NO. __________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JOSEPH ALFONSO DURAN,

Petitioner-Appellant,

vs.

JEFFREY BEARD, Warden,

Respondent-Appellee.

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

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QUESTIONS PRESENTED FOR REVIEW

Has a defendant received ineffective assistance of counsel when defense counsel tells him his maximum sentencing exposure is twenty years in custody when his true exposure is life, thereby failing to communicate the benefit of a favorable plea bargain and causing the defendant to reject the bargain?

Is an indigent defendant's waiver of counsel both knowing and voluntary when, at the time of his waiver, he is only advised of the charged maximum of twenty years and then when the charges are enhanced to a Life maximum by alleging a "third strike," he is neither offered counsel nor told that he can request counsel?

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

The Petitioner-Appellant, Joseph Alfonso Duran, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The memorandum decision of a panel of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of Mr. Duran's petition for writ of habeas corpus was entered on October 17, 2017 (attached here as "Appendix A").[1]

JURISDICTION

This Court has Jurisdiction under 28 U.S.C. § 1254 (1) to review the above cited decision.

[1] Citations to the Ninth Circuit's October 17, 2017, opinion is cited here as "Mem. Op.", followed by the specific page number referenced. Citations to the excerpts of record below are to "ER" and are preceded the year n which the excerpts were filed and followed by the specific page number referenced.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person. . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

U.S. Const. Amend. VI:

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

U.S. Const. Amend. XIV (section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

FEDERAL STATUTES INVOLVED IN THIS CASE

Title 28 U.S.C. §§ 2254(1) and (d):

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(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.

STATEMENT OF THE CASE

A. State Trial Proceedings

Joseph Alfonso Duran was arrested on January 12, 2004, under suspicion he had stolen a vehicle by threat of force, and was thereafter charged in the Superior

Court of the County of San Diego, California, with car-jacking, robbery, vehicle theft and receipt of stolen property. On May 28, 2004, the state filed an Information that contained several enhancements, including two "prison priors". While the Information was titled, "Three Strikes Case", it actually alleged only one "strike" allegation.

Although Mr. Duran was initially represented by appointed counsel, he requested to represent himself during an October 28, 2004, "*Faretta* hearing", and signed a form that stated his maximum sentencing exposure was twenty years. The judge granted Mr. Duran's request to proceed *pro se*.

According to the transcript of the October 28 *Faretta* hearing, the state's pre-trial plea offer was a "stip 15", i.e. a stipulated sentence of fifteen years. [2015 ER 167-68.] Believing he could receive no more than twenty years, Mr. Duran rejected the fifteen-year offer. Defense counsel never mentioned (let alone discussed) the possibility that the state could add a second strike and thereby increase Mr. Duran's maximum exposure to life in prison. Notably, the likelihood of a second strike was clear because the initial Information alleged Mr. Duran's conviction for theft of a firearm – which became the second strike allegation – as a prison prior.

Three months later, and only ten days before trial, the state amended the Information to specifically allege a second strike, thereby increasing Mr. Duran's exposure to life in prison. Despite two hearings in which Mr. Duran appeared confused regarding the case proceedings, the trial court never offered Mr. Duran counsel or inquired as to whether he still wished to proceed *pro se*. On January 24, 2004, Mr. Duran proceeded to trial and was convicted on counts one through three (car-jacking, robbery and vehicle theft). He then waived jury trial on the alleged "strike priors" and admitted the strikes. The trial court sentenced Mr. Duran to a total of forty years to life. Following direct appeal the sentence was reduced to thirty-five years to life.

B. <u>Habeas Proceedings</u>

On February 26, 2008, Mr. Duran filed a habeas petition before the California Supreme Court. There, in relevant part to this petition, he argued that (1) his waiver of counsel was invalid under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975), because he was incorrectly told his maximum exposure was twenty years when the maximum exposure was actually life in prison, and (2) defense counsel was ineffective for failing to inform Mr. Duran of the true maximum penalties he faced before waiving counsel. The California Supreme

Court summarily denied the petition.

