No. ____

IN THE

Supreme Court of the United States

DONALD BOYD,

Petitioner,

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;

ATTORNEY GENERAL NEW JERSEY

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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February 19, 2021

QUESTIONS PRESENTED

1. Whether the State of New Jersey's administration of unreasonably high doses of the controlled psychotropic drug Xanax (i.e., dosages four times the manufacturer's recommended starting dose) to Petitioner Donald E. Boyd while representing himself during his criminal trial violated his constitutional rights to counsel, a fair trial and due process?

2. Whether the State of New Jersey violated Petitioner Donald E. Boyd's Sixth Amendment right to counsel by failing to consider the intervening change in circumstances in drugging him with unreasonably high doses of a controlled psychotropic drug, rendering his prior *Faretta* waiver no longer knowing, voluntary and intelligent at the time it was made one month earlier?

3. Whether it is unconstitutional for a state to prescribe and administer powerful doses of a controlled psychotropic drug to a criminal defendant acting as his own attorney during his criminal trial without an in-person or face-to-face evaluation by a prescribing physician or other medical professional?

PARTIES

The only parties to this proceeding are identified in the case caption on the cover.

STATEMENT OF RELATED CASES

- Petition for Post-Conviction Relief
  - *State v. Boyd*, Indictment No. 04-06-1142, Superior Court of New Jersey, Law Division, Bergen County. Petition for post-conviction relief denied on October 11, 2013.
  - *State v. Boyd*. Affirmed by New Jersey Superior Court, Appellate Division, A-2171-13T1 (N.J. Super. Ct. App. Div., Sept. 30, 2016).
  - *State v. Boyd*. Certification denied by New Jersey Supreme Court, 078465, C-645 Sept. Term 2016 (Mar. 16, 2017).
- Civil Claim (42 U.S.C. § 1983)
  - *Boyd v. Bergen County Jail*, Civ. Case No. 07-769 (FSH) (PS) (D.N.J.). Partial summary judgment entered by the United States District Court for the District of New Jersey (Sept. 4, 2012).
  - *Boyd v. Bergen County Jail*. Affirmed sub nom. by the Third Circuit Court of Appeals, *Boyd v. Russo*, No, 13-1521 (Aug. 27, 2013). Case settled for monetary amount.
- Direct Criminal Appeal
  - *State v. Boyd*, Indictment No. 04-06-1142, Superior Court of New Jersey, Law Division, Bergen County. Judgment entered June 27, 2006.
  - *State v. Boyd*. Remanded for resentencing by New Jersey Superior Court, Appellate Division, A-6537-05T4 (N.J. Super. App. Div. Aug. 12, 2008).
  - *State v. Boyd*. Certification denied by New Jersey Supreme Court, Nos. C-410 Sept. Term 2008, 63,165, 197 N.J. 16. (Nov. 19, 2008).
  - *State v. Boyd*. Certiorari denied by United States Supreme Court, No. 08-9145, 129 S. Ct. 2391 (May 18, 2009).
  - *State v. Boyd*. Change of Judgment entered December 1, 2008. Affirmed by New Jersey Superior Court, Appellate Division, A-005315-08T4 (Mar. 7, 2010).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(continued)

Page

APPENDIX

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Donald E. Boyd ("Mr. Boyd") respectfully petitions for a writ of certiorari to review the decision of the Superior Court of New Jersey, Appellate Division, and the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's order denying Mr. Boyd's petition for rehearing is unreported. The Third Circuit's opinion denying habeas relief appears at 824 Fed. Appx. 111. The Third Circuit's order granting in part and denying in part Mr. Boyd's motion for a certificate of appealability is unreported. The district court's opinion denying habeas corpus appears at 2019 WL 316025, and its opinion denying reconsideration appears at 2019 WL 1013337. The New Jersey Supreme Court's order denying Mr. Boyd's petition for certification is published at 229 N.J. 603. The Superior Court of New Jersey Appellate Division's opinion denying Mr. Boyd post-conviction relief appears at 2016 WL 5497588. The opinion of the Superior Court of New Jersey, Law Division, Bergen County, is unreported. The United States Supreme Court order denying Mr. Boyd's petition for certiorari following his direct appeal is published at 556 U.S. 1241. The New Jersey Supreme Court's order denying certification on Mr. Boyd's direct appeal is published at 107 N.J. 16. The Superior Court of New Jersey Appellate Division's opinion on direct appeal affirming Mr. Boyd's conviction appears at 2008 WL 3287240. The opinion of the Superior Court of New Jersey, Law Division, Bergen County is unreported.

JURISDICTION

The Third Circuit entered its judgment on August 20, 2020, and denied petitioner's timely petition for rehearing *en banc* on September 22, 2020. The period for timely filing a petition for certiorari was extended pursuant to the March 19, 2020 Order of this Court. (Order List: 589 U.S.). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

***United States Constitution, Amendment XIV*:**

Section 1. 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.

***United States Constitution, Amendment VI*:**

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

STATEMENT OF THE CASE

A. Factual Background.

Mr. Boyd had never taken or been prescribed a psychotropic medication in his life before the State of New Jersey (the "State") drugged him during his criminal trial. Therefore, this Court's holdings in *Riggins v. Nevada*, 504 U.S. 127 (1992), *Sell v. United States*, 539 U.S. 166 (2003), and *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975), control and require a new trial be granted. Specifically, *Riggins* and *Sell* mandate specific due process protections before the involuntary medication of prisoners during trial. As set forth herein, these mandates were never observed or afforded to Mr. Boyd.

Mr. Boyd was on trial for his life when, unbeknownst to him, the very State prosecuting him also drugged him with unreasonably high doses (i.e., four times the manufacturer's recommended dose) of the benzodiazepine drug Alprazolam, commonly known as Xanax, a controlled, psychotropic medication. This involuntary and unknowing dosing of Mr. Boyd is made even more egregious because Mr. Boyd, who had never previously taken a psychotropic medication, was in the midst of representing and defending himself before a jury at the same time he was unwittingly drugged.

The State charged Mr. Boyd with 15 counts related to an alleged sexual assault. Prior to trial, Mr. Boyd requested to represent himself *pro se*. The trial court undertook the requisite *Faretta* hearing (*See generally* J.A. 230-245[1] (Excerpts from

[1] Citations to 'J.A.' refer to the record filed below in the Third Circuit.

the March 28, 2006 Pre-Trial Hearing)), during which the trial judge, at the behest of the State, explicitly inquired whether Mr. Boyd was taking any psychotropic medications, as these would affect his ability to represent himself (J.A. 244-45 at 67:16-68:1; 245 at 68:2-21). Only after confirming that Mr. Boyd was not taking any psychotropic medication was he permitted to proceed *pro se*. During the *Faretta* hearing, Mr. Boyd believed he was making a knowing and voluntary waiver of his right to counsel with his eyes open. It turns out, he was not.

Mr. Boyd's criminal trial proceeded one month later. Mr. Boyd, confined in State prison at the time, was taken to the Bergen County jail prior to and for the duration of his criminal trial (J.A. 223 at ¶ 2 (Supplemental Certification of Donald E. Boyd in Support of His Petition for Post-Conviction Relief)). To accommodate this change in housing, the State prison sent Mr. Boyd with a three-day supply of the medications he was prescribed at the prison for more than a year (all non-narcotic with no psychotropic drugs) (*Id.* at ¶ 4). When the trial started, however, it became a daily fight for Mr. Boyd to get his regular medications. He had to beg for them on the first day of his trial and then was denied his medication on the second day, all while attempting to defend his own trial.

On the third day of trial – after multiple pleas for the trial judge to intervene and after the State had consistently withheld his daily medications – the State was directed by the trial court to give Mr. Boyd his medications so that the trial could proceed. The State, however, never did provide Mr. Boyd with his regular medications. Instead, the Bergen County jail's medical doctor, without a face-to-face

or in-person evaluation, changed his regular medications and also prescribed, for the first time, midtrial, Alprazolam (i.e., Xanax), a controlled, psychotropic medication, to be administered to Mr. Boyd along with only one of his regular requested medications (J.A. 363 (April 27, 2006 Medical Record); J.A. 208 (FDA Label information for Xanax); J.A. 124 (Report of Kenneth J. Weiss, M.D.)). A nurse then brought the newly prescribed medication to the courthouse, which were presented to Mr. Boyd on a take-it-or-leave-it basis, crushed and dissolved together in a cup of juice (J.A. 181-82 at 42:24-43:6; J.A. 185 at 54:2-16; *see generally* J.A. 116-88).

Mr. Boyd had never previously taken Xanax nor any psychotropic medication. No healthcare professional spoke to him about Xanax or its potential effects on his abilities to continue to proceed *pro se* (*See generally* J.A. 116-88 (expert reports and depositions, including deposition of the State's nurse)). Indeed, the nurse who arrived in court with the drug was expressly instructed not to speak to Mr. Boyd (J.A. 180 at 36:3-23). Therefore, he did not and could not have known that: (1) the prescribed 2.0 mg daily dose of Xanax was four times higher than the manufacturer's recommended start dose, (2) Xanax has numerous, sometimes severe, side effects that could significantly diminish someone who was representing himself at his criminal trial, and (3) Xanax could interact with his other medications, exacerbating the side effects of both. Following several days of continued dosing with Xanax, Mr. Boyd was convicted.

Importantly, the Xanax prescribed on that third day of trial was a "stat" dose, meaning it was a one-time dose (J.A. 177 at 33:12-18). Not only was Mr. Boyd

completely ignorant as to the significance of the dosage (i.e., it was an incredibly high start dose), but he did not learn until the morning of summations that more Xanax had been subsequently crushed, mixed in juice and administered to him daily for the remainder of his trial pursuant to an additional, new prescription (J.A. 85).

After his conviction, Mr. Boyd made repeated requests for his medical records from the Bergen County Jail, which were denied without reason for years. It was only during the course of the appeals that followed and Mr. Boyd's civil rights action against the State and various medical professionals that he learned the jail's doctor had entered a subsequent additional 2.0 mg daily dose prescription of Xanax to continue for the duration of his trial. He was never informed of this second prescription or the actual continuing administration of the drug, nor was he told why the State deemed the drug necessary or appropriate.

The State has conceded that Xanax has severe side effects, including things like drowsiness or light headedness, which side effects generally are observed at the beginning of taking the course of the medication – i.e., the side effects are most likely to appear in the first week of administration, which is the duration Mr. Boyd was drugged and defending his own trial. In fact, the State's own doctors and medical experts, Jon Hershkowitz, M.D. (the prescribing physician), Phillip Slonim, Ph.D. (the State's psychologist) and Joseph Deltito, M.D. (the State's expert), as well as Kenneth Weiss, M.D. (Mr. Boyd's expert), each agree that the side effects of Xanax could significantly reduce Mr. Boyd's ability to represent himself:

- Dr. Slonim: "[S]ome reported adverse reactions to Xanax included impaired memory or attention [and dysarthria] which could have

negatively impacted defendant's performance in court ...." (J.A. 113 (May 15, 2006 Clinical Summary of Dr. Slonim);

- Dr. Deltito: "Xanax 'may or may not have' reduced [Mr. Boyd's] capacity to represent himself.... Taking Xanax could make some patients drowsy and affect their thinking .... The combination of Clonidine, Ultram and Flexeril, in conjunction with Xanax, **could have contributed to defendant being overly sedated**." (emphasis added) (J.A. 145 at 47:7-13; J.A. 146-47 at 55:21-6; J.A. 148:57:5-12; J.A. 152 at 117:2-7);

- Dr. Hershkowitz: the side effects of Xanax include "drowsiness" and "somnolence" (which is a state of strong desire for sleep, or sleeping for unusually long periods) (J.A. 171 at 54:10-21); and

- Dr. Weiss: Xanax is a sedative that can have severe side effects including "reducing the mental sharpness associated with worry, excessive vigilance, and the bodily feelings of tension, as well as death, general cloudy, intoxication similar to alcohol, and mood swings." (J.A. 124 (Expert Report of Dr. Weiss)).

Critically, at the time Mr. Boyd waived his right to counsel, he had no knowledge that he would later be given powerful doses of a psychotropic drug, crushing the medication into a small cup mixed with juice.

B. <u>The Proceedings Below</u>.

1. New Jersey Appellate Division Decision.

After denial of his direct appeals, Mr. Boyd filed a Petition for Post-Conviction Relief ("PCR") with the Superior Court of New Jersey. The PCR was denied on October 28, 2013. Thereafter, Mr. Boyd filed an appeal of the PCR denial with the Superior Court of New Jersey, Appellate Division on January 7, 2014. The New Jersey Appellate Division entered an order on September 30, 2016, denying his appeal.

In its opinion, the New Jersey Appellate Division acknowledged that: (1) beginning on the third day of trial, Mr. Boyd was given Xanax in addition to his "regular" medications, (2) Mr. Boyd was never given the opportunity to meet with the physician who suddenly prescribed him Xanax, (3) the record contained absolutely no evidence of "written consent or acknowledgment by defendant that he was being given Xanax," and (4) beginning on the first day of trial, Mr. Boyd had been pleading for his regularly prescribed medications, which did not include Xanax. *State v. Boyd*, 2016 WL 5497588, at *3, 5 (N.J. App. Div. Sept. 30, 2016). The New Jersey Appellate Division also offered an excerpt of Mr. Boyd's trial transcript, which exhibits that the nurse who administered the medication did not offer Mr. Boyd *any* information about the drugs he was about to take, and that Mr. Boyd found himself in a take-it-or-leave-it situation wherein he had no choice but to take what was given to him so that he could receive his "regular" medications and proceed with the trial.

Despite this discussion of facts from the record, the New Jersey Appellate Division concluded that this Court's decision in *Riggins* was "distinguishable" from Mr. Boyd's case for two reasons.

First, the New Jersey Appellate Division found *Riggins* was distinguishable because it concluded that Xanax was unlike Mellaril, the drug administered in *Riggins*. *See Boyd*, 2016 WL 5497588, at *7 ("The drug in question here is Xanax, anti-anxiety medication, not Mellaril, a powerful anti-psychotic drug. The drugs at issue vastly differ in their effects."). Though the New Jersey Appellate Division stated that Xanax and Mellaril are different, it did not offer any reasoning for this conclusion.

In fact, both Mellaril and Xanax are psychotropic drugs, meaning they are both drugs that alter a person's mental state and have the potential to impair cognitive function. *See Riggins*, 504 U.S. at 130, 134 and 144. Moreover, that these drugs have substantially similar side effects was established by the experts presented by both Mr. Boyd and the State. *See Boyd*, 2016 WL 5497588, at *7. As the table below demonstrates, the potential side effects that concerned this Supreme Court in *Riggins* are also present here, which courts below simply ignore, with the side effects appearing on both lists bolded and underlined:

Notable Side Effects and Adverse Reactions	
Mellaril and Antipsychotic Drugs	***Xanax and Benzodiazepines***
In the majority opinion and Justice Kennedy's concurrence, the Supreme Court acknowledged that the side effects of Mellaril and/or antipsychotic drugs include: Acute **dystonia (involuntary spasms)**, **akathesia (motor restlessness, often characterized by an inability to sit still)**, tardive **dyskinesia (uncontrollable movements of various muscles)**, **restlessness**, **tremors** of the limbs, diminished range of facial expression, slowed movements and speech, a "**sedation**-like effect" that may affect thought processes, **drowsiness**, **lack of alertness**, and **depression of the psychomotor functions**. *Riggins*, 504 U.S. at 134, 137, 142-43.	According to its FDA label information, the reported side effects of Xanax and benzodiazepines include: **Drowsiness**, **fatigue and tiredness**, **impaired coordination**, irritability, memory impairment, lightheaded/dizziness, insomnia, headache, cognitive disorder, anxiety, nervousness, depression, confusion or confused state, rigidity, **abnormal involuntary movement, muscular twitching**, **tremors**, blurred vision, **akathesia (motor restlessness, often characterized by an inability to sit still)**, agitation, disinhibition, hallucinations and depersonalization. **Dystonia (involuntary muscle spasms)**, irritability, **concentration difficulties**, transient amnesia or memory impairment, loss of coordination, **fatigue**, **sedation**, slurred speech, and musculoskeletal weakness.

	See Xanax FDA Label Information (Adverse Reactions) (J.A. 203-204).

Second, and critically, the New Jersey Appellate Division decided that "[t]he administration of medication is considered involuntary only when a person in custody refuses it, requests it must be terminated, or makes such requests through counsel." *Id.* In other words, the New Jersey Appellate Division determined that *Riggins* applies only in the "forced medication" context. The New Jersey Appellate Division, however, did not cite *Riggins* or any other Supreme Court precedent when fashioning this definition of involuntariness. Instead, the court cited the Ninth Circuit's decision in *Benson v. Terhune*, 304 F.3d 874 (9th Cir. 2002). *Benson*, however, explicitly states that *Riggins* is not limited to a "forced" administration context, but applies where administration of medication is involuntary. Armed with this inaccurate definition of involuntariness, the New Jersey Appellate Division concluded that *Riggins* did not apply to Mr. Boyd's case, and accordingly, that his due process rights had not been violated such that he deserved a new trial. *See Boyd*, 2016 WL 5497588, at *8.

Mr. Boyd sought certification with the New Jersey Supreme Court on October 18, 2016. His petition was denied on March 16, 2017.

2. District Court Decision.

After Certification was denied on Mr. Boyd's PCR appeal, he filed a Petition for a Writ of Habeas Corpus on January 23, 2018, which was denied on January 24, 2019. The District Court's decision rested largely on the New Jersey Appellate Division's reasoning and findings. Mr. Boyd filed a motion to Alter or Amend the

Judgment on February 21, 2019. He then filed a Notice of Appeal to the Third Circuit on February 22, 2019. His motion to Alter or Amend was denied on March 1, 2019.

3. Third Circuit Decision.

The Third Circuit granted Mr. Boyd's application for a certificate of appealability on one issue: "The application is granted as to the claim that appellant's involuntary and unknowing dosing with Xanax violated his Sixth Amendment right to counsel and deprived him of a fair trial and due process." Following briefing on the merits and without oral argument, the Third Circuit concluded that "Boyd had no right to those protections [offered by *Riggins* and *Sell*] because both cases limit only involuntary medication." *Boyd v. Administrator New Jersey State Prison*, —Fed. Appx.— , 2020 WL 4876278, at *4 (3d Cir. Aug. 20, 2020). The Third Circuit opined that though these precedents "require courts to make certain findings before the government can *involuntarily* medicate a defendant on trial, they do not extend those procedural safeguards to defendants who are *not forced* to accept medication." *Id.* at *4. In the Third Circuit's view, then, because Mr. Boyd did not object to the State's first "stat" administration of Xanax while in court, this entirely foreclosed the application, and therefore the protections, of *Riggins* and *Sell*. *Id.* at *3.

Mr. Boyd filed a Petition for Rehearing and En Banc review. The petition was denied on September 22, 2020, and a mandate was issued on September 30, 2020.

