24-5319

ORIGINAL

No. _____

Appeal Case #s 18-50352
17-50436

IN THE

SUPREME COURT OF THE UNITED STATES



**MARLIN LEE GOUGHER, PETITIONER,**
In Propria Persona,
**vs.**

**UNITED STATES, RESPONDENT.**

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

## QUESTION(S) PRESENTED

1. Does a defendant that gave a lucid, literate, articulate answer that the District Court Judge did not like during a Faretta colloquy precludes self-representation? Explain your answer.

2. Dose a defendant have a Sixth Amendment right to understand the Nature and Cause of the Accustations against him? Explain your answe

3. Is it the responsibility of an Article III U.S. District Court to provide the understanding of the Nature and Cause of the Accusations against a defendant, as according to the Sixth Amendment? Explain your answer.

4. Dose the panel majority's holding conflict with the Ninth Ciruit case law and the Eleventh Circuit and Sate court decisions which hold the defendants lack of cooperation in anwering questions during a Faretta Calloquy dose not preclude self-representation? Explain your answer.

5. Dose the U.S. District Court have the responsibility to revisit the Bill of Particulars filed in the defendants case when requested by the defendant when the defendant claims that the Bill of Particulars was incorrectly and inaccurately answered by the prosecution? Explain your answer.

6. Could the U.S. District Court Judge have rephrased the question in the Faretta colloquy?

7. Dose the Sixth Amendment require an inquiry into a potential conflict of interest when the trial court is made aware the defendant has filed a BAR complaint against the forced upon-the-defendant-by-the-court attorney? Explain your answer.

8. Dose the subtle effects of a BAR complaint sacrafice Sixth Amendment interests for court efficiency? Explain your answer.

9. Dose Congress have the authority to change the Sixth Amendment by Statute? to define or expand the scope of Constitutional rights? Explain your answer.

10. Have the courts overstepped their Constitutional authority by violating the separation of powers? Explain your answer.

11. Did the Founding Fathers mean that the People were only entitled to an effective assistance of counsel for all crimes including State for which the punisment was death (capital offence) which they brought traditionally from England? Explain your answer.

12. Dose Mr. Gougher have a right to a speedy trial when he reserved all of his rights on the record after he waived that right and continuously requested a speedy trial that was denied? Explain your answer.

13. If child pornography or sexual child pornography is criminalized to punish the citizens for seeing, receiving, passing, through from the media, internet, and newspapers, where they originated from, then it should be an equality, and non-discrimination within the law to receive and passit but not the "source" that exposed it to the citizens private lives? Explain your answer.

14. Because I reserved all my rights on the record, shouldn't I have been indicted by a grand jury "presentment", which is a grand jury investigation, even before the fact and after the fact based upon the grand jury's own fact finding without input of the prosecution and the government?

15. Is it true that Mr. Gougher's Sixth Amendment right to an impartial jury has been violated as jurors cannot deal with an equity of judgement due to complicated multi-count prosecution and do not understand the legalities of the law in certain criminal cases such as this one, therefore, can only form an opinion to satisfy the prosecutor and the judge(whom was a former prosecutor) according to their instructions to stay within the boundry of the law which they already do not know? Explain your answer.

16. Is it ~~no~~ a denial of my First Amendment right to Free Speech and/or denial of my access to the court when a judge will not allow you to speak openly in the court by cutting me off/interupting me when I was speaking in an intelligent and calm demeanor about a specific right of an Consitutional and then locking me up in a cage (additional punishment) without allowing me to speak? Is it also not an Eighth Amendment violation of Cruel and Unusual punishment for exercising a Constitutional right? Explain your answer.

17. Can a trial court deny a motion of substitute counsel based on conflict created by a BAR complaint without inquiry into the nature of the complaint? Explain your answer.

18. The U.S. Constitution assumed a criminal justice system dominated by STATE GOVERMENTS. Near the end of Section 8 of Article 1 is the catch-all provision with which it ends: The Congress shall have power...to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." The only bodies of criminal law mentioned in that long list are counterfeiting, piracy, "offences against the law of nations," and crimes that occur within the military: a decidely modes legal agenda. Other federal criminal prohibitions might be deemed "necessary and proper" to the execution of other powers, but Madison and his friends did not expect that category to be LARGE, as this feature of the list shows: The clause authorizing "the Punishment of counterfeiting the Securities and current Coin of the United States" follows immediately after the clause that permits Congress to coin money. The counterfeiting clause was needed only on the assumption that the power to punish counterfeiters is not implied by the "coin money" clause--which suggests that implied federal powers to criminally

punish must have been few and small in the view of Constitution's authors. Federal criminal law enforcement was meant to be rare. Is this true? Explain your answer.

19. Round and about 2012 the Pentagon was caught with multiple individuals, civilian and military, violating the same type of supposed crimes under a specific project name but was shut down by the Chief of the Pentagon at the time under a false documentation that it ran out of money to protect the elite in the Pentagon and their name and reputations. The defendant saw this documentation. On a specified date that defendant dosen't have in front of him at the moment but can be provided later, an individual called into the Michael Savage conservative talk show host and announced this very thing as he stated that he was high military official retired from the Pentagon and stated that the Chief of the Pentagon shut down this project to save face. Is this not a violation of the defendant's Constitutional 14th Amendment right as this has created a separate class of citizen, the powerful and or elite? A vioation of the equal protection clause? The restrictions are supposed to operate on government officials, not on Private Citizens. This provision dose not...add anything to the rights which one citizen has under the Constitution against another citizen. Every Repubican government is in duty bound to protect all its citizens in the enjoyment of this principle. Explain your answer.

