No. 19-7856

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

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities ii
Reply in Support of Petition for Writ of Certiorari 1
I. The Ninth Circuit's rejection of Mr. Djerf's waiver of counsel claim misapplied this Court's precedents. 1
II. The Ninth Circuit's misapplication of this Court's precedents created a circuit split with the Third and Tenth Circuits. 4
Conclusion 7

TABLE OF AUTHORITIES

Federal Cases

Edwards v. Arizona,
451 U.S. 477 (1981) 1, 2, 3, 6

Faretta v. California,
422 U.S. 806 (1975) 1, 2, 3 5, 6

Johnson v. Zerbst,
304 U.S. 458 (1938) 2, 3, 6

Pazden v. Maurer,
424 F.3d 303 (3d Cir. 2005) 6

Strickland v. Washington,
466 U.S. 668 (1984) 3

United States v. Silkwood,
893 F.2d 245 (10th Cir. 1989) 4, 5, 6

United States v. Taylor,
113 F.3d 1136 (10th Cir. 1997) 4, 5, 6

Von Moltke v. Gillies,
332 U.S. 708 (1948) 2, 6

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents devote their Brief in Opposition ("BIO") to either summarizing the court proceedings below, or attempting to distinguish factually the cases Mr. Djerf cites in his petition for writ of certiorari ("Petition") while ignoring the legal principles for which they were cited. Respondents fail to meaningfully engage with, or appreciate the constitutional importance of, Mr. Djerf's arguments.

Mr. Djerf has presented an important federal question about the voluntariness of a waiver of counsel and whether a trial court must ensure that a defendant is not being forced to choose between being represented by incompetent counsel and proceeding *pro se*. The Ninth Circuit misapplied this Court's precedents when it affirmed the federal district court's decision that a trial court is to do no more than conduct a colloquy about the dangers of self-representation, creating a circuit split with the Third and Tenth Circuit Courts of Appeal. Certiorari is warranted in this case.

I. The Ninth Circuit's rejection of Mr. Djerf's waiver of counsel claim misapplied this Court's precedents.

Respondents largely ignore Mr. Djerf's argument that the Ninth Circuit's affirmance of the federal district court's opinion relied on a misapplication of the constitutional standard for determining the voluntariness of a waiver of counsel. Instead, Respondents simply assert, without saying more, that *Faretta v. California*, 422 U.S. 806 (1975), and *Edwards v. Arizona*, 451 U.S. 477 (1981), are the

"appropriate controlling federal standards" and "were reasonably applied by the state courts and affirmed by the federal courts." (BIO at 14.) But Mr. Djerf did not argue that *Faretta* and *Edwards* are not controlling. Rather, Mr. Djerf has argued that *Faretta* and *Edwards*, along with this Court's precedents that underpin those decisions, were misapplied. Here, the district court held that a more in-depth colloquy was not necessary to ensure that Mr. Djerf was not choosing between incompetent counsel and proceeding *pro se*, and the court below affirmed. (Pet. at 17–18.)

The district court's decision in this case explicitly held that *Faretta* and *Edwards* do not require a trial 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. This is an incorrect application of this Court's precedent.

In *Faretta*, this Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he does so voluntarily. 422 U.S. at 835. In holding so, this Court relied on the standards for a valid waiver in *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Von Moltke v. Gillies*, 332 U.S. 708 (1948). *Johnson* and *Von Moltke*, in turn, established that a trial court has a "protecting duty" to ensure that a waiver is voluntary. 304 U.S. at 465; 332 U.S. at 723 (quoting *Johnson*). And, in *Von Moltke*, this Court stressed that a trial court "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 of counsel. 332 U.S. at 724 (emphasis added); *see also id.* at 723–24 ("[A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand."); *Johnson*, 304 U.S. at 464. *Edwards* echoed these concerns, holding that a waiver of counsel depends "'upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.'" 451 U.S. at 482 (quoting *Johnson*, 304 U.S. at 464 and citing *Faretta*, 422 U.S. at 835).

Respondents not only ignore these established legal principles and their misapplication in Mr. Djerf's case, but also ignore the very facts that made the trial court's "protecting duty" in this case crucial.[1] Mr. Djerf discussed this at length in his Petition. (Pet. at 3–9, 20–25.) At bottom, the trial court and prosecutor had repeated concerns about trial counsel's preparation for trial, and those facts were ignored when Mr. Djerf, *pro se*, filed his Motion for Change of Counsel. Here, Mr. Djerf was forced to make a "choice" between incompetent counsel and appearing *pro se*.