REASONS FOR GRANTING THE WRIT

The New Jersey Appellate Division and the Third Circuit's narrow and unjustified view of *Riggins* and *Sell* is, in fact, contrary to the federal habeas statute. Though these courts frame Mr. Boyd's case as requesting an expansion of this Court's precedent, Mr. Boyd asks for no more than the application of well-established precedents to the particular facts of his case. As this Court has explained time and again, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that "a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts *different from those of the case in which the principle was announced*.'" *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)) (emphasis added).

By creating an artificial separation between "involuntary" and "forced" medication, the Third Circuit also created a real circuit split with the Ninth Circuit's decision in *Benson v. Terhune*. By relying on the New Jersey Appellate Division's analysis, the Third Circuit refused to consider whether the due process protections at issue in *Riggins* and *Sell* apply outside of the forced medication context. By rejecting the idea and unnecessarily restricting themselves to a strict reading of the facts of *Riggins* and *Sell*, the Third Circuit assumed a narrow definition of involuntariness contrary to the requirements under the AEDPA.

Conversely, the Ninth Circuit's analysis in *Benson v. Terhune* realized that *Riggins* and *Sell* are not wholly limited to the forced medication context. Instead, the real constitutional question is whether a criminal defendant's ingestion of psychotropic medication was voluntary under this Court's precedent – i.e., was there

both voluntary consent (free and unconstrained choice) and knowing consent (intelligent choice). For purposes of § 2254 habeas relief, the Ninth Circuit evaluated *Riggins*, along with this Court's precedent in its *Miranda* waiver and guilty plea cases, to determine whether the procedural safeguards guaranteed by those cases were unreasonably applied. That *Sell* happened to involve facts analogous to *Riggins* does not render *Riggins* and *Sell* only applicable to one factual context – forced administration – foreclosing other factual patterns where administration was no less involuntary.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT THE CONSTITUTIONAL PROTECTIONS SET FORTH IN *RIGGINS* AND *SELL* APPLY TO INVOLUNTARY ADMINISTRATION OF DRUGS, AND NOT SOLELY TO THE CONTEXT OF "FORCED" MEDICATION.

A. *Riggins* And *Sell* Establish That The Involuntary Administration Of Psychotropic Drugs Without Proper Procedural Safeguards Was A Violation Of Mr. Boyd's Due Process And Fair Trial Rights.

In *Riggins v. Nevada*, 504 U.S. 127, this Court addressed the issue of involuntary administration of medication to a not yet convicted prisoner. Defendant Riggins was placed on a regimen of the antipsychotic[2] drug Mellaril. *Id.* at 129. Mr. Riggins moved for a court order to cease the dosing until the end of his trial, arguing that the drug could affect his demeanor and mental state during trial. *Id.* at 130. Because he had an opportunity to object and seek court intervention, Mr. Riggins was afforded an evidentiary hearing. *Id.* His motion was denied and he ultimately was convicted. *Id.* at 131.

This Court granted certiorari "to decide whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth amendments." *Id.* at 132-33. In reversing the state court, this Court held that constitutional protections applied to pretrial detainees, which required the court below to make a "finding of overriding justification and a determination of medical appropriateness" before the involuntary administration of medication. *Id.* at 129, 135.

[2] Phenothiazine drugs (such as Mellaril) and benzodiazepine drugs (such as Xanax) are both psychotropic drugs, by their classification. Additionally, as set forth in the chart at p. 10 above, the side effects of both drugs are materially similar.

This Court further criticized the trial court's failure to acknowledge the "liberty interest in freedom from unwanted antipsychotic drugs," as well as its failure to investigate the concerns raised by Mr. Riggins and psychiatrists regarding the possible side effects of Mellaril. *Id.* at 137.

Critically, Mr. Riggins was not required to demonstrate that he was *actually* prejudiced by the involuntary medication. Instead, the expert testimony, alone, demonstrated the drug *could* have affected his demeanor, meaning "an unacceptable risk of prejudice remained." *Id.* at 137-38.

Similarly, in *Sell v. United States*, 539 U.S. 166, a federal magistrate judge had found that defendant Sell was incompetent to stand trial. *Id.* at 171. A treating psychiatrist sought to administer antipsychotics, but Mr. Sell refused to consent. *Id.* The magistrate subsequently issued an order authorizing the involuntary administration of antipsychotic medication. *Id.* at 173. The District Court and the Eighth Circuit affirmed. *Id.* at 174. This Court, however, vacated the order, holding that antipsychotic medication may be administered to an incarcerated patient against his will for the purpose of rendering him or her competent to stand trial *only if* the government can show that: (1) important government interests are at stake; (2) involuntary medication is substantially unlikely to have side effects that may undermine the fairness of the trial; (3) involuntary medication is necessary significantly to further government interests, and less intrusive means are unlikely to achieve substantially the same results; and (4) the administration is medically appropriate. *Id.* at 179-82.

Indeed, in each of these decisions, this Court noted that involuntary administration of psychotropic drugs *could* impact a defendant's "outward appearance," the "content of his testimony," "his ability to follow the proceedings," "the substance of his communication with counsel," "rapid reaction to trial developments," and/or "the ability to express emotions," thus possibly "undermin[ing]" the defendant's constitutional right to a fair trial. *Riggins*, 504 U.S. at 137; *Sell*, 539 U.S. at 185-86. This mere *possibility* that a defendant's defense is impaired by the involuntary drug administration is enough to warrant a new trial. *See Riggins*, 504 U.S. at 137-38.

Thus, *Riggins* and *Sell* establish that the involuntary administration of psychotropic drugs without proper procedural safeguards is a violation of a defendant's Constitutional rights. Neither *Riggins* nor *Sell*, however, expressly defined what constitutes involuntary administration of a drug, and under the particular facts of both cases, the defendants had the meaningful opportunity to object to the administration of the drug before it was given. Regardless, this Court has extensive precedent that sheds light on what voluntariness means.

Moreover, as exhibited by this Court's construction of the AEDPA, state courts are to apply clearly established law from this Court for different defendants whose cases arise in distinct factual contexts. Plainly, that means that the legal principles articulated in *Riggins* and *Sell* apply even under fact patterns that are dissimilar to those that arose in *Riggins* and *Sell* themselves. That is, contrary to the opinion of

the New Jersey Appellate Division and the Third Circuit, *Riggins* and *Sell* also apply to cases existing outside of the forced medication context.

B. The Courts Below Erroneously Restrict This Court's Decisions In *Riggins* And *Sell* To The Forced Medication Context.

The Third Circuit's (and the New Jersey Appellate Division's) decision boils down to a dichotomy that cannot be countenanced under this Court's precedents. On the one hand, if a state forces medication on a defendant over his objection, the state violates due process where such medication could *possibly* affect the defendant's ability to participate in his trial. On the other hand, if a criminal defendant requesting his regular medication is presented with a brand new drug and ingests it, without any information to intelligently accept or refuse the drug, then it does not matter if the drug possibly affected the defendant's ability to represent himself at his criminal trial. That is not what this Court has said.

Indeed, the Ninth Circuit recognized that the clearly established law articulated in *Riggins* and *Sell* was meant to apply to various sets of facts outside of the limited forced administration context. In *Benson v. Terhune*, a criminal defendant sought *habeas* relief to overturn her conviction because she was given psychotropic drugs during her criminal trial without voluntary and knowing consent. 304 F.3d 874, 876 (9th Cir. 2002). At the outset of its analysis, the Ninth Circuit stated:

> Benson's circumstances, of course, are factually different [from *Riggins*]. Not only did she not object to the administration of drugs, including Elavil and Valium, but she also affirmatively sought medication to remedy her physical ailments. The California court, as did the district court, considered this distinction dispositive—and concluded that *Riggins* is not applicable unless the inmate

> affirmatively objects to the administration of the objectionable drug. Although we agree that Benson's case differs from *Riggins* in this respect, we cannot agree that the distinction is wholly dispositive.

Benson, 304 F.3d at 881-82.

The Ninth Circuit then explained that "because the facts of Benson's case differ from those in *Riggins*," it needed to inquire "whether the California court unreasonably applied *Riggins* or other Supreme Court authority to this new factual situation." *Id.* at 882. The Ninth Circuit realized that the crucial question at issue was one of voluntariness. Recognizing that "*Riggins* does not explicitly define what makes the administration of medicine voluntary," it looked to other applicable Supreme Court precedent for guidance in defining the term. *Id.*

In so doing, the Ninth Circuit applied a rubric constructed from this Court's precedent related to *Miranda* waivers and guilty pleas. *Id.* The Ninth Circuit determined that voluntariness under this precedent comprised two inquiries: (1) whether Benson made a free and deliberate choice to ingest the drugs (voluntary consent), and (2) whether her un-coerced acceptance of medications was based on a knowing and intelligent choice (knowing consent). *Id.*

Under voluntary consent, the Ninth Circuit explained that "the Supreme Court has held that 'the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). In considering "the particular facts of [Benson's] case," the court concluded that Ms. Benson's ingestion of the drugs was a product of voluntary consent because she was

never forced, threatened, intimidated or unduly influenced, and the jail's formal policy permitted her to refuse specific drugs at will. *Id.* at 882-83.

Turning to knowing consent, the Ninth Circuit asserted that this Court's precedent requires a waiver to be made "'with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id.* at 883 (quoting *Burbine*, 475 U.S. at 421). Similarly, in the guilty plea context, a plea is "'unintelligent' if the defendant is without the information necessary to assess intelligently 'the advantages and disadvantages of a trial as compared with those attending a plea of guilty.'" *Id.* (quoting *United States v. Hernandez*, 203 F.3d 614, 619 (9th Cir. 2000), *overruled on other grounds*, (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985))).

Unlike the Third Circuit, the Ninth Circuit rightly recognized that the AEDPA requires clearly established legal principles articulated by this Court to be applied to the facts of each individual case that comes before a court. Without such an inquiry to determine how to apply these legal principles in various factual contexts, a court cannot properly determine whether a state court's decision "involved an unreasonable application of" the very legal principles at stake. The Ninth Circuit cautioned that it was "untenable . . . to assume that an inmate's unquestioning acceptance or failure to refuse the administration of psychotropic medication – without information about the drugs – automatically forecloses a finding of involuntariness." *Id.*

A quick comparison of Mr. Boyd's facts to the facts of *Benson* drastically demonstrate why Mr. Boyd's ingestion of Xanax was neither voluntary nor knowing.

Indeed, the distinguishable differences between Mr. Boyd and Ms. Benson are both compelling and numerous.

As to voluntariness, Ms. Benson had previously (and successfully) been able to refuse medication, and thus was "aware she could have objected to medication during trial – or asked for more information about the nature or dosage of particular drugs." *Id*. at 885. Here, Mr. Boyd was put in a take-it-or-leave it situation. The State did not give Mr. Boyd his regular medication for the first three days of his trial or at any time thereafter. He was supposed to receive Clonidine (for high blood pressure), Ultram and Feldene (for pain), and Zantac (for stomach ulcers). On the first day of trial, Mr. Boyd received his blood pressure and pain medications only after complaining to the trial court that the State had not given them to him. The very next day, Mr. Boyd explained that he again did not receive his medication, including his pain medication. This time, the trial moved forward despite his complaints and without his medication. On the third day, Mr. Boyd stated he could not represent himself until he received his medications and explained that he had not seen any medical personnel to date. The State's reaction was, "If he's in a little pain, you know what, too bad. The trial needs to move forward." (J.A. 276).

The Third Circuit had previously stated the "undisputed facts reveal that on April 27, 2006, while Boyd was in court, a nurse (who never examined Mr. Boyd) called Dr. Hershkowitz and told him that Boyd needed a prescription for his pain and arthritis, and that she was concerned about the level of anxiety he was displaying." *Boyd v. Russo*, 536 Fed. Appx. 203, 206 (3d Cir. 2013) (emphasis added). It was only

then that the State, without consulting with Mr. Boyd, prescribed his regular Ultram (his pain medication) and added Xanax (a drug he has never taken). At that point, a nurse brought "Xanax, one milligram, and Ultram, fifty grams" to the courthouse (J.A. 278), but was instructed that she could not speak with Mr. Boyd about this medication. Mr. Boyd, who had complained about not receiving his regular medication the two prior days – including his pain medication – had but one choice: take the medicine or not. Believing he was getting his regular Zantac medication and Ultram, he took it.

It cannot be said, therefore, that Mr. Boyd's consent was a free and deliberate choice under these circumstances. It is entirely uncontested and uncontestable that Mr. Boyd was never afforded the opportunity to evaluate and either refuse or accept the drug Xanax. *See id*. at 206. As such, Mr. Boyd's ingestion of the psychotropic drug was not the product of voluntary consent.

Nor was Mr. Boyd's ingestion of Xanax the product of knowing consent, as demonstrated by the following stark differences in factual situations:

- Ms. Benson made over 90 "sick call" requests for medical attention and drugs, meeting with jail medical staff before and throughout the proceedings. *Benson*, 304 F.3d at 885. Mr. Boyd was never seen, spoken to or evaluated by any doctor or nurse prior to or while being given Xanax. *Boyd*, 536 Fed. Appx. at 206.

- Ms. Benson had personal knowledge of the drugs she was taking "from her own usage (and abuses)" and "from her training as a practical nurse." Indeed, "Ms. Benson's history of illicit and prescription drug use provided her with knowledge of various medications and the 'recognition of the effect[s] of [those] drugs.'" *Benson*, 304 F.3d at 884 n.11. Mr. Boyd has a GED education, no history of taking psychotropic drugs, and had never taken Xanax.

- Ms. Benson previously had taken all but one of the medications of which she complains were given to her at trial, with Ms. Benson's real complaint being that Valium "was replaced by Vistaril, another psychotropic drug." *Id.* at 878. Indeed, Ms. Benson was taking Valium before and during her trial. It bears repeating, Mr. Boyd had never taken a psychotropic drug in his life.

- When Ms. Benson returned to custody after being released on bail, she "promptly requested to be medicated again with the same supposedly 'mind-numbing' cocktail of drugs she previously had taken." *Id.* at 884 n.11. Mr. Boyd, on the other hand, has never taken Xanax again.

There is nothing in the record to indicate Mr. Boyd had any appreciation or recognition of these psychotropic drugs when the State drugged him with Xanax. Indeed, the Third Circuit has already acknowledged that Mr. Boyd "unquestionably . . . did not in fact receive the information concerning Xanax" that would allow him to make an informed decision to accept or reject a treatment, or a reasonable explanation of viable alternative treatments. *Boyd*, 536 Fed. Appx. at 206. In light of Mr. Boyd's lack of education, knowledge, and understanding about the drug he was given, it cannot be concluded that Mr. Boyd's ingestion of Xanax was voluntary.

II. THE STATE FAILED TO ESTABLISH THAT THE 2.0 MG DOSE OF XANAX WAS NEEDED, MEDICALLY APPROPRIATE, AND THAT NO LESS INTRUSIVE ALTERNATIVES WERE AVAILABLE.

Riggins and *Sell* mandate that before the government can force a defendant to involuntarily ingest psychotropic drugs, it must find that the treatment is (1) "medically appropriate," (2) "substantially unlikely to have side effects that may undermine the fairness of the trial," (3) "necessary to further" governmental interests, and (4) "any alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Sell*, 539 U.S. at 180-81; *Riggins*, 504 U.S. at 135.

That did not happen here. Instead, the State unilaterally administered Xanax to Mr. Boyd – Mr. Boyd's *first* ever psychotropic drug, for which he had no previous experience – at a dose four times the manufacturer's recommended dosage: 1.0 mg instead of 0.25 mg per administration, delivered twice daily to Mr. Boyd.

Not only does the State fail to demonstrate that the administration of psychotropic medication was medically appropriate, but it also cannot demonstrate that there were no less intrusive alternatives or that the manufacturer's recommended start dose of 0.25 mg per dose would have been insufficient. And, most critically, the State certainly did not show that administration of the drug was substantially unlikely to have side effects that could undermine the fairness of Mr. Boyd's trial.

Riggins indisputably establishes that a defendant need not demonstrate that he was *actually* prejudiced by the involuntary administration of a psychotropic drug. Instead, expert testimony, alone, demonstrated the drug *could* have affected his demeanor, meaning "an unacceptable risk of prejudice remained." *Id.* at 137-38. In denying Mr. Boyd's application, the New Jersey Appellate Division, as upheld in these habeas proceedings, incorrectly or completely failed to apply *Riggins*, instead concluding, after examining the trial record, that "to the extent any harm was visited upon defendant by the administration of Xanax, that harm does not undermine our confidence in the fairness of the process." *Boyd*, 2016 WL 5497588, at *8. This Court, however, explicitly rejected such application of an actual prejudice analysis, reasoning that "[e]fforts to prove or disprove actual prejudice from the record would be futile, and

guessing whether the outcome of the trial might have been different... would be purely speculative …. [T]he precise consequences of forcing antipsychotic medication upon [the defendant] cannot be shown from a trial transcript." *Riggins*, 504 U.S. at 137. As was the case in *Riggins*, Mr. Boyd is entitled to a new trial.

III. THE STATE'S DOSING OF MR. BOYD WITH XANAX WAS AN INTERVENING CHANGE IN CIRCUMSTANCES RENDERING HIS PRIOR *FARETTA* WAIVER NO LONGER KNOWING, VOLUNTARY AND INTELLIGENT AT THE TIME IT WAS MADE.

A. Mr. Boyd's Waiver Of His Sixth Amendment Right To Counsel Was Made Void By The State's Drugging With Unconscionably High Doses Of Xanax.

Mr. Boyd was denied his Sixth Amendment right to counsel when the State drugged him with unreasonably high doses of Xanax *after* he had previously waived his critical right to counsel.

"It is well-settled that [a defendant's waiver of right to counsel] must be knowing, voluntary, and intelligent." *Erie Telecommunications, Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1094 (3d Cir. 1988) (citing *Faretta*; other citations omitted); see also *U.S. v. Jones*, 452 F.3d 223, 223 (3d Cir. 2006) (vacating conviction and remanding for a new trial because defendant's decision to proceed *pro se* was not knowing, voluntary and intelligent). As the trial court itself explained to Mr. Boyd on March 28, 2006, the Sixth Amendment "recognize[s] the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel." Citing *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). The trial judge even reiterated: "Without counsel,

the right to a fair trial means little." Citing *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).

The right of a criminal defendant to act as his own counsel, as recognized in *Faretta*, is inherently reliant on the defendant's full knowledge and understanding of the undertaking before him, and the risks of proceeding without the aid of counsel. *Faretta v. California*, 422 U.S. 806, 835-36 (1975). A defendant may waive his constitutional right to assistance of counsel only if he "knows what he is doing and his choice is made with his eyes open." *Adams v. U.S. ex rel. Mecann*, 317 U.S. 269, 279 (1942). As this Court has stated, "the information a defendant must possess in order to make an intelligent election, . . . depend[s] on a range of case-specific factors . . ." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). That's because when an accused manages his own defense, he relinquishes the benefits associated with the right to counsel.

