No. _____

IN THE

Supreme Court of the United States

MICHAEL MARION COTHAM,

Petitioner,

v.

DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION, AND REENTRY; ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Arizona Court of Appeals' decision was "contrary" to *Faretta v. Arizona*, 422 U.S. 806 (1975), within the meaning of 28 U.S.C. § 2254(d)(1), because the state appellate court did not require the trial court to have found that petitioner "deliberately engage[d] in serious and obstructionist misconduct," *id.* at 834 n.46, before terminating petitioner's fundamental constitutional right to self-representation.

II.

Whether the Arizona Court of Appeals' decision that the trial court did not contravene *Faretta v. Arizona*, 422 U.S. 806 (1975), by terminating petitioner's constitutional right to represent himself at trial was based on an unreasonable determination of the relevant facts, 28 U.S.C. § 2254(d)(2).

III.

Whether, in applying 28 U.S.C. § 2254(d)(2), to petitioner's *Faretta* claim, the Ninth Circuit erroneously considered the state trial court's ruling rather than the Arizona Court of Appeals' subsequent ruling on direct appeal.

IV.

Whether, in view of the Ninth Circuit's erroneous refusal to engage in *de novo* review of petitioner's *Faretta* claim, this Court should remand for the Ninth Circuit to decide whether petitioner "deliberately engage[d] in serious and obstructionist misconduct," so as to have warranted the trial court's termination of petitioner's fundamental constitutional right to self-representation.

V.

Whether the Ninth Circuit's decision that petitioner's direct appeal counsel's deficient performance in filing an *Anders* brief did not "prejudice" petitioner was contrary to *Strickland v. Washington*, 466 U.S. 668 (1984), and *Smith v. Robbins*, 528 U.S. 259 (2000).

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Cotham v. Shinn*, No. 2:21-cv-00138-ROS (D. Ariz.). Judgment was entered on August 29, 2023.

- *Cotham v. Shinn*, No. 23-2456, United States Court of Appeals for the Ninth Circuit. Judgment was entered on May 13, 2025.

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The decision of the Ninth Circuit affirming the federal district court's judgment denying federal habeas corpus relief (**App. A**) is unreported but is available at 2025 WL 1379098. The written order of the district court denying petitioner's federal habeas corpus petition (**App. B**) is unreported but is available at 2023 WL 5590287. The federal magistrate judge's report and recommendation to the district court (**App. C**) is unreported but is available at 2022 WL 20595113.

The Arizona Court of Appeals' decision on petitioner's direct appeal (**App. D**) is unreported but is available at 2015 WL 1228183. The state superior court's decision denying petitioner's motion for post-conviction relief (**App. E**) is unreported. The Arizona Court of Appeals' decision on post-conviction review (**App. F**) is unreported but is available at 2019 WL 4509101.

JURISDICTION

The Ninth Circuit issued its decision affirming the district court's judgment on May 13, 2025. Petitioner did not file a petition for rehearing in the Ninth Circuit. This petition for writ of certiorari was filed within 90 days of the Ninth Circuit's decision. This Court thus has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the U.S. Constitution provide in pertinent part:

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

U.S. Const. amend. VI.

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

U.S. Const. amend. XIV.

Section 2254(d) of Title 28 of the United States Code provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2).

STATEMENT OF THE CASE

I. Procedural Background

In 2013, petitioner was charged with four counts of promoting child prostitution in state court in Phoenix, Arizona. After a jury trial, he was convicted of two counts and acquitted of two counts. The Arizona superior court sentenced petitioner to 42 years in state prison (ER-15).[1] In 2015, on direct appeal, the Arizona Court of Appeals affirmed petitioner's convictions, App. D, and the Arizona Supreme Court denied petitioner's petition for review in a summary order that offered no reasons. *State v. Cotham*, No. CR-15-0204-CR (Ariz. Dec. 1, 2015). No petition for writ of certiorari was filed with this Court.

[1] "ER" is the Excerpts of Record filed in the Ninth Circuit.

Thereafter, petitioner filed a *pro se* petition for post-conviction relief in the state trial court (ER-15). In 2019, the state trial court denied that petition. App. E. In 2019, the Arizona Court of Appeals granted review of the trial court's judgment denying post-conviction relief but ultimately denied relief on appeal. App. F.

Petitioner then filed a *pro se* petition for writ of habeas corpus in federal district court for the District of Arizona (ER-16, 241). In 2022, the federal magistrate judge issued a report and recommendation that the district court deny petitioner's federal petition. App. C. In 2023, the federal district court (the Honorable Roslyn O. Silver, presiding), adopted the magistrate judge's report and recommendation and denied federal habeas relief in a final order. App. B. The district court also denied a certificate of appealability. App. B, at 8.

Petitioner, still acting *pro se*, appealed to the Ninth Circuit (ER-239). The Ninth Circuit granted a certificate of appealability, which it later expanded, and appointed undersigned counsel to represent petitioner. On May 13, 2025, the Ninth Circuit, after conducting an oral argument, affirmed the district court's judgment denying federal habeas corpus relief. App. A.

II. Statement of the Facts

A. Trial Court's Revocation of Petitioner's Right to Self-Representation

The state trial court initially permitted petitioner to waive his Sixth Amendment right to counsel at trial and invoke his constitutional right to represent himself at trial. On October 8, 2013, the day before the jury trial was scheduled to commence, and while petitioner was still proceeding *pro se*, the trial court engaged in the

following colloquy with petitioner about his responsibilities when acting as his own counsel at trial:

> THE COURT: . . . So you're going to have to handle it just like any other lawyer would, which is you make your own objections, you state your basis for it in one or two words. And if we need to, we'll have a side bar either up here at the – at the bench in a bench conference or have the jury step out. So that's what you need to do. Don't talk out of turn. Don't . . . make improper objections, and that's what you're going to need to figure out is what objections are appropriate. I will advise you at some point if you start to make improper objections and it becomes a problem.
>
> THE DEFENDANT: Okay.
>
> THE COURT: Same rules apply to Ms. Micflikier [the prosecutor], and she is well aware, and I have told attorneys, stop making objections that don't have any value. If you fail to attend the trial or refuse transport – it has happened[2] – and if you decide to do that and absent yourself from this courtroom, you waive your right to represent yourself. So you need to make sure that you get ready and get here. The way that trials work, because I do recognize the difficulty with transport to the central court building, I expect that we will try to start our trials at 11 o'clock every day. So our deputy will come get you. You need to make sure that you get ready quickly so that you get over here every day at 11 o'clock.
>
> THE DEFENDANT: As far as with the different clothes and everything?
>
> THE COURT: Yes. Your [standby] attorney will make the arrangements and has made arrangements for your clothing to be delivered.
>
> THE DEFENDANT: Okay.
>
> THE COURT: If you fail to comply with rules of procedure or substantive law – so you need to make sure that you follow the procedural rules just as I was talking about –
>
> THE DEFENDANT: Yes. . . .

