No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAMES R.W. MITCHELL—PETITIONER

VS.

RAYMOND MADDEN, Warden of Richard J. Donovan Correctional Facility, an individual —RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In *Faretta v. California*, 422 U.S. 806 (1975), this Court held that a criminal defendant has a Sixth Amendment right to represent himself at trial. In *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), this Court confirmed that a criminal defendant has a right of autonomy under the Sixth Amendment to insist that defense counsel present a defense of complete innocence. *Id.* at 1507-1509. It is undisputed that, in this murder case, defense counsel knew throughout the representation of petitioner's insistence on a defense of complete innocence and his refusal of a defense based on mental state.

1. Did the state court unreasonably apply *Faretta* by reading a timeliness requirement into it when it is clear that the references to timing in *Faretta* bear solely on the knowing and voluntary nature of the request for self-representation?

2. Assuming a timing component to *Faretta*, is a *Faretta* request timely when it is made in good faith at the first court hearing after defense counsel confirms that he intends to betray his commitment that the client's defense would be limited to innocence? Is a state court's determination to the contrary on such a record unreasonable?

3. The trial court refused to appoint new counsel for sentencing after defense counsel vowed to the court that he would not act as petitioner's advocate on discretionary sentencing decisions but would simply "be the body" and submit the matter. Did the state court unreasonably conclude that petitioner was not denied counsel at sentencing, a critical stage of the proceeding?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PRIOR PROCEEDINGS

- *People v. James R.W. Mitchell*, Marin County Superior Court No. SC165475A. (Original trial and conviction. Judgment entered October 16, 2011);
- *People v. James R.W. Mitchell*, California Court of Appeal, First Appellate District, No. A133094. (Direct appeal. Judgment affirmed July 28, 2014);
- *People v. James R.W. Mitchell*, California Supreme Court No. S220833. (Petition for discretionary review. Petition denied October 15, 2014);
- *In re James Mitchell*, California Court of Appeal, First Appellate District, No. A150765. (*Pro se* habeas petition on sentencing issue. Petition denied March 22, 2017);
- *Mitchell v. Davey*, U.S. District Court, Northern District of California No. 15-cv-04919-VC. (Federal habeas petition. Petition denied October 18, 2016);
- *Mitchell v. Davey*, U.S. Court of Appeals, Ninth Circuit No. 16-17057. (Case underlying this petition. Denial of federal habeas relief affirmed December 16, 2021; rehearing and *en banc* review denied February 8, 2022);

- *In the Matter of James R.W. Mitchell*, on Habeas Corpus, Marin County Superior Court No. SC210551A. (State habeas petition under *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). Ninth Circuit appeal was stayed to pursue this. Following an order to show cause, petition denied on the merits May 20, 2020);
- *In re James R.W. Mitchell*, on Habeas Corpus, California Court of Appeal, First Appellate District, No. A160759. (State habeas petition on *McCoy* issues. Petition denied on the merits November 18, 2020);
- *In re James R.W. Mitchell*, on Habeas Corpus, California Supreme Court No. S265812. (Petition for discretionary review of *McCoy* issues denied January 13, 2021);
- *Mitchell v. California*, U.S. Supreme Court No. 20-7808. (Petition for writ of *certiorari* re *McCoy* issues in state habeas case. Petition denied January 13, 2021).

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The memorandum decision of the Ninth Circuit, its order denying rehearing and *en banc* review, and the district court order denying habeas relief are unpublished. (App. 1, 6, 51.) The opinion of the California First District Court of Appeal denying relief on the merits and the order of the California Supreme Court denying discretionary review are also unpublished. (App. 7, 52.)

JURISDICTION

On December 16, 2021, a panel of the U.S. Court of the Appeals for the Ninth Circuit affirmed the denial on the merits of petitioner's petition for writ of habeas corpus. The petition alleged two violations of petitioner' rights under the Sixth Amendment of the United States Constitution. (App. 1.) On February 8, 2021, the Ninth Circuit denied petitioner's petition for rehearing and *en banc* review. (App. 6.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241-2254. The Ninth Circuit had jurisdiction of petitioner's appeal pursuant to 28 U.S.C. §§ 1291, 2253(c). This petition is timely under Supreme Court Rule 13.3.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Sixth Amendment

"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 jury convicted petitioner of first-degree murder, kidnapping of a child, stalking, and related charges, with weapons use enhancements. He was acquitted of a special circumstance that the murder was committed for purposes of kidnapping. On August 16, 2011, petitioner was sentenced to 35 years to life in state prison. (App. 8.)

On direct appeal, the California Court of Appeal rejected his arguments that revolved around his entitlement to dictate a defense of complete innocence: 1) that because defense counsel concealed their intention to argue for voluntary manslaughter, petitioner lost the chance to replace them with counsel who would follow his instructions, effectively denying him counsel of

his choice; 2) that the trial court violated his Sixth Amendment rights by, at points in the trial when petitioner had doubts that defense counsel would follow his instructions, denying his requests to replace them with the Public Defender, denying his request for self-representation, and denying counsel's requests to withdraw; and 3) that his Sixth Amendment right to counsel was violated when the trial court let counsel refuse to participate at sentencing because he did not want to argue against petitioner's wishes again. As the issue arose, the Court rejected the view that petitioner was entitled to dictate a defense of complete innocence. The decision to concede guilt as appropriate was a strategic decision left to defense counsel, to be reviewed for ineffective assistance, which it was not. (App. 27-28, 30-31, 33, 37.) The California Supreme Court denied petitioner's petition for discretionary review of the same issues on October 15, 2014. (App. 52.)