To be allowed to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. *Zerbst*, 304 U.S. at 464-465. Trial courts are therefore burdened with viewing *Faretta* waivers with skepticism and even disapproval, and it is well-established that courts are to "indulge in every reasonable presumption against waiver" of the constitutional right to counsel. *Adams*, 317 U.S. at 279; *Brewer v. Williams*, 430 U.S. 387, 404 (1977); see also *Patterson v. Illinois*, 487 U.S. 285, 307 (1988); *Pazden v. Maurer*, 424 F.3d 303, 312 (3d Cir. 2005); *United States v. Forrester*, 512 F.3d 500, 507 (9th Cir. 2008).

The relevant inquiry is whether Mr. Boyd, at the time of his waiver: (1) possessed full knowledge and understanding of the undertaking before him and of

the risks of proceeding without the aid of counsel, (2) knew what he was doing when he made that choice, (3) possessed the information necessary to make the intelligent election, and (4) made his choice with eyes wide open. *Faretta*, 422 U.S. at 835-36 (1975), *Adams*, 317 U.S. at 279; *Tovar*, 541 U.S. at 88. He clearly did not. As set forth herein, Mr. Boyd satisfied none of these requirements.

Mr. Boyd's decision to represent himself one month before trial began was hinged on the belief that he would not be dosed with unreasonably high and powerful quantities of psychotropic medication during his trial. The trial court's acceptance of Mr. Boyd's *pro se* request was also hinged on the same belief. This is proven by the record.

The State clearly understood what impact psychotropic drugs could have had on Mr. Boyd's ability to represent himself. Soon after the trial court ruled that Mr. Boyd could represent himself, the prosecutor separately and independently requested that the trial court ask Mr. Boyd about the medications he was taking: "I don't mean to pry . . . but if he has medication for some type of psychiatric condition, I think we need to be aware of that before you rule – I know you already said that he voluntarily and knowingly volunteered (phonetic) his right to counsel, if he is taking [psychotropic] medication, and he is on it now, and it affects his thinking, we have to explore that briefly." (J.A. 244 at 67:17-24). Put another way, the State was making the point that should Mr. Boyd be taking any psychotropic medications, the trial court would be required to explore that prior to ruling on Mr. Boyd's ability to represent himself.

In response to the State's request, the trial judge explicitly queried Mr. Boyd about such drugs. When Mr. Boyd informed the trial court of his prescriptions, the prosecutor stated, "I was worried about psychotropic medications," to whom Mr. Boyd emphatically replied, "there are no psychotropic medications that I take." (J.A. 245 at 68:2-19). It is uncontested that Mr. Boyd had no history of psychiatric treatment or was ever previously treated with any kind of psychotropic drugs like Xanax. Thus, at the time, both Mr. Boyd and the trial court thought Mr. Boyd was waiving his right to counsel with his "eyes open," and a month before trial when Mr. Boyd moved to represent himself, he was.

Both Mr. Boyd and the trial court, however, were blissfully unaware at the hearing in March 2006 of what the State would end up doing to Mr. Boyd the next month during the trial proceedings. Specifically, Mr. Boyd did not waive his right to counsel with his "eyes open" to the unanticipated scenario of the State drugging him with psychotropic medication while he was attempting to conduct his own defense. Indeed, neither Mr. Boyd nor the trial court foresaw (or could have foreseen) such an outrageous deprivation of Mr. Boyd's constitutional rights.

B. The Trial Court Should Have Conducted Another *Faretta* Hearing To Evaluate Mr. Boyd's Ability To Continue To Represent Himself While Taking Xanax.

Self-representation at trial requires that the defendant's mind be clear, sharp and without impairment. Here, however, there is no doubt that Mr. Boyd, while being medicated, may have been dispossessed of the higher level of capacity necessary to conduct his own defense, which should have been the subject of additional informed

inquiry by the trial court. Given Mr. Boyd was representing himself *pro se*, the trial judge was required to be extra vigilant.

In fact, the moment the trial judge learned of the Xanax dosing, he was required to evaluate (1) whether Mr. Boyd clearly and unequivocally desired to continue *pro se* while medicated with an unreasonably high 2.0 mg daily dose of Xanax; (2) whether he was thoroughly satisfied that Mr. Boyd understood the facts and risks involved while continuing to represent himself when medicated with such a powerful dose of Xanax; and (3) whether he felt confident and assured that Mr. Boyd was competent to stand trial (and, more importantly, represent himself) while under such heavy quantities of a psychotropic drug. *Faretta*, 422 U.S. at 835-36. The trial judge made no such inquiry.

Indeed, the State went so far as to remind the trial court that Mr. Boyd's *pro se* status was reversible. During the *Faretta* hearing, there was a conversation concerning standby counsel's role at the trial. The State explained to the trial judge: "*The court can withdraw that self-representation at any time*." As this Court has ruled, "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . [but who] are not competent to conduct trial proceedings by themselves," such as where the defendant is taking a medication that could affect his ability to conduct his own trial. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

On the very day Mr. Boyd learned of the dosing, he requested that counsel take over. (*See, e.g.*, J.A. 283 at 4:4-5:15 (Excerpts from May 3, 2006 Trial

Proceedings)). His request was denied. Instead, the trial judge demanded that Mr. Boyd continue with the trial and give closing arguments in this drug-induced state.

Every doctor who examined Mr. Boyd regarding this issue, including the State's own experts as well as the prescribing physician, uniformly concluded that there may have been some impact on Mr. Boyd's ability to serve as his own attorney as a result of the Xanax. This has simply been ignored.

The purpose of the Sixth Amendment's specific procedural guarantees is to ensure that convictions are obtained only by way of fair trials. When an accused manages his own defense, he relinquishes the benefits associated with the right to counsel. Therefore, to be allowed to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. *Zerbst*, 304 U.S. at 464-465. Trial courts are therefore burdened with viewing *Faretta* waivers with skepticism and even disapproval, and it is well-established that courts are to "indulge in every reasonable presumption against waiver" of the constitutional right to counsel. *Adams*, 317 U.S. at 279; *Brewer*, 430 U.S. at 404; *see also Pazden*, 424 F.3d at 312; *Patterson*, 487 U.S. at 307; *Forrester*, 512 F.3d at 507.

This Court cannot have been clearer: the Sixth Amendment's purpose "is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, *and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution*." *Zerbst*, 304 U.S. at 465 (emphasis added). But this is exactly what the courts below have done. They are using Mr. Boyd's ignorance as a sword.

The courts below contend that Mr. Boyd, upon simply hearing the word "Xanax" (a fact he disputes), was supposed to appreciate its potential impact on his Sixth Amendment rights and his ability to act as his own counsel without any additional information. Mr. Boyd had never previously taken Xanax or any psychotropic medication, has a GED education, and has no legal or medical training. Yet, the position of the courts below is that he was required to independently raise the issue of his continued self-representation with the trial court.

This obligation, however, did not fall to Mr. Boyd. Instead, it was the trial court's obligation to maintain this protection, which right Mr. Boyd was not afforded. *See, e.g.*, *Zerbst*, 304 U.S. 458; *Adams*, 317 U.S. 279; *Faretta*, 422 U.S. 806; *Tovar*, 541 U.S. 77; *Edwards*, 544 U.S. 164; *see also U.S. v. Peppers*, 302 F.3d 120, (3d Cir. 2002). It is "the solemn duty [of trial judges] … to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right [to the assistance of counsel] *at every stage of the proceedings*." *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948) (plurality op.) (citing *Zerbst*, 304 U.S. 458; *Hawk v. Olson*, 326 U.S. 271, 27 (1945)) (emphasis added). "This duty cannot be discharged as though it were a mere procedural formality." *Id*.

The obligation of ensuring a defendant's constitutional protections is a never-ending one, unequivocally and squarely placed upon the trial judge. *See Gillies*, 332 U.S. 708 at 723–24 (footnotes, internal quotations omitted).

Mr. Boyd's case illustrates that a one-time, routine pretrial inquiry is "inadequate" and leaves the defendant and the trial judge "entirely unaware of the

facts essential to an informed decision that an accused has [exercised] a valid waiver of his right to counsel." *Id.* at 724. Accordingly, "many courts ha[ve] made clear that if after the waiver of counsel the circumstances faced by the defendant significantly changed, a new *Faretta* inquiry is required because under such circumstances the defendant could no longer be said to have knowingly and intelligently waived his constitutional right to counsel." *Jensen v. Hernandez*, 864 F. Supp. 2d 869, 897 (E.D. Cal. 2012), *aff'd*, 572 Fed. Appx. 540 (9th Cir. 2014) (citing *United States v. Erskine*, 355 F.3d 1161, 1165 (9th Cir. 2004)) (reversing conviction because the court failed to ask defendant "whether in light of the new and different information as to the penalty he faced, he desired to withdraw his *Faretta* waiver."); *United States v. Fazzini*, 871 F.2d 635, 643 (7th Cir. 1989) ("a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver[.]") (other citations omitted).

"The essential inquiry is whether circumstances have sufficiently changed since the date of the *Faretta* inquiry that the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel." *United States v. Hantzis*, 625 F.3d 575, 581 (9th Cir. 2010). When "intervening events substantially change the circumstances existing at the time of the initial colloquy," a properly conducted *Faretta* colloquy must be renewed. *Id.* at 580-81 (citations omitted).[3]

[3] *See also United States v. Santos*, 349 Fed. Appx. 776, 778 (3d Cir. 2009) (change in circumstances or revocation necessary to reopen *Faretta* colloquy); *United States v. Nunez*, 137 Fed. Appx. 214, 215–16 (11th Cir. 2005) (placing a *Faretta* readvisement requirement "only on a showing of a substantial change in circumstances since the initial hearing"); *United States v. McBride*, 362 F.3d 360, 367 (6th Cir. 2004) (same); *Spence v. Runnels*, 2006 WL 224442 (E.D. Cal. 2006) (citing *Von Moltke*, 332 U.S. at 723; *Faretta*, 422 U.S. at 835) ("A requirement of readvisement under changed circumstances is consonant with the Supreme Court's repeated holding that a waiver of counsel is valid only if made

The State cannot credibly argue its subsequent Xanax drugging did not significantly change the circumstances considered at the initial *Faretta* inquiry. Indeed, the trial court having already accepted Mr. Boyd's initial waiver, the State's prosecutor even separately and independently requested the trial judge to *reopen* the *Faretta* colloquy to address her substantial concern over psychotropic medications.

Because of the centrality of the right to counsel to our justice system, this Court must "indulge every reasonable presumption against a waiver of counsel," *Buhl*, 233 F.3d at 790, and cannot "ignor[e] the teachings of *Faretta* and its progeny," *id.* at 806-07. A new trial is the only appropriate remedy.

CONCLUSION

The State dissolved powerfully high doses of Xanax and mixed it in juice along with Mr. Boyd's regular medications without so much as a conversation. Mr. Boyd had no understanding or knowledge as to what pills he was being given. The State also dispossessed the trial court from exercising its gatekeeping functions to safeguard Mr. Boyd's constitutional and procedural rights. The State's undisputed actions simply shock the conscience.

Moreover, this Court has mandated that Mr. Boyd could only waive his critical right to counsel if such waiver is with full knowledge and made with eyes wide open. The State, however, materially changed the circumstances of Mr. Boyd's waiver of his right to counsel and the trial court's acceptance of such waiver when it drugged him

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with an awareness of the possible penalties and with eyes open."); *Davis v. United States*, 226 F.2d 834, 840 (8th Cir. 1955) (further inquiry would be required if "something transpired in the interim which justified such further inquiry").

with 1.0 mg doses of Xanax (which dose is four times the manufacturer's recommended dose of 0.25 mg), two times per day, and continued to do so without any new evaluation of Mr. Boyd's ability to continue representing himself.

While the trial was proceeding, the State of New Jersey unilaterally changed the rules of the game and violated Mr. Boyd's constitutional rights in the process. These structural errors affected the entire trial process and are *per se* prejudicial, rendering a new trial as the only appropriate remedy.

Respectfully submitted.

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No. ____

IN THE

Supreme Court of the United States

DONALD BOYD,

Petitioner,

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;

ATTORNEY GENERAL NEW JERSEY

Respondent.

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

PETITIONER'S APPENDIX

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February 19, 2021

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19-1436

DONALD E. BOYD,

Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;

ATTORNEY GENERAL NEW JERSEY

On Appeal from the United States District Court

for the District of New Jersey

(D.C. No. 2:18-cv-00965)

District Judge: Honorable Susan D. Wigenton

Submitted Under Third Circuit L.A.R. 34.1(a)

on May 19, 2020

Before: McKEE, BIBAS, and COWEN, Circuit Judges

(Filed: August 20, 2020)

OPINION*

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

BIBAS, *Circuit Judge*.

On habeas review of a state conviction, a federal court's role is limited. When a state court reasonably finds facts and applies clearly established federal law, we must defer.

Donald Boyd decided to represent himself at his criminal trial for kidnapping and rape. It did not go well, and the jury convicted him. He now attacks that conviction on habeas, arguing that the State denied him due process and his right to counsel when it involuntarily drugged him with Xanax starting on the third day of trial.

But as the state court reasonably found, Boyd knew all along that he was taking Xanax for his anxiety and did not object to it. Indeed, he demanded that drug by name, heard the nurse announce that she was giving it to him, and said he felt better after he took it. So although Supreme Court precedent requires courts to make certain findings before letting the government *involuntarily* medicate a defendant, Boyd had no right to that process. And no clearly established federal law required the state court to reevaluate Boyd's waiver of his right to counsel after he started taking Xanax. So we will affirm the District Court's denial of his habeas petition.

I. BACKGROUND

A. The crime

Pretending to be an expected visitor, Donald Boyd tricked a woman into letting him into her apartment. *State v. Boyd*, No. 04-06-1142, 2008 WL 3287240, at *2 (N.J. Super. Ct. App. Div. Aug. 12, 2008) (per curiam). Once inside, Boyd attacked her from behind. Id. He then bound her arms and legs to the bed, threatening her with a knife and gun. Id. As she resisted, he gagged her and raped her both vaginally and anally. *Id*.

A year and a half later, DNA tests identified the semen found on the victim as coming from Boyd. See id. As a forensic scientist testified, the odds that the DNA could have come from anyone else were several quadrillion to one. Id.

B. Boyd's trial

The State of New Jersey charged Boyd with aggravated sexual assault, kidnapping, burglary, and terroristic threats. Before trial, Boyd moved to fire his lawyer. Though the court warned him of the dangers of self-representation, Boyd still chose to represent himself. At the hearing, Boyd noted that he takes pain medication but not psychotropic drugs. Finding that his waiver of counsel was knowing and voluntary, the trial court granted his motion but ordered his lawyer to stay on as standby counsel.

The trial did not go smoothly. For the first three days, Boyd kept protesting that the jail had not given him his medications. The first morning, he told the judge that he had not eaten breakfast or slept in thirty hours because he had gotten into a quarrel in jail. He also said that he needed Clonidine (for high blood pressure), Ultram and Pheldene (for pain), and Zantac (for stomach ulcers), but the jail had not given him these medications. Later that morning, Boyd took all but the Zantac, which would have to wait until he met with the jail doctor.

That afternoon, the court noted on the record that in another trial, Boyd had made the same allegations. There too, Boyd said he had gotten into a quarrel at the jail, had not had his blood-pressure medicine, and had neither eaten nor slept in thirty hours. State v. Boyd, No. 01-12-3098, 2006 WL 1096622, at *1 (N.J. Super. Ct. App. Div. Apr. 27, 2006) (per curiam).

The second day, Boyd again complained that he had gotten only his blood-pressure medication. He told the judge that he takes painkillers and anxiety medication and that he was "shaking" without them. JA 8, 271. The trial transcript shows that he specifically named "Xanax." JA 271. But because the jail doctor had decided that he did not need them, the trial moved ahead.

On the third day of trial, Boyd said he could not keep representing himself until he got his other medications. Though he told the court that he was "shaking," the court did not believe him. JA 276. The court noted that Boyd was not shaking, slurring, or stuttering; instead, he looked "as solid and secure as everyone else in the courtroom." JA 279. Still, the court called the jail doctor to see about getting Boyd his other medications.

When the jail nurse arrived later that morning, she said on the record and in Boyd's presence that she had brought "Xanax, one milligram, and Ultram, fifty grams." JA 278. Boyd then drank the medicine dissolved in a glass of juice. An officer confirmed that he would keep getting those medications twice a day for the rest of the trial.

After a long weekend, the trial resumed with closing arguments. When Boyd stood up to give his argument, he faced the jury and said something like: "My name is Donald Boyd. Do you want to see a man bleed? I'll show you blood." JA 285. He then took out a hidden razor blade and cut his arm. Boyd later admitted that he had "planned [the incident], maybe to hurt himself, [or] maybe to get a mistrial." JA 22.

On the last morning of trial, Boyd showed up to court in his prison jumpsuit. The cut on his arm did not need stitches, nor was he wearing a bandage. When asked why he was not dressed for trial, he said he had just learned that the jail was giving him Xanax, not Zantac. He alleged that he had never taken Xanax in his life and that the high dosage made him "crazy." JA 282. When the court asked again why he was not dressed for trial, he said, "[i]t doesn't matter any more." JA 282. Later, he added: "Of course I'm going to be found guilty in front of this jury. This was a lynching." JA 285.

The jury did indeed convict Boyd of all fifteen charges, and the court sentenced him to life imprisonment plus sixty years. The state appellate court affirmed. 2008 WL 3287240. The New Jersey and U.S. Supreme Courts denied review. 960 A.2d 745 (N.J. 2008); 556 U.S. 1241 (2009) (mem.).

C. State habeas

In his state post-conviction petition, Boyd claimed that he did not know he had been given Xanax for part of the trial. The trial court denied his petition, finding that his claim conflicted with his statements at trial that he took anxiety medication. The New Jersey appellate court affirmed. It distinguished *Riggins v. Nevada*, which provides constitutional safeguards when the government seeks to medicate a defendant at trial involuntarily. 504 U.S. 127, 135 (1992). Here, by contrast, the nurse had announced the drug on the record, so Boyd "knew he was being given Xanax from the beginning of the trial" yet never objected. JA 32. The court also noted that *Riggins* involved an anti-psychotic rather than an anti-anxiety drug. In any event, it found

no prejudice because there were no signs that the Xanax left Boyd "intoxicated, or cognitively impaired." JA 34. The New Jersey Supreme Court denied review.

D. Federal habeas

Boyd raised the same claim again on federal habeas. The District Court denied his petition. It deferred to the state court's finding that Boyd knew he was taking Xanax. And it recognized that *Riggins* is limited to "forced and involuntary" medication. JA 88 (citing *Sell v. United States*, 539 U.S. 166, 178–81 (2003)).

The District Court also rejected Boyd's claim that he had a right to a second hearing on self-representation. Boyd argued that taking Xanax after he had decided to proceed pro se impaired his understanding of the risks of representing himself. But, the court noted, he offered no support for that assertion apart from "after the fact speculation." JA 91. We issued a certificate of appealability.