20. The length of time given by statute(sentence) for these stacked crimes in the defendant's case (200 months). Is that not a cruel and unusual for a victimless supposed crime, a violation of the 8th amendment and when compared to a murderer whom receives 5 to 10 years a violation of the 14th amendment in disparity of sentencing when taking someone's life is far more henious than supposedly looking at a picture or video? Explain your answer.

21. Is it stretch by Congress to deem an obscenity(low level) crime into a full physical contact sexual crime and the statutes declaring so be found null and void? Explain your answer.

22. Isn't trying to impress community steward to the stanard to making laws against the Constitution, therefore, is censorship and against the FIRST AMENDMENT of the CONSTITUTION? Explain your answer.

23. In ACLU vs Reno, it allows obscene material to be viewed by the public. If child pornography is defined as obscene, then isn't it technically allowable by law? Explain your answer.

24. Is it not an unequal application of the law, a 14th Amendment violation, when predomiately adults 18 and above are the persons being prosecuted for child pornography laws and only a handful of minors? Explain your answer.

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

Marlin Lee Gougher petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

## I.
## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit, which is also reported at 835 Fed. Appx. 231, is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included in the appendix as Appendix 2. The transcripts of the relevant portions of the district court's oral rulings are included in Appendix 3.

## II.
## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 19, 2020, *see* App. A001-11, and a timely petition for rehearing en banc was denied on January 4, 2021, *see* App. A012.

The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

## III.

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

## IV.

## STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

Petitioner was charged with child pornography offenses. *See* App. A001, A077. After several continuances, he became dissatisfied with representation by the Federal Defender. App. A079. The district judge

indicated it would appoint substitute counsel, but Petitioner indicated he could hire his own attorney. App. A079. The judge told Petitioner he was free to hire his own attorney, but "provisionally appoint[ed]" an attorney nonetheless. App. A079.

There followed several more status hearings and a bail revocation hearing in which Petitioner expressed dissatisfaction with the new appointed attorney and indicated he was still trying to retain an attorney. *See* App. A079-81, There was also discussion of self-representation. *See* App. A079-81. Petitioner cross-examined witnesses and argued at the bail revocation hearing, and there was a partial colloquy about self-representation of the sort required by *Faretta v. California*, 422 U.S. 806 (1975). *See* App. A080-81.

There were more status hearings after the bail revocation hearing, with more discussion of Petitioner's efforts to hire an attorney, more discussion of Petitioner's objection to another appointed attorney, more discussion of the possibility of self-representation, and more *Faretta* colloquies. *See* App. 082-84. At one of these hearings, the district judge allowed Petitioner to file a "bill of particulars," which asked questions about "the status of the accused"; various forms of "venue" and "jurisdiction," including "common law" venue and jurisdiction, "corporate" venue and jurisdiction, "Maritime/Admiralty" venue and jurisdiction, and "martial-law" venue and jurisdiction; and whether the "person" in the "accusatory instrument" was a "natural" and/or "artificial" person. App. A082-83. During the last *Faretta* colloquy, Petitioner stated, "I don't understand the nature and causes of these charges," and the judge responded, "[T]he court believes that you do understand the nature of the charges." App. A083-84. Petitioner repeated he did not understand "the

nature and causes" and made references like those in his "bill of particulars" to "common law, corporate law, marshal [sic] law, maritime, or admiralty law." App. A084.

At this last hearing, the district judge sua sponte recused herself when Petitioner complained she was biased. App. A084. Petitioner appeared before a new district judge and again objected to the appointed attorney. *See* App. A014. The new judge held an in camera hearing and appointed another attorney. *See* App. A015. The judge told the prosecutor there had also been a discussion of possible self-representation, but Petitioner did not understand the charges. *See* App. A015-16. Petitioner explained, "The reason that I don't understand is because I don't understand how I am subject to the laws." App. A016.

The new attorney appeared at another status hearing the next day, and Petitioner threatened to sue him. *See* App. A022. The district judge subsequently ordered a competency report, which established Petitioner was competent. *See* App. A029-33. Petitioner said at the beginning of the competency hearing that he was "proceeding persona [sic] propria," had told the appointed attorney "not to do anything in my case," and had "the right to an attorney of my choice." A029-30. The judge told Petitioner he was not representing himself, was represented by the attorney, and not to "interrupt the proceedings." App. A030. Petitioner asked if he could say something, and the judge asked what that was, but ordered him to stop speaking when he tried to make arguments about "null and void," "grants of the constitutional," and "operating outside the law under color of law." App. A038-39. The judge ordered Petitioner removed from the courtroom when he kept trying to talk.

*See* App. A039.

At a final status hearing three weeks before trial, the appointed attorney indicated Petitioner might want to represent himself. *See* App. A044-45. When the district judge asked Petitioner if that was correct, Petitioner responded, "Yes, sir. I think I will request to represent myself, sir." App. A045. The judge noted Petitioner had never been able to understand the charges, and Petitioner explained:

> The reason is because I submitted a Bill of Particulars which was answered, but the – by the prosecution, and unfortunately the prosecution didn't answer correctly, completely, and with a step-by-step facts of how they got there. I am challenging personal choice –

App. A045.[1]

The judge then began a *Faretta* colloquy with, "Question number one, are you requesting to represent yourself, yes or no?," to which Petitioner responded, "Yes, sir." App. A046. The judge asked if Petitioner recalled telling the first district judge he did not understand the nature of the charges, and Petitioner explained this was "because the prosecution didn't answer my Bill of Particulars correctly." App. A046.