(ER-151-152).

[2] The trial judge did not indicate that "it" was referring to any prior refusal of jail transport *by petitioner*. Instead, the trial judge appeared to be referring to other defendants' refusals in past cases.

Later that day, petitioner requested that he be permitted to review evidence (on compact discs) in the courtroom, along with his court-appointed investigator, before the trial was scheduled to commence the next day at 1:30 p.m. The following exchange then occurred between the state trial judge, the prosecutor (Ms. MicFlikier), petitioner's standby counsel (Mr. Allen), and petitioner:

> THE COURT: Well, I'm looking at coming back tomorrow at 1:30 for the jury [to be selected].
>
> MS. MICFLIKIER: Well, we can make them [the compact discs] available for [Mr. Allen, petitioner's then-standby counsel] to stop by my office, if he's able to do that.
>
> THE COURT: . . . So what I'd like to do is make sure Mr. Allen has them by 10:30, and then what I'll do is order that – are we okay getting the defendant over here at 10:30 tomorrow . . .? And what I'm thinking, Mr. Allen, if there's anything else that needs to be reviewed with him [i.e., petitioner], you have those disks in a computer that you can play it for him. That way, he can see if there's something that he thinks he hasn't seen tomorrow morning before we start to pick the jury.
>
> MR. ALLEN: Yes, Your Honor. . . .
>
> THE COURT: Okay. What I'm going to do is, Counsel, call [the investigator] and let her know that she needs to be here at 10:30 tomorrow morning, as well. She's court-appointed investigator. So if there's something he wants to look at as he's getting ready here, that that happens. It sounds like she has done work. She had the phone number for you for the one witness. If she has the other phone number, certainly that would be helpful. So she'll be here tomorrow morning at 10:30, as well, and I think we're in a position to be able to move forward at that point without a pretrial conference.
>
> THE DEFENDANT: Your Honor, I was going to ask – addressing on that issue, I was just going to say if there was time for me to look at this stuff because I want to try to use that as evidence. I can do that, correct?
>
> THE COURT: You're going to look at it tomorrow, and you'll have to see if it's something that even is admissible. The problem is how you make it admissible, whether you had it earlier or not. It needs to be in a form that is admissible.
>
> THE DEFENDANT: So I can go over this with Mr. Allen.

THE COURT: Yes. . . .

THE COURT: . . . You're going to have to look at [the CD discs] tomorrow, but the reality is, this is the challenge with being your [own] lawyer. You need to figure out what you are able to use and not use and what you can introduce and can't introduce under the rules. And Mr. Allen can give you some insight into that, and he'll have the tapes tomorrow so that you're going to be able to look at those and see if they are of any value in that regard and whether they may be something that can be introduced. So that will give you a chance to look at that. We'll have the jury come in as 1:30. So we'll do the first 50 folks tomorrow afternoon at 1:30 following the procedures that I've already outlined. So tomorrow morning when you come, sir, you won't have to be dressed out. Deputy, if you want to dress him out so it's ready, that's fine, but otherwise, you will be dressed out for tomorrow afternoon.

THE DEFENDANT: At 1:30?

THE COURT: At 1:30.

***

THE COURT: . . . I'm going to have the investigator here tomorrow [at 10:30 a.m.].

THE DEFENDANT: Uh-huh.

THE COURT: I'm going to have Mr. Allen here. You're going to get to listen to those CDs that you're concerned about . . . .

MS. MICFLIKIER: . . . And just so that I'm clear, tomorrow morning, we will provide a copy of the interview disks to Mr. Allen. I'll let him know when those are ready for pickup, and I will be here at 1:30, since they'll be doing their interview at 10:30; is that correct?

THE COURT: Okay.

MS. MICFLIKIER: Okay.

THE COURT: Right. Their interview [i.e., the meeting between petitioner, his investigator, and Mr. Allen] is 10:30. You don't need to be here for that. That is for them to make sure we have time set aside for that. . . . Ms. Micflikier doesn't have to be here at 10:30. That's for you, the investigator, and the defendant just for any final things that need to be done and to make sure he looks at the [witness] list.

MR. ALLEN: Yes, sir. . . .

THE COURT: What I'm going to do, Counsel, when you get here tomorrow I'm going to have you take a look at the indictment that they're going to read. We don't need to do that today because we're a couple of days away from reading it, all right?

MS. MICFLIKIER: Yes, Judge.

THE COURT: Anything else?

MR. ALLEN: No.

THE COURT: All right.

MS. MICFLIKIER: I don't believe so.

THE COURT: We will see you folks tomorrow at 1:30. Sir, I'm not going to come in tomorrow at 10:30.

THE DEFENDANT: But I'll be here?

THE COURT: You will be transported here tomorrow at 10:30.

(ER-213-237). The court then adjourned the proceedings for the day.

After petitioner did not appear in the courtroom the following day by 10:30 a.m., the trial judge ordered that sheriff's deputies bring petitioner to the courtroom. Petitioner arrived "later in the morning or shortly after noon" on October 9, 2013. App. B, at 3. Thereafter, the following exchange occurred between the trial judge and petitioner:

THE COURT: Yesterday we had a conversation about what to do in order to preserve your right to represent yourself. Do you recall that conversation?

THE DEFENDANT: It had to do with being here and being present, correct?

THE COURT: Correct.

THE DEFENDANT: To some degree, yes. May I explain myself?

THE COURT: I wanted to make sure first, do you remember that?

THE DEFENDANT: Yes.

THE COURT: Do you remember me telling you that if you refused transport, failed to appear, that that was something refused that I could use to decide to no longer represent yourself?

THE DEFENDANT: Yes.

THE COURT: Do you remember me ordering that you would be here at 10:30 this morning to review the information that you said that you needed to review?

THE DEFENDANT: Yes, I do.

THE COURT: And you failed to appear this morning, didn't you? Don't explain, just the answer is yes or no.

THE DEFENDANT: Yes, sir.

THE COURT: And my understanding is because you refused to be transported, even though I entered the order specifically to allow you to prepare for yourself here today.