The District Court had jurisdiction under 28 U.S.C. § 2254(a), and we have jurisdiction under §§ 1291 and 2253(a). We cannot grant federal habeas relief unless the state court's decision rested on an "unreasonable determination of the facts" based on the evidence before it or its decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court." § 2254(d)(1)–(2). Because the District Court held no evidentiary hearing, we review its decision de novo. *Robinson v. Beard*, 762 F.3d 316, 323 (3d Cir. 2014).

II. THE STATE COURT REASONABLY FOUND THAT BOYD RECEIVED DUE PROCESS

Boyd first claims that the State denied him due process by "unknowingly and involuntarily drugg[ing]" him with high doses of Xanax at trial. Appellant's Br. 16. The state habeas court, he argues, unreasonably applied *Riggins* and *Sell*. Not so.

Though *Riggins* and *Sell* require courts to make certain findings before the government can *involuntarily* medicate a defendant on trial, they do not extend those procedural safeguards to defendants who are *not forced* to accept medication. 504 U.S. at 133; 539 U.S. at 179. Here, the state court reasonably found that Boyd knew the jail was giving him Xanax and did not refuse it. So its decision reasonably applied those precedents.

A. The state court's finding that Boyd knew he was taking Xanax was reasonable

The state court found that Boyd knew the jail was giving him Xanax and did not object. On federal habeas, we presume the state court's factual finding was correct. 28 U.S.C. § 2254(e)(1). As petitioner, Boyd bears the burden of rebutting this presumption of correctness by clear and convincing evidence. *Id.* He has not met that heavy burden.

Boyd claims that he did not know he was taking Xanax. But that claim conflicts with the record. On the third day of trial, the jail nurse announced the name of the drug ("Xanax") and the dosage ("one milligram") on the record in Boyd's presence before giving it to him. JA 278.

Boyd responds that he never heard the nurse say "Xanax." Rather, he says he heard "Zantac," the ulcer medication that he had asked for. But this is unlikely. On the first day of trial, Boyd complained about not getting his *anxiety medication*. He

told the court: "I take anxiety medication and my blood pressure medication together with painkillers. Not to have them I'm shaking right now." JA 8 (emphasis added). He also explained: "This morning, they gave me my blood pressure medication, no Ultum [sic]. *The Xanax is for my ulcers*. Because I have anxiety. I don't have any of that. I've been on it, taking it regularly now for over a year. You take a person off of it like that at their discretion, I'm just very shaky." JA 271 (emphasis added).

Plus, Boyd heard the nurse say "one milligram" of Xanax. JA 278. That makes it unlikely that he thought he was taking Zantac. On the first day of trial, he told the court that he takes *one hundred and fifty* milligrams of Zantac twice a day. He was articulate and persistent in demanding the particular medications he needed. Though Xanax and Zantac sound alike, Boyd did not object to hearing a dose that would have been 1/150 of his usual Zantac dose.

Based on the evidence before it, the state court could have reasonably found that he knew he was taking Xanax, an anxiety medication, not Zantac, an ulcer medication. And the record does not show, nor does Boyd claim, that he objected. Thus, Boyd cannot show by clear and convincing evidence that the state court's findings were wrong.

B. Because Boyd knew he was taking Xanax and did not object, the state court did not unreasonably apply Supreme Court precedent

Boyd argues that the state habeas court unreasonably applied *Riggins* and *Sell*. He claims that he was denied the procedural safeguards guaranteed by those cases. But Boyd had no right to those protections because both cases limit only involuntary medication.

The facts of *Riggins* and *Sell* are largely the same. In each case, the trial court rejected a defendant's objection to having to take antipsychotic drugs during trial. 504 U.S. at 129– 31; 539 U.S. at 173–74. In each case, the Supreme Court recognized defendants' "constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.' " Sell, 539 U.S. at 178 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)); accord *Riggins*, 504 U.S. at 133–34. So before the Government can force a defendant to take those drugs, it must find that the treatment is (1) "medically appropriate," (2) "substantially unlikely to have side effects that may undermine the fairness of the trial," and (3) necessary (given the alternatives) to promote important governmental interests relating to the trial. Sell, 539 U.S. at 179; *accord Riggins*, 504 U.S. at 135. These cases mandated these safeguards for defendants who are "treated involuntarily" or "forced" to take the medication. *Riggins*, 504 U.S. at 135; *accord Sell*, 539 U.S. at 179.

Boyd tries to stretch involuntariness to include lack of informed consent. But Riggins and Sell do not say that. On federal habeas, we cannot extend the definition of involuntariness to reach lack of informed consent. The habeas statute neither "require[s] state courts to extend [Supreme Court] precedent [n]or license[s] federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014) (emphasis omitted).

Boyd knew he was taking Xanax, and he did not object. No one forced him to take it. So this is not a case of involuntary medication, and the state court correctly set *Riggins* aside. That is enough to support the court's decision. We need not decide

whether the state court erred by distinguishing *Riggins* based on the type of drug given, or by considering actual prejudice.

III. THE STATE COURT REASONABLY FOUND NO SIXTH AMENDMENT VIOLATION

Boyd also argues that the State violated his Sixth Amendment right to counsel by drugging him with high doses of Xanax after he decided to proceed pro se. This claim fails too. No clearly established federal law guaranteed him a second Faretta hearing, after he started taking Xanax, to reevaluate his decision to represent himself.

Though the Sixth Amendment guarantees a defendant the right to represent himself, he must choose to do so "with eyes open." *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). The court must first warn him of the "dangers and disadvantages of self-representation" so the record reflects a knowing and intelligent waiver. *Id.*

Boyd now argues that once he started taking Xanax, the state court should have held a second *Faretta* hearing. To be sure, Boyd did say at the hearing that he was not taking any psychotropic drugs. But while he was taking Xanax on the third and fourth days of trial, he never said that he felt sick or unable to represent himself. Only on the fifth day, after he claimed that he learned he was taking it, did he say it made him "crazy." JA 282.

This silence is telling. Given his repeated pleas for medication, the state court could have reasonably expected him to speak up if he felt unwell. But just the opposite happened: once the medicine "kick[ed] in," he told the court he was "definitely feeling

a little better and a little bit level headed and a little bit more clear." JA 280. "That medication is essential for me," he added. Id. He also said he "d[id]n't have the shakes anymore." JA 280. And though Boyd cut his arm in front of the jury during his closing statement, he admitted that he had planned that in part "maybe to get a mistrial." JA 22.

Boyd does not cite, nor can we find, any clearly established federal law that requires a second Faretta hearing in these circumstances. So the state habeas court properly denied relief. We express no opinion on whether there could be some intervening circumstance that might require a court to reevaluate a defendant's waiver of his right to counsel.

* * * * *

On federal habeas, we must defer to the state court's reasonable findings of fact and application of clearly established Supreme Court precedent. The state court reasonably found that Boyd knew he was taking Xanax and did not object to it. So it reasonably distinguished this case from Riggins and Sell, which prescribe procedures before the Government can medicate a defendant involuntarily. And no clearly established federal law required the state court to hold a second Faretta hearing, after Boyd started taking Xanax, to reevaluate his waiver of his right to counsel. Because the District Court correctly rejected these claims, we will affirm.

CLD-001 October 3, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1436**

DONALD E. BOYD, Appellant

VS.

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL.

(D.N.J. Civ. No. 18-cv-00965)

Present: JORDAN, KRAUSE and MATEY, Circuit Judges

Submitted are:

(1) Appellant's motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1);

(2) Appellees' response; and

(3) Appellant's reply

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is granted in part and denied in part. The application is granted as to the claim that appellant's involuntary and unknowing dosing with Xanax violated his Sixth Amendment right to counsel and deprived him of a fair trial and due process. The application is otherwise denied. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). The Clerk will issue a briefing schedule.

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: October 10, 2019
SLC/cc: Catherine A. Foddai, Esq.
Jack N. Frost Jr., Esq.

Christine A. Lozier, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD E. BOYD,

Petitioner,

v.

STEVEN JOHNSON, et al.,

Respondents.

Civil Action No. 18-965 (SDW)

OPINION

WIGENTON, District Judge:

Presently before the Court is the petition for a writ of habeas corpus of Donald E. Boyd ("Petitioner") brought pursuant to 28 U.S.C. § 2254 challenging his state court conviction. (ECF No. 1). Respondents filed an answer to the petition (ECF No. 7), to which Petitioner replied. (ECF No. 18). For the following reasons, the Court will deny the petition and no certificate of appealability shall issue.

I. BACKGROUND

In affirming the denial of post-conviction relief, the Superior Court of New Jersey –Appellate Division provided the following summary of the facts underlying this matter:

> On March 9, 2002, [Petitioner] gained entry into the victim's apartment under the guise of being her former boyfriend, in whose company [Petitioner] had spent the prior evening. The victim, who was ill, buzzed [Petitioner] into her apartment, assuming she had just admitted [her] former boyfriend into the building so he could retrieve some belongings from the home. The victim immediately returned to bed. She was [then] assaulted from behind. The victim never saw her assailant's face, but said he was white, dressed in a blue sweatshirt, and wore surgical gloves.

The initial assault resulted in a spiral fracture of the victim's upper arm. [Petitioner] pulled a pillow case over the victim's head and secured it with a rope or wire, threatened her with a knife and gun, and told her that he was "never going back to prison." After vaginally and anally raping her, [Petitioner] forced her into the shower, directed her to wash, and left. The victim remained in the shower until she was certain her assailant was gone. She then ran into the hallway of her apartment building, pounding on neighbors' doors, screaming that she had been raped.

When police arrived, they found the victim with the pillow case still around her head, string or lace around one leg, and a telephone cord wrapped around her broken arm. She was taken to a nearby hospital for treatment of her injuries.

The victim's former boyfriend testified at trial that he had spent the evening before the assault drinking with [Petitioner] and another person. The following morning, when he awakened, the former boyfriend realized [Petitioner] had taken his truck keys and left. When [Petitioner] returned, he was "sweaty, very nervous, agitated, and couldn't sit still." Soon after he returned, the police called to inform the boyfriend of the assault. [Petitioner] promptly left without a word.

[Petitioner] was not identified as the perpetrator until approximately a year and a half later, when his DNA was found to match the perpetrator's.

. . . .

Approximately a month before the trial was scheduled to begin, [Petitioner] sought to discharge his attorney and represent himself. After a lengthy . . . hearing [on the issue], the court permitted [Petitioner] to do so, but designated his former defense attorney to serve as standby counsel. During the hearing, [Petitioner] denied ever receiving treatment for a mental health disorder, and asserted that his only physical ailments were high blood pressure and arthritis. He was then forty-two years old, had obtained a GED, and claimed to have spent months while incarcerated preparing for the trial. [Petitioner] asked the court to order that he be allowed extra time in the law library, which request the judge granted. [Petitioner] assured the court he had spent many hours training in criminal law, and said he had "been

doing this for years. He owned a few Gann law books, including the Criminal Code.

Pre-trial, [Petitioner] consented to have standby counsel conduct jury selection. The judge also ruled, over [Petitioner]'s objection, that he could not directly cross-examine [the victim], rather, that he had to use standby counsel as a "conduit" for his questions.

On the second day of trial, [Petitioner] requested that standby counsel take over the representation. The judge declined the request.

. . . .

Towards the end of the [self-representation] hearing, the trial judge warned [Petitioner] that if he represented himself, he would not be able to raise ineffective assistance of counsel as a basis for [post-conviction relief].

. . . .

[Petitioner] had [previously] been convicted of, among other offenses, a violent rape against a sixteen[-]year[-]old in 1985 and was linked by DNA evidence to a rape in Arizona. [An] Avenel report described [Petitioner] as "a psychopathic individual who merges his barely masked rage and distorted drive for sexual release into violent and sadistic assaults against women[,]" and who has "a complete lack of remorse or even acknowledgement of culpability.

This conclusion was reached by the Avenel psychologist at least in part because when [Petitioner], who entirely denied any culpability, was asked about the DNA evidence, he responded that "[j]ust because there was DNA doesn't mean I raped anyone[,]" implying that he and the victim had consensual sex. When asked further question[s] about the victim's spiral fracture, he responded that he had seen the photographs of [her] arm and it did not look broken to him.

The first day of his closing argument at trial, [Petitioner] superficially cut his arm with a sharp object he had hidden in his mouth. [Petitioner] told the Avenel psychologist that it was "planned, maybe to hurt myself, [or] maybe to get a mistrial." [Petitioner]'s prior criminal history included twenty-seven

arrests, seven prior convictions, pending charges in New York, and the possible rape charge in Arizona.

[Petitioner] was represented by a public defender at his sentence hearing, a different attorney than the one who acted as standby counsel. At [Petitioner]'s behest, that attorney requested his medical records from the Bergen County jail. She was provided with a summary of the medications he was administered while there. The summary [indicated that Petitioner had been treated with Xanax], but, in contrast to the summary, [Petitioner's] complete records revealed that the Xanax was prescribed telephonically by the facility's physician. The physician never met with [Petitioner]. He prescribed the tranquilizer upon being advised of [Petitioner]'s allegedly combative conduct upon arrival at the jail. Neither the records nor the summary included any written consent or acknowledgement by [Petitioner] that he was being given Xanax.[1[1]]

. . . .

As [Petitioner]'s trial was about to begin, he claimed he had been in an altercation with prison staff the night before, had not slept for thirty hours, and had not been provided his regular medication.

The trial judge noted that in our opinion in [Petitioner]'s prior appeal [of a different conviction], the record indicated that as trial was about to begin, [Petitioner] had similarly requested an adjournment because "he had been involved in an altercation in jail the night before, as a result of which he had sustained 'severe abrasions' and a 'nearly closed' right eye. He also claimed he had not received his blood pressure medication and had not slept or eaten in thirty hours."

[Petitioner]'s defense strategy included interruptions to the smooth progress of the trial, accomplished both by his legal arguments and objections, and his conduct. For example, [Petitioner] raised his middle finger at the victim's former boyfriend when he began to testify, requiring the judge to call a

[1] The factual details of Petitioner's being provided and imbibing of the Xanax without challenging or seeking the cessation of the medication are discussed in detail below in the relevant section of this Court's opinion.

recess to address [Petitioner]'s conduct, in the courtroom but outside the presence of the jury.

[Petitioner] appeared to have a plan of action for how he would proceed. For example, he attempted to admit into evidence the police report prepared by the first officer at the scene in order to demonstrate inconsistencies with the victim's description of the event at trial. In support of his application, [Petitioner] argued the excited utterance exception to the hearsay rule.

When cross-examining a detective testifying for the State, the judge admonished [Petitioner] that it was improper to refer to "alleged" restraint marks on the victim's ankles and wrists. [Petitioner] promptly corrected himself and thereafter only employed the phrase the "alleged victim."

[Petitioner]'s relationship with standby counsel was fraught. At times, he was adamant that he wanted counsel to represent him, and at other times, he claimed counsel had betrayed him and sabotaged his defense by making promises of assistance which did not materialize.

Returning to the cutting incident and its immediate aftermath . . .

Defendant started his summation with the words, "My name is Donald Boyd. You want to see a man bleed?," and proceeded to cut one of his arms with a sharp object he had concealed in his mouth. Sheriff's officers immediately took the blade away from [Petitioner], and the judge and jury left the courtroom. After the incident, while standby counsel, the judge, and the prosecutor were meeting in chambers, standby counsel was directed to leave by her supervisor, and did not return for the summations. Another attorney from the Office of the Public Defender represented [Petitioner] at sentencing.

. . . .

The next day, [Petitioner] finished his closing statement. During a colloquy with the judge outside the presence of the jury, including the judge's repetition of the explanation of the limited role of standby counsel, [Petitioner] said "I don't mean to say this prejudicially, but this is one of the . . . richest, whitest communities in the United States of America, and you're going to give me a black attorney to represent me? I ain't going that route."

> Among other things [Petitioner] told the jury in closing: "I had multiple problems with medication at that time, okay. Like I said I was not going to trial with an attorney that said I was guilty."
>
> [Petitioner] also told the jury that the cell phone records that he had attempted to move into evidence, that were in the name of another person, were actually his own records because he had borrowed the other person's phone. The time frame of the loan included the date of the assault. Since the records showed calls made while the assault was taking place, he argued that "I couldn't have been in three places at once according to those records and I could not introduce them to you." [Petitioner] made this argument despite the fact he did not testify.
>
> The medical expert whom [Petitioner] called as his witness was arranged by standby counsel at [Petitioner]'s request. The expert testified in his behalf that spiral fractures such as the one sustained by the victim can result from accidents, like a fall in a bathtub.
>
> . . . .
>
> From the second day [Petitioner] was housed at the Bergen County Jail, [Petitioner] was given Xanax as well as his regular blood pressure, stomach, and pain medicine. After his conviction, [Petitioner] sued the Bergen County Jail and [its] medical staff in federal court for medical malpractice.[] According to counsel at oral argument on appeal, [Petitioner] recovered $100,000 by way of settlement.
>
> Dr. Kenneth Weiss acted as [Petitioner]'s expert in the federal [civil matter]. Dr. Weiss opined that . . . medical negligence was established by the [jail] doctor's failure to meet with his patient before prescribing medication, and the failure to obtain his informed consent. Dr. Weiss also opined that "the non-consensual administration of Xanax, a drug with known cognition-impairing properties, would likely have impaired [Petitioner's] capacity to act as his own counsel." Presumably, this was mentioned in the report because it was argued as an element of damages.

(Document 11 attached to ECF No. 7 at 4-13, internal citations and quotations omitted).

Following trial, Petitioner was convicted of first-degree aggravated assault, second-degree aggravated assault, first-degree aggravated sexual assault during a kidnapping, first-degree kidnapping, first-degree aggravated assault during a burglary, second-degree burglary, first-degree aggravated sexual assault during a robbery, first-degree robbery, first degree aggravated sexual assault while armed with a knife, and third-degree terroristic threats. (Id. at 2-3). Petitioner was ultimately sentenced as a persistent offender to life imprisonment on the first-degree aggravated sexual assault, and a consecutive thirty years on the first-degree kidnapping charge, ten years consecutive to both the kidnapping and aggravated sexual assault on the burglary charge, and an additional consecutive twenty-year sentence on the robbery charge, for a total sentence of life followed by sixty years. (Id. at 3). This sentence was made consecutive for a sentence Petitioner was already serving at the time of his trial and concurrent to a sentence on an additional sentence on an unrelated charge imposed on the same day. (Id.). Petitioner appealed, and his conviction was affirmed, but his sentence remanded. (Id. at 3-4). Petitioner was resentenced to the same sentence on remand, again appealed, and his resentencing was upheld. (Id.).

II. DISCUSSION

A. Legal Standard

Under 28 U.S.C. § 2254(a), the district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The petitioner has the burden of establishing

his entitlement to relief for each claim presented in his petition based upon the record that was before the state court. See Eley v. Erickson, 712 F.3d 837, 846 (3d Cir. 2013); see also Parker v. Matthews, 132 S. Ct. 2148, 2151 (2012). Under the statute, as amended by the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2244 ("AEDPA"), district courts are required to give great deference to the determinations of the state trial and appellate courts. See Renico v. Lett, 559 U.S. 766, 772-73 (2010).