Petitioner filed a *pro se* petition for writ of habeas corpus in the Northern District of California. *Mitchell v. Davey*, 15-cv-04919-VC. He pled all the claims from his state appeal. On October 18, 2016, the district court denied the petition and a certificate of appealability. (App. 51-60.)

The Ninth Circuit granted a certificate of appealability on the issues of "whether the state trial court violated appellant's constitutional rights when it (1) denied his request for self-representation under *Faretta v. California*,

422 U.S. 806 (1975); and (2) denied his motion to dismiss retained counsel at sentencing, including whether counsel rendered ineffective assistance at sentencing." The undersigned was appointed to represent petitioner under the Criminal Justice Act. (App. 262.)

On July 17, 2019, prior to the filing of a reply brief, the Ninth Circuit granted petitioner's motion to stay his appeal so that he could seek state habeas relief premised on *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). After the state courts denied relief, petitioner returned to the Ninth Circuit. On December 16, 2021, the Ninth Circuit issued a memorandum decision affirming the denial of petitioner's habeas petition. (App. 1.) Petitioner timely sought rehearing and *en banc* review of the issues presented here. This was denied on February 8, 2022. (App. 6.)

STATEMENT OF FACTS

I. Statement of Facts from Trial[1]

The murder victim was petitioner's girlfriend, D.K. The kidnapping victim was his daughter with her. The relationship began in August 2007. They moved in together two weeks later. Petitioner used drugs and

[1] This Statement of Facts is derived from the state court of appeal's opinion. (App. 8-12.)

committed acts of domestic violence. Arrests led to charges and restraining orders. The couple reunited from time to time, sometimes at D.K.'s initiation.

Petitioner made many calls to D.K.'s phone in the weeks preceding her death. He also called her best friend and said that he knew he had messed up but would do anything to get back with D.K. and his daughter. Between June 26 and July 12, 2009, he called D.K. 78 times, but she never answered until July 12. Petitioner made no calls to her after 6:42 p.m. that day.

Shortly before 7:00 p.m. on July 12, 2009, D.K.'s elderly neighbors, Bessie and Nick, heard her scream. Nick saw a man hitting D.K. on the head with a baseball bat. He told Bessie to call the police "because he's here." Bessie told the 911 dispatcher that the child's father was beating D.K.

Bessie saw a white man run past with a screaming child. He had a shaved head and wore a black t-shirt and jeans. Other neighbors gave descriptions consistent with petitioner's—white, bald, heavy set. There were inconsistencies in the description of the clothing; one neighbor said the man wore a white t-shirt. The lineup process was inconclusive, but everyone said one person was involved in beating D.K. and carrying off the child.

D.K. was dead when police arrived. A baseball bat was found. It had petitioner's left index fingerprint on it near the grip. Petitioner is left-handed.

Petitioner's cousin and brother got word that D.K. was dead. Both called him that evening. Petitioner was crying, teary, and distraught. Both heard the child in the background. The cousin asked petitioner if he knew D.K. was dead. He said he did. He neither admitted nor denied killing her. Petitioner told both men that he would take the child to Mexico rather than surrender her. Alternatively, he might take her to his mother's house. Neither man knew petitioner to own a bat or play baseball or softball.

Petitioner's cell phone was tracked, and his car was found. The minor was unharmed, asleep in the front seat. D.K.'s blood was on her cheek. Petitioner's passport was in the center console. He was arrested nearby without incident. He wore a red and navy-blue striped shirt and jeans.

Petitioner's jeans had blood spatter that was determined to be D.K.'s blood. The spatter pattern was consistent with beating D.K. on the head from a few feet away while she was on the ground.

Trace DNA was found on the bat. D.K. was the primary contributor. Neither petitioner nor the child could be excluded. There were two low-level contributors. If petitioner was one, there was another unknown contributor. The DNA sample included an allele foreign to both D.K. and petitioner.

Petitioner testified to a defense of mistaken identity. D.K. had invited him over. He left home around 5:00 p.m. He wore a red and blue striped polo shirt and jeans. Arriving, he parked and walked towards D.K.'s duplex.

Petitioner heard D.K. scream for help. He encountered two men, one with a buzzed head in a white shirt, the other in a black t-shirt. Petitioner fought with both men. The man in the black shirt hit him in the back with a baseball bat. Petitioner tried to take it away. After more fighting, petitioner chased the men. The man in the black t-shirt disappeared. The man in the white shirt had the child. Petitioner confronted him, punched and kicked him, and demanded the child. The man let him take her and ran away.

Petitioner went back up towards the duplex with the child. He heard someone say to call 911. Remembering he had a restraining order, he decided to leave before the police arrived.