The judge continued with the *Faretta* colloquy, *see* App. A048-51, and asked the prosecutor to go over "the nature of the charges including the elements of the charges," App. A051. When Petitioner tried to object, the

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[1] The government had filed a response to the "bill of particulars," at the first judge's request, which (1) stated venue lay in the Southern District of California because that was where Petitioner was alleged to have been at the time of the offenses: (2) cited the statute giving district courts jurisdiction over federal criminal offenses; (3) "contend[ed] the defendant is a living human being who can be charged with a federal crime"; and (4) simply answered, "No," to most of the remaining questions. App. A083.

judge told him there was no opportunity to object at that point, *see* App. A052, and allowed the prosecutor to finish, *see* App. A051-53. The judge asked Petitioner if he understood "the nature of the charges, including the elements of the charges," App. A054, and the following exchange took place:

> THE DEFENDANT: I do not understand what the fact or facts that the DA relies upon that says I am subject to these.
>
> THE COURT: Do you understand the nature of the charges?
>
> THE DEFENDANT: The extraterritorial instrument and schedule does not indicate how I am subject to these charges, sir.
>
> THE COURT: Do you understand the nature of the charges, including the elements?
>
> THE DEFENDANT: I do not understand the nature and the cause.
>
> THE COURT: All right.
>
> THE DEFENDANT: I do not understand how I am being sued by damages by the US Corporation and how the US corporation is being damaged. I have a right to face my accuser rather than a representation of an artificial entity, sir.
>
> The fact that I don't understand that a corporation of my name is all capital letters and the government district court is all in capital letters and how I became a corporation. It was discussed in the Federalist Papers that the Tenth Amendment only applies to the ten square miles of Washington, DC, so I don't know how I am supposed to be a federal citizen, lower case citizen, rather than a state, capital C, citizen.

App. A054-55.

The judge found Petitioner did not understand "the nature of the charges, including the elements of the charges," and so was "not capable of representing [him]self." App. A055. Petitioner tried to object, complained about the appointed attorney, complained the judge was biased, said he "ha[d] two letters here," and was removed from the courtroom again. *See* App. A055-57. Petitioner thereafter mailed two "affidavits of truth" to the judge.

*See* App. A087. One of the affidavits reiterated Petitioner "wish[ed] to go pro se" and complained about the judge's treatment of his attempt to "make the court understand my point as to why I don't understand the nature and cause of the charges." App. A088.

On the first day of trial, prior to jury selection, the appointed attorney told the judge Petitioner had sent him a letter threatening to sue and enclosing a bar complaint Petitioner had filed. *See* App. A059. The attorney declared a conflict of interest and moved to be relieved. *See* App. A059, A060-61. The judge summarily ruled: "I'm not going to relieve Mr. Kraus [defense counsel]. Mr. Kraus will continue to represent you." App. A060. The judge made no inquiry into the nature of the bar complaint or what allegations had been made in the complaint. *See* App. A059-61. The judge also told Petitioner he had received an "affidavit of truth," but, "You have not knowingly and intelligently waived your right to counsel, and you have not shown that you are able and willing to abide by the rules of procedure and courtroom protocol." App. A062-63.

Petitioner was convicted and appealed. One of the claims he raised was that the district court erred in refusing to allow him to represent himself because he would not expressly acknowledge that he understood the nature of the charges. *See* App. A074-75, A093-101. He argued, first, that it was the duty of the court to make him understand the nature of the charges, and, second, that what he meant by "nature of the charges" was different than the elements of the offense that Ninth Circuit case law requires a defendant to understand. *See* App. A094-97. The government argued it was not error to deny Petitioner the right to represent himself because of, first, Petitioner's

"explicit and repeated insistence that [he] did not understand – or at least refused to acknowledge that he could understand – the nature of the charges," App. A142, and, second, "his disruptive behavior in court," App. A143.

A second claim raised by Petitioner was that the district court erred in summarily rejecting the defense attorney's declaration of a conflict and motion to withdraw based on the bar complaint. One of Petitioner's arguments was that the bar complaint created a conflict because "[a] pending bar complaint has the subtle, impossible-to-identify, and ongoing effects described in [*Douglas v. United States*, 488 A.2d 121 (D.C. 1985)]." App. A106. Petitioner also made an alternative argument that "there should have been at least some inquiry into the complaint." App. A104. *See also* App. A169 (reply brief). The government argued that allowing bar complaints to force appointment of new counsel "would invite criminal defendants anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial." App. A150 (quoting *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993)).

The court of appeals affirmed. On the claim that the district court erred in denying Petitioner's request to represent himself, the court was divided. The majority held the district court's ruling was properly based on Petitioner's refusal to acknowledge he understood the charges.

> Gougher had repeatedly insisted, and continued to insist, that he did not understand the nature of the charges against him. A district judge cannot be expected to ensure that a defendant understands the nature of the charges against him when the defendant repeatedly and consistently refuses to acknowledge that he understands them.

App. A003-04. The third judge on the court of appeals panel disagreed with

this, however. He reasoned:

> [T]here is no indication in the record that Gougher did not understand either the elements of the crimes with which he was charged or the nature of the charged conduct that he was alleged to have committed. Rather, Gougher's comments made clear that he claimed not to understand why the "United States" – which he characterized as an officious "corporation" – could assert the authority to punish him at all. But that is not part of what *Faretta* requires, because there is a difference between agreeing with the charges and understanding them. And if it really had been true that Gougher did not understand the charged offenses, then the district court should have informed him of the pending charges before proceeding any further.

App. A010-11 (internal quotation marks and citations omitted).

The third judge concurred in the result on an alternative ground the majority did not reach – that Petitioner was not "able and willing to abide by the rules of procedure and courtroom protocol." App. A011. Petitioner had argued this was an improper basis for denying self-representation because "[o]rdinarily, this authority would be exercised only after the defendant has begun to represent himself" and the authority may be exercised preemptively in only "exceptional situations." App. A098 (quoting 3 Wayne R. LaFave, *et al.*, *Criminal Procedure* 869 (4th ed. 2015)). Petitioner pointed to indications in the record that he would have been cooperative and respectful if he had been allowed to present his arguments. *See* App. A098-99, A163.