Where a claim has been adjudicated on the merits by the state courts, the district court shall not grant an application for a writ of habeas corpus unless the state court adjudication

> (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.

28 U.S.C. § 2254(d)(1)-(2). Federal law is clearly established for the purposes of the statute where it is clearly expressed in "only the holdings, as opposed to the dicta" of the opinions of the United States Supreme Court. See Woods v. Donald, 125 S. Ct. 1372, 1376 (2015). "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." Id. Where a petitioner challenges an allegedly erroneous factual determination of the state courts, "a determination of a factual issue made by a State court shall be presumed to be correct [and t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Analysis

1. Petitioner's forced medication claim

In his chief claim, Petitioner contends that he was denied Due Process when he was medicated with Xanax during trial without his consent. In making this claim, Petitioner relies upon the Supreme Court's decision in *Riggins v. Nevada*, 504 U.S. 127 (1992). In *Riggins*, the Court was faced with a situation where a petitioner, whose only defense to a murder charge was an insanity defense, was subjected to the "forced administration of Mellaril," a powerful antipsychotic drug, at a very high dose. *Id.* at 129-33. As the Court noted, there was no dispute in *Riggins* that the administration of the medication was "involuntary" and "unwanted," that Riggins had specifically sought a court order terminating administration of the drug, and that the application of Mellaril "denied [Riggins] an opportunity to show jurors his true mental condition." Id. at 133. Based on these background facts, the Court determined that "once Riggins moved to terminate administration of antipsychotic medication" the Due Process Clause required the state "to establish the need for Mellaril and the medical appropriateness of the drug" by showing either that administration of the drug was "essential for the sake of Riggins' own safety or the safety of others" or that "involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." Id. at 135-36. The Court did not expressly find that no showing of prejudice was necessary in involuntary medication cases. Instead the Court observed that "trial prejudice can sometimes be justified by an essential state interest," but that the failure of the State to show in Riggins' case that there was an essential state interest which required the

involuntary administration of Mellaril combined with the "substantial probability of trial prejudice" under the circumstances – Riggins' attempt to show his insanity while being heavily medicated and the inability to establish the exact changes to his behavior after the fact – required the reversal of Riggins' conviction. Id. at 137-38.

Petitioner argues that the state courts in this matter acted contrary to or unreasonably applied *Riggins* in denying him relief based on his having been given Xanax during and before trial without an affirmative expression of consent from him. In rejecting this claim in their opinion affirming the denial of post-conviction relief, the Appellate Division noted that Petitioner was given medication only after complaining about shaking and not being given his normal medications, that a jail nurse announced in open court and in the presence of Petitioner (but out of the jury's presence) that she was providing Petitioner with "Xanax, one milligram" in addition to his other medications, that Petitioner after being medicated specifically said he was thinking and feeling more "level headed and . . . clear," and that Petitioner did not complain about the administration of Xanax until shortly before summations when he claimed he had only learned the night before that he was being given one milligram of Xanax. (Document 11 attached to ECF No. 7 at 13-15). The Court also noted that the trial judge "responded immediately to defendant's concerns regarding his medications" when he first complained shortly before summations, and that even when he complained about the Xanax, Petitioner "did not request the drug be stopped."[2] (Id. at 19).

[2] Prior to summation, Petitioner stated that the State had "been giving [him] Xanax for the last five days in a row. . . . It's an antidepressant medication. I've never taken it in my life and I come here . . .

Based on these facts, the Appellate Division concluded that Petitioner's case was entirely distinguishable from *Riggins* because Petitioner's willing ingestion of Xanax, after the name and dosage of the drug were announced in his presence in open court, indicated that the administration of the drug was not forced or involuntary. (*Id*. at 19). The Appellate Division found further support for this determination in noting that Petitioner had vociferously complained about the failure of the jail to medicate him and about his various other disagreements with his originally appointed counsel, and that Petitioner's silence combined with his voluntary ingestion of the drug thus refuted any claim that Petitioner was unaware of what he was taking and was opposed to the Xanax in any event. (*Id*. at 20).

As the Appellate Division determined that the administration of Xanax was not involuntary, the Appellate Division in turn found that no per se constitutional violation had occurred, and that Petitioner had failed to otherwise show that he was prejudiced by the administration of the drug based on the following:

> our review of the transcripts [does not] support the claim that [Petitioner] was in some fashion intoxicated or cognitively impaired, as a result of the Xanax. This is [Petitioner's] second point on the issue, and he supports the claim by stating he was being given the drug twice a day in large amounts. We reiterate that on the record when [Petitioner] spoke to the trial judge regarding his mental status, it was only to point out how much better he felt once his regular medication was resumed. At that

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and you're going to start giving me Xanax, at the highest dosage." (Document 1 attached to ECF No. 1 at 626). Petitioner also stated that he doesn't "take drugs." (Id.). Petitioner did not, however, request that the Xanax be stopped, that he not be required to take the drug, or an order of the Court directing the jail to cease providing Xanax or alter the dose. The record is thus absent of any request by Petitioner to stop or otherwise alter the administration of Xanax, even after he indisputably was aware that he was being given the drug, was aware of the nature of the drug, and was aware of the high dosage he asserts he was being given.

> juncture, he had been taking the Xanax for approximately two days.
>
> [Petitioner]'s responses to legal issues during the trial, although those of a layperson, not versed in the law, were not at all confused. Based on our review of the transcripts, [Petitioner]'s course of conduct during the trial was consistent with his course of conduct during his un-medicated pre-trial court appearances including [during pre-trial] hearing[s].
>
> Even [Petitioner]'s highly unusual strategy in cutting himself in front of the jury he later acknowledged was a tactic employed to trigger a mistrial. The admission was made to the evaluator at Avenel, months after the trial, months after he stopped being given Xanax. [Petitioner]'s decision to represent himself in the face of first-degree charges with the potential for sentencing as a persistent offender was itself atypical. And that crucial choice, and the . . . hearing [on it] that followed, occurred weeks before [Petitioner] was given Xanax.
>
> We therefore find that the administration of the drug was not a per se violation of [Petitioner]'s constitutional rights that would warrant a new trial. Nor was it a circumstance that impaired [Petitioner]'s ability to function as his own attorney such as would entitle him to a new trial.
>
> We do not mean by this decision to condone in any way the conduct of the jail staff. However, after close examination of the trial record, we conclude that to the extent any harm was visited upon [Petitioner] by the administration of Xanax, that harm does not undermine our confidence in the fairness of the process.
>
> Throughout, [Petitioner] has blamed his attorneys, the State, and the judge for what he described as the "rigged" outcome [of his trial]. That the outcome was preordained was the result of proof that, unfortunately for him, could not have led a reasonable jury to any other result. There is a significant difference between a "rigged" outcome and one produced by the weight of overwhelming evidence.

(*Id*. at 20-21).

This Court having extensively reviewed and considered the record in this matter, it is clear that the Appellate Division's determination of the facts recounted

above was not unreasonable. Likewise this Court finds that Petitioner has failed to show that those factual conclusions, including his having ingested the Xanax after he was told what he was being given in open court and his failure to ever request the medication be stopped, were incorrect by clear and convincing evidence[3], and this Court is therefore required to presume that those factual findings are correct. 28 U.S.C. § 2254(e)(1). Because the factual findings of the Appellate Division are not unreasonable and are presumed to be correct, the question presented to this Court is whether the Appellate Division unreasonably applied Supreme Court caselaw in concluding that Riggins did not mandate relief where the Petitioner did not oppose or object to the medication he was given (i.e. where the medicating of the Petitioner was essentially voluntary).

Numerous courts, including some circuit courts, have distinguished Riggins along the same lines as the state courts in this matter – by finding that the extreme relief of a new trial is not automatically warranted without a showing of prejudice where the medication in question was ingested voluntarily or without objection. See, e.g., Benson v. Terhune, 304 F.3d 874 (9th Cir. 2002); Basso v. Thaler, 359 F. App'x

[3] Petitioner argues in his briefs that there is "no evidence" that Petitioner was aware that he was being given Xanax following the identification of the medicine in his presence in open court by the nurse who administered the drug to him. Petitioner essentially asserts that he either wasn't paying attention at the time or did not hear the name of the medication when announced by the nurse. Petitioner does not dispute, however, that he was in the court room at the time, and that the nurse made the announcement while speaking with the trial judge in Petitioner's presence. Petitioner has also failed to show that he ever requested the medication be stopped even after he was clearly aware of the nature of the drug and dosage he was being given. Petitioner's self-serving assertion that he may not have heard what the nurse said is by no means "clear and convincing" evidence that he was unaware of what he was given, and thus is insufficient to overcome the presumption that the state courts' factual conclusion that he heard this statement and was aware of the medication he was given is correct. 28 U.S.C. § 2254(e)(1).

504, 507-08 (5th Cir. 2010); Anger v. Klee, No. 14-14159, 2015 WL 6437224, at *11 (E.D. Mich. Oct. 21, 2015); Tiran v. Lafler, No. 09-14807, 2011 WL 2518922, at *10 (E.D. Mich. June 23, 2011); Powell v. Kelly, 531 F. Supp. 2d 695, 728-29 (E.D. Va. 2008), aff'd, 562 F.3d 656 (4th Cir. 2009), cert. denied, 559 U.S. 904 (2010); Commonwealth V. Baumhammers, 92 A.3d 708, 733 (Pa. 2014). Indeed, the Supreme Court has itself reiterated that the Riggins framework applies only where the medication of the criminal defendant was forced and involuntary. Sells v. United States, 539 U.S. 166, 178-81 (2003). Where an individual voluntarily ingests the medication without objection, it follows that Riggins and its assumption of prejudice simply do not apply. Basso, 359 F. App'x at 508 ("there is no authority holding that voluntary administration of medication violates [a petitioner's] right to due process"). Likewise, although Benson may have required a level of informed consent similar to that required to waive a petitioner's Miranda rights, Petitioner has identified no Supreme Court caselaw requiring that a criminal defendant expressly indicate his informed consent to the medication he was being given in the absence of an objection to his continued treatment with the medication. Petitioner thus cannot show that the state courts were unreasonable merely by asserting that no hearing was held on the issue of informed consent in the absence of an objection from Petitioner to his continued medication as there is no such requirement present in the clearly established decisions of the United States Supreme Court.[4]

[4] Petitioner's reliance on White v. Napolean, 897 F.2d 103, 113 (3d Cir. 1990), a case dealing with a § 1983 claim for damages brought against a prison doctor is misplaced. White concerned whether convicted prisoners had a right to refuse treatment and in turn to be informed about the proposed course of treatment in determining whether to refuse treatment. Id. White likewise concerned whether

Petitioner by the Appellate Division was neither contrary to nor an unreasonable application of *Riggins*. Petitioner is therefore not entitled to habeas relief on that basis.

In his final Xanax related claim, Petitioner contends that his being given Xanax deprived him of his right to counsel insomuch as it retroactively rendered his decision to represent himself uninformed. While the Constitution "does not force a lawyer upon a [criminal] defendant, it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (internal quotations and citations omitted). A waiver meets this standard when the criminal defendant "knows what he is doing and his choice is made with eyes open,"

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a doctor who allegedly violated this right to information could be held civilly liable for his failings, and did not address any requirement that a criminal court go beyond its own record to ensure that a criminal defendant had informedly consented to all of the medications which he had been provided in the absence of an objection to his continued medication. Id. Petitioner has failed to identify any clearly established Supreme Court caselaw imposing such a requirement on Based on the well supported factual conclusions of the state courts, to which this Court owes considerable deference and a presumption of correctness, Petitioner voluntarily consumed Xanax, and never requested that his Xanax administration be stopped. As Petitioner's ingestion of Xanax was neither forced over his objection nor involuntary based on the well-supported factual determinations of the Appellate Division, the Appellate Division's conclusion that Petitioner was not entitled to a new trial without a showing of prejudice does not amount to an unreasonable application of the Supreme Court's decision in Riggins. As the Appellate Division's rejection of Petitioner's claim that he was involuntarily medicated was neither contrary to nor an unreasonable application of Riggins or any other identified Supreme Court precedent, Petitioner is not entitled to habeas relief on that basis. Basso, 359 F. App'x at 508. Petitioner also takes issue with the Appellate Division's conclusion that Petitioner was not prejudiced by his having been medicated with Xanax during trial, arguing that Riggins specifically precluded use of an actual prejudice standard in forced medication cases. Petitioner is correct, but only to the extent that Riggins does not require a showing of actual prejudice in cases involving the forced or involuntary medicating of a criminal defendant with powerful psychotropic drugs. 504 U.S. at 137 (finding that a showing of prejudice was not required in cases involving the forced medication cases as "the precise consequences of forcing antipsychotic medication upon [a defendant] cannot be shown from a trial transcript"). As Petitioner was not subject to forced medication based on the well supported factual determinations of the state courts, that holding of Riggins is inapplicable to Petitioner's case, and thus the requirement of prejudice placed upon criminal courts in general or for criminal courts dealing with a pro se defendant specifically, and the state courts thus could not have unreasonably applied Supreme Court caselaw by not imposing such a requirement in cases in which no objection to continued medication has been raised.

which requires he possess sufficient information which "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id*. "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to [sic] choose self-representation, he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing." *Id*. at 89 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). Because counsel at trial "is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of voir dire, examine and cross-examine witnesses effectively . . . , object to improper prosecution questions, and much more . . . [w]arnings of the pitfalls of proceeding to trial without counsel . . . must be rigorous[ly] conveyed." Id. In order to warrant habeas relief, a petitioner asserting that he was improperly allowed to proceed pro se must "convince[] the court by a preponderance of the evidence that he neither had counsel nor properly waived his constitutional right to counsel." *Pazden v. Maurer*, 424 F.3d 303, 313 (3d Cir. 2005) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 469 (1938)).

As the Appellate Division explained on direct appeal, the trial judge in this matter conducted a hearing on Petitioner's decision to waive his right to counsel. At that hearing, the trial court explained to Petitioner forcefully that it was unwise of him to proceed pro se in light of his lack of legal knowledge and experience, as well as the difficulty of playing the dual roles of defendant and defense counsel. (See

Document 3 attached to ECF No. 7 at 12-14). Petitioner was warned of the extremely limited role of standby counsel, informed Petitioner that he would not be able to withdraw his waiver easily once made, and made certain Petitioner understood that he was foregoing the ability to raise ineffective assistance of counsel claims by choosing to proceed pro se. (*Id*. at 14-16). The trial court also explained to Petitioner the impact self-representation would have upon both his ability to discern whether he should testify on his own behalf and his ability to remain silent if he so chose in light of his engaging in questioning of fact witnesses. (*Id*. at 16). In spite of all these warnings, Petitioner was adamant that he proceed pro se, insisted he understood the charges and how he was going to defend himself, and expressed his belief that he would be acquitted following his self-representation. Based on this hearing, the state courts determined that Petitioner made a knowing, voluntary, and intelligent waiver of his right to counsel.

Having reviewed the record, this Court finds these determinations well supported, and finds Petitioner's contention that his being given Xanax without objection to his continued medication somehow undid his knowing and voluntary waiver of his right to counsel which was made before Xanax was prescribed by jail house doctors without merit. Although Petitioner contends that his being permitted to continue to waive his right to counsel following his being given Xanax without an objection or request to cease medication was improper because he had not been given information about this medication at his pre-trial hearing for obvious reasons, Petitioner has provided nothing but after the fact speculation to suggest that

Petitioner's ability to understand the pitfalls of self-representation was hindered or harmed by his being given Xanax after having made that decision. Petitioner has presented no caselaw to support the assertion that the Court is required to presage the actions of jail house doctors or readdress Petitioner's waiver to counsel following a change in his medication to which the Petitioner does not actively object. Given Petitioner's clear decision to proceed pro se following extensive warnings from the trial court, and given the lack of any controlling caselaw which supports Petitioner's contention that the Court had to reevaluate his waiver in the absence of his being involuntarily medicated, Petitioner has failed to convince this Court that he proceeded to trial without having knowingly, voluntarily, and intelligently waiving his right to counsel, and has likewise failed to show that the state courts' decisions were contrary to or unreasonable applications of federal law. Petitioner has thus failed to show his entitlement to habeas relief on any of his Xanax related claims.

2. Petitioner's confrontation clause and self-representation claim

Petitioner next contends that he was denied his right to confront the witnesses against him where he was required to cross-examine the victim in this matter through the "conduit" of standby counsel. The right of an accused individual "to be confronted with the witnesses against him" under the Sixth Amendment "includes the right to conduct reasonable cross-examination." *Wright v. Vaughn*, 473 F.3d 85, 93-94 (3d Cir. 2006) (internal quotations omitted). A criminal defendant can therefore establish a violation of his rights under the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination" which would "expose the jury [to facts] from which jurors . . . could appropriately draw

inferences relating to the reliability of the witness." *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). A criminal defendant's rights under the clause are not unlimited, however; a criminal defendant's cross-examination of a witness is still subject to the discretion of trial judges to curtail improper questioning and to limit repetitive and otherwise irrelevant testimony on cross-examination. Wright, 473 F.3d at 93. Likewise, alleged violations of the Confrontation Clause based on the curtailment of cross-examination are subject to harmless error analysis. Id. (citing *Van Arsdall*, 475 U.S. at 684). On collateral review, even errors of a constitutional dimension will be considered harmless and thus not a basis for habeas relief "unless [the alleged constitutional error] had a substantial and injurious effect or influence in determining the jury's verdict." *Fry v. Piller*, 551 U.S. 112, 116 (2007); see also Brecht v. Abrahamson, 507 U.S. 619, 631 (1993).

Petitioner asserts that the decision to force standby counsel to question the victim over his objection not only infringed his confrontation clause rights, but also impugned his right to self-representation. As the Supreme Court has explained,

> In determining whether a [petitioner's right to self-representation has] been respected, the primary focus must be on whether the [petitioner] had a fair chance to present his case in his own way. . . .
>
> . . . [T]he right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others. [Thus,] the objectives underlying the right to proceed pro se may be undermined by unsolicited and excessively intrusive participation by standby counsel. In proceedings before a jury, the [petitioner] may legitimately be concerned that multiple voices "for the defense" will confuse the message the [petitioner] wishes to convey, thus defeating [the purposes of the petitioner's

> right to represent himself. Accordingly, [the right to self-representation] must impose some limits on the extent of standby counsel's unsolicited participation.
>
> First, the pro se [Petitioner] is entitled to preserve actual control over the case he chooses to present to the jury . . . [which] is the core of [a petitioner's] right [to self-representation]. If standby counsel's participation over the [petitioner's] objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter, the [self-representation] right is eroded.
>
> Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the [petitioner] is representing himself. The [petitioner'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.

McKaskle v. Wiggins, 465 U.S. 168, 177-78 (1984) (internal footnotes omitted); see also *Buhl v. Cooksey*, 233 F.3d 783, 802 (3d Cir. 2000). "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the [petitioner], its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless." *Buhl*, 233 F.3d at 806 (quoting *McKaskle*, 465 U.S. at 177 n. 8). Because there is no absolute bar on standby counsel's unsolicited participation, however, that standby counsel took part in portions of a petitioner's trial does not amount to a *per se* denial of the right to self-representation. *McKaskle*, 465 U.S. at 176-79.