On March 6, 2008, Mr. Duran filed a petition for habeas corpus in the United States District Court for the Southern District of California, again arguing his waiver of counsel was not made knowingly and voluntarily because he was incorrectly told his maximum exposure was twenty years. Mr. Duran also argued that defense counsel committed IAC. At the time of that petition, the state and courts believed the charged maximum at the time of Mr. Duran's waiver of counsel was life in prison because the Information was titled, "Three Strikes Case." Accordingly, the state's argument was that *Faretta* does not require the defendant be accurately told the charged maximum before waiving counsel. The district court adopted the magistrate judge's recommendation to grant the petition on the *Faretta* ground "on the basis that Petitioner did not knowingly and voluntarily waive his right to counsel under the Sixth Amendment and *Faretta*."

On appeal, the state realized that at the time of Mr. Duran's waiver, there was only one strike alleged, thereby making the charged maximum sentence twenty-years (under the one-strike charge), as stated on the waiver form. As a result, the state changed its initial position and argued the twenty-year maximum was accurate at the time of waiver and that no federal law requires the defendant be advised of the possible maximum sentencing exposure (here, life) as opposed to only the *charged* maximum. The Ninth Circuit vacated the grant of the petition and remanded to the district court with instructions to reconsider and specifically review whether during the January 14 arraignment on the amended charges, Mr. Duran was advised of (1) the increase of the maximum punishment from twenty years to life he faced upon conviction, and (2) his Sixth Amendment right to counsel.

On remand to the district court, Mr. Duran filed additional briefing regarding the IAC issue as it applied to Mr. Duran's rejection of the "stip-15" plea offer. Mr. Duran argued that counsel's representation fell below an objective standard of reasonable competence because counsel (1) failed to investigate the nature of the second "prison prior", and (2) failed to advise Mr. Duran of his potential maximum exposure, life. Those failures prejudiced Mr. Duran because they materially affected his ability to accurately evaluate the terms of the "stip-15" plea offer, i.e., he would have accepted the deal if he knew he was facing life in prison.

As to the *Faretta* issue, the magistrate judge found that

> (1) Duran was advised of the maximum penalty he faced at the October 28, 2004 *Faretta* hearing; (2) the trial court informed Petitioner he was facing at least 25 years to life at his January 14, 2005 arraignment on the amended

> information; (3) the trial court did not explicitly advise Duran of his Sixth Amendment right to counsel at the January 14, 2005 arraignment; and (4) the court urged Duran to consult with his defense attorney who was representing him in another criminal case.

The magistrate judge reversed his previous recommendation to grant the petition and recommended the petition be denied because the state court's finding the "state court's denial of Duran's claim that his October 28, 2004 *Faretta* waiver was invalid was neither contrary to, nor an unreasonable application of, clearly established law." [2015 ER 452.]

As to the IAC issue, the magistrate judge found that "Petitioner's subclaim of ineffective assistance of trial counsel related to plea bargaining was not presented in Petitioner's Amended Petition and therefore not subject to consideration on remand from the Ninth Circuit Court of Appeals. Even assuming *arguendo* that the claim is properly before this Court and technically exhausted, it is procedurally defaulted. It should be DISMISSED." [2015 ER 471.] The district court adopted the magistrate judge's recommendations, denied the petition, and issued a certificate of appealability.

Mr. Duran appealed the denial of the petition to the Ninth Circuit, arguing that *Von Moltke*, *Faretta*, et al, established a rule that required a defendant's waiver of counsel to be not only knowing and intelligent, but also voluntary. Because Mr. Duran was neither (1) apprised of his true exposure at the time of his initial waiver of counsel, nor (2) re-informed of his right to counsel or in any way told he could again have counsel after the charges were amended to solidify a potential life sentence, he was never both intelligently and voluntarily proceeding *pro se* and the state court's denial of the habeas petition was contrary to, and an unreasonable application of, clearly-established federal law.

Mr. Duran also argued the state court's decision regarding the IAC issue was contrary to, and an unreasonable application of, clearly-established federal law. Although the state court claimed no clearly-established federal law requires counsel to investigate a defendant's possible sentencing exposure, Mr. Duran cited several Supreme Court cases establishing the general rule that counsel must make reasonable investigation and inform a defendant to the extent needed to make an intelligent decision to accept or reject a plea offer. Mr. Duran also argued the state court erred with respect to the *Strickland* prejudice prong. Finally, Mr. Duran also argued the IAC/plea negotiations argument was not procedurally barred because it was sufficiently pled in both his first state and federal habeas petitions.