The court of appeals also rejected the argument that the bar complaint created a conflict of interest. The court first stated the general test that "[t]he Sixth Amendment is violated when an attorney has an actual conflict of interest that adversely impacts his or her performance in a criminal case." App. A004. It then stated, "Where, as here, the defendant has been repeatedly uncooperative with successive counsel, we have declined to find that an eve-

of-trial filing of a bar complaint against the defendant's latest counsel gives rise to an actual conflict of interest that would require a substitution of counsel." App. A004. It failed to address the alternative argument that there at least had to be an inquiry into the nature of the complaint.

## IV.

## REASONS FOR GRANTING THE WRIT

The petition should be granted because the two questions presented are important issues on which there are splits in the lower courts and this case presents an excellent vehicle for resolving those splits. First, there is the question of whether a defendant's lack of cooperation in answering some of the court's questions during a *Faretta* colloquy precludes self-representation. Some courts hold this does preclude self-representation, some courts hold it does not necessarily preclude self-representation, and some courts hold it can never preclude self-representation because it is the court's duty to make the defendant understand. The question is an important one for this Court to resolve because defendants who choose to represent themselves frequently have fringe, unorthodox views like Petitioner's that make them hesitate to answer some trial court questions. Petitioner's case is an excellent vehicle for resolving the question because that scenario is precisely what took place here.

Second, there is the question of whether the filing of a bar complaint can in some instances create a conflict of interest that interferes with effective assistance of counsel, and so there must be an inquiry into the nature of the complaint. Some courts hold the filing of such a complaint never creates a

conflict that interferes with effective assistance of counsel, while others hold there must be an inquiry before that judgment can be made. This question also frequently arises in cases where defendants have fringe, unorthodox beliefs, because such defendants are particularly likely to be dissatisfied with their counsel. Petitioner's case squarely presents the question because there was absolutely no inquiry by the district court here.

## A. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A SPLIT IN THE LOWER COURTS OVER WHETHER A DEFENDANT'S LACK OF COOPERATION IN ANSWERING SOME OF THE COURT'S QUESTIONS DURING A *FARETTA* COLLOQUY PRECLUDES SELF-REPRESENTATION.

### 1. There Is a Split in the Lower Courts Over the Effect on the Right of Self-Representation of a Defendant's Lack of Cooperation in Answering Some of the Court's Questions During a *Faretta* Colloquy.

The Court recognized a defendant's right to waive his right to counsel and represent himself in *Faretta v. California*, 422 U.S. 806 (1975). But this is not to say such waivers are to be encouraged. "Rather, the reverse is true." *United States v. Hayes*, 231 F.3d 1132, 1136 (9th Cir. 2000). As the Court explained in *Faretta*, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law" and "requires the guiding hand of counsel." *Id.*, 422 U.S. at 833 n.43 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). Because of this, a defendant must competently and

intelligently waive the right to counsel before he represents himself. *See Faretta*, 422 U.S. at 814, 835 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942), and *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). In the Ninth Circuit, the defendant must be advised of three "elements": (1) "the nature of the charges against him"; (2) "the possible penalties"; and (3) "the dangers and disadvantages of self-representation." *Hayes*, 231 F.3d at 1136.

The panel majority held that "[a] district judge cannot be expected to ensure that a defendant understands the nature of the charges against him when the defendant repeatedly and consistently refuses to acknowledge that he understands them." App. A004. This conclusion does find support in two cases which the government cited – *United States v. Hausa*, 922 F.3d 129 (2d Cir.), *cert. denied*, 140 S. Ct. 208 (2019), *cited in* App. A139, and *United States v. Harrison*, 293 Fed. Appx. 929 (3d Cir. 2008) (unpublished), *cited in* App. A140. *Hausa* held the "trial court did not err in concluding that it was impossible" to determine whether the defendant's "request to waive his right to counsel was 'knowing and intelligent.'" *Id.*, 922 F.3d at 135. *Harrison* similarly held the trial court properly denied a request for self-representation when the defendant "refused to answer questions relevant to whether he . . . understood the case." *Id.*, 293 Fed. Appx. at 930.

Other courts suggest the defendant's lack of cooperation is not the proper focus and is not a bar to self-representation. The Eleventh Circuit in *United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008), explained:

> A dialogue cannot be forced; therefore, when confronted with a defendant who has voluntarily waived counsel by his conduct and who refuses to provide clear answers to

> questions regarding his Sixth Amendment rights, it is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a pro se litigant. . . . In such cases, a *Faretta-like* monologue will suffice.

*Garey*, 540 F.3d at 1267 (emphasis in original).

The Florida Supreme Court has reasoned similarly. It held a trial court properly allowed self-representation in a death penalty case despite the defendant having refused to respond to multiple questions during a *Faretta* colloquy. *See Muehleman v. State*, 3 So. 3d 1149, 1157-58 (Fla. 2009). It held self-representation proper despite the lack of cooperation, because "[t]he record in this case supports the judge's findings and shows that [the defendant] was lucid, literate, articulate, and appeared to have a clear understanding of what he was facing," *Id.* at 1160.

The Ohio Court of Appeals – in two different cases – also has held a lack of cooperation does not preclude self-representation. In *State v. Tucker*, 62 N.E.3d 903 (Ohio App. 2016), the court recognized that the defendant there, much like Petitioner in the present case, "repeatedly frustrated the court's attempt to engage him in a dialogue about his waiver by refusing to answer questions, posing objections to the legitimacy of the court in the proceedings, and demanding the trial court's oath of office." *Id.* at 910. The court held: "Nonetheless, the record demonstrates that the trial court engaged in a colloquy that was appropriate given the totality of the circumstances, and Mr. Tucker, though obstinate, knowingly, voluntarily, and intelligently waived the right to counsel." *Id.* In another case, the defendant, again like Petitioner in the present case, asserted "sovereign immunity" and, when asked if he

understood the nature of the charges, said that "'all [he] underst[ood]' was that the State was a corporation." *State v. Godley*, 2018 Ohio App. LEXIS 4581, at *16-17 (Ohio App. 2018). The court held that "the defendant's refusal to cooperate does not preclude a conclusion that the defendant knowingly, intelligently, and voluntarily waived his right to counsel." *Id.*, 2018 Ohio App. LEXIS 4581, at *36.