In affirming Petitioner's conviction on direct appeal, the Appellate Division provided the following summary in support of its conclusion that counsel's acting as a "conduit" for Petitioner to cross-examine the victim at trial:

[Petitioner] objects to [standby counsel] acting as a "conduit" for [Petitioner's] cross-examination of the victim. [Petitioner] was offered the choice of communicating his questions to standby counsel through headphones, or of sitting next to standby counsel and providing her directly with the questions he wanted to pose to the victim. [Petitioner] chose to have standby counsel sit next to him, and [Petitioner] wrote many pages of questions, all of which standby counsel asked. The judge ordered the procedure because he considered it "unreasonable" to expose the victim to the psychological impact of direct examination by a man which DNA evidence establishes [to have been her] rapist. This procedure should not ordinarily be employed in the absence of a hearing. Although in substance, [Petitioner] continued to exercise total control of his defense, no record was developed to establish a particularized need for this victim to be questioned in this manner.

[The Appellate Division then properly identified the *McKaskle* standard and its state law progeny as the controlling legal principles.]

[Petitioner] was able [through standby counsel] to ask every question that he wanted. Because of the unique process, it would be clear that [Petitioner] continued to represent himself, and that he and he alone[] controlled the cross-examination.

The jury would have observed [Petitioner]'s extensive notes as the cross-examination was proceeding, and the fact that standby counsel was asking questions given to her by [Petitioner]. [Petitioner] was not permitted to "confront" his accuser only in the most literal meaning of the term. The right of confrontation does not mean the right to face-to-face confrontation; rather it means a party must have a meaningful opportunity, through the legal process, to cross-examine witnesses.

. . . .

Even if this cross-examination procedure was, as [Petitioner] contends, constitutional error [insomuch as it allegedly violated his Confrontation Clause rights], we believe it was harmless beyond a reasonable doubt. . . . Given the strength of the [State's] proofs, this cross-examination procedure raises no such doubt.

(Document 3 attached to ECF No. 7 at 25-29). The Appellate Division thus found that Petitioner's right to self-representation had not been denied because it was clear that Petitioner continued to control both the cross-examination of the victim and his own case, and that to the extent one could argue there was a Confrontation Clause violation, it was utterly harmless. (*Id.*).

Having reviewed the record of this matter, this Court concludes that the above quoted decisions of the Appellate Division are neither contrary to nor unreasonable applications of controlling Supreme Court caselaw. Turning first to the self-representation issue, the Appellate Division identified and applied *McKaskle* reasonably and found that requiring Petitioner to ask his questions for the victim through the conduit of standby counsel neither deprived Petitioner of control of his own defense nor suggested to the jury that anyone other than Petitioner – including standby counsel – was in control of Petitioner's defense. The Appellate Division thus found that the trial court's requirement, although not ideal, amply respected and did not deny Petitioner's right to self-representation. As the factual findings underpinning this conclusion – including Petitioner's taking and use of notes in providing his questions to counsel and the Court's offer to Petitioner of alternative means to provide counsel with his questions in the form of headphones and a microphone – are well supported in the record, and in light of the deference thus owed those findings, this Court concludes that the Appellate Division did not unreasonably apply *McKaskle* in finding that there was no violation of Petitioner's right to self-

representation. Petitioner's claim that he was so denied his self-representation right is thus insufficient to warrant habeas relief.

Turning to Petitioner's claim that he was denied his right to confront the witnesses against him in the form of the victim in this matter, this Court agrees with the Appellate Division that any Confrontation Clause error would have been utterly harmless in light of the substantial DNA evidence of Petitioner's guilt. Although this alone is sufficient to deny Petitioner habeas relief on his confrontation claim, this Court further finds that there was no error in any event. Petitioner was provided ample means to present any and all questions he had for the victim through the conduit of standby counsel, and there is nothing in the record which suggests that Petitioner was denied the ability to pursue any legitimate line of questioning he wished to pursue during the cross-examination of the victim. As Petitioner was not prohibited from engaging in any otherwise proper form of cross-examination, that he was required to ask his questions through the conduit of standby counsel did not violate Petitioner's rights under the Confrontation Clause. Olden, 488 U.S. at 231; Wright, 473 F.3d at 93-94. Petitioner's Confrontation Clause claim is thus also insufficient to warrant habeas relief.

3. Petitioner's Ineffective Assistance of Counsel Claim

Petitioner next argues that the counsel he was assigned for sentencing and his direct appeal counsel were constitutionally ineffective insomuch as they obtained only a summary of his medications rather than his full jail medical history. Essentially, Petitioner contends that had counsel had Petitioner's full medical history, counsel could either have made a more successful motion for a new trial on the Riggins basis

discussed above or could have presented such an argument on direct appeal. The standard which governs such claims is well established:

> [c]laims of ineffective assistance are governed by the two-prong test set forth in the Supreme Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984). To make out such a claim under Strickland, a petitioner must first show that "counsel's performance was deficient. This requires [the petitioner to show] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687; *see also United States v. Shedrick*, 493 F.3d 292, 299 (3d Cir. 2007). To succeed on an ineffective assistance claim, a petitioner must also show that counsel's allegedly deficient performance prejudiced his defense such that the petitioner was "deprive[d] of a fair trial . . . whose result is reliable." *Strickland*, 466 U.S. at 687; *Shedrick*, 493 F.3d at 299.
>
> In evaluating whether counsel was deficient, the "proper standard for attorney performance is that of 'reasonably effective assistance.'" *Jacobs v. Horn*, 395 F.3d 92, 102 (3d Cir. 2005). A petitioner asserting ineffective assistance must therefore show that counsel's representation "fell below an objective standard of reasonableness" under the circumstances. *Id.* The reasonableness of counsel's representation must be determined based on the particular facts of a petitioner's case, viewed as of the time of the challenged conduct of counsel. *Id.* In scrutinizing counsel's performance, courts "must be highly deferential . . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.
>
> Even where a petitioner is able to show that counsel's representation was deficient, he must still affirmatively demonstrate that counsel's deficient performance prejudiced the petitioner's defense. Id. at 692-93. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. The petitioner must demonstrate that "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Shedrick, 493 F.3d at 299. Where a "petition contains no factual matter regarding Strickland's prejudice

> prong, and [only provides] . . . unadorned legal conclusion[s] . . . without supporting factual allegations," that petition is insufficient to warrant an evidentiary hearing, and the petitioner has not shown his entitlement to habeas relief. See Palmer v. Hendricks, 592 F.3d 386, 395 (3d Cir. 2010). "Because failure to satisfy either prong defeats an ineffective assistance claim, and because it is preferable to avoid passing judgment on counsel's performance when possible, [Strickland, 466 U.S. at 697-98]," courts should address the prejudice prong first where it is dispositive of a petitioner's claims. United States v. Cross, 308 F.3d 308, 315 (3d Cir. 2002).

Judge v. United States, 119 F. Supp. 3d 270, 280-81 (D.N.J. 2015).

Petitioner argues that his trial and appellate counsel proved ineffective by failing to acquire his full jail medical history, and in so doing prevented his motion for a new trial or appeal from fully presenting the *Riggins* claim discussed above. The Appellate Division rejected these claims, finding that even had Petitioner presented his full medical records, Petitioner failed to show that he would have been entitled to a new trial. (*See* Document 11 attached to ECF No. 7 at 24-25). Specifically, the Appellate Division rejected that Riggins provided a basis for a new trial for the reasons discussed above, and to the extent that Petitioner contends that the Xanax unconstitutionally addled his self-defense notwithstanding his failure to show that he had opposed or objected to his continued treatment, Petitioner had failed to present sufficient evidence to show that the medication actually affected his self-defense. (*Id*.). Although Petitioner had presented the Appellate Division with an expert report from his previous federal civil suit, the Appellate Division found this expert opinion largely irrelevant as the expert in question did not note the basis for his report, was unlikely to have actually reviewed the trial transcript because it was extraneous to the subject of his opinion in the civil case, and because the expert had

no ability to retroactively measure or guess what effects the medication had upon Petitioner at trial. (Id. at 25-26). Thus, given the lack of evidence showing how Petitioner's self-defense was prejudiced, as well as the fact that Petitioner was extensively warned of the dangers of self-representation, and as Petitioner failed to make out a claim under Riggins, the Appellate Division concluded that counsel could not have prevailed on a new trial motion or on direct appeal even with Petitioner's full medical records as there was little if any actual evidence of prejudice and certainly not enough to establish prejudice in light of the overwhelming evidence of Petitioner's guilt presented at trial. (*Id*. at 24-26).

For the reasons expressed above, Petitioner has failed to establish his entitlement to a new trial under Riggins, and in turn cannot show that the Appellate Division's rejection of his Riggins based ineffective assistance of counsel claim on that basis amounts to an unreasonable application of the Strickland standard. Likewise, the Appellate Division's finding that Petitioner failed to show prejudice as to counsel's failure to obtain his full medical records also was neither contrary to nor an unreasonable application of *Strickland*. While Petitioner makes much of the expert reports submitted in his federal civil rights suit – which concerned not his trial but rather whether he had been prescribed Xanax by jailhouse doctors without proper consultation or examination – the Appellate Division correctly notes that these reports provide little more than speculation as to how Petitioner may have been affected in representing himself at his trial by his having ingested the prescribed Xanax, and do not suffice to establish that the outcome of his trial was prejudiced by

the medication. As such, Petitioner failed to establish Strickland prejudice, and the Appellate Division's rejection of his ineffective assistance of sentencing and appellate counsel claims were therefore neither contrary to nor an unreasonable application of *Strickland*. Petitioner's ineffective assistance of counsel claims thus provide no basis for habeas relief.

Additionally, Petitioner contends that standby counsel's supervisor, who eventually represented him during his sentencing and his post-trial new trial motion, was also ineffective in ordering standby counsel to leave the court room following Petitioner's cutting of himself during his initial attempt at summation, "leaving" Petitioner to deliver his second summation and to mention to the Court his having been medicated without the presence of standby counsel. The Appellate Division rejected this claim, finding that Petitioner had been repeatedly warned of the dangers of representing himself, including the fact that he waived "any and all later claims that his self-representation constituted ineffective assistance of counsel." (See Document 11 attached to ECF No. 7 at 24-25). The Appellate Division thus found that Petitioner was barred from raising any such claim based on his self-representation. (*Id.*). As the Supreme Court explained in Faretta, "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" 422 U.S. at 834 n. 46. As the applicable Supreme Court precedent supports the Appellate Division's rejection of Petitioner's claim that his self-representation during summation was inadequate, and as the record of this matter firmly establishes that Petitioner was fairly warned

of the dangers of self-representation, including the waiver of ineffective assistance claims, and chose to proceed pro se regardless, the Appellate Division's decision was neither contrary to nor an unreasonable application of relevant Supreme Court caselaw, and provides no basis for habeas relief.[5]

4. Petitioner's cumulative error claim

In his final argument, Petitioner contends that even if the errors he alleged were insufficient to warrant habeas relief individually, he should in any event still be entitled to a new trial because those alleged errors cumulatively denied him a fair trial. Although errors "that individually do not warrant habeas relief may do so when combined,"

> a cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Cumulative errors are not harmless if they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish actual prejudice.

Albrecht v. Horn, 485 F.3d 103, 139 (3d Cir. 2007) (internal quotations and citations omitted), *cert. denied*, 552 U.S. 1108 (2008). Petitioner's claims in this matter fair no better cumulatively than they do individually. To the extent that Petitioner has presented claims not subject to harmless error analysis, Petitioner has failed to establish a violation sufficient to warrant relief, and in his remaining claims

[5] Although Petitioner's claim provides no basis for habeas relief, this Court joins the Appellate Division in refusing to "condone standby counsel's departure from the courthouse or her supervisor's instruction to do so." (Document 3 attached to ECF No. 7 at 24 n.. 2). That this decision was ill advised, however, is not sufficient to warrant habeas relief in this matter in light of Petitioner's decision to proceed pro se after being amply warned against doing so.

Petitioner has failed to show any error that, either cumulatively or individually, could have had "a substantial and injurious effect" on the outcome of Petitioner's trial given the strong evidence of his guilt. *Id*. Petitioner has therefore failed to show any basis for habeas relief, and his habeas petition is denied.

III. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. §2253(c), a petitioner may not appeal from a final order in a habeas proceeding where that petitioner's detention arises out of a state court proceeding unless he has "made a substantial showing of the denial of a constitutional right." "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). For the reasons expressed above, Petitioner's claims are insufficient to warrant habeas relief and jurists of reason would therefore not disagree with this Court's denial of Petitioner's habeas petition. Petitioner is therefore denied a certificate of appealability.

IV. CONCLUSION

For the reasons stated above, Petitioner's petition for a writ of habeas corpus (ECF No. 1) is DENIED, and Petitioner is DENIED a certificate of appealability. An appropriate order follows.

January 24, 2019 **s/ Susan D. Wigenton**
Hon. Susan D. Wigenton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD E. BOYD,

Petitioner,

v.

STEVEN JOHNSON, et al.,

Respondents.

Civil Action No. 18-965 (SDW)

ORDER

This matter having come before the Court on Petitioner Donald E. Boyd's petition for a writ of habeas corpus (ECF No. 1, Jack N. Frost, Jr., appearing), the Court having considered the petition, the records of proceedings in this matter, the response of Respondents (Catherine A. Foddai, appearing), and Petitioner's reply (ECF No. 18), and for the reasons expressed in the accompanying opinion,

IT IS on this 24th day of January, 2019,

ORDERED that Petitioner's petition for a writ of habeas corpus (ECF No. 1) is DENIED; and it is further

ORDERED that Petitioner is DENIED a certificate of appealability; and it is finally ORDERED that the Clerk of the Court shall serve a copy of this order and the accompanying opinion upon the parties electronically, and shall CLOSE the file.

s/ Susan D. Wigenton
Hon. Susan D. Wigenton, United States District Judge

State v. Boyd, 229 N.J. 603 (2017)
164 A.3d 400 (Table)

229 N.J. 603
Supreme Court of New Jersey
Petitions for Certification.
This disposition is referenced in the Atlantic Reporter.
Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Respondent,

v.

Donald BOYD, Defendant-Petitioner.

March 16, 2017

ON PETITION FOR CERTIFICATION

Opinion

To the Appellate Division, Superior Court:
A petition for certification of the judgment in A–002171–13 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

All Citations:

229 N.J. 603, 164 A.3d 400 (Table)

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2171-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD BOYD,

Defendant-Appellant.

Argued April 20, 2016 — Decided September 30, 2016 Before Judges Alvarez, Ostrer, and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 04-06-1142.

Jack N. Frost, Jr., argued the cause for appellant (Drinker Biddle & Reath LLP, attorneys; Mr. Frost and Paul G. Nittoly, of counsel and on the briefs; Andrew C. Egan, on the briefs).

Annmarie Cozzi, Special Deputy Attorney General/Acting Senior Assistant Prosecutor, argued the cause for respondent (Gurbir S. Grewal, Acting Bergen County Prosecutor, attorney; Ms. Cozzi and Jessica A. Gomperts, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief.

Defendant Donald Boyd appeals from the October 28, 2013 Law Division order denying his petition for post-conviction relief (PCR). We affirm.

Defendant alleges ineffective assistance of the Office of Public Defender (OPD) in serving as his standby counsel while he represented himself during the trial, serving as his trial counsel for purposes of sentence, and representation on his appeal of the jury's verdict. Defendant's principal point, however, involves the claim that while he was housed at the Bergen County Jail, without his knowledge

or consent, he was given Xanax. He contends this constitutes an inherently unconstitutional deprivation of his due process rights that per se warrants a new trial, and furthermore that the medication deleteriously affected his self-representation, entitling him to a new trial.

The jury convicted defendant of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(6) (counts one and two); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count three); first-degree aggravated sexual assault during a kidnapping, N.J.S.A. 2C:14-2(a)(3) (counts four and five); first-degree kidnapping, N.J.S.A. 2C:13-1(b) (count six); first-degree aggravated assault during a burglary, N.J.S.A. 2C:14-2(a)(3) (counts seven and eight); second-degree burglary, N.J.S.A. 2C:18-2 (count nine); first-degree aggravated sexual assault during a robbery, N.J.S.A. 2C:14-2(a)(3) (counts ten and eleven); first-degree robbery, N.J.S.A. 2C:15-1 (count twelve); first-degree aggravated sexual assault while armed with a knife, N.J.S.A. 2C:14-2(a)(4) (counts thirteen and fourteen); and third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count fifteen).

Defendant was sentenced to an extended term of imprisonment as a persistent offender, N.J.S.A. 2C:44-3(a) and 2C:43-7(a)(2), to life subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(a), on the first-degree aggravated sexual assault, count one, and a consecutive sentence of thirty years subject to NERA on the first-degree kidnapping, count six. Ten years consecutive to counts one and six were imposed on the second-degree burglary and twenty years consecutive to counts one, six, and nine on remand were imposed on the first-degree

robbery, count twelve. In the aggregate, defendant's sentence is life, followed by sixty years. All were consecutive to the sentence defendant was serving at the time of trial on another matter, and concurrent to another sentence imposed on the same date on an unrelated charge. We affirmed the convictions and remanded for re-sentencing in accordance with the opinion;[6] the Supreme Court denied defendant's petition for certification. State v. Boyd, No. A-6537-05 (App. Div. Aug. 12, 2008), certif. denied, 197 N.J. 16 (2008), cert. denied, 556 U.S. 1241, 129 S. Ct. 2391, 173 L. Ed. 2d 1304 (2009).

On remand, defendant was re-sentenced to the same terms of imprisonment. He appealed to the excessive sentence calendar, and we affirmed on March 17, 2010. See R. 2:9-11.

The reader is directed to our 2008 opinion in State v. Boyd for a more detailed description of the incident that resulted in these charges, which we only briefly describe here. We also recount relevant trial events and pertinent information presented at the PCR hearing.

I.

A.

On March 9, 2002, defendant gained entry into the victim's apartment under the guise of being her former boyfriend, in whose company defendant had spent the prior evening. State v. Boyd, supra, slip op. at 3-4. The victim, who was ill, buzzed

[6] This court remanded for re-sentencing in light of State v. Pierce, 188 N.J. 155 (2006), decided after defendant's sentencing, and State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

defendant into her apartment, assuming she had just admitted the former boyfriend into the building so he could retrieve some belongings from the home. The victim immediately returned to bed. Ibid. She was assaulted from behind. Id. at 4. The victim never saw her assailant's face, but said he was white, dressed in a blue sweatshirt, and wore surgical gloves. Ibid.