Petitioner called his cousins from the road. He planned to go to a cousin's house to wait to hear from D.K. He did not want to call while the police were there. Petitioner's mother called and said D.K. was dead and that people said he killed her. Petitioner said he needed to talk to his lawyer.

Petitioner did not see anyone hit D.K. with a bat. He had not known she was dead when he left with the child. He did not know how blood got on

his jeans. A urine test showed he had no alcohol in his system and a small amount of methamphetamine, indicative of use within five to seven days.

A softball coach testified that the bat might be used by a high school player or small man or woman. D.K.'s mother had never seen the bat near her home. Her other children had played baseball and softball; their bats had been given away. The coroner testified that D.K.'s mother told him that the bat may have been in the laundry room of the complex before the murder.

II. Relevant Procedural History

A. Proceedings re Petitioner's Representation at Trial.

Petitioner was initially represented by Terence Hallinan. On February 24, 2010, Hallinan told the court he had been fired. (App. 13-14). On March 11, 2010, Douglas Horngrad substituted in and asked that all dates be reset because the case was huge. (App. 14) On September 1, 2010, the trial court granted Horngrad's motion to be relieved. He withdrew because "a disagreement about strategy" had led petitioner to threaten him. (App. 14.) Attorneys Stuart Hanlon and Sara Rief were appointed. (App. 14.)

On January 20, 2011, the court held an *in camera*[2] hearing. Hanlon said that rather than proceed on a heat-of-passion manslaughter theory, they would present the defense petitioner wanted, which was that he "did not

[2] All *in camera* hearings have been unsealed in prior proceedings.

commit this crime and that there were other people who did." Petitioner would so testify. (App. 85.) To pursue this credibly would require DNA testing on the bat and petitioner's clothes. (App. 85-88.)

On May 10, 2011, petitioner asked the court to relieve Hanlon and Rief. He was considering suing them. He had no money and wanted the Public Defender. He hoped to go to trial in three weeks to a month. He was not interested in delay. (App. 91-92.) At this point, some prospective jurors had been summoned and were in the jury room. However, juror hardships had not yet begun. (App. 95-96.)

Petitioner was concerned that Hanlon was not being honest with him about the defense that he had been promised. Hanlon had made no public statements about it. The court opined that one would expect defense counsel to remain publicly non-committal about the defense theory. (App. 91.)

The court observed that petitioner had already had several competent attorneys, particularly Hanlon and Horngrad. Petitioner replied that competency was not his concern; honesty and loyalty was. Horngrad wanted him to take a deal. Hanlon misled him by saying that things would be done for him and then not doing them. The court asked petitioner what he had done to retain new counsel; petitioner said he was indigent. (App. 93-94.) The

court denied the motion as untimely given the posture of the case and the fact that petitioner was on his third set of attorneys. (App. 95-96.)

On May 25, 2011, the court held an *in camera* hearing on Hanlon's request for additional defense funds. Hanlon said that petitioner would be testifying that he did not commit the crime. Whether Hanlon actually argued that would be up to him. (App. 98.)

Hanlon said there was substantial evidence that petitioner suffered from psychiatric problems. When he was getting involved with the case, he was told that petitioner had agreed to present a mitigating mental defense. That turned out not to be the case. "Mr. Mitchell has consistently told me he would not go forward with the [mental state] defense." (App. 98-100.)

Hanlon said his duties to petitioner extended beyond deferring to the defense he wanted to present. He was uncertain if he could put on a defense that contradicted petitioner's testimony. However, it was necessary to investigate, and if he got the funds, he would do just that. (App. 100-101.) He asked for $25,000 to $30,000. The court understood that petitioner was insisting on a defense of complete innocence, with which Hanlon disagreed. (App. 102-103.) It refused to approve so much money for "a conflicting defense that might not come into play in any event." (App. 103.) When the hearing ended, the court went on vacation for several weeks. (App. 104.)

At the next hearing on Friday, June 10, 2011, petitioner asked to represent himself. Hanlon had lied to him, so he expected him to lie to the jury. (App. 109.) If he received the files that day or Saturday, he would be prepared to proceed the following Tuesday. He was already prepared to argue the motions that had been filed. (App. 109-110.)

The prosecutor questioned the timing. He was concerned about the volume of discovery. Petitioner said that he had seen all the discovery. He just needed to get the trial books and other trial preparation materials and review them over the course of a few days. (App. 112.)

The prosecutor reiterated that this might be gamesmanship, saying that if Hanlon was relieved that Friday, petitioner could come back Tuesday asking for new counsel. (App. 114.) Hanlon said petitioner was intelligent and understood the facts of the case. He believed that if petitioner was prepared to do so, he had an absolute right to represent himself. He had no doubts about petitioner's competency. (App. 114-115.)

The court agreed that petitioner had the right to represent himself "under certain circumstances." It questioned the wisdom of it but said that petitioner had the right to represent himself if he was "capable of doing so, and if there's no request for delay." (App. 115.) The court continued the matter until Monday, June 13, 2011, for further discussion. (App. 115-116.)