THE DEFENDANT: Yes, sir.

THE COURT: Go ahead and explain.

THE DEFENDANT: . . . I have a bad back. I was getting moved from cell to cell . . . from place to place in the jail. I have some complications with my back. I've been having a complication with going and seeing a provider and/or a doctor inside a jail because they don't allow one to see me, okay. So in the process of – their process is because their provider isn't part of the jail staff, okay, so it's complete subcontractor in a sense. So they're not obligated to see me. So I let them know about two-and-a-half weeks ago, hey, I got problems with my back, it's a reoccurring injury, okay. Therefore, they provided transportation in a wheelchair for me because walking over here would be complicated for me to do. Now, I did not in any way, shape, or form try [not][3] to show up today. In the morning when I came here – since I've been transported in the morning until about 6:00, I sit in the cell, and being that my back is exerted to that kind

[3] The word "not" does not appear in the court reporter's transcript, but it is clearly apparent from the context that petitioner either intended to say "not" but inadvertently omitted it or the court reporter omitted the word "not."

of pressure, when I got to my cell and laid down, I was not able to get up this morning at 5 o'clock, and I let the guy know that. He said, I'll come back in a little bit to try to get you. I said, fine. So they understand my situation. About a half hour, 45 minutes, I was working myself up and got up finally. Once I changed position in my back, I'm able to move and function sometimes, okay, without medication. They stopped my medication about four days ago. They only put me on for about 10 days, and that's a complication with the jail. So I have no control over that.

What happened I went and alerted them, hey, man, it's about 7:00, 7:30, I have complications right now because of my medical needs . . . and I let the guy in the tower know, hey, I need to go to court, today is very, very important, and he said, well, you refused to go, and I said, check it out, the guy was supposed to come back, he never did. I have no control over that. Now, I understand how important that is. I talked to the sergeant. Usually they would address with transport to come and pick me up so I was not late or was not here. I understand that you did make the ruling for me to be here present, and the complication was because I have no control over what they're going to do once that happens.

THE COURT: Did you tell them that you would not be transported when they came for you this morning?

THE DEFENDANT: Not at all.

THE COURT: Then – so when the deputies tell me that you refused transport, are they lying?

THE DEFENDANT: I was not able to get out of bed this morning.

THE COURT: So you refused to come?

THE DEFENDANT: I couldn't get out of bed until later. I finally got up, I let them know, hey, I'm ready to go.

THE COURT: Are you telling me that in other mornings, you're not going to be able to get out of bed, too?

THE DEFENDANT: This just happened today. It's the first time I ever missed a court appearance at all.

THE COURT: My problem is it's on the day of trial. Let me finish. It's on the day after I told you if you refused transport, that was going to cost you or could cost you your right because you need to be here to represent yourself. Now, I made special arrangements so that a prosecutor, your attorney, our courtroom, and your investigator would be here with you this morning.

THE DEFENDANT: Uh-huh.

THE COURT: And whatever issue it is you were having with your back, you made a decision not to come here because of it. They didn't refuse to bring you. You refused to come with them. So I'm going to, at this point, find that you're not participating in this action the way you should, and that you refused your transport, even though I told you that if you refused a transport and failed to appear, that you would lose your right to represent yourself. And so I'm – unless you give me a very good reason in one minute – you have 60 seconds on why I should not, based on what I told you yesterday, lose your right to represent yourself, because I can't have the case just stop. I have 50 jurors downstairs.

THE DEFENDANT: Uh-huh.

THE COURT: I, again, had folks here. My courtroom was made available so that whatever else you needed to do was done, and you took action that prevented that from happening.

THE DEFENDANT: All I can say I was physically unable to get up from my bed to actually walk to do anything physically. I have no medication. I'm not prescribed it anymore. Once it ran out, I have no way of getting to a doctor for them to do a completely correct way. I have documentation that would prove that, too. If you find that I'm not competent, and you don't feel that in the future I'm going to take this seriously, and that's – then that's your decision, Judge, because all I can tell you is tell you what did happen. And you can go from there, and you can think whether I'm trying to do it on purpose because I don't want to represent myself, or if you think that I'm not taking this seriously. So the decision is up to you because I've heard what you said, and I've read what you said already in the paperwork that was brought to me as far as representing myself as far as if I were to do anything wrong or if I was to make any harsh movements or judgments in the courtroom that may obstruct or disrupt you or in the process at all. So if you feel that in the future I'm unable to represent myself because I will refuse transport in the future, then that's something you got to deal with. I do deal with the fact that if I can't physically get up and I have no control over walking or moving to this place, and when I do get up, and I say, hey, I'm ready to go to court, it doesn't work that way here. So I'm stuck. I'm sorry.

THE COURT: Well, you don't get to pick when you get up and get transported.

THE DEFENDANT: I understand that, sir.

THE COURT: That is the reality.

THE DEFENDANT: Uh-huh.

THE COURT: And you chose not to be transported when you could.

THE DEFENDANT: Okay.

THE COURT: And so, no, I'm not going to find that your explanation . . . has merit at this point.

THE DEFENDANT: That's fine.

THE COURT: So I'll have Mr. Allen take over your defense.

(ER-108-114).

At that point, the trial judge postponed the trial for two weeks to give Allen an opportunity to prepare for the trial as petitioner's actual defense counsel (as opposed to merely being petitioner's stand-by counsel) (ER-115-116). Subsequently, petitioner was represented at trial by Allen.

B. Arizona Court of Appeals Proceedings on Direct Appeal

After petitioner was convicted and sentenced to prison, he appealed to the Arizona Court of Appeals. Petitioner's court-appointed appellate counsel moved to withdraw and filed an *Anders*[4] brief (ER-75). Petitioner proceeded to file a *pro se* handwritten brief, which, among other things, contended that the trial court had erroneously revoked petitioner's right to represent himself (which the trial court had initially granted him) (ER-61). Petitioner's *pro se* brief specifically contended that the trial court had abused its discretion because petitioner had "extraordinary circumstances that restricted his movement from his bed" – i.e., his debilitating back pain – and that a corrections officer had stated that he would come back later that

[4] *Anders v. California*, 386 U.S. 738 (1967).

morning after petitioner had time to recover but never did (thus causing petitioner to miss the early morning transport to the courthouse) (ER-72).[5]

The Arizona Court of Appeals rejected petitioner's *Faretta* claim as follows:

> ¶11 Cotham contends the superior court abused its discretion by revoking his right to self-representation after he failed to appear for a morning meeting with his investigator on the first day of trial. The decision to revoke a defendant's self-representation right is reviewed for an abuse of discretion. *State v. Gomez*, 231 Ariz. 219, 222 ¶ 8, 293 P.3d 495, 498 (2012).
>
> ¶12 "The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself," *State v. Lamar*, 205 Ariz. 431, 435 ¶ 22, 72 P.3d 831, 835 (2003) (citing cases), "but only so long as the defendant 'is able and willing to abide by the rules of procedure and courtroom protocol,'" *State v. Whalen*, 192 Ariz. 103, 106, 961 P.2d 1051, 1054 (App. 1997) (citation omitted). Here, the superior court clearly informed Cotham of his responsibilities and consequences before it revoked Cotham's right to self-representation. The superior court explicitly stated that "[i]f you [Cotham] fail to attend the trial or refuse transport – it has happened – and if you decide to do that and absent yourself from this courtroom, you waive your right to represent yourself. So you need to make sure that you get ready and get here." The record shows that the next morning, Cotham refused transportation. After a delay and the superior court successfully ordering Cotham transported, the following exchange took place:
>
> > THE COURT: Do you remember me telling you that if you refused transport, failed to appear, that that was something that I could use to decide to no longer represent yourself?
> >
> > THE DEFENDANT: Yes.
> >
> > THE COURT: Do you remember me ordering that you would be here at 10:30 this morning to review the information that you said you needed to review?
> >
> > THE DEFENDANT: Yes, I do.

[5] The trial transcripts reflect that petitioner gave that same explanation to the trial court (ER-109-111), which found that it lacked "merit" (ER-114).

> THE COURT: And you failed to appear this morning, didn't you? Don't explain, just the answer is yes or no.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And my understanding is because you refused to be transported, even though I entered the order specifically to allow you to prepare for yourself here today.
>
> THE DEFENDANT: Yes, sir.
>
> Given Cotham's refusal to be transported on the first day of trial, notwithstanding the superior court's clear, unambiguous and timely warnings that Cotham would lose the right to represent himself if he did not follow the court's procedures and refused transport, the superior court did not abuse its discretion in revoking Cotham's right of self-representation. *See Whalen*, 192 Ariz. at 107-08, 961 P.2d at 1055-56.

App. D.

In assessing petitioner's *Faretta* claim, the state appellate court conspicuously did not mention petitioner's explanation that he had not acted volitionally in his failure to take the early-morning transportation to the courthouse because (1) he was immobile as the result of debilitating back pain (which was not being adequately treated by jail staff) and (2) petitioner was led to believe by a deputy that he would come back and get petitioner after his pain had sufficiently subsided and take petitioner to the courthouse in time for the 10:30 a.m. meeting.

C. Petitioner's State Post-Conviction Proceedings

Among other claims raised in his *pro se* filings in the state post-conviction proceedings, petitioner contended that his counsel on direct appeal had deprived petitioner of effective assistance by failing to raise the *Faretta*[6] issue in an adversarial brief. The state trial court rejected this claim as follows:

> Determination of what issues are appealable in view of the trial record is a matter of appellate counsel's judgment. . . . Far from being ineffective assistance, the selection and winnowing of issues on appeal is the hallmark of effective appellate advocacy. . . . Here, Appellate counsel adequately performed all professional obligations even though appellate counsel did not raise every possible issue. For example, appellate counsel had full discretion to raise or not raise the issue of [petitioner's] self-representation.

App. E, at 4.

On petitioner's petition for review of that ruling, the Arizona Court of Appeals granted review but denied relief by concluding that:

> We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find the petitioner has not established an abuse of discretion [by the trial court].

App. F, at 2.

D. Federal Habeas Corpus Proceedings

1. Federal District Court's Decision

The district court's rejection of petitioner's *Faretta* claim was as follows:

> Since *Faretta*, the Supreme Court has not provided clear guidance on the precise level of misconduct necessary to merit revocation of an individual's right to self-representation. Lower courts have interpreted *Faretta* as requiring significant misconduct. *See United States v. Flewitt*, 874 F.2d 669,

[6] *Faretta v. California*, 422 U.S. 806 (1975).

671 (9th Cir. 1989) (concluding refusal to "get ready [for] trial" was insufficient to revoke self-representation). But there is no Supreme Court authority prohibiting revocation of self-representation when a prisoner fails to appear at an ordered time and that failure prevents the trial from proceeding as scheduled.

. . . [F]ederal courts may grant relief to state prisoners only when the state courts "blunder[ed] so badly that every fairminded jurist would disagree" with their rulings. *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021). When determining whether the "blunder" is of sufficient magnitude to merit relief, federal courts can only rely on the holdings of Supreme Court cases. In the circumstances of this case, revocation of petitioner's self-representation rights was not a sufficiently severe "blunder" to merit relief. Petitioner's unexcused failure to arrive on time and prepare for the trial set to begin that day constituted refusal to comply "with basic rules of courtroom protocol and procedure." *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). The R&R's analysis will be adopted and the Sixth Amendment claim will be rejected on the merits.

App. B, at 6-7.

The district court rejected petitioner's claim of ineffective assistance by his direct appeal counsel by concluding that petitioner's *Faretta* claim lacked merit so there was no ineffectiveness on direct appeal by appellate counsel's filing an *Anders* brief. App. B, at 7 n.4.

2. Ninth Circuit's Decision

On appeal, petitioner contended that the Arizona Court of Appeals' rejection of petitioner's *Faretta* claim was both based on unreasonable factual findings (28 U.S.C. § 2254(d)(2)) and also was contrary to and an unreasonable application of this Court's clearly-established precedent (28 U.S.C. § 2254(d)(1)).

Regarding petitioner's § 2254(d)(2) argument, the Ninth Circuit held that:

The state trial court's factual determination that Cotham refused transport and thereby violated the court's order was not unreasonable. The state court had ordered Cotham to appear the next morning and

specifically warned him that his Sixth Amendment rights were conditional on following the court's orders. The next morning, Cotham was nowhere to be found, so the trial court ordered him transported to the courthouse and held a brief hearing on the matter. Cotham claimed the delay was because of untreated back pain, but the court's deputies stated that Cotham had refused to be transported that morning to the courthouse. Weighing the evidence and its own lengthy experience with Cotham as he navigated various pretrial conferences with the court, the court determined Cotham's explanation was not credible. The court also determined that, even if the excuses were valid, he had still voluntarily chosen to violate the court's order by refusing transport to the courthouse in a timely manner. Keeping in mind the "substantial deference" accorded state courts' factual findings, *Brumfield v. Cain*, 576 U.S. 305, 314 (2015), we find the state court's factual finding that Cotham voluntarily refused transport in violation of the court's order was not unreasonable.