The initial assault resulted in a spiral fracture of the victim's upper arm. Id. at 4-5. Defendant pulled a pillow case over the victim's head and secured it with a rope or wire, threatened her with a knife and gun, and told her that he was "never going back to prison." Ibid. After vaginally and anally raping her, defendant forced her into the shower, directed her to wash, and left. Id. at 4-5. The victim remained in the shower until she was certain her assailant was gone. Ibid. She then ran into the hallway of her apartment building, pounding on neighbors' doors, screaming that she had been raped. Id. at 5.

When police arrived, they found the victim with the pillow case still around her head, string or lace around one leg, and a telephone cord wrapped around her broken arm. Ibid. She was taken to a nearby hospital for treatment of her injuries. Ibid.

The victim's former boyfriend testified at trial that he had spent the evening before the assault drinking with defendant and another person. Id. at 3. The following morning, when he awakened, the former boyfriend realized defendant had taken his truck keys and left. Ibid. When defendant returned, he was "sweaty, very nervous, agitated, and couldn't sit still." Id. at 5. Soon after he returned, the police

called to inform the former boyfriend of the assault. Defendant promptly left without a word. Ibid.

Defendant was not identified as the perpetrator until approximately a year and a half later, when his DNA was found to match the perpetrator's. Id. at 5-6.

B.

We previously described the procedure the trial judge followed regarding defendant's election to proceed pro se, and the role played by stand-by counsel:

> Approximately a month before the trial was scheduled to begin, defendant sought to discharge his attorney and represent himself. After a lengthy Crisafi/Reddish[1] hearing, the court permitted defendant to do so, but designated his former defense attorney to serve as standby counsel. During the hearing, defendant denied ever receiving treatment for a mental health disorder, and asserted that his only physical ailments were high blood pressure and arthritis. He was then forty-two years old, had obtained a GED, and claimed to have spent months while incarcerated preparing for the trial. Defendant asked the court to order that he be allowed extra time in the law library, which request the judge granted. Defendant assured the court he had spent many hours training in criminal law, and said he had "been doing this for years." He owned a few Gann law books, including the Criminal Code.
>
> Pre-trial, defendant consented to have standby counsel conduct jury selection. The judge also ruled, over defendant's objection, that he could not directly cross-examine [the victim], rather, that he had to use standby counsel as a "conduit" for his questions.
>
> On the second day of trial, defendant requested that standby counsel take over representation. The judge declined the request. . . .
>
> ---
>
> [1]State v. Crisafi, 128 N.J. 499 (1992); State v. Reddish, 181 N.J. 553 (2004).
>
> [Id. at 6-8.]

Towards the end of the Crisafi hearing, the trial judge warned defendant that if he represented himself, he would not be able to raise ineffective assistance of counsel as a basis for PCR. Id. at 16.

C.

This appeal record does not include a copy of defendant's post-trial presentence investigation report or his Adult Diagnostic & Treatment Center (Avenel) evaluation. See N.J.S.A. 2C:44-6 and N.J.S.A. 2C:47-2. From the trial judge's comments during the sentence hearing we glean the following.

Defendant had been convicted of, among other offenses, a "violent rape against a sixteen[-]year[-]old in 1985" and was "linked by DNA evidence to a rape in Arizona in 1994." The Avenel report described defendant as "a psychopathic individual who merges his barely masked rage and distorted drive for sexual release into violent and sadistic assaults against women[,]" and who has "a complete lack of remorse or even acknowledgement of culpability."

This conclusion was reached by the Avenel psychologist at least in part because when defendant, who entirely denied any culpability, was asked about the DNA evidence, he responded that "[j]ust because there was DNA doesn't mean I raped anyone[]" implying that he and the victim had consensual sex. When asked the further question about the victim's spiral fracture, he responded that he had seen the photographs of the victim's arm and it did not look broken to him.

The first day of his closing argument at trial, defendant superficially cut his arm with a sharp object he had hidden in his mouth. Defendant told the Avenel

psychologist that it was "planned, maybe to hurt himself, [or] maybe to get a mistrial." Defendant's prior criminal history included twenty-seven arrests, seven prior convictions, pending charges in New York, and the possible rape charge in Arizona.

Defendant was represented by a public defender at his sentence hearing, a different attorney than the one who acted as standby counsel. At defendant's behest, that attorney requested his medical records from the Bergen County jail. She was provided with a summary of the medications he was administered while there. The summary listed the Xanax, but, in contrast to the summary, the complete records revealed that the Xanax was prescribed telephonically by the facility's physician. The physician never met with defendant. He prescribed the tranquilizer upon being advised of defendant's allegedly combative conduct upon arrival at the jail. Neither the records nor the summary included any written consent or acknowledgment by defendant that he was being given Xanax.

D.

As defendant's trial was about to begin, he claimed he had been in an altercation with prison staff the night before, had not slept for thirty hours, and had not been provided his regular medication. Boyd, supra, slip op. at 8-9.

The trial judge noted that in our opinion in defendant's prior appeal of his conviction on a different indictment, the record indicated that as trial was about to begin, defendant had similarly requested an adjournment because "he had been involved in an altercation in jail the night before, as a result of which he had sustained 'severe abrasions' and a 'nearly closed' right eye. He also claimed that he

had not received his blood pressure medication and had not slept or eaten in thirty hours." State v. Boyd, No. A-5554-04 (App. Div. Apr. 27) (slip op. at 3), cert. denied, 188 N.J. 356 (2006).

Defendant's defense strategy included interruptions to the smooth progress of the trial, accomplished both by his legal arguments and objections, and his conduct. For example, defendant raised his middle finger at the victim's former boyfriend when he began to testify, requiring the judge to call a recess to address defendant's conduct, in the courtroom but outside the presence of the jury.

Defendant appeared to have a plan of action for how he would proceed. For example, he attempted to admit into evidence the police report prepared by the first officer at the scene in order to demonstrate inconsistencies with the victim's description of the event at trial. In support of his application, defendant argued the excited utterance exception to the hearsay rule. N.J.R.E. 803(c)(2).

When cross-examining a detective testifying for the State, the judge admonished defendant that it was improper to refer to "alleged" restraint marks on the victim's ankles and wrists. Defendant promptly corrected himself and thereafter only employed the phrase the "alleged victim."

Defendant's relationship with standby counsel was fraught. At times, he was adamant that he wanted counsel to represent him, and at other times, he claimed counsel had betrayed him and sabotaged his defense by making promises of assistance which did not materialize.

Returning to the cutting incident and its immediate aftermath, we previously said:

> Defendant started his summation with the words, "My name is Donald Boyd. You want to see a man bleed?," and proceeded to cut one of his arms with a sharp object that he had concealed in his mouth. Sheriff's officers immediately took the blade away from defendant, and the judge and jury left the courtroom. After the incident, while standby counsel, the judge and the prosecutor were meeting in chambers, standby counsel was directed to leave by her supervisor, and did not return for the summations. Another attorney from the Office of Public Defender represented defendant at sentencing.
>
> [(slip op. at 8).]

The next day, defendant finished his closing statement. During a colloquy with the judge outside the presence of the jury, including the judge's repetition of the explanation of the limited role of standby counsel, defendant said: "I don't mean to say this prejudicially, but this is one of the most richest, whitest communities in the United States of America and you're going to give me a black attorney to represent me? I ain't going that route."

Among other things, defendant told the jury in closing: "I had multiple problems with medication at that time, okay. Like I said I was not going to go to trial with an attorney that said I was guilty."

Defendant also told the jury that the cell phone records that he had attempted to move into evidence, that were in the name of another person, were actually his own records because he had borrowed the other person's phone. The time frame of the loan included the date of the assault. Since the records showed calls made while the assault was taking place, he argued that "I couldn't have been

in three places at once according to those records and I could not introduce them to you." Defendant made this argument despite the fact he did not testify.

The medical expert whom defendant called as his witness was arranged by standby counsel at defendant's request. The expert testified in his behalf that spiral fractures such as the one sustained by the victim can result from accidents, like a fall in a bathtub.

E.

From the second day defendant was housed at the Bergen County Jail, defendant was given Xanax as well as his regular blood pressure, stomach, and pain medicine. After his conviction, defendant sued the Bergen County Jail and medical staff in federal court for medical malpractice.[7] According to counsel at oral argument on appeal, defendant recovered $100,000 by way of settlement.

Dr. Kenneth Weiss acted as defendant's expert in the federal medical malpractice trial. Dr. Weiss opined that the medical negligence was established by the doctor's failure to meet with his patient before prescribing medication, and the failure to obtain his informed consent. Dr. Weiss also opined that "the nonconsensual administration of Xanax, a drug with known cognition-impairing properties, would likely have impaired Mr. Boyd's capacity to act as his own counsel." Presumably, this was mentioned in the report because it was argued as an element of damages.

[7] We were not provided a copy of the complaint, and we therefore do not know the nature of defendant's causes of action. We do not know any details regarding the settlement.

On the first day of trial, defendant asserted that he had been "shaking" because he was given Prilosec instead of Zantac for his ulcer, and had not received his pain medication. The judge responded that he saw no sign whatsoever of any shakes, tremors, or any other physical manifestations from the problem.

Later that same morning, a jail nurse announced in open court that defendant was being administered Xanax, along with the name of one other medication, outside the presence of the jury but on the record. When mentioned, defendant said nothing:

> [THE COURT]: Okay. Please go to the jury room.
>
> (Jury excused. The following is heard outside the presence of the jury.)
>
> THE COURT: The nurse is here from the jail and she has Mr. Boyd's medicine. You can take it. You have water here? Is there a glass of water?
>
> MR. BOYD: Yes.
>
> THE COURT: Good morning. Thank you for coming over. What medicine do you have[?]
>
> A VOICE: Xanax, one milligram, and Ultram, fifty grams.
>
> THE COURT: Tell us your name.
>
> A VOICE: [The nurse].
>
> THE COURT: You're a nurse from the jail.
>
> [The nurse]: Yes.
>
> THE COURT: Thank you. Would you deliver it to Mr. Boyd so he can take his medicine[?]
>
> (Short recess taken.)
>
> (No jury present.)

> THE COURT: The record will indicate it's a little after ten this morning. Immediately when I heard the problem with Mr. Boyd getting his medicine today I looked at the sergeant. We had a brief whisper off the record and he attended to getting the medicine for Mr. Boyd. He has now taken it and I understand that the nurse will make sure he gets his medicine twice a day, right, Sergeant?
>
> SERGEANT FEDERICO: Twice a day. The doctor ordered the medicine on a regular basis.

At one point during trial, after assuring the judge that the jail had begun to give him his regular medication, defendant said "[t]hat medication is essential for me. Now I'm definitely feeling a little better and a little bit level headed and a little bit more clear. It did kick in . . . . It's amazing . . . . I don't have the shakes anymore . . . . I feel a lot easier."

Prior to summations, however, defendant told the judge outside the presence of the jury that he recently discovered that Bergen County Jail had been supplementing his regular medication with Xanax. He stated:

> You guys have been giving me Xanax for the last five days in a row. You know what Xanax is? It's an antidepressant medication. I've never taken it in my life and I come here to Bergen County and you're going to start giving me Xanax, the highest dosage. Not a .2. A 1.0. I found that out yesterday.

II.

During the PCR hearing, even though he was represented, defendant spoke directly to the judge. He argued that the Xanax prevented him from being effective: "how can I be prescribed a psychotropic drug and correctly represent myself in court?"

The judge who heard the motion decided, in abbreviated fashion, that under the second prong of Strickland,[8] defendant had failed to prove that any of the claimed errors prejudiced the outcome. The judge's ruling was based on the strength of the State's overwhelming proofs.

Defendant now raises the following points for our consideration:

I. THE VIOLATIONS OF MR. BOYD'S FUNDAMENTAL CONSTITUTIONAL RIGHTS REQUIRES THE GRANTING OF A NEW TRIAL.

A. Mr. Boyd was Denied His 14th Amendment Right to Informed Consent and the Right to Refuse Medication.

B. Mr. Boyd's Involuntary and Unknowing Dosing with Xanax Requires a New Trial.

C. Mr. Boyd's Involuntary and Unknowing Dosing with Xanax Violated His Sixth Amendment Right to Counsel.

II. MR. BOYD WAS DENIED THE EFFECTIVE ASSISTANCE OF PUBLIC DEFENDER COUNSEL DURING THE IMMEDIATE AFTERMATH OF HIS TRIAL.

A. The Appointed Public Defender Failed to Adequately Protect Mr. Boyd's Rights During and After Trial.

B. Because of the Public Defender's Inactions, Mr. Boyd Was Denied the Ability to Present His Constitutional Arguments on Appeal Because He Did Not Have, and His Counsel Failed to Seek, His Medical Records.

III. THE CUMULATIVE EFFECT OF CONSTITUTIONAL VIOLATIONS AND ERRORS PREJUDICED MR. BOYD AND PREVENTED HIM FROM HAVING A FAIR TRIAL.

III.

[8] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Defendant contends that the administration of Xanax during the trial is a per se constitutional violation that warrants a new trial, relying on Riggins v. Nevada, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992), in support of his argument. He also asserts that the drug rendered him unable to effectively represent himself.

In Riggins, a defendant in a death penalty case who was involuntarily medicated with Mellaril, an anti-psychotic drug, was granted a reversal of his conviction. Id. at 129-31, 112 S. Ct. at 1812-13, 118 L. Ed. 2d at 485-87. The Court reiterated that although the involuntary treatment of a person in custody by the administration of antipsychotic drugs was permissible, the State bore the burden of demonstrating that the medication was appropriate, that less intrusive alternatives had been considered, and that the medication was essential for the safety of the inmate or others. Id. at 135, S. Ct. at 1815, 118 L. Ed. 2d at 489. This is because, due process considerations notwithstanding, there are instances in which the treatment is in the inmate's best interest, and he or she is a danger to himself or others. Id. at 134-35, 112 S. Ct. 1815, 118 L. Ed. 2d at 489. The Court considered the powerful effects of the drug, that included devastating side-effects that in some instances are irreversible. Id. at 142-43, 112 S. Ct. 1818-19, 118 L. Ed. 2d at 493-94. The possible side effects include the possibility that a defendant's cognitive functioning and his ability to interact with his attorney would be affected. Ibid. As a result, there was a "strong possibility that Riggins' defense was impaired due to the administration of Mellaril." Id. at 137, 112 S. Ct. at 1816, 118 L. Ed. 2d at 491.

Riggins, however, is distinguishable. The drug in question here is Xanax, anti-anxiety medication, not Mellaril, a powerful anti-psychotic drug. The drugs at issue vastly differ in their effects.

Most significantly, however, defendant knew he was being given Xanax from the beginning of the trial. That he was being given the drug was announced on the record, along with the name of one of his regular medications. That knowledge, and ensuing silence, means no due process violation occurred. See People v. Jones, 931 P.2d 960, 980 (Cal. 1997) (where a defendant voluntarily ingests a psychotropic medication there is no violation of due process), overruled on other grounds, by People v. Hill, 952 P.2d 673 (1998). Had defendant objected initially, the trial judge, who responded immediately to defendant's concerns regarding his medications, would no doubt have ordered the medication stopped. As has been held in the federal courts, a defendant must take affirmative action regarding medication. The administration of medication is considered involuntary only when a person in custody refuses it, requests it be terminated, or makes such requests through counsel. Benson v. Terhune, 304 F.3d 874, 880-82 (9th Cir. 2002).

Even when defendant did complain to the judge before summations that he had been given Xanax, defendant did not request the drug be stopped. It is also noteworthy that defendant specifically claimed he learned that he was being given the drug the day before -- a statement contradicted by the record we have from the beginning of the trial.

It is not credible that defendant would not have told the judge he wanted the medication stopped. This defendant objected vociferously and effectively about the jail's failure to provide him with his blood pressure medication; it is not probable that he would have stood mute had he wished to stop being given Xanax. He knew that the trial judge had forcefully and properly addressed his concerns about the failure of the jail to give him his medication. Defendant had no reason to believe the judge would not have taken immediate action regarding the medication he did not want.

Nor does our review of the transcripts support the claim that defendant was in some fashion intoxicated, or cognitively impaired, as a result of the Xanax. This is defendant's second point on the issue, and he supports the claim by stating he was being given the drug twice a day in large amounts. We reiterate that on the record when defendant spoke to the trial judge regarding his mental status, it was only to point out how much better he felt once his regular medication was resumed. At that juncture, he had been taking the Xanax for approximately two days.

Defendant's responses to legal issues during the trial, although those of a layperson, not versed in the law, were not at all confused. Based on our review of the transcripts, defendant's course of conduct during the trial was consistent with his course of conduct during his un-medicated pre-trial court appearances, including the Crisafi hearing.

Even defendant's highly unusual strategy in cutting himself in front of the jury he later acknowledged was a tactic employed to trigger a mistrial. This

admission was made to the evaluator at Avenel, months after the trial, months after he stopped being given Xanax. Defendant's decision to represent himself in the face of first-degree charges with the potential for sentencing as a persistent offender was itself atypical. And that crucial choice, and the Crisafi hearing that followed, occurred weeks before defendant was given Xanax.

We therefore find that the administration of the drug was not a per se violation of defendant's constitutional rights that would warrant a new trial. Nor was it a circumstance that impaired defendant's ability to function as his own attorney such as would entitle him to a new trial.

We do not mean by this decision to condone in any way the conduct of the jail staff. However, after close examination of the trial record, we conclude that to the extent any harm was visited upon defendant by the administration of Xanax, that harm does not undermine our confidence in the fairness of the process.

Throughout, defendant has blamed his attorneys, the State, and the judge for what he described as the "rigged" outcome. That the outcome was preordained was the result of proof that, unfortunately for him, could not have led a reasonable jury to any other result. There is a significant difference between a "rigged" outcome and one produced by the weight of overwhelming evidence.

IV.

It is well-established that in order to prevail on a PCR petition alleging ineffective assistance of counsel, a defendant must demonstrate he received substandard professional assistance and that prejudice resulted from the substandard representation. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064,

80 L. Ed. 2d at 693. The Strickland standard was adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

"Prejudice means 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." State v. Nash, 212 N.J. 518, 542 (2013) (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). Prejudice is presumed "in cases exemplified by egregious shortcomings in the professional performance of counsel." Fritz, supra, 105 N.J. at 61. Unless such a presumption is warranted, "a defendant whose counsel performed below a level of reasonable competence must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 60-61 (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). The burden is on the defendant to demonstrate the constitutional violation by a preponderance of the evidence. See State v. Gaitan, 209 N.J. 339, 350 (2012), cert. denied, ____ U.S., ____, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013).

Here, defendant asserts that the attorney who represented him at the sentence was ineffective in that she did not obtain his actual medical records from the county jail, only a summary of the care he received. Although not entirely clear, defendant seems to also contend that counsel's representation at sentence was deficient because she did not attempt to pursue defendant's entitlement to a new trial on the basis that he had been given Xanax, or because had she possessed the actual records, she might have obtained a more lenient sentence. Defendant further

claims that appellate counsel was ineffective because this initial failure to obtain the actual records kept him from arguing on appeal that defendant was entitled to a new trial.

We observe first that these points were not raised before the judge who decided the PCR petition. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'").

