntary as a result of counsel's pretrial performance also failed. *Id.* The court detailed counsel's pretrial jail visits, correspondence, witness interviews, plea negotiations, pretrial motions, evidence review, and participation in consolidated challenges to DNA evidence, and also observed that Djerf had personally acknowledged counsel's considerable pretrial work on his behalf. Pet. App. At 13a–14a. The Ninth Circuit further determined that the record belied Djerf's contention that his counsel sought continuances because they had done no work and instead revealed that "brief continuances sought by counsel were reasonably necessary to permit the continued preparation for trial and accommodate health issues and other case responsibilities." *Id.* at 14a.

Critically, the Ninth Circuit found that, because the record fails to establish that counsel

> provided constitutionally inadequate pretrial assistance, it also fails to establish that Djerf was forced to choose between self-representation and incompetent counsel. As a result, his claim that his waiver of

> counsel was involuntary fails. So does his related argument that the trial judge erred by failing to further investigate his motivation for removing counsel and therefore discover the purportedly ineffective representation.[FN3]
>
> > [FN3] Djerf also argues that his waiver of counsel and request for self-representation in February 1995 should have been construed as a request to substitute counsel and that the trial court erred by failing to do so. This argument is not consistent with the record; Djerf several times expressly stated his desire to represent himself, despite strong discouragement from the judge and counsel. At no point prior to or during the February 1995 hearing did Djerf intimate a desire for other counsel. In view of this record, the Arizona Supreme Court's denial of this claim was not an unreasonable application of Supreme Court precedent. *See Djerf*, 959 P.2d at 1283–84.

Pet. App. 15a. The Ninth Circuit went on to determine that even assuming that Djerf's pretrial-ineffective-assistance-of-counsel claim was "substantial," (which the panel called "a stretch in light of the record and the service performed by counsel"), Djerf "would have struggled to show that the purported deficiencies resulted in sufficient prejudice to warrant overturning his four murder convictions." *Id.* at 880–81.

C. *The Ninth Circuit correctly applied this Court's precedent and did not create a conflict.*

This Court has explained that "[f]or purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect*, application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotations omitted). *See also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Bell v. Cone*, 535 U.S. 685, 694 (2002) (unreasonable application distinct from incorrect one). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as

fairminded jurists could disagree on the correctness of the state court's decision." *Richter*,, 562 U.S. at 101 (quotations omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. Rather, a prisoner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. The Ninth Circuit correctly applied these standards, as discussed above, and there is no need for this Court's intervention.

Djerf labors to create a reason to justify this Court's review of the Ninth Circuit's decision in this case, however, none exists. First, and most important, all that matters in this AEDPA case is whether the state court correctly applied *Faretta* and *Edwards*, and Djerf's cited authority does not address that issue. Second, Djerf's argument assumes that counsel provided constitutionally ineffective pretrial assistance, which, as both the Ninth Circuit and district court found, is factually unsupported. Third, none of the cases Djerf cites to create a conflict is applicable.

For example, Djerf relies on *United States v. Taylor*, 113 F.3d 1136 (10th Cir. 1997)—a circuit court decision issued *after* the trial court's inquiry into Djerf's decision to waive counsel in 1995. In *Taylor*, like the instant case, the defendant moved to self-represent because he wanted to, and never gave any indication that appointed counsel was "incompetent or unprepared to proceed with adequate representation," and thus the court found his waiver of counsel was voluntary. 133 F.3d at 1140. However, the Tenth Circuit faulted with the trial court for failing to

make the defendant sufficiently aware of the dangers and disadvantages of self-representation, and on those grounds, found that the defendant's waiver of counsel was not knowing or intelligent. *Id.* at 1142–43. Conversely, in the instant case, the trial court and counsel repeatedly warned Djerf of the dangers of self-representation, rendering Djerf's waiver of counsel not only voluntary, but also knowing and intelligent. *Taylor* is not inconsistent.

Neither is *United States v. Silkwood*, 893 F.2d 245 (10th Cir. 1989), another case that Djerf contends forms a circuit split, applicable. Again, Djerf's case if factually distinguishable. In *Silkwood*, the Tenth Circuit, applying *Faretta*, found that the defendant's dissatisfaction with specific aspects of trial counsel's representation led him to self-represent rather than to continue with the assigned counsel, thus making his waiver of counsel involuntary. *Id.* at 248–49. The court also criticized the level of information the trial court provided to the defendant regarding the pitfalls of self-representation and the potential outcomes from his trial, thus making his waiver of counsel not knowing or intelligent. *Id.* at 249. Again, this analysis is not inconsistent with the Ninth Circuit's here; it is merely factually distinguishable based on the record in this case. *See also Pazden v. Maurer*, 424 F.3d 303, 316–17 (3rd Cir. 2005) (defendant's request to proceed *pro se* predicated on denial of continuance request for counsel to prepare for complicated trial with late discovery); *Baker v. Kaiser*, 929 F.2d 1495, 1500 (10th Cir. 1991) (where record demonstrated that defendant wanted assistance of an attorney to perfect an appeal, he did not knowingly and voluntarily waive the right to appellate counsel); *Sanchez v Mondragon*, 858 F.2d 1462, 1466–67 (10th Cir. 1988) (record

indicated that lack of preparation may have been part of defendant's request to self-represent, throwing voluntariness of waiver of counsel into question, and, regardless, general warnings insufficient to find waiver knowing and intelligent). The cases cited by Djerf thus do not create a circuit split, but rather are easily factually distinguishable.

Similarly, Djerf's reliance on *Von Moltke v. Gillies*, 332 U.S. 708 (1948), a case predating *Faretta* by nearly thirty years, is misplaced. Like the other cases Djerf cites, *Von Moltke* is factually distinguishable from the instant case. *Von Moltke* involved a World War II espionage prisoner who, other than at her arraignment, was never represented by counsel and signed a written waiver of counsel form and pleaded guilty at a five-minute change of plea hearing where she was not informed by the court of the potential sentencing consequence (which included a death sentence) nor inquired of by the court regarding her ability to retain, or desire for, counsel. *Von Moltke*, 332 U.S. at 709–18. The factual record in this case is, as discussed above, easily distinguishable. Moreover, *Faretta* and *Edwards* are the appropriate controlling federal standards here, and they were reasonably applied by the state courts and affirmed by the federal courts. This Court should deny certiorari.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request this Court to deny Djerf's petition for writ of certiorari.

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