The foregoing cases address the question of whether a defendant's lack of cooperation in answering questions during a *Faretta* colloquy *precludes* self-representation, without addressing whether it could *allow a denial* of self-representation. But there are published Ninth Circuit cases which take that further step. Those cases hold, as the concurring judge in the present case recognized, that the trial court cannot deny self-representation based on a lack of understanding, but has a duty to make the defendant understand. As explained in *United States v. Hernandez*, 203 F.3d 614 (9th Cir. 2000):

> [T]he defendant . . . must be *made aware* of (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation. This requirement precludes the district court from denying a self-representation request on the ground that the defendant has not *independently* informed himself of these elements. Rather, as we have consistently stated, it is the responsibility of the district court to ensure that the defendant is informed of them by providing him with the requisite information.

*Id.* at 623-24 (emphasis in original) (citations, footnote, and internal quotations omitted). "Accordingly, if the court fails to fulfill its obligation to inform the defendant and then *denies* his request to represent himself, it violates the defendant's Sixth Amendment right of self-representation." *Id.* at 625 (emphasis in original). *See also United States v. Arlt*, 41 F.3d 516, 521

(9th Cir. 1994) (noting government is not entitled to affirmance if request for self-representation is denied because court fails to explain consequences).

The panel majority's holding here conflicts with both this published Ninth Circuit case law – which this Court could discount as just an intracircuit conflict – *and* the Eleventh Circuit and state court decisions which hold the defendant's lack of cooperation in answering questions during a *Faretta* colloquy at least does not preclude self-representation. The panel majority's holding was that a district judge does note even have discretion – that the judge "cannot" be expected to ensure a defendant understands the nature of the charges against him when the defendant refuses to acknowledge he understands them. App. A004. The split created by this holding and the Second Circuit and Third Circuit opinions cited by the government compared to the Eleventh Circuit and state court opinions which at least recognize *discretion* to allow self-representation in these circumstances should be resolved.

2. The Question Is an Important One Which Arises Frequently and Which Petitioner's Case Provides an Excellent Vehicle for Resolving.

The question is an important one because circumstances such as those here arise frequently in self-representation cases. The "sovereign citizen" belief system that Petitioner had is one reflected in multiple federal cases, *see, e.g., United States v. Glover*, 715 Fed. Appx. 253, 256 n.2 (4th Cir. 2017) (unpublished), *and United States v. Mesquiti*, 854 F.3d 267, 269-70 (5th Cir. 2017), *cited in* App. A002; *see also United States v. Neal*, 776 F.3d 645, 657

(9th Cir. 2015); *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010), and multiple state cases, *see, e.g., State v. Godley*, 2018 Ohio App. LEXIS 4581 at *16-17; *State v. Tucker*, 62 N.E.3d at 910. This "fringe" belief system, *State v. Tucker*, 62 N.E.3d 893, 899 (Ohio App. 2016), with its "unorthodox" theories, *Neal*, 776 F.3d at 657, frequently triggers uncooperative answers to questions, including questions about the "nature of the charges" such as in the present case and the Ohio *Tucker* case.

The present case is also an excellent vehicle for resolving the question because it is clear that Petitioner was simply attaching a different meaning to "nature of the charges," rather than not understanding the elements of the offense. As the concurring judge explained:

> [T]here is no indication in the record that Gougher did not understand either the elements of the crimes with which he was charged or the nature of the charged conduct that he was alleged to have committed. (Citation omitted.) Rather, Gougher's comments made clear that he claimed not to understand why the "United States" – which he characterized as an officious 'corporation' – could assert the authority to punish him at all.

App. A010-11.[2] Petitioner simply had his own agenda.

3. The Panel Majority Holding Is Wrong, as the Concurring Judge Recognized.

The panel majority holding is also wrong, as the concurring judge

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[2] Consistent with the concurring judge's view, the first district judge on the case told Petitioner, as noted *supra* p. 3, that "the court believes that you do understand the nature of the charges." App. A084.

recognized.[3] *At most*, a trial judge should have discretion to consider a defendant's lack of cooperation in evaluating the voluntariness of the defendant's decision to represent himself. And it should be considered only to the extent it makes the judge doubt whether the defendant truly desires to represent himself, as opposed to making the judge unhappy with a perceived lack of cooperation. To hold that a judge "cannot" be expected to ensure the defendant understands the nature of the charges simply because the defendant will not cooperate in uttering those words goes too far.

The reason it goes too far is that it will allow the trial judge to simply give up and not make the hard call when faced with a defendant who is uncooperative. As explained in the slightly different context of the *Hernandez* case cited *supra* p. 14:

> Were the rule otherwise, the Sixth Amendment right to self-representation would be severely weakened. Its exercise would be wholly dependent on the whim of the district judge, or on how well the district judge understood the law. If the judge failed to perform his duties properly . . . [,] the defendant would be penalized: his right to self-representation would be forfeited by virtue of the court's error. To put it another way, the defendant's rights would be taken from him because the district judge failed to provide him with the information necessary to make an

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[3] The concurring judge's reliance on the alternative ground given by the district court – that Petitioner would not abide by the rules of procedure and courtroom protocol – does not warrant denial of this petition for two reasons. First, this alternative rationale should be considered in the first instance by the majority of the court of appeals panel, which may well have had a different view, since it did not reach the question. Second, this alternative rationale raises a difficult question to which the answer is far from clear. There is little case law on the question, and at least one treatise suggests that "[o]rdinarily, this authority would be exercised only after the defendant has begun to represent himself." 3 Wayne R. LaFave, *et al.*, *Criminal Procedure* 869 (4th ed. 2015).

informed request.