Since the administration of medication to a person in custody is a subject that implicates the public interest, we will reach the merits of defendant's ineffective assistance of counsel claim. Nonetheless, because we conclude in this case that the Xanax did not entitle defendant to a new trial under Riggins or for any other reason, this point must also fail.

First, defendant's argument that his own representation was ineffective because he was under the influence is simply not tenable. An ineffective assistance of counsel claim is measured against a professional standard.

Each self-represented defendant argues to the judge making the decision on the question of representation that he is competent, has some familiarity with the law, and is sufficiently educated to represent himself. See Reddish, supra, 181 N.J. at 592-95. But none participates in the trial in the fashion we expect from a trained

attorney with the detachment that flows from representing another person. Criminal defense attorneys follow certain clearly marked paths, guided by our constitutions, statutes, and precedents. A person who chooses to represent himself does so in the face of "likely detriment." Reddish, supra, 181 N.J. at 580. The New Jersey Supreme Court said "that a defendant who represents himself 'relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.'" Ibid. (citing Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1975)). For that reason, a defendant who elects to represent himself, like this defendant, waives the ineffective assistance of counsel argument as a result. We neither have a means by which to assess a pro se defendant's own effectiveness nor should we attempt to make such a judgment.

As required by Reddish, defendant was told self-representation meant he would "waive any and all later claims that his self-representation constituted ineffective assistance of counsel." Id. at 594. This defendant was clearly informed that as a result of his self-representation he was waiving the right to raise the issue on a PCR petition.

Moreover, the record does not indicate the materials Dr. Weiss reviewed before he issued his report in the federal medical malpractice case. It is unlikely, of course, that he would have reviewed the trial transcript not only because it was not relevant to his opinion regarding the error of prescribing a drug to a patient without examining him, but because he would not have a standard by which to measure impacts on defendant's cognitive functioning. Dr. Weiss cannot say that defendant's

conduct at trial was affected by the medication because he does not know if it would have been different in an unmedicated state, and if so, in what fashion.

With regard to defendant's attorney's effectiveness at sentence, we do not agree that had counsel obtained the actual records, as opposed to only the summary, defendant would have been entitled to a new trial or obtained a more lenient sentence given these very serious charges and his significant prior criminal history. Thus defendant has not established by a preponderance of the evidence a prima facie case of either substandard representation or prejudice to the outcome with regard to the sentence. See Nash, supra, 212 N.J. at 542.

As to appellate counsel, even without defendant's actual records, he did argue that defendant's condition was affected during the trial because of the jail's initial failure to provide his blood pressure, stomach, and pain medication. That point was unsuccessful, and after our consideration of the claim here, we are unconvinced the records would have had the desired impact.

V.

Defendant's final argument is that the cumulative effect of constitutional violations and errors prejudiced his right to a fair trial and entitle him to relief. We do not agree. There were no errors of any magnitude, much less cumulative errors, which warrant vacating defendant's conviction and granting him a new trial.

Defendant fought vigorously for the right to represent himself. He was advised by the judge at the time that if self-represented, he would, among other things, lose the right to raise the issue of ineffective assistance of counsel.

It is easier to articulate the harmless error test than to apply it. State v. Pillar, 359 N.J. Super. 249, 276 (App. Div.), certif. denied, 177 N.J. 572 (2003). As defined in Pillar,

> [t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee.
>
> [Id. at 277-78 (quoting Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 2081-82, 124 L. Ed. 2d 182, 189 (1993)).]

The guilty verdict was attributable to the DNA match and the circumstantial evidence, including the testimony of the victim and her former boyfriend. Therefore, even if any of defendant's arguments establish error, the error was harmless beyond reasonable doubt. The guilty verdict in this case was "unattributable" to the alleged errors. See Pillar, supra, 359 N.J. Super. at 276.

Affirmed.

STATE OF NEW JERSEY	SUPERIOR COURT OF NEW JERSEY
v.	LAW DIVISION — CRIMINAL
DONALD BOYD Defendant	BERGEN COUNTY
	INDICTMENT #: 04-06-01 142-I
	CASE OR PROMIS #: 03-003450-001

ORDER ON POST-CONVICTION APPLICATIONS ON INDICTABLE OFFENSES

This matter being opened on the application of defendant, DONALD BOYD, by:

☒ Petition for Post-Conviction Relief determined to be defendant's
☒first petition
□second or subsequent petition
□ Motion for Change or Reduction of Sentence pursuant to *Rule* 3:21-10

□ Motion for ___ ___ and the defendant having been represented by:
_____, Assistant Deputy Public Defender
_____, Retained or Designated Counsel *(circle one)* or

□ The court having concluded that there was no good cause entitling the assignment of counsel on the application, and the State having been represented by:
___ Assistant Prosecutor; and
□ There having been proceedings conducted on the record on _, 2013 or
□ The matter having been disposed of on the papers;
It is on this 28th day of October, 2013 **ORDERED THAT DEFENDANT'S APPLICATION IS HEREBY:**
□ Granted
☒ Denied
□ Other:
For the reasons: **stated in open court on Friday October 11, 2013.**

Expressed in the court's written opinion of _____
Expressed orally on the record on _____

(Hon. Eugene H. Austin)

1.

2. SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CIVIL PART BERGEN COUNTY

INDICTMENT NO. 01-06-1142
APP. DIV. NO. A-002171-13-T1

STATE OF NEW JERSEY

Plaintiff,
v.

DONALD BOYD,

Defendant.

TRANSCRIPT OF PROCEEDINGS

PCR MOTION

Place: Bergen County Courthouse 10 Main Street Hackensack, NJ 07601

Date: October 11, 2013

B E F 0 R E:

HONORABLE EUGENE H. AUSTIN, J.S.C.

TRANSCRIPT ORDERED BY:

SUZANNE MARTINEZ,
(Office of the Public Defender - Appellate Section)

A P P E A R A N C E S:

JESSICA A. GOMPERTS, ESQ., Bergen County Assistant Prosecutor, Attorney for the Plaintiff. CRAIG S. LEEDS, ESQ. , (Craig *S.* Leeds Law Offices), Attorney for the Defendant.	RECEIVED APPELLATE DIVISION JUL 25 2014 SUPERIOR COURT OF NEW JERSEY

Audio Recorded by: N/A

TAPE REPORTERS, INC.
Cathy E. Betz
29 Beach Road
Monmouth Beach, New Jersey 07750
(732) 263-1191

3.		30. Court Decision
4.		32
5.	1	31.
6.	2	say that this was a continuing pattern by -- by the
7.	3	sheriff's department that it's not something that
8.	4	should be used against him, but rather it -- it
9.	5	supports his claim that he was mistreated, that it
10.	6	was an ongoing situation. Thank you.
11.	7	THE COURT: Thank you, Mr. Leeds. I've
12.	8	heard enough to be able to decide this. I've read
13.	9	the submissions. First and foremost I am going to
14.	10	deny defendant's application for post-conviction
15.	11	relief. First and foremost, the issues he raises
16.	12	have been previously addressed in direct appeal.
17.	13	Secondly, the issue of the medication -- but
18.	14	if you look at the transcripts, the trial transcripts
19.	15	of April 26th, 2006, the following exchange took
20.	16	place.
21.	17	"MR. BOYD: Your Honor, I take anxiety
22.	18	medication and my blood pressure medication
23.	19	together with painkillers. Not to have them I'm
24.	20	shaking right now.
25.	21	"THE COURT: When was the last time you
26.	22	took your medication?
27.	23	"MR. BOYD: I took it on time yesterday
28.	24	and that's a period of three to four days now. I'm
29.	25	not taking" -- "talking about blood pressure
		medication. I have a controlled dangerous
		substance medication. I

32.

33.		60. Court Decision
34.		33
35.	1	61.
36.	2	62. need them for my ulcers. Right now my
37.	3	ulcer is kicking up."
38.	4	63. From that exchange between the Court
39.	5	and Mr. Boyd, it is clear that Mr. Boyd knew he was
40.	6	taking an anti-anxiety medication for his ulcers, and
41.	7	that that medication was a controlled dangerous
42.	8	substance. Xanax.
43.	9	64. THE DEFENDANT: No. Zantac.
44.	10	65. THE COURT: Zantac.
45.	11	66. THE DEFENDANT: Zantac is what I
46.	12	take for my ulcers. Zantac. Zantac is not Xanax. It's not
47.	13	for ulcers. I've never taken psychotropic medication in
48.	14	my life before that day. And then to give me a Xanax
49.	15	like that? And then this Court is going to go ahead and
50.	16	-- and cosign, the Court is sending that
51.	17	67. transcript right there? Without
52.	18	attempting to get the court transcripts? No. That's
53.	19	incorrect, Judge. That's wrong. I never took
54.	20	psychotropic medication. I addressed that at the pro se
55.	21	motion hearing when Judge Conte addressed me
56.	22	asking, are you on any type of psychotropic
57.	23	medications, Mr. Boyd, and I said no. I don't take any
58.	24	of that. Okay.
59.	25	68. And then the Bergen County Jail turns
		around and prescribes that to me? Instead of giving me
		69.

70.

71.		98. Court Decision
72.		34
73.	1	99.
74.	2	100. Zantac they give me Xanax? Okay. And --
75.	3	and twice the amount as normally prescribed and a
76.	4	psychotropic sedative. Double the amount. And you're
77.	5	going to say it didn't affect my ability to represent
78.	6	myself? That is bizarre.
79.	7	101. THE COURT OFFICER: Don't stare at
80.	8	that lady while -
81.	9	102. THE DEFENDANT: That's crazy.
82.	10	103. THE COURT OFFICER: Don't stare at
83.	11	her when you're talking. Look forward. Look at the
84.	12	judge. Don't look at -
85.	13	104. THE COURT: Please address the Court.
86.	14	105. THE DEFENDANT: I'm addressing the
87.	15	Court, Judge.
88.	16	106. THE COURT: Look at me.
89.	17	107. THE DEFENDANT: I apologize if -- if I
90.	18	sound a little out of control here, but, I mean, the -- the
91.	19	Court's reference of that is -- is sort of wrong. I tried to
92.	20	get a copy and -- of a recording but the stenographer
93.	21	who took the report says they didn't have an audio
94.	22	report of the -- of the trial. And I don't understand why,
95.	23	because every trial is audio recorded or is supposed to
96.	24	be.
97.	25	MS. GOMPERTS: Not Judge Conte's
		courtroom. THE DEFENDANT: No. He's also
		supposed to
108.		135. Court Decision
109.		35
110.	1	136.
111.	2	137. have (indiscernible).
112.	3	138. THE COURT: Mr. Boyd, some courtrooms
113.	4	have stenographic reporters there.
114.	5	139. THE DEFENDANT: I never asked for a
115.	6	psychotropic medication. I've never taken psychotropic
116.	7	medication before, and then they're prescribing
117.	8	psychotropic medication without even telling me or
118.	9	informing me or even seeing me at the Bergen County
119.	10	Jail.
120.	11	140. The prosecutor makes reference in her --
121.	12	in her brief -- in her brief. She says that the doctor said
122.	13	I didn't need my medication. She admits -- on Page 22
123.	14	of her brief she admits that old accusation that their
124.	15	doctor over here said I didn't need my medication. But
125.	16	how can you make that accusation when you've never
126.	17	seen me. Never evaluated me. Never even spoke to me,

127.	18	but yet he makes that determination? How? That came
128.	19	out in the federal district court case.
129.	20	141. Because the doctor who prescribed
130.	21	medications that I took is Dr. Hershkowitz (phonetic).
131.	22	Said, yes, I never saw Mr. Boyd. I never examined Mr.
132.	23	Boyd. And then he's going to prescribe me a
133.	24	psychotropic drug while I'm on trial and not even see
134.	25	me? And then the nurse that brought him to me at the
142.		169. Court Decision
143.		36
144.	1	170.
145.	2	courthouse in -- in -- in Judge Conte's
146.	3	court, was denied the opportunity to speak to me
147.	4	by sheriff's officers. By the sheriff's officer. They
148.	5	said you can't speak in this court when you give
149.	6	him his medication. So she was deprived -- even
150.	7	the Third Circuit just agreed with me. The Third
151.	8	Circuit just opined -- it says unquestionable that
152.	9	Mr. Boyd's denied his rights to informed consent.
153.	10	However, and I've got a copy of the opinion
154.	11	here with me right now today. However, Dr.
155.	12	Hershkowitz understood that the nurse was
156.	13	supposed to give Mr. Boyd the information
157.	14	concerning the Xanax and why he was being
158.	15	prescribed it. But it was a unilateral intervention
159.	16	of that. And Mr. Boyd never received the
160.	17	information concerning the Xanax. And how is
161.	18	that supposed to be constitutional?
162.	19	MR. LEEDS: (Indiscernible).
163.	20	THE DEFENDANT: How can I be -- how
164.	21	can I be prescribed psychotropic drug and
165.	22	correctly represent myself in court?
166.	23	(Counsel and client confer.)
167.	24	THE DEFENDANT: You know, I
168.	25	understand that you're going to deny this, Your
		Honor, and that's okay. I've --
		THE COURT: Mr. Boyd –
171.		197. Court Decision
172.	1	37
173.	2	THE DEFENDANT: -- got all the
174.	3	documentation that, you know, I will submit it to
175.	4	the Appellate Division. The prosecutor's already --
176.	5	been (indiscernible) directed wrong. Okay. They
177.	6	unilaterally did this with the Bergen County Jail
178.	7	to take away from my ability to properly represent
179.	8	myself.
180.	9	THE COURT: As --
181.	10	

182.	11	THE DEFENDANT: I proved that in the
183.	12	Federal
184.	13	District Court, and the Third Circuit agreed with
185.	14	me.
186.	15	THE COURT: As we know, the Appellate
187.	16	Division has already found that you, the
188.	17	defendant, acknowledged that representing
189.	18	yourself meant that you could not argue
190.	19	ineffective assistance of counsel, that you were the
191.	20	victim.
192.	21	THE DEFENDANT: But when you
193.	22	drug the defendant, how is that --
194.	23	THE COURT: My turn.
195.	24	THE DEFENDANT: -- defendant supposed to --
196.	25	THE COURT: My turn.
		THE DEFENDANT: Okay. Judge, I apologize to
		you. I apologize.
		THE COURT: The Appellate Division said it's ironic that on appeal defendant argues that standby counsel's departure prejudiced him when on trial he
198.		225. Court Decision
199.		38
200.	1	226.
201.	2	
202.	3	objected that her services were unnecessary
203.	4	and unworthy.
204.	5	There is unfortunately a basis when
205.	6	someone is granted post-conviction relief. There is a
206.	7	two-prong test. The two-prong test in Strickland is
207.	8	that there has to be a reasonable likelihood, the
208.	9	second part of it, that the claim will be ultimately
209.	10	successful on the merits. That doesn't exist here.
210.	11	Not with the DNA evidence.
211.	12	Unfortunately because there's no basis
212.	13	under the United States v. Cronic and Strickland v.
213.	14	Washington, cites of Strickland v. Washington is
214.	15	466 U.S. 668 and U.S. v. Cronic, 466 U.S. 648, was
215.	16	adopted by the New Jersey Supreme Court in State
216.	17	v. Fritz at 105 N.J. 42. There has to be, one,
217.	18	ineffective assistance of counsel, and the reasonable
218.	19	likelihood of success, the two-prong test.
219.	20	So we don't even get to a Preciose hearing.
220.	21	Preciose says that there is factual issues that have
221.	22	to be resolved, and our Appellate Division has
222.	23	recently made some rulings on Preciose, and it
223.	24	doesn't exist here. There's no basis for a Preciose
		hearing.

224.	25	And under -- under Preciose, 129 N.J. 451, there has to be something more than an allegation. We do not have that here. Here we have anger. Here we

227.

228.		255. Court Decision
229.		39
230.	1	256.
231.	2	257. have finger pointing. Here we have an upset
232.	3	defendant. Here we have a defendant whose issues have
233.	4	already been raised on direct appeal.
234.	5	258. I wish there was something more to this than
235.	6	what I've seen. But I find no basis to grant your
236.	7	application. Accordingly, I would ask the prosecutor to
237.	8	submit a five-day order.
238.	9	259. MS. GOMPERTS: Yes, sir.
239.	10	260. THE COURT: And I will have Mr. Leeds
240.	11	or Mr. Boyd himself understand that he has 45 days
241.	12	from today to go further and appeal this decision to the
242.	13	Appellate Division.
243.	14	261. THE DEFENDANT: Judge, I don't know
244.	15	how something can be not raised in the trial court and
245.	16	then State's raised in the Appellate Division.
246.	17	262. Because it was denied in the trial court to be
247.	18	heard on that issue.
248.	19	263. MR. LEEDS: (Indiscernible).
249.	20	264. THE DEFENDANT: There Judge Conte
250.	21	denied that motion that this is (indiscernible) for court.
251.	22	And so that she wasn't -- she didn't have the best
252.	23	acumen to make that argument before the Court. So
253.	24	we needed an expert. She never got it.
254.	25	Are we still on the record? Can we put that on the record?
265.		292. Court Decision
266.		40
267.	1	293.
268.	2	294. THE COURT: We are on the record.
269.	3	Everything you're saying has been recorded.
270.	4	295. THE DEFENDANT: Okay.
271.	5	296. THE COURT: I'll have you walked out
272.	6	with the officers.
273.	7	297. MR. LEEDS: Thank you, Judge.
274.	8	298. THE DEFENDANT: And of course, you
275.	9	know, ineffective assistance of PCR counsel is
276.	10	warranted on this one.
277.	11	299. (Counsel confer.)
278.	12	

MS. GOMPERTS: It was nice to meet you, counselor.

(Proceedings concluded.)

CERTIFICATION

I, Cathy E. Betz, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Bergen County Superior Court, Law Division, on October 11, 2013, on CD No. 10/11/13, Index Nos. 2:35:50 to 22:23:44, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

_____

Cathy E. Betz, AOC #540

Tape Reporters, Inc.

Date: 7/18/14

JOHN L. MOLINELLI
BERGEN COUNTY PROSECUTOR
BERGEN COUNTY JUSTICE CENTER
HACKENSACK, NEW JERSEY 07601
(201) 646-2300

SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY - LAW DIVISION Ind. S-1142-04

STATE OF NEW JERSEY
Plaintiff;

-vs- CRIMINAL ACTION

DONALD BOYD ORDER

Defendant

THIS MATTER having been opened to the Court by defendant Donald Boyd, Craig Leeds, Esq. appearing on behalf of the defendant, and Assistant Prosecutor Jessica Gomperts, appearing on behalf of the State of New Jersey; and the Court having considered the position of the prosecutor and the brief from defendant and for good cause shown;

IT IS on this 28th of Oct. 2013,

ORDERED that defendant's motion for post-conviction relief is DENIED.

Eugene H. Austin

Honorable Eugene H. Austin, J.S.. C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1436

DONALD E. BOYD,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

(D.N.J No. 2:18-cv-00965)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and COWEN,* Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas
Circuit Judge

* Judge Cowen's vote is limited to panel rehearing only.

Dated: September 22, 2020

Sb/cc: All Counsel of Record