Hanlon then said that there was new discovery he had not shared with petitioner. Further, while petitioner had reviewed prior discovery, he had nothing organized in his cell. Given potential jail security concerns and the time it would take to prepare trial preparation materials, Hanlon doubted that he could get petitioner what he needed before Monday. The court said that if petitioner was not ready for trial on Monday, June 13, it would not relieve Hanlon. Hanlon said he could get enough material to satisfy the court to petitioner by Sunday. (App. 116-118.)

The trial court advised petitioner to think carefully about whether he wanted to represent himself in such a serious case and whether he truly would be prepared to do so. If he showed up asking for a continuance, it would be denied. This was despite the trial court's acknowledgment of the core disagreement between Hanlon and petitioner. (App. 120-121.)

On Monday, June 13, 2011, petitioner said that he received new discovery and jury questionnaires on Sunday and had spent over 13 hours reviewing material. He said that he would be ready for *voir dire* the next day but that he needed more time to prepare for trial. He needed time to confer with his investigator, get a trial manual and evidence guide from Hanlon, and interview witnesses. He also saw DNA issues that required further investigation. He would be ready in four weeks. (App. 124-129.)

Hanlon responded that he had five boxes of materials in his car that he would deliver that day. He had witnesses under subpoena. He had contacted his investigator, who he assumed would continue working on the case. The prosecutor objected to a further continuance. (App. 1292.)

The trial court said the issue was committed to its discretion and that it had broader discretion to deny a *Faretta* motion on the eve of trial. Citing California cases, it understood that a request made at this stage that required a continuance was untimely and should be denied. The case was in the midst of jury selection, and most of the motions *in limine* had been ruled on. This was petitioner's third request to change counsel. (App. 130-1322.)

The court did not doubt the sincerity of petitioner's need for more time. Petitioner then said he could be ready in two weeks. The court doubted that even four weeks would truly be enough for him or even an experienced attorney. It recognized that petitioner was at a disadvantage given his situation. Nonetheless, it denied the *Faretta* motion because of the delay involved; it deemed the motion untimely. (App. 132-133.)

Hanlon then moved to withdraw. (App. 134.) At an *in camera* hearing, he said he had received two threatening letters from petitioner. (App. 138-141.) Petitioner said he had been angry because his lawyers were insisting on a heat-of-passion defense. After they embraced his desired defense, relations

improved. That did not stop him from writing rambling, spur-of-the-moment letters he sometimes regretted. (App. 143-149.) The court denied Hanlon's motion. (App. 149-150.) In open court, Hanlon announced doubts about petitioner's competency. (App. 152-154.) Doubting Hanlon's credibility, the court refused to suspend proceedings. (App. 153, 155, 159-160.)

B. <u>Defense Counsel Betrayal of Petitioner's Requested Defense</u>.

In opening statement, Hanlon said petitioner would testify that he was at the homicide scene. He did not say petitioner would testify about the two other men he came upon and fought with. (App. 161-166.)

Hanlon asked for the manslaughter instructions at the instructions conference. (App. 167-173.) The trial court instructed on two theories of manslaughter as well as on second-degree murder. (App. 174-176.)

The first part of Hanlon's closing argument alluded generally to petitioner's innocence. He discussed petitioner's likely state of mind as he drove to see his daughter, the lack of proof that he brought the bat, the weakness of the eyewitness identification, and the inconclusiveness of the blood spatter evidence and the evidence that petitioner touched the bat on the question of what petitioner actually did. (App. 188-229.)

Hanlon argued that petitioner's testimony about fighting two men who really killed D.K. was consistent with the inconsistent eyewitness testimony

about whether the killer wore a black or a white shirt. Hanlon did not otherwise advocate for the credibility of petitioner's testimony. He said that the coincidence of petitioner coming upon two other men doing violence to D.K. was one the jury would have to grapple with. (App. 229-231.)

Shifting gears, Hanlon then argued for a guilty verdict on a lesser homicide, primarily manslaughter. (App. 231-241.) He argued, "What happened . . . that led to a man beating in the brains of a woman he loved?" (App. 234.) He prefaced this by saying that his job was to advocate for his client even if, impliedly, he disagreed with him. Petitioner would not agree with the argument he was about to make. (App. 231-232.) The jury should not conclude that he did not believe his client, but the record contained evidence that petitioner was lying. (App. 232-233.) Hanlon told the jury, not once, but twice, that his duties as "an officer of the court" required him to argue against petitioner's wishes and inform the jury about the possible falsity of his testimony. (App. 232.)[3] Petitioner was convicted of first-degree murder.

[3] Hanlon had no such obligation. Although the right to testify does not include testifying falsely and his right to counsel does not include having the assistance of counsel in suborning perjury, *Nix v. Whiteside*, 475 U.S. 157, 173-176 (1986), nothing in the record shows that petitioner told Hanlon his intended testimony was false. Had Hanlon so known, his duty would have been not to put petitioner on the stand or to withdraw. *Ibid.* Hanlon had no business putting him on the stand and then telling the jury he lied.