App. A, at 2-3.

In rejecting § 2254(d)(1) argument, the Ninth Circuit held that:

[I]n rejecting the *Faretta* claim, the Arizona Court of Appeals did not use the "serious and obstructionist" standard. Instead, it stated that a defendant may only represent himself "so long as the defendant is able and willing to abide by the rules of procedure and courtroom protocol." The court then concluded that, ["]Given Cotham's refusal to be transported on the first day of trial, notwithstanding the superior court's clear, unambiguous and timely warnings that Cotham would lose the right to represent himself if he did not follow the court's procedures and refused transport, the superior court did not abuse its discretion in revoking Cotham's right of self-representation.["]

We have instructed federal courts in the Ninth Circuit to follow the "serious and obstructionist misconduct" standard strictly and have clarified that a mere "failure to comply with . . . rules" will not "result in a revocation of *pro se* status." *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989). But Arizona state courts are not bound by our decisions. Interpreting Faretta to allow revoking self-representation rights when a defendant fails to appear the morning of trial in direct defiance of a court's order is not clearly contrary to any Supreme Court decision. *Cf. McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) ("[A]n accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol.");

> *Martinez v. Ct. of Appeal of Cal.*, 528 U.S. 152, 162 (2000) ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.").

App. A, at 3-5.

The Ninth Circuit also held that:

> Nor was the state court's consideration of Cotham's pretrial conduct an unreasonable application of Supreme Court precedent. Indeed, even *Flewitt* itself acknowledged that pretrial activity could be grounds to revoke self-representation rights, provided "it affords a strong indication that the defendants will disrupt the proceedings in the courtroom." 874 F.2d at 674. Tellingly, Cotham points to no Supreme Court case whatsoever to support his position that a state court cannot use a defendant's conduct during pretrial proceedings to inform a *Faretta* analysis.

App. A, at 5.

On appeal, petitioner also contended that the Arizona Court of Appeals issued a decision that was "contrary" to this Court's decision in *Smith v. Robbins*, 528 U.S. 259 (2000), by concluding that petitioner's direct appeal counsel did not deprive petitioner of the effective assistance of counsel by filing an *Anders* brief (as opposed to raising the *Faretta* claim). The Ninth Circuit agreed that the Arizona courts issued a decision contrary to *Smith* but, on *de novo* review, concluded that petitioner could not show that he was "prejudiced" on direct appeal as a result of his counsel's deficient performance in failing to raise the *Faretta* claim. App. A, 5-6.

REASONS FOR GRANTING THE PETITION

Petitioner's case raises several important issues worthy of this Court's review. First, it affords this Court the opportunity to reaffirm that a defendant who has properly waived his right to the assistance of counsel and opted to exercise his fundamental constitutional right to represent himself at trial may only have that right

revoked upon a showing that the defendant "deliberately engage[d] in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46. Second, this case presents this Court with an excellent vehicle to provide guidance to the lower federal courts about the proper application of 28 U.S.C. § 2254(d)(1) & (2). As explained below, the Ninth Circuit significantly misapplied both § 2254(d)(1) & (2) in concluding that petitioner is not entitled to federal habeas corpus relief. And, third, petitioner's case raises an important issue about proper application of the "prejudice" prong of the ineffective-assistance-of-counsel standard as applied to an appellate attorney's deficient performance.

I.

This Court Should Grant Certiorari and Reaffirm that the Fundamental Constitutional Right to Self-Representation May Be Terminated Only if a Defendant "Deliberately Engages in Serious and Obstructionist Misconduct."

In *Faretta*, this Court held that:

> We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, *the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See Illinois v. Allen*, 397 U.S. 337 [1970]. . . . The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

422 U.S. at 834 n.46 (emphasis added); *accord Martinez v. Court of Appeal of California, Fourth District*, 528 U.S. 152, 162 (2000) ("A trial judge may also terminate self-representation . . . if necessary.") (citing footnote 46 in *Faretta*).

In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), this Court, in describing its ruling in *Faretta*, stated that: "The Court held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." *Id.* at 173. However, this Court in *McKaskle* did not hold that a *pro se* defendant's ability and willingness to abide by procedural rules was a basis *to terminate* a criminal defendant's *pro se* status, at least when a defendant's actions did not amount to deliberate, serious, and obstructionist misconduct. Instead, this Court – consistent with *Faretta*, 422 U.S. at 835-36[7] – mentioned the requirement that a defendant be willing and able to abide by procedural rules as a criterion that a trial court must consider in deciding whether to permit a defendant to *waive* the right to the assistance of counsel and thereby *invoke* the fundamental right to self-representation. *See McKaskle*, 465 U.S. at 173.*; see also United States v. Tucker*, 451 F.3d 1176, 1180 (10th Cir. 2006) ("To properly invoke the right to self-representation, a defendant must satisfy four requirements" – including that the "defendant "must be 'able and willing to abide by rules of procedure and courtroom protocol.'") (quoting, *inter alia*, *McKaskle*, 465 U.S. at 173).

[7] *See Faretta*, 422 U.S. at 835-36 (in discussing Faretta's own waiver of the right to counsel, this Court stated: "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.").

In *Faretta*, this Court made it clear that a defendant's right of self-representation may be terminated only if the trial court finds that a defendant has engaged in "serious and obstructionist misconduct." 422 U.S. at 834 n.46. In that same footnote, this Court, addressing a distinct topic, stated that:

> The right of self-representation is not a license . . . not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

422 U.S. at 834 n.46. As the Ninth Circuit itself correctly noted in a decision decades before it denied relief to petitioner, this Court's reference to the "procedural . . . law" in footnote 46 in *Faretta* specifically referred to a defendant's inability later to challenge his self-representation as "ineffective assistance of counsel" if he failed to comply with such procedural law during trial – as opposed to being a basis for *terminating* a defendant's properly-invoked right to self-representation at trial. *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989) ("There is no indication [in footnote 46] that a failure to comply with such rules can result in a revocation of *pro se* status. Instead, the footnote indicates the Court's meaning to be that a defendant cannot claim 'ineffective assistance of counsel' flowing from his failure to follow the rules of procedure or from his misinterpretation of the substantive law.").[8]

As the Ninth Circuit stated, the Arizona Court of Appeals in petitioner's case "did not use the 'serious and obstructionist' standard" in evaluating petitioner's

[8] In his opening Ninth Circuit brief, petitioner specifically cited *Flewitt* for that proposition, but the Ninth Circuit panel ignored *Flewitt*'s interpretation of footnote 46 in *Faretta*. *See* Appellant's Opening Brief, at 23-24; Appellant's Reply Brief, at 7.