On October 17, 2017, the Ninth Circuit filed a memorandum opinion denying Mr. Duran's petition for habeas relief. *See* Appendix A. As to the *Faretta* issue, the court stated Mr. Duran could not establish relief under 28 U.S.C § 2254 because "[n]o Supreme Court case requires that the court advise a petitioner of the penalties associated with potential future amended charges." The court also stated that "no clearly established federal law required the trial court to reaffirm petitioner's waiver of counsel after the charges against him were amended to include a second strike." and a maximum sentence of life. [Mem. Op. at 2.] As to the IAC issue, the court held that "[t]he California Supreme Court found that this claim was procedurally barred because of California's timeliness rule, which is an independent and adequate state ground for denying review here." [*Id.*]

This petition follows.

REASONS FOR GRANTING THE WRIT

A. Regarding Ineffective Assistance of Counsel

In *Missouri v. Frye*, 132 S. Ct. 1399 (2012), this Court applied the *Strickland* standard for ineffective assistance to the plea negotiation context, noting that "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Id.* at 1407; *see also Lafler v. Cooper*,132 S. Ct. 1376, 1384 (2012) (counsel committed IAC by advising defendant to reject favorable plea bargain). The Court specifically noted that ninety-seven percent of federal convictions are the result of plea bargains. *Id.* at 1407 (stating also that our judicial system "is for the most part a system of pleas, not a system of trials").

Here, Mr. Duran's defense counsel violated the standards of competence set forth by *Strickland, Frye*, and *Lafler*, when he wholly failed to investigate whether Mr. Duran's previous conviction for theft of a firearm could constitute a second "strike" and thereby cause his maximum sentencing exposure to go from twenty years to life in prison. Because counsel never conducted that investigation, Mr. Duran was affirmatively led to believe the most he would receive after proceeding to trial was twenty years. That belief caused Mr. Duran to reject the state's "stip-15" offer because there was only a five-year difference between that offer and the twenty year maximum. Had Mr. Duran known that he was actually facing life, there was a reasonable likelihood that he would have accepted the fifteen-year deal. After all, there is a dramatic difference between gambling on five years and gambling on life.

Under these facts, the state court's determination that defense counsel was not ineffective and that there was no prejudice, was contrary to and an unreasonable application of clearly established federal law. Moreover, the state court's (and the federal courts') determination that the IAC/plea negotiations claim was procedurally barred was based on the erroneous determination that Mr. Duran (as a *pro se* defendant) had not ***sufficiently*** pled the issue in his first habeas petition.

Therefore, this Court should grant certiorari to address whether, under the facts of this case, the lower courts decided an important federal question in a way that conflicts with relevant decisions of this Court.

B. Regarding Waiver of Counsel

In *Von Moltke v. Gillies*, 332 U.S. 708 (1948), this Court explained that the Sixth Amendment demands a defendant's waiver of counsel "be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, *and all other facts essential to a broad understanding of the whole matter*." *Id.* at 724 (emphasis added).

Since *Von Moltke*, this Court has expanded, rather than narrowed, the Sixth Amendment guarantee to counsel, and to the corollary right to be adequately apprised of the dangers of proceeding to trial without counsel. Therefore, in *Faretta v. California*, 422 U.S. 806 (1975), this Court held that

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Id. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U. S. 269, 279 (1942)). Cases subsequent to *Faretta* have explained the general rule that in order for a waiver of counsel to be constitutionally valid, trial courts must consider a "range of case-specific factors" (*Iowa v. Tovar*, 541 U.S. 77, 88 (2004)) to determine whether, "upon the particular facts and circumstances surrounding that case" (*Edwards v. Arizona*, 451 US 477, 482 (1981)), the defendant is waiving counsel with his "eyes open". The inquiry into whether the defendant comprehends all of the possible consequences of proceeding *pro se* is not easily accomplished, as such possible consequences must be "rigorously conveyed". *See Tovar*, 541 U.S. at 89 (quoting *Patterson v. Illinois*, 487 U.S. 285, 299 (1988)). Thus, this Court has set forth a general rule that before a conviction following a defendant's waiver of counsel may be found constitutionally permissible, the defendant must be made aware of all salient aspects of the case and of all potential negative consequences of proceeding *pro se*. As with any waiver of a constitutional right, the waiver of the right to counsel must be voluntary. *See Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (holding that "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right . . . .").