C. Proceedings re Representation at Sentencing

On August 16, 2011, the court held an *in camera* hearing on a mutual request that Hanlon and Rief not represent petitioner at sentencing or on a possible motion for new trial. Petitioner was upset because Hanlon had argued in the alternative at trial for a heat-of-passion manslaughter verdict against his express instructions. (App. 245.) This had been sprung on him at the last minute, leaving him no time to find new counsel. Petitioner thought Hanlon planned it that way. (App. 245-249.)

Although the issue at sentencing was concurrent vs. consecutive sentences, Hanlon doubted that he could perform the way he believed petitioner wanted. He believed that petitioner still wanted him to argue that he did not commit the murder. Although guilt was settled given the verdict, Hanlon was still unwilling to argue against petitioner's wishes. (App. 250-253.) "I made that decision once. I'm not going to do it again." (App. 251.) If forced to appear for petitioner, he would "be the body," say nothing, and submit the matter. (App. 251-253.)

The court ordered Hanlon to explain why he argued for manslaughter. Hanlon said that he thought it was the only possible way to save petitioner from life in prison. He had told petitioner at some point that petitioner had

the right to testify however he wished, but the decision of what to argue was his. (App. 251-252.)

> "Mr. Mitchell clearly expressed his desire that I not do it. I told him—I don't remember when that conversation first came up, whether it was before trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he was saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests." (App. 252.)

The court said Hanlon's strategy was reasonable. It denied petitioner's motion for new counsel on that basis. (App. 258-260.)[4]

D. <u>The State Court of Appeal Decision</u>

The Court held that an untimely *Faretta* motion may be denied. Motions brought on the eve of trial are untimely. When a late motion is made, the court should consider the stage of the proceedings, the potential disruption or delay, "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, and the reasons for the request[.]" (App. 24.)

All these factors supported denial. Thus, there was no abuse of discretion. (App. 24.) Elsewhere, the Court noted petitioner's dissatisfaction

[4] At sentencing, petitioner reasserted his innocence and criticized the process. Hanlon said nothing. (App. 34.) Petitioner was sentenced.

with Hanlon's lack of commitment to the defense of complete innocence but held that petitioner had no control over this. (App. 27-28.)

Leaving Hanlon as counsel at sentencing was reasonable because doing otherwise would have forced petitioner to appear without counsel in derogation of his constitutional rights. (App. 41.) Petitioner had not been effectively denied counsel because Hanlon surely would have intervened if necessary. (App. 34.)

E. The Ninth Circuit Decision

The panel held that petitioner was not entitled to habeas relief on his *Faretta* claims because this Court had never opined on what satisfies *Faretta's* timeliness requirement. (App. 2-3.) He was not entitled to relief on his claim of deprivation of counsel at sentencing because this Court had never settled what justifies a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984). (App. 4.) Petitioner's alternative claim of ineffective assistance of counsel at sentencing under *Strickland v. Washington*, 466 U.S. 668 (1984) failed because he could not show prejudice. (App. 4-5.)[5]

[5] Petitioner did not revisit his *Strickland* claim in his petition for rehearing in the Ninth Circuit, and he does not revisit it here.

REASONS FOR GRANTING THE PETITION

I. *Faretta* Imposes No Timing Requirement Much Less One that Requests be Made Weeks Before Trial to be Timely.

A. Introduction

The Ninth Circuit has held that it is clearly established law of this Court for habeas purposes that 1) *Faretta v. California*, 422 U.S. 806 (1975) imposed a timing requirement to requests for self-representation and 2) requests made "weeks before trial," as the request was in *Faretta*, are timely. *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997). *Faretta* said no such thing. The references to timeliness bear solely on the knowing and voluntary nature of the request.

This flows from a straightforward reading of the opinion. The conclusion to the contrary is an unreasonable application of *Faretta*. This Court should eliminate an unauthorized procedural barrier to the constitutional right of self-representation. Because the Ninth Circuit and the state court of appeal's decision "conflicts with relevant decisions of this Court," the petition should be granted. Supreme Court Rule 10(c).

B. Standard of Review

For purposes of this and the following questions, petitioner sets out the standard of review applicable to federal habeas cases.

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), to obtain relief on a claim that has been adjudicated on the merits in state court proceedings, a petitioner must show either that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1), or that the state court's decision "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)(2). Section 2254(d)(2) applies to "situations where petitioner challenges the state court's findings based entirely on the state record." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.), *cert. denied, Maddox v. Taylor*, 543 U.S. 1038 (2004). *Accord*, *Kesser v. Cambra*, 465 F.3d 351, 358 n.1 (9th Cir. 2006) (*en banc*). An unreasonable determination of the facts may also be found if the fact-finding process was deficient in a material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). When the state court has refused to reach the merits of a properly raised issue, review in the federal court is *de novo*. *Visciotti v. Martel*, 862 F.3d 749, 760 (9th Cir. 2017).