By ignoring Mr. Djerf's legitimate concerns about his trial counsel, the trial court readily encouraged Mr. Djerf's waiver instead of ensuring that he was waiving counsel voluntarily. The Ninth Circuit's affirmance of the district court's opinion

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[1] Respondents address the facts in Mr. Djerf's case by simply pointing to the Ninth Circuit's holding that trial counsel were not constitutionally ineffective. (BIO at 10.) As stated in his Petition at 17–25, Mr. Djerf is not arguing an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). He argues that the Ninth Circuit misapplied this Court's precedent for ensuring that a waiver of counsel is voluntary.

misapplied this Court's precedents and is in conflict with the Third and Tenth Circuits.

II. The Ninth Circuit's misapplication of this Court's precedents created a circuit split with the Third and Tenth Circuits.

Respondents recognize that the Third and Tenth Circuit cases establish that the performance of counsel is relevant to determining whether a defendant's waiver of counsel was voluntary but attempt to factually distinguish them. (*See* BIO at 12–13.) Respondents cannot erase the guiding legal principles of those decisions that put this case in conflict with the Third and Tenth Circuits.

Respondents argue that *United States v. Taylor*, 113 F.3d 1136 (10th Cir. 1997), is inapplicable because it post-dates Mr. Djerf's trial proceedings and because it is factually distinguishable from Mr. Djerf's case. (BIO at 12–13.) *Taylor*, however, was relying on *United States v. Silkwood*, 893 F.2d 245 (10th Cir. 1989), for the principle that a waiver of counsel is involuntary unless "the defendant is not forced to make a 'choice' between incompetent counsel or appearing pro se." *Taylor*, 113 F.3d at 1140 (quoting *Silkwood*, 893 F.2d at 248). The law on which *Taylor* relies was settled at the time of Mr. Djerf's trial proceedings. Moreover, Respondents argue that *Taylor* only held that the defendant received an inadequate colloquy about the dangers of self-representation. (BIO at 12–13.) But, as Respondents acknowledge (BIO at 12), the court in *Taylor* first determined that the defendant's waiver of counsel was voluntary because trial counsel was not "incompetent or unprepared to

provide adequate representation," thus underscoring the legal principle that places the Tenth and Ninth Circuits in conflict. *Taylor*, 113 F.3d at 1140.

Respondents also concede that the Tenth Circuit applied *Faretta* in *Silkwood*, and "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." (BIO at 13.) However, Respondents then note additional analysis by the court that addressed the inadequacy of the colloquy about the dangers of self-representation (BIO at 13), which also made the waiver of counsel not knowing and intelligent, *Silkwood*, 893 F.2d at 249. This additional analysis does not negate the fact that the Tenth Circuit considered trial counsel's incompetent representation as a basis for finding the waiver of counsel invalid.

Respondents' assertion that the analysis in *Silkwood* "is not inconsistent with the Ninth Circuit's" in Mr. Djerf's case is wrong. (BIO at 13.) Indeed, the court in *Silkwood* explained that "[f]or the waiver [of counsel] 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*." *Silkwood*, 893 F.2d at 248. The court then found that the defendant's waiver of counsel was not voluntary. *Id*. at 249. Here, the Ninth Circuit affirmed the district court's holding that *rejected* the analysis that the Tenth Circuit considers as essential to the waiver of counsel inquiry—that is, that a

trial court is required to ensure that a defendant is not choosing between incompetent or unprepared counsel and proceeding *pro se*.

Respondents further contend that *Pazden v. Maurer*, 424 F.3d 303, 316–17 (3d Cir. 2005), is factually distinguishable because defendant's waiver of counsel was "predicated on [the] denial of [a] continuance request for counsel to prepare for [a] complicated trial with late discovery . . . ." (BIO at 13.) This is a distinction without a difference, as both *Pazden* and Mr. Djerf's case ultimately involved a waiver of counsel due to the belief that trial counsel would not adequately represent them at trial. *See Pazden*, 424 F.3d at 308–09 (discussing issues with counsel's preparations and stating he is "selecting the lesser of two evils" in waiving counsel); (ER 199 (Mr. Djerf discussing issues with counsel's preparations as the reason for waiving counsel and stating "I just assume I can do this myself.").)

Respondents also say nothing about the Third Circuit's requirement that trial courts are to ensure that "the defendant is not forced to make a choice between incompetent counsel or appearing pro se." *Pazden*, 424 F.3d at 313 (internal quotations omitted). This requirement was rejected by the Ninth Circuit.

Faretta, *Edwards*, *Johnson*, and *Von Moltke* require a "penetrating and comprehensive examination of all the circumstances" to determine whether a waiver of counsel is voluntary. Unlike the Third Circuit in *Pazden*, and Tenth Circuit in *Taylor* and *Silkwood*, the Ninth Circuit has failed to follow this Court's precedents. Respondents' argument that a circuit split does not exist must be rejected.

CONCLUSION

The conflict between the Ninth Circuit, and the Third and Tenth Circuits on this important federal question counsels in favor of this Court granting review. For these reasons and the reasons stated in the Petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted this 14th day of April 2020.

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