*Id.*, 203 F.3d at 625.

The issue under *Faretta* is not whether the defendant will adopt the district court's meaning of the buzz words, "nature of the charges," or whether he will *say* he understands the nature of the charges. The issue is whether the defendant in fact *does* understand the nature of the charges. More fundamentally, it is whether he can be made to understand them.

Petitioner's case highlights the concern expressed in the *Hernandez* case because there were obvious further steps to take, as explained in Petitioner's reply brief below. *See* App. A161. One alternative was to recognize that what Petitioner meant by "the nature and the cause" was something different than the elements of the offense and simply make findings that (a) Petitioner meant something different and (b) Petitioner did understand the elements even though he kept saying he did not understand "the nature and the cause." *See* App. A084 (first district judge so opining). A second alternative was to simply avoid the "nature of" language that triggered Petitioner's focus on his different meaning. Instead of asking Petitioner whether he understood "the nature of the charges, including the elements," *supra* p. 6, the court could have simply asked questions that avoided the words, "nature of," and even "elements." Tracking the prosecutor's language in reciting the elements, the court could have asked, "Do you understand the government has to prove you distributed a visual depiction in interstate commerce or foreign commerce?," "Do you understand the government has to prove the production of such visual depiction involved the use of a minor engaged in sexually explicit conduct?," and so on. *Compare* App. A052 (prosecutor's recitation of elements). It was,

first, error not to try these alternatives, and, second, error to rule on self-representation based on what Petitioner would or would not say rather than what he did or did not understand.

B. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A SPLIT IN THE LOWER COURTS ON THE QUESTION OF WHETHER THE SIXTH AMENDMENT REQUIRES AN INQUIRY INTO A POTENTIAL CONFLICT OF INTEREST WHEN THE TRIAL COURT IS MADE AWARE THE DEFENDANT HAS FILED A BAR COMPLAINT AGAINST HIS ATTORNEY.

1. There Is a Split in the Lower Courts on the Question of Whether a Trial Court Can Deny a Motion for Substitute Counsel Based on Conflict Created by a Bar Complaint Without an Inquiry into the Nature of the Complaint.

This Court has addressed the effect of a conflict of interest on the Sixth Amendment right to effective assistance of counsel in several cases. *See Mickens v. Taylor*, 535 U.S. 162 (2002); *Wood v. Georgia*, 450 U.S. 261 (1981); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978). These cases establish two general principles. First, an inquiry into a conflict is required when "the trial court knows or reasonably should know that a particular conflict exists." *Mickens*, 535 U.S. at 168 (quoting *Holloway*, 446 U.S. at 347). Second, there is an "actual conflict of interest" when there is a conflict that "adversely affected counsel's

performance." *Mickens*, 535 U.S. at 170.[4]

The Court has not considered the question of a conflict of interest created by a defendant's filing of a bar complaint against his attorney, but multiple federal circuit courts and state courts have. None have held that such a complaint automatically creates a conflict requiring new counsel, *but see People v. Johnson*, 592 N.E.2d 345, 353 (Ill. App. 1992) (reading some opinions as so holding), though one opinion's reasoning arguably suggests this, *see Douglas v. United States*, 488 A.2d 121, 136-37 (D.C. 1985) (describing multiple subtle and hard-to-identify ways in which pending bar complaint might affect representation). But the courts are divided on the alternative argument made by Petitioner here, namely, whether the trial court must at least inquire. *See State v. Robertson*, 44 P.3d 1283, 1287-88 (Kan. App. 2002) (discussing conflicting opinions).

Some courts have held the filing of a bar complaint can never create a conflict requiring the appointment of substitute counsel. As explained by the Arizona courts:

> "As a matter of public policy, a defendant's filing of a bar complaint against his attorney should not mandate removal of that attorney." A rule to the contrary would encourage

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[4] There is also a question of whether prejudice is then presumed or whether the defendant must make the further showing that *Strickland v. Washington*, 466 U.S. 668 (1984), requires in other ineffective assistance of counsel cases – a reasonable probability that the ineffective assistance had an effect on the outcome of the trial, *see id.* at 694. Prejudice is presumed when the conflict is due to concurrent representation of multiple defendants, but whether this presumption extends to other conflicts is "an open question." *Mickens*, 535 U.S. at 176. Lower courts are split on this question, *see United States v. Williamson*, 859 F.3d 843, 854-55 n.3 (10th Cir. 2017), and the lower courts in the present case did not reach the question.

the filing of such complaints solely for purposes of delay.

*State v. Henry*, 944 P.2d 57, 64 (Ariz. 1997) (quoting *State v. Michael*, 778 P.2d 1278, 1281 (Ariz. App. 1989)). The Washington Court of Appeals has taken a similar view, reasoning, "Were [filing of a bar complaint] sufficient to disqualify court-appointed counsel, . . . a defendant could force the appointment of a new attorney simply by filing such a complaint, regardless of its merit." *State v. Sinclair*, 730 P.2d 742, 744 (Wash. App. 1986).

Some federal courts have also taken this view. The Sixth Circuit, like the foregoing state courts, has reasoned that "if the filing of state-bar grievances was in itself sufficient to create a conflict of interest that would prevent attorneys from providing effective representation, then criminal defendants could habitually abuse this rule." *United States v. Gandy*, 926 F.3d 248, 261 (6th Cir. 2019). The Sixth Circuit then opined that even a meritorious complaint would not create a conflict:

> [E]ven if the grievances in question here had merit, they did not create a conflict of interest because the grievances did not establish any competing obligations for the attorneys. If anything, they aligned the attorneys' interests with those of their clients and incentivized the attorneys to work even harder.