"Clearly established federal law means the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Xiong v. Felker*, 681 F.3d 1067, 1073 (9th Cir. 2012) (citation

omitted). Although "circuit court precedent may be persuasive in determining what law is clearly established and whether a state court applied that law unreasonably[,]" *Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011) (citation omitted), the determination of clearly-established law under AEDPA must ultimately rest on a Supreme Court holding, not on dicta that has been interpreted in circuit decisions. See *Carey v. Musladin*, 549 U.S. 70, 74, 77 (2006); see also *Wright v. Van Patten*, 552 U.S. 120, 125-126 (2008) (reiterating that a Supreme Court case must have "squarely address[ed]" a certain issue and given a "clear answer" regarding the applicable legal rule to create "clearly established federal law for AEDPA purposes").

A state court decision is "contrary to" federal law if it either "applies a rule that contradicts the governing law" as set forth in United States Supreme Court cases or reaches a different decision from a United States Supreme Court case when confronted with materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state makes an "unreasonable application" of federal law if it identifies the correct governing legal principle from the United States Supreme Court's decisions but applies that principle to the facts of the prisoner's case in an objectively unreasonable manner. *Id.* at 413; *Lockyer v. Andrade*, 538 U.S. 63, 74-75 (2003). For federal habeas relief to be granted, the challenged state court ruling must be "so

lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

In applying 28 U.S.C. § 2254, a federal court examines the last reasoned state court decision on the merits as the basis for the state court's final judgment. *Wilson v. Sellers*, 138 S.Ct. 1188, 1193-1194 (2018); *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). The last reasoned decision is the California Court of Appeal's opinion affirming the judgment.

A district court's disposition of a petition under AEDPA is reviewed *de novo*. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir. 2001). Legal claims in a state prisoner's federal petition are reviewed *de novo* on appeal. *Sumner v. Mata*, 455 U.S. 591, 597 (1982). Purely factual findings by the district court in habeas proceedings are reviewed for clear error. *Lockhart v. Terhune*, 250 F.3d 1223, 1226 (9th. Cir. 2001).

C. <u>The Merits</u>

The Sixth Amendment secures both the right to assistance of counsel and the right of self-representation. *Faretta v. California*, 422 U.S. 806, 807 (1975). It "does not provide merely that a defense shall be made for the

accused; it grants to the accused personally the right to make his defense." *Id*., at 819. When a defendant decides to represent himself, he must do so "competently and intelligently[.]" *Faretta v. California*, *supra*, 422 U.S. at 835. Denial of the right to self-representation is structural error. *Id.* at 836; *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017); *McKaskle v. Wiggins*, 465 U.S. 168, 177, n. 8 (1984).

In *Faretta*, the defendant asked to represent himself. He was concerned about his Public Defender's caseload and claimed to have represented himself before. *Faretta v. California*, *supra*, 422 U.S. at 807. The trial court tentatively granted the request. *Id.* at 807-808. Several weeks later, after questioning Faretta about legal rules and procedures, the court ruled that Faretta had not made "an intelligent and knowing waiver of his right to the assistance of counsel[,]" and he had no constitutional right to conduct his own defense. *Id.* at 808-810. This Court reversed.

Faretta noted the stage of the proceedings at several points. Faretta's request was made "[w]ell before the date of trial." *Id.* at 807. The follow-up hearing was held "[s]everal weeks thereafter, but still prior to trial[.]" *Id.* at 808. In holding that Faretta should have been allowed to represent himself, this Court noted that Faretta's initial request was made "[w]eeks before trial." *Id.* at 835.

Words like "delay," "timeliness," etc. appear nowhere in the opinion. *Faretta* does not impose a time limitation on the assertion of the right to self-representation. The concluding reference to the timing of Faretta's initial request, considered in context, bears on the knowing and voluntary nature of the request.

> "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to 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 and his choice is made with eyes open.'
>
> Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.
>
> In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense." *Id.* at 835-836 [citations and footnotes omitted]."

The reference to the stage at which Faretta's request was made establishes that it was knowing and voluntary. It was not made on the spur of the moment or in a panic; it was not a "mere whim or caprice." *United States v. Farhad*, 190 F.3d 1071, 1100 (9th Cir. 1999). This reference does not impose a timing requirement, establish that requests made on the eve of trial should be denied, or hold that only requests made at least weeks before trial should be granted. It does not do this anymore than it holds *Faretta* requests can only be made on Tuesday.

The Ninth Circuit has read timeliness requirements into *Faretta*. A request, in addition to being unequivocal, knowing, and intelligent, must be timely and not for purposes of delay. *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1982). The Ninth Circuit considers references in *Faretta* to the request being made weeks before trial to be part of this Court's holding and, as such, clearly established Supreme Court law under AEDPA on the subject of timeliness. *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997). *Marshall v. Taylor*, 395 F.3d 1058 (9th Cir. 2005), cited in the memorandum, cited *Moore* to hold that *Faretta* "clearly established some timing element," though "we still do not know the precise contours of that element." *Id.* at 1061. "At most, we know that *Faretta* requests made 'weeks before trial' are timely." *Ibid*.

This is an unreasonable application of *Faretta*. The references in *Faretta* to the timing of the request bear strictly on voluntariness. This Court should grant the petition and so hold.

II. If *Faretta* Has a Timeliness Requirement, the State Court Unreasonably Applied it. Petitioner Made his Request at the First Court Hearing after Defense Counsel Confirmed his Intention to Betray the Understanding that Petitioner's Defense Would be Limited to Complete Innocence.