Faretta claim. App. A, at 4. Instead, the Arizona Court of Appeals believed that petitioner's supposed refusal to follow the trial court's "procedural" rule – i.e., the rule that petitioner not refuse transportation to the court house by jail staff – was a sufficient basis to revoke petitioner's constitutional right to represent himself, even if it did not amount to a "deliberate" act of "serious and obstructionist misconduct." App. D, at 4-5. In reaching that conclusion, the Arizona Court of Appeals relied on its own prior precedent – *State v. Whalen*, 961 P.2d 1051 (Ariz. App. 1997) – which had mistakenly cited this Court's decision in *McKaskle* for that same proposition. *See Whalen*, 961 P.2d at 1054 ("A defendant in a state criminal trial has a constitutional right to proceed without counsel when the defendant knowingly, intelligently, and voluntarily elects to do so [under *Faretta*], but only so long as the defendant 'is able and willing to abide by the rules of procedure and courtroom protocol.' *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984)."). The court in *Whalen* further stated:

> Whalen argues that there is a narrow class of behavior, not encompassing his, which can justify termination of the right of self-representation. He contends the trial court may do so only when a defendant "deliberately engages in serious and obstructionist misconduct," relying on *Faretta*, 422 U.S. at 834 n.46 . . . . We do not find that the court's ability to terminate a defendant's right to self-representation is as circumscribed as appellant claims. . . . Although, as Whalen contends, *Faretta*, in a footnote, mentions, without elaboration, that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct," 422 U.S. at 834 n.46, it does not suggest that this is the only type of behavior that may warrant such a revocation.

Whalen, 961 P.2d at 1054-55.

The Ninth Circuit held that the Arizona Court of Appeals in petitioner's case did not render a decision that was "contrary" to the clearly-established precedent of

this Court. App. A., at 4 ("We have instructed federal courts in the Ninth Circuit to follow the 'serious and obstructionist misconduct' standard strictly and have clarified that a mere 'failure to comply with . . . [procedural] rules' will not 'result in a revocation of pro se status.' [citing *Flewitt*, *supra*]. But Arizona state courts are not bound by our decisions. Interpreting *Faretta* to allow revoking self-representation rights when a defendant fails to appear the morning of trial in direct defiance of a court's order [about complying with a procedural rule] is not clearly contrary to any Supreme Court decision.") (citing *McKaskle*, *supra*).

The Ninth Circuit erred in reaching that conclusion. *Faretta* clearly held that a defendant must "deliberately engage in serious and obstructionist misconduct" before a trial court may "terminate" a defendant's previously-invoked fundamental constitutional right of self-representation. 422 U.S. at 834 n.46. Although a defendant's inability or unwillingness to follow procedural rules is a basis not to grant the defendant's request to exercise his right to represent himself at trial, it is not itself a basis to terminate the right to self-representation, at least when it does not rise to the level of "deliberate," "serious[,] and obstructionist misconduct."

Furthermore, the Ninth Circuit erroneously deferred to the Arizona Court of Appeals under 28 U.S.C. § 2254(d)(1) in a second, independent manner. The Ninth Circuit held that the Arizona Court of Appeals' decision that petitioner's failure to follow the trial court's "procedural rule" was not contrary to *Faretta* even though petitioner's alleged rule violation did not relate to any *judicial proceeding* and, instead, was related to his scheduled *non-judicial* pretrial meeting with his

investigator and standby counsel. App. A, at 5. The Ninth Circuit erred because *Faretta*'s holding about the termination of a defendant's right to self-representation was clearly concerned with a defendant's actions *related to judicial proceedings*. *See Faretta*, 422 U.S. at 834 n.46 ("We are told that many criminal defendants representing themselves may use the courtroom for *deliberate disruption of their trials*.") (emphasis added). Petitioner's alleged rule-breaking on which the trial court terminated his right of self-representation related to petitioner's failure to accept early-morning transportation from the jail to the court house for the purpose of meeting with his investigator and standby counsel at 10:30 a.m. – three full hours before the jury selection was scheduled to commence at 1:30 p.m. The record thus fails to show that petitioner did not intend to appear for the beginning of his trial in the afternoon.

Therefore, because the Arizona Court of Appeals' decision was contrary to *Faretta* in two different ways, the Ninth Circuit should have engaged in *de novo* review – applying the "serious and obstructionist" standard (and requiring "deliberate" conduct by petitioner) – rather than affording deference to the Arizona Court of Appeals' erroneous decision. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."). This Court should vacate the Ninth Circuit's judgment and remand for that court to apply the proper legal standard in a *de novo* manner to petitioner's *Faretta* claim.

II.

This Court Should Grant Certiorari and Reverse the Ninth Circuit's Judgment in View of Its Erroneous Application of 28 U.S.C. § 2254(d)(2).

As noted above, in the Ninth Circuit, petitioner challenged the Arizona Court of Appeals' ruling on two, alternative grounds: under 28 U.S.C. § 2254(d)(1) and under § 2254(d)(2). Even assuming *arguendo* that the Arizona Court of Appeals' ruling was not "contrary" to *Faretta*'s governing legal rule under § 2254(d)(1), the Ninth Circuit nonetheless erred by applying § 2254(d)(2) to the *state trial court's purported factual finding* that petitioner had "refused" transportation from the jail to the court house. App. A, at 2 ("The *state trial court's* factual determination that Cotham refused transport and thereby violated the court's order was not unreasonable [under § 2254(d)(2).]") (emphasis added).