*Id.* at 261-62. The Fourth Circuit in *United States v. Burns*, 990 F.2d 1426 (4th Cir. 1993), expressed similar views, stating, first, "[w]e do not think that Burns's appointed attorney could have gleaned any advantage for himself in disciplinary proceedings before the state bar by failing to employ his best exertions on Burns's behalf of trial," and, second, "to hold otherwise on such unpersuasive facts would invite criminal defendants anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees

on the eve of trial." *Id.* at 1438.

Other courts have rejected a per se view that a bar complaint cannot create a conflict of interest and indicated there must be an inquiry into the nature of the complaint. The District of Columbia Court of Appeals, after initially implying that a bar complaint would always require appointment of substitute counsel, *see Douglas*, 488 A.2d at 136-37, *cited supra* p. 20, clarified that it depends on the nature of the complaint, but the trial court does "ha[ve] a duty to inquire," *see Taylor v. United States*, 138 A.3d 1171, 1178 (D.C. App. 2016); *see also id.* at 1179 (distinguishing *Douglas* because "[h]ere, the court did appropriately inquire into the potential conflict"); *Malede v. United States*, 767 A.2d 267, 271 (D.C. App. 2001) (recognizing "that the proper remedy in such circumstances is inquiry by the court"). The Supreme Court of Hawaii followed the District of Columbia Court of Appeals in *State v. Harter*, 340 P.3d 440 (Haw. 2014), and held that "[i]n the absence of any examination by the [trial] court into the underlying circumstances, the record in this case indicates there was a conflict of interest between [the defendant] and [the attorney]." *Id.* at 459.

Some federal courts have also indicated there must be an inquiry. The Second Circuit held in *Mathis v. Hood*, 937 F.2d 790 (2d Cir. 1991), where there had been an inquiry, that a meritorious bar complaint did create a conflict of interest resulting in ineffective assistance of counsel. *See id.* at 795-96. The Fourth Circuit has also at least implicitly suggested there must be an inquiry by reversing for failing to make an adequate inquiry in *United States v. Blackledge*, 751 F.3d 188 (4th Cir. 2014), and distinguishing the *Burns* case cited *supra* p. 21 on the ground that the bar complaint in *Blackledge* was

"seemingly non-frivolous." *Blackledge*, 751 F.3d at 196.

In sum, there are some lower court opinions holding a bar complaint can never create a conflict of interest resulting in ineffective assistance of counsel because (1) policy considerations weigh against recognizing such conflicts and (2) a bar complaint aligns the interests of the attorney and the defendant. But other lower court opinions recognize that it is not so simple, that bar complaints sometimes do create conflicting attorney interests, and that there must be an inquiry into the particular bar complaint.

2. The Question Is Important and Petitioner's Case Is an Excellent Vehicle for Resolving the Split in the Lower Courts.

The question is important because defendants who seek to represent themselves frequently do so because of dissatisfaction or conflicts with their counsel and/or "fringe" and "unorthodox" views such as those described above. Those conflicts and that dissatisfaction will frequently lead to complaints. Sometimes those complaints will be made only to counsel, but sometimes they will be taken further, perhaps first to the trial court, but then to bar disciplinary authorities if the trial court is not responsive.

The present case is also an excellent vehicle for resolving the split in the lower courts, because the trial court made absolutely no inquiry into the nature of the bar complaint here. This meant the court had no way of judging whether the complaint was frivolous or had merit. It had no way of judging whether the attorney's defense against the complaint would align his interests with those of the defendant or instead be adverse to the position it was best to

take in Petitioner's trial. It had no way of judging what more subtle effects the complaint might have had on the attorney's performance.

The present case thus squarely presents the question of whether the courts that do not require an inquiry are right or the courts that do require an inquiry are right. There is no gray area of a limited inquiry which might have been sufficient. There is the absolute failure to make any inquiry at all and hence a ruling without any information at all.

3. The View That There Does Not Need to Be an Inquiry Fails to Recognize the Subtle Effects a Bar Complaint May Have and Completely Sacrifices Sixth Amendment Interests for Court Efficiency Rather than Balancing the Interests.

The view that there does not need to be an inquiry should be rejected. It fails to recognize the subtle effects a bar complaint may have and completely sacrifices Sixth Amendment interests for court efficiency.

First, it is an overly facile response to assume that a bar complaint always aligns the interest of the attorney with the interests of the defendant and therefore makes the attorney more likely to represent the defendant effectively, as some courts have assumed, *see supra* p. 21. The Kansas courts have noted it depends on the nature of the complaint:

> We recognize that an attorney's best defense to a disciplinary complaint is to provide the defendant with the best possible defense and, as such, a pending disciplinary complaint does not necessarily create a conflict of interest. However, we also recognize that under certain circumstances, a disciplinary complaint could create an actual conflict of interest, depending on the nature of the

complaint.

*State v. Bryant*, 179 P.3d 1122, 1137 (Kan. 2008) (quoting *State v. Robertson*, 44 P.3d at 1288). And almost any non-frivolous complaint can have subtle, hard-to-identify effects. As the District of Columbia Court of Appeals explained in *Douglas*:

> [A]s soon as [the attorney] learned of Bar Counsel's intention to pursue an investigation of appellant's complaint, he acquired a personal interest in the way he conducted appellant's defense – an interest independent of, and in some respects in conflict with, appellant's interest in obtaining a judgment of acquittal. For instance, fearing that appellant's complaint to Bar Counsel might later be expanded to include claims of ineffective assistance at trial, [the attorney] would have an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for *post hoc* criticism of his efforts. This could compromise [the attorney's] professional judgment about the best means of defending this particular case; it could encourage the most standard or conservative trial strategy, as well as overcautious tactical decisions and courtroom demeanor. Furthermore, concerns about the pending investigation might impede communications between appellant and [the attorney]. [The attorney] might be apprehensive about sharing with appellant the reasons behind tactical defense decisions and refrain from disclosing to appellant any unexpected problem that arose during the course of the trial. (Footnote omitted.) Appellant, in turn, might be reluctant to question [the attorney's] trial decisions for fear of further alienating counsel in the midst of trial.