A. Introduction

Rejecting a claim like this on the theory that any defendant can request self-representation on day one is not realistic. Logic dictates that there must be cases where the failure to grant a seemingly belated *Faretta* request is unreasonable. Courts must analyze the context with an understanding of what might prompt a defendant to dispense with counsel and represent himself, assuming all the risks of a bad outcome that self-representation entails, and of which *Faretta* holds he should be advised.

This Court and California courts have recognized a defendant's right to dictate the ultimate goals of the representation and insist on a defense of complete innocence, including that he did not commit the *actus reus* of the charged crime. It is undisputed that petitioner demanded such a defense and that defense counsel Hanlon was aware of this. It is also undisputed that Hanlon initially promised to limit petitioner's defense to complete innocence

and then broke his word. Finally, it is undisputed that petitioner asked to represent himself at the first hearing after Hanlon said in open court that he would not honor petitioner's wishes.

A *Faretta* request should not be denied on timeliness grounds when the defendant could not realistically have made it any sooner. The state court's rejection of petitioner's claim was unreasonable. Review should be granted to settle this important question. Supreme Court Rule 10(c).

B. <u>The Merits</u>

Assuming a timing aspect to *Faretta*, the Ninth Circuit is wrong that *Faretta* set a standard of "weeks before trial." "*Faretta* nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case. Indeed, the timeliness of the request was not even contested in *Faretta*." *People v. Lynch*, 50 Cal. 4th 693, 724 (2010). Here, the key factors dictating relief are 1) what prompted the request and 2) the fact that it was made as promptly as it could have been.

Petitioner had the right to eschew an alternative defense of mitigated homicide that would have watered down the case for complete innocence.

> "Certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" *Florida v. Nixon*, 543 U.S. 175, 187 (2004).

Accord, *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

McCoy v. Louisiana, 138 S.Ct. 1500 (2018) confirms this reading of *Nixon*. Defense counsel violates a defendant's Sixth Amendment right to autonomy when, over objection, he concedes that the defendant committed the charged crime or the *actus reus* of the crime or overrides the defendant's wishes for a defense of complete innocence. *Id.* at 1507-1509. The error is structural. *Id.* at 1511.

Citing *Faretta*, *McCoy* emphasized that the right to make a defense under the Sixth Amendment was "personal." *Id.* at 1507-1508. While most trial management decisions are ceded to defense counsel, the client retains exclusive control over certain fundamental decisions. *Id.* at 1508. These fundamental decisions included McCoy's defense objectives.

> "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." *Id.* at 1508.

California law was similar at the time of petitioner's trial. Defense counsel may not refuse to put on any guilt phase defense, at least where one

is supported by evidence. *People v. Frierson*, 39 Cal. 3d 803, 815-18 & fns. 3-4 (1975). Counsel may not stipulate without the defendant's consent that the result of a bench trial would be either manslaughter or second-degree murder but not the charged first-degree murder or acquittal. *People v. Rogers*, 56 Cal. 2d 301, 305-307 (1961). A defendant may preclude counsel from arguing for convictions on lesser offenses, at least where evidence of innocence existed. *People v. Jones*, 53 Cal. 3d 1115, 1139-1140 (1991).

Petitioner's goal was a defense of complete innocence. He had the right to set that boundary. Having counsel honor the defendant's decision of which convictions to assume the risk of would be a critical consideration in any decision about representation vs. self-representation. The state court acted unreasonably in failing to recognize this.

As to timing, *Fritz v. Spalding*, *supra*, though a pre-AEDPA case, is instructive. "A defendant must . . . have a last clear chance to assert his constitutional right . . . before meaningful trial proceedings have commenced." *Fritz v. Spaulding*, *supra*, 682 F.2d at 784, quoting *United States v. Chapman*, 553 F.2d 886, 895 (5th Cir. 1977). A *Faretta* request "is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay." *Ibid*.

There was no bad faith delay. Petitioner invoked *Faretta* to ensure that his defense would be innocence, not mitigated homicide. He had fought this battle with his attorneys since the case began. The request was not last-minute gamesmanship.

One need only consider how things played out to understand petitioner's desire to control his defense. In the best of cases, any argument in the alternative for a conviction on a lesser offense will dilute the case for complete innocence. Hanlon did not just dilute the case, he obliterated it. He told the jury petitioner would not approve of his alternative argument, and he twice invoked his duties as an officer of the court to tell the jury petitioner had lied. (App. 231-233.) Hanlon's professed disavowal of not believing his client did not cure this. It actually told the jurors the exact opposite. It told them that they should not belabor petitioner's innocence defense but, rather, focus on manslaughter, which is what he, Hanlon, believed the case to be about. Hanlon essentially tried to plead petitioner out to a lesser charge without his consent and over his objection. Naturally, petitioner wanted to take the reins.

The need for a continuance did not establish bad faith delay.