Petitioner's Ninth Circuit briefs correctly challenged the *Arizona Court of Appeals' decision* as being based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" within the meaning of § 2254(d)(2). *See* Appellant's Opening Brief, at 26-27, 31; Appellant's Reply Brief, at 10. Petitioner's focus on the Arizona Court of Appeals' decision was the proper focus because both § 2254(d)(1) & § 2254(d)(2) require consideration of the reasons given by "the last state court" to have rendered a decision on the merits. *See Wilson v. Sellers*, 584 U.S. 122, 125 (2018). In particular, a federal habeas court must "train its attention on the particular reasons – both legal and factual" – that were the basis for the last state court's decision. *Id.*

As petitioner contended in his Ninth Circuit briefs, the Arizona Court of Appeals' 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), because the state appellate court did not even mention petitioner's *unrebutted* reasons given for not taking the early morning transportation from the jail to the court house. The state appellate court selectively quoted from the court reporter's transcript of the trial court proceedings to make it appear as if petitioner had simply decided not to take the early morning transportation as an act of defiance; the state appellate court never mentioned the unrebutted evidence of petitioner's debilitating back pain and lack of proper medical treatment by jail staff.[9]

[9] Notably, unlike the Arizona Court of Appeals – which completely ignored the relevance of petitioner's debilitating back pain – the trial court ruled that, even if petitioner had suffered from debilitating back, petitioner's actions nevertheless justified termination of his right to self-representation. *See* ER-112 ("And *whatever issue it is you were having with your back*, you made a decision not to come here because of it. . . . [Y]ou don't get to pick when you get up and get transported. . . . And you chose not to be transported when you could. . . . And so, no, I'm not going to find that your explanation . . . has merit at this point.") (emphasis added). The trial court's ruling – which is not relevant under 28 U.S.C. § 2254(d)(2) because it was not the last state court to have ruled on petitioner's *Faretta* claim – also would warrant no deference under § 2254(d)(1) or (d)(2) because (1) a defendant with debilitating back pain that prevented him from getting out of bed cannot be said to have "deliberately" violated the court's procedural rule to take the first transport to the court house; and (2) no evidence in the record contradicted petitioner's evidence of his debilitating back pain. To the extent that the trial court made reference to unnamed deputies' supposed out-of-court, unsworn, and *ex parte* comments that petitioner had "refused" to be transported (ER-111), any "factual finding" by the trial court that petitioner acted volitionally was objectively unreasonable because it was not supported by any competent evidence and was not made after a reasonable fact-finding process (and, in any event, the trial court also did not say whether the unnamed "deputies" were even aware of petitioner's back pain). *See Nunes v. Miller*, 350 F.3d 1045, 1055 (9th Cir. 2003) (emphasis added) ("State court findings are generally presumed correct unless they . . . based on an unreasonable evidentiary foundation."), *abrogated on other grounds as stated in Ochoa v. Davis*, 50 F.4th 865, 888 (9th Cir. 2022); *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) ("[Section 2254(d)(2)] applies most readily to situations where [a habeas corpus] petitioner challenges the state court's findings based entirely on the state record. Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence [or] that the process employed by the state court is defective . . . ."), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014). The state trial judge clearly employed a defective fact-finding process that resulted in an unreasonable purported factual finding.

Furthermore, the record supports petitioner's assertion that he suffered from debilitating back pain that prevented him from being able to get out of bed in time for the initial transport – an assertion which contradicts the Arizona Court of Appeals' statement that he had "refused" to comply with the trial court's order. In addition to petitioner's unrebutted assertions about his debilitating back problems and the jail staff's contributions to his failure to make it to the 10:30 a.m. pretrial meeting (ER-109-113), the record reflects that petitioner regularly used a wheelchair to come from the jail to the courthouse (ER-102, 109).

A "refusal" is an act done willfully or otherwise in bad faith. *Cf. Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir.1990) (a court's dismissal of a civil action based on a party's refusal to comply with a court's discovery order is appropriate only when the refusal involved "willfulness or bad faith and is accompanied by a clear record of delay or contumacious conduct"). A person's inability to get out of bed because of debilitating back pain cannot reasonably be deemed a "refusal" because it is not the willful act of that person. *Cf. Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless *insists* on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.") (emphasis added); *cf. Bearden v. Georgia*, 461 U.S. 660, 668 (1983) ("[I]f the probationer has made all reasonable efforts to pay the fine

or restitution, and yet cannot do so *through no fault of his own*, it is fundamentally unfair to revoke probation automatically . . . .") (emphasis added).

Even if a trial court could terminate a defendant's right to self-representation based on the defendant's refusal to comply with procedural rules, such a termination is proper only if a defendant acts volitionally and deliberately in breaking those rules. *See Faretta*, 422 U.S. at 834 n.46 ("We are told that many criminal defendants representing themselves may use the courtroom for *deliberate* disruption of their trials. . . . Moreover, the trial judge may terminate self-representation by a defendant who *deliberately* engages in serious and obstructionist misconduct. . . . The right of self-representation is not a license *to abuse* the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.") (emphasis added). Clearly, whatever type of misconduct that warrants termination of a defendant's right to self-representation, it must be sufficiently volitional and deliberate.

For the reasons, the Ninth Circuit erred by deferring to the Arizona Court of Appeals' decision in petitioner's case because the state appellate court simply ignored petitioner's detailed reasons given for failing to take the early-morning transportation to the court house as well as other relevant evidence in the record (such as petitioner's use of a wheelchair). *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) ("Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony [relevant to the federal habeas corpus petitioner's claim raised in state court].").

In addition to acting unreasonably within the meaning of 28 U.S.C. § 2254(d)(2), the Arizona Court of Appeals should have presumed that petitioner did not relinquish his "fundamental right"[10] to represent himself at trial (and that immobility due to his back pain, rather than his volition, prevented him from taking the early morning transportation) – unless the record contained clear evidence to the contrary (which the record did not contain). *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (noting "courts indulge every reasonable presumption against waiver of fundamental constitutional rights") (citation and internal quotation marks omitted); *see also State v. Rickman*, 715 P.2d 752, 756 (Ariz. 1986) ("[O]nce a defendant has chosen to proceed *pro se*, he is exercising a constitutional right. Courts therefore are to indulge every reasonable presumption against waiver of fundamental constitutional rights.") (citing *Johnson*).

Because the Ninth Circuit erroneously applied § 2254(d)(1) & (d)(2), this Court should vacate the Ninth Circuit's judgment and remand for the lower court to engage in *de novo* review of petitioner's *Faretta* claim.

III.

This Court Should Grant Certiorari and Reverse the Ninth Circuit's Judgment Because Its Decision that Petitioner's Direct Appeal Counsel's *Anders* Brief Did Not "Prejudice" Petitioner Was Contrary to *Strickland v. Washington*, 466 U.S. 668 (1984), and *Smith v. Robbins*, 528 U.S. 259 (2000).