*Id.*, 488 A.2d at 136-37.

Second, the interest in court efficiency should not be absolutely controlling, but should be taken into account through a balancing with the merits of the bar complaint and its likely impact. As the Second Circuit explained in its discussion of the disciplinary charges in *Mathis*:

> The district court recognized that its decision might "cause many appellants to file disciplinary charges against their attorneys", but it correctly observed that "such

> complaints, if unwarranted or brought with a motivation for delay, should not be grounds for [habeas corpus relief]". As the district court noted, Mathis's disciplinary complaint against [his attorney] was well-founded, was based on egregious delay, and resulted in the attorney's being formally admonished by the disciplinary committee. A frivolous complaint against an attorney, or one filed for purposes of delay, or even one filed for the purpose of obtaining new counsel, would not create a conflict of interest warranting habeas corpus relief of the type approved here.

*Id.*, 937 F.2d at 796. The appropriate way to take court efficiency into account is to inquire into the nature of the complaint, use that inquiry to evaluate how the complaint might affect the attorney, and evaluate whether the effect will "adversely affect[ ] counsel's performance" and thereby create an "actual conflict of interest" under this Court's case law.

## VI.

## CONCLUSION

**May 23, 2024**

## Additional Reason For Granting the Writ

The courts and Congress have overstepped their Constitutional authority. Congress does not have the authority to change the Sixth Amendment by statute and neither do the courts by court precedent. The enumeration in the "Constitution, of Certain Rights"; of which the right to represent oneself is one; shall not be contrued (added to) to deny or disparage (substracted from) others retained by the people.

The courts and Congress have violated the constitution by adding to the Sixth Amendment of right to assistance of counsel to include all crimes when the Founding Fathers meant that the people were only entitled to an effective assistance of counsel in a capitol offence where the sentence is death. An amendment can only be changed, added to or subtracted from by Congress and must be ratified by the states, and not by the courts, that established that, Johnson v. Zerbst, in 1938. In this case the Supreme Court overstepped it's power to reverse a Constitutional doctrine, just like in many cases, without overruling any of its own precedents and violated the Constiution by violatiing the Constitutional Separation of Powers. In addition, the court must find Criminal Justice Act 1964, Aug. 20, P.L. 88-455, 78 Stat. 552, 18 U.S.C.S 3006-3006A, Crimes and Criminal Procedure, Part II. Criminal Procedure, Chapter 201, General Provisions, 3006-3006a, Adequate Representation of defendants unconstitutionally nationally for all US District Circuit Courts as Congress cannot Constitutionally change the Constitution by statute; "In short, Congress lacks the ability independently to define or expand

the scope of Constitutional rights by Statute", City of Boerne v. Flores, 138 LED2D, 117 Sct 2157,1; 138 LED2D 625, 521 US 507.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they open it at all, what part of it are they forbidden to read or to obey?

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tabacco, or of flour; and a suit instituted to recover it. Ought judgment be rendered in such a case? ought the judges close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person, "says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed expecially to the courts, It prescribes, diredtly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and delcare one witness, or a confession out of court, sufficient for conviction, must the Constitutional principle

yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule of the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that will faithfully and impartially discharge all the duties incumbent on me as, according to the best of my abilities and understanding agreeably to the Constitution and the laws of the United States."

If such be the real state of things, this is worse them solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strenthens the principle, supposed

to be essential to all written Constitutions, that a law repugnant to the Constitution is **VOID**; and that the courts, as well as other departments, are bound by that instrument.

"It is even more basic principle of American Law that Congress does not have authority to overide the Constitution", United States v. Gomez, 9th circuit, May 16, 2008.

Therefore, Mr. Gougher's right to represent himself was Constitutionally interferred with by the Court and Congress. Mr. Gougher requests that the Supreme Court vacate is conviction based upon this premise and/or the other premise within this Writ of Certiorari and to instruct Congress to change the 6th Amendment or add a new Amendment by the Correct Constitutional method.

A defendant has a Constitutional right to represent himself in a criminal action. A pro se defendant must be allowed, according to Founding Fathers, to control the organization and and content of his own defence, to make motions, to argue points of law, to participate in voir dire, to question witnesses, to face his accuser, and to address the court and, even at trial, the jury at appropriate points in the trial, all of which Mr. Gougher was Unconstitutionally prevented from accomplishing.

The Court has held the following errors not subject to harmless-error analysis and, therefore, these errors can be placed within the category of "structural error": total deprivation of the right to counsel; 99 a jusdge with a conflict of itnerest 100 and certain attorney conflicts of interest; 101 selection of a jury by a judge without jurisdiction to preside over the procedure, 102 Batson error 103 and race discrimnation in grand jury selection; improper exclusion of a juror for his views

on the death penalty; 104 denail of the **right to proceed pro se**; 105 complete denial fo the right to trial by jury; 106 an erroneour instruction on reasonable doubt; 107 and the denial of the right to a speedy 108 or public 109 trial.

The denial of two other rights--the right to effective assistance of counse 110(only in capitol offence crime according to our Founding Fathers) and the Brady right to exculpatory evidence 111--bring reversal without formal harmless-error analysis.

May 23, 2024

Marlin Boyle