> "Delay *per se* is not a sufficient ground for denying a defendant's constitutional right of self-representation. Any motion to proceed pro se that is made on the morning of trial is likely to cause delay; a defendant may nonetheless have bona fide reasons for

> not asserting his right until that time, see *Chapman*, 553 F.2d at 888-89, and he may not be deprived of that right absent an affirmative showing of purpose to secure delay." *Fritz v. Spaulding*, *supra*, 682 F.2d at 784.

This is another way of saying that context matters. The trial court agreed petitioner's need for a four-week continuance was reasonable. It found no bad faith.

Petitioner made his request on June 10, 2011, the first hearing after the May 25 hearing where Hanlon said he would not honor his January commitment to petitioner's innocence defense. If petitioner's request was not timely under these circumstances, when should he have made it? Like most defendants, petitioner started out wanting counsel. Counsel would want to explore alternative defenses and explain them to the client before acceding to a defense of complete innocence.

If, rather than invoke *Faretta* right away, a defendant brings his disagreements to the trial court's attention early in the process, the response likely will be "let counsel investigate." If the defendant then invokes *Faretta* on the eve of trial when it is finally clear his wishes will not be honored, the proper response, apparently, is "You're too late." Whether it takes two months in a small case or two years in a big case to get to this point is irrelevant from the defendant's perspective.

It is often useful to ask before faulting someone, "Could they have done any better?" The answer here is "no." The state court of appeal's rejection of this claim with its focus on the age of the case, the supposed lateness of the request, and the failure to give proper weight to petitioner's reasons for the request was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

III. Refusing to Appoint New Counsel for Sentencing When Defense Counsel Represents that he will Refuse to be the Client's Advocate Denies the Defendant Counsel at a Critical Stage of the Proceedings.

A. Introduction

Respondent has never denied that sentencing is a critical stage of the proceedings at which the Sixth Amendment entitled petitioner to counsel. The question is whether petitioner was denied counsel when the trial court refuses to appoint a new attorney after defense counsel promised he would do nothing for petitioner at sentencing.

This Court has recognized that the mere presence of an attorney does not satisfy the Sixth Amendment if counsel cannot or will not function. *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978). There, the presence of conflicted counsel required automatic reversal because the conflict presumptively silenced defense counsel. *Id.* at 489-490. Here, there was nothing to presume or speculate about. Hanlon promised not to advocate for

petitioner at sentencing. The trial court saddled petitioner with him, anyway. This was a denial of counsel.

Because the state court of appeal's resolution of this issue "conflicts with relevant decisions of this Court," the petition should be granted. Supreme Court Rule 10(c).

B. <u>The Merits</u>

The Sixth Amendment secures the right to counsel at critical stages of the prosecution. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970). Sentencing is a critical stage. *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Mempa v. Rhay*, 389 U.S. 128, 133-134 (1967). When a defendant is denied counsel at a critical stage, prejudice is presumed, and reversal is automatic. *Garza v. Ohio*, 139 S.Ct. 738, 744 (2019); *Penson v. Ohio*, 488 U.S. 75, 85-88 (1988).

"The mere physical presence of an attorney does not fulfill the sixth amendment entitlement to the assistance of counsel[.]" *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984), citing *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978). In "sleeping lawyer" cases, "[p]rejudice is inherent . . . because unconscious or sleeping counsel is equivalent to no counsel at all." *Javor v. United States*, *supra*, 724 F.2d at 834. "That sleeping counsel is absent counsel is elementary." *Burdine v. Johnson*, 262 F.3d 336, 354 (5th Cir. 2001). Whether "absence" is due to exhaustion or spite is immaterial.

Holloway held that representation by conflicted counsel is no representation at all. The conflict may have "effectively sealed his lips on crucial matters." There were many things the conflict could lead counsel to "*refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Holloway*, *supra*, 435 U.S. at 490 (emphasis in original).

Here, there is no wondering about how the trial court may have let Hanlon fail petitioner. The issues at sentencing were whether the upper term would be imposed on the kidnapping count and whether punishment on the determinate terms would be run concurrent or consecutive to petitioner's indeterminate 25-to-life sentence on the murder conviction. Hanlon knew this, and the court knew this. Hanlon said he would not be petitioner's advocate, yet the trial court left him there.

For present purposes, it does not matter under AEDPA that this Court has never granted relief for deprivation of counsel on the precise facts of this case. Section 2254(d)(1) does not require an identical fact pattern before a clearly established legal rule must be applied. *White v. Woodall*, 572 U.S. 415, 427 (2014). "Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). While, as

the Ninth Circuit noted, "the precise contours" of when prejudice should be presumed under *United States v. Cronic*, 466 U.S. 648 (1984) for counsel's failing to subject a case to meaningful adversarial testing are unclear, nothing is unclear about petitioner's entitlement for relief under *Holloway* and critical stage precedent due to Hanlon's anticipatory breach of his obligations to petitioner and the trial court's failure to cure it.

The state court of appeal's conclusion that petitioner was not left without counsel at sentencing was unreasonable. That court was "confident" Hanlon would have jumped in to prevent abuses at sentencing. (App. 34.) Why? Hanlon insisted he would "be the body" and say nothing. (App. 251-253.) This was one promise he actually kept.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

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