Here, at two stages of the criminal proceedings, there was a violation of the rule established by the Sixth Amendment and by this Court's precedent that the defendant's waiver be knowing and voluntary and the trial court rigorously apprise the defendant of *all* facts and circumstances of the case before it can be said that the defendant's eyes are open and his/her waiver of counsel is constitutionally valid. The first instance occurred during Mr. Duran's initial waiver, where he waived counsel while under the impression that he was facing a maximum of twenty years, when in reality he was facing a potential maximum of life in prison. The second instance occurred when the state upped the ante under the California "Three Strikes" law, solidifying the potential life in prison exposure but the trial court did not make *any* inquiry into whether Mr. Duran still wished to proceed without counsel. In the end, the court sentenced Mr. Duran to thirty-five years to life in prison.

Under these facts, the state court's determination the Mr. Duran did not need to know his maximum sentencing exposure before waiving counsel was contrary to and an unreasonable application of clearly established federal law. Moreover, the state court and federal courts below adopted an unreasonably narrow interpretation of the *Faretta* rule by holding that no Supreme Court cases specifically require trial courts to inform the defendant about possible sentencing exposure before permitting an initial or continued waiver of counsel.

Given the unquestioned magnitude of the Sixth Amendment right to counsel and this Court's repeated holdings that defendants can only validly waive that right if they are accurately informed as to all circumstances potentially affecting that waiver, this case presents a question of particular constitutional importance. Therefore, this Court should grant certiorari to address whether, under the facts of this case, the lower courts decided an important federal question contrary to the decisions of this Court or applied these cases unreasonably.

STATEMENT OF FACTS RELEVANT TO THIS PETITION

In January 2004, Mr. Duran went to a car dealership where the car salesman accompanied him on a test drive of a Jeep. During that drive, Mr. Duran told the salesman to get out of the car and drove off, leaving the salesman to make his way back to the dealership on foot. The following day, Mr. Duran was arrested while driving the stolen Jeep. The salesman identified Mr. Duran as the car-jacker from a photographic line-up and at trial.

The portions of the pre-trial record relevant to this petition are primarily taken from the colloquies between Mr. Duran and the trial court regarding (1) the waiver of counsel; (2) the penalties Mr. Duran faced, and (3) the confusion Mr. Duran exhibited throughout his attempts to represent himself *pro se*.

The first such colloquy took place during the October 24, 2004, hearing in which Mr. Duran sought to proceed without counsel. There, the trial court's comments focused almost exclusively on the fact that Mr. Duran did not have the same legal education and training as the prosecutor and that he would therefore be facing an uphill battle. The meat of the exchange (which comprised only two pages of transcript) was the following:

COURT: You have an absolute right to represent yourself, but just because you have the right to do something doesn't make it a good idea.

	because you have the right to do something doesn't make it a good idea.
DEFENDANT:	I just think, your honor, that I could get the right information that I need that I haven't been able to get from several attorneys with all due respect to Mr. Plummer.
COURT:	Do you understand the person who will be the opposing attorney is a prosecutor who went to law school, went to college, and has been trained and has done other cases before while you haven't done any of those?
DEFENDANT:	Yes, Your Honor.
COURT:	Don't you think that's kind of unfair to you?
DEFENDANT:	I think it's unfair that I have not had a proper defense. That's not what I feel I'm getting.
COURT:	The problem is it's like stepping into a ring with a heavy weight fighter. Do you think you have a chance?
DEFENDANT:	Rocky won.

At no time during this brief exchange did the court ever advise Mr. Duran of any specific facts about the case, including the complexity of the charges, potential enhancements, or the strength of the evidence [2/] Most conspicuously, although the waiver form Mr. Duran signed noted that he faced a maximum of twenty years

[2] In fact, the colloquy transcript reveals the trial court's palpable dislike for Mr. Duran, as the judge was openly hostile to the concept that Mr. Duran could adequately represent himself or that Mr. Duran should be able to argue for additional time to prepare his defense. For instance, when Mr. Duran asked how much time he would receive to prepare, the court bristled, "I'm not negotiating that. You have to sign the form. I'm going to relieve Mr. Plummer [defense counsel], but either act as an attorney of record or if you don't sign the form, Mr. Plummer is in."

based on the charges as they existed at that moment, the court never explained – or even mentioned – the very real possibility that the state could add the second strike allegation in the future and that Mr. Duran would then be facing a maximum of life in prison.

Moreover, at the time he waived counsel, Mr. Duran had