As discussed above, on petitioner's direct appeal, his court-appointed counsel filed an *Anders* brief and, thus, did not raise what clearly is a non-frivolous (indeed,

[10] *Faretta*, 422 U.S. at 817; *United States v. Berry*, 565 F.3d 385, 389-90 (7th Cir. 2009).

meritorious) *Faretta* claim. The Arizona Court of Appeals denied relief on the *Faretta* claim based on petitioner's short *pro se* handwritten brief. On state post-conviction review, the trial court erroneously concluded that petitioner's direct appeal counsel did not perform deficiently under *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel supposedly made a strategic decision about what issues to raise on appeal (when counsel in fact raised *no* issues). Appendix E, at 4-5 ("Far from being ineffective assistance, the selection and winnowing of issues on appeal is the hallmark of effective appellate advocacy. . . . Here, [a]ppellate counsel adequately performed all professional obligations even though appellate counsel did not raise every possible issue."); *see also* App. F, at 2 (Arizona Court of Appeals' decision on post-conviction review, concluding that the state trial court did not abuse its discretion in rejecting appellant's ineffective-assistance claim).

The Ninth Circuit correctly concluded that the Arizona courts unreasonably applied this Court's clearly-established precedent by holding that petitioner's direct appeal counsel did not perform "deficiently" by filing an *Anders* brief (and, thus, by failing to raise the *Faretta* claim). App. A, at 5 (citing *Smith v. Robbins*, 528 U.S. 259 (2000)). Yet the Ninth Circuit erred in its further conclusion, on *de novo* review, that petitioner failed to show "prejudice" resulting from direct appeal counsel's filing an *Anders* brief despite the clearly nonfrivolous nature of petitioner's *Faretta* claim. App. A, at 6 ("Reviewing *de novo*, we hold that Cotham would not have succeeded on *Robbins*'s second prong. Binding Arizona precedent specifically held that a defendant's refusal to follow procedural rules and orders need not rise to the level of 'serious

and obstructionist misconduct' to trigger revocation of self-representation rights. *State v. Whalen*, 961 P.2d 1051, 1054 (Ariz. Ct. App. 1997). Thus, even armed with counsel, Cotham's *Faretta* claim was doomed to fail in the Arizona Court of Appeals.").

The Ninth Circuit's holding – that a properly-filed merits brief by an attorney on petitioner's direct appeal that raised the *Faretta* claim in an adversarial manner would have been "doomed to fail" in view of the Arizona Court of Appeals' prior decision in *Whalen*, *supra* – failed to apply the proper "prejudice" analysis. This Court has long held that, in deciding whether a defendant was prejudiced by his counsel's deficient performance, the proper inquiry is an objective one that "proceed[s] on the assumption that the [court] is reasonably, conscientiously, and impartially applying the standards that govern the decision" at issue. *Strickland*, 466 U.S. at 695; *see also id.* at 694 ("In making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the [court] acted according to law.").

A defendant must show only a "reasonable probability" – which is less than by a preponderance of the evidence – that the result of the proceeding would have been different but for counsel's deficient performance. *Id.* at 694. The *Strickland*/*Robbins* prejudice inquiry is a "counterfactual" one – that is, a court must ask how the direct appeal would have gone if counsel had performed competently. *See United States v. Dominguez*, 998 F.3d 1094, 1120 (10th Cir. 2021) ("*Strickland*'s prejudice analysis involves a 'counterfactual' inquiry that hinges on counsel's alleged in-

effective representation – that is, the inquiry turns on whether, but for such ineffective representation, there is a reasonable probability that the outcome of the proceeding would have been different."); *Lopez v. Greiner*, 323 F. Supp.2d 456, 478 (S.D.N.Y. 2004) (noting "the Court must determine whether the result of Lopez's criminal proceedings would have differed 'but for counsel's unprofessional errors," *Strickland*, 466 U.S. at 694," which was deemed a "counterfactual analysis").

If petitioner's direct appeal counsel had argued that the record fails to show that petitioner acted *deliberately* (and in bad faith) when he initially was unable to get out of bed because of his debilitating back pain – and, thus, that the record fails to overcome the presumption that petitioner did not wish to waive his fundamental right to represent himself[11] – there is at least a "reasonable probability" that the Arizona Court of Appeals would have reversed petitioner's convictions, notwithstanding its 1997 decision in *Whalen, supra. Cf. State v. Underwood*, 527 P.3d 891, 894 (Ariz. App. 2023) (reversing trial court's termination of defendant's right to self-representation after concluding that "defendant's conduct at the pretrial conference did not demonstrate a *contemptuous* refusal to comply with court orders") (emphasis added); *State v. Cook*, No. 1 CA-CR 09-0801, 2011 WL 3211052, at *4 (Ariz. App. July 28, 2011) ("We conclude that on this record, the court erred in terminating Cook's self-

[11] *See State v. Rickman*, 715 P.2d 752, 756 (Ariz. 1986) ("[O]nce a defendant has chosen to proceed *pro se*, he is exercising a constitutional right. Courts therefore are to indulge every reasonable presumption against waiver of fundamental constitutional rights.") (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

representation. Although the court 'may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct,' *Faretta*, 422 U.S. at 834 n.46, Cook's repeated requests for continuances did not constitute the type of *deliberate* misconduct that would allow the court to terminate his right to represent himself.") (emphasis added). As discussed above, the Arizona Court of Appeals in petitioner's case did not address whether the evidence of petitioner's debilitating back pain, the jail staff's failure to treat his back pain, and the deputy's unfulfilled promise to come back later in the morning to transport petitioner to the courthouse precluded a finding that petitioner had acted "deliberately" (or "contemptuously"). Indeed, the word "deliberate" (or "deliberately") appears nowhere in the Arizona Court of Appeals' opinion on petitioner's direct appeal. *See* App. D.

Regardless of whether a defendant engages in "serious and obstructionist misconduct" or some lesser form of procedural rule-breaking, this Court's precedent requires the defendant's actions to be "deliberate" before a trial court may terminate the defendant's fundamental right to self-representation. *See Faretta*, 422 U.S. at 834 n.46. That argument was never made to the Arizona Court of Appeals by petitioner's direct appeal counsel (because he filed an *Anders* brief). There is a reasonable probability that, if that argument had been made, the state appellate court would have reversed petitioner's conviction.

Therefore, the Ninth Circuit's "prejudice" analysis was erroneous. This Court should reverse that court's judgment. At the very least, this Court should vacate the

Ninth Circuit's judgment and remand with instructions to reconsider whether petitioner was "prejudiced" after engaging in a proper legal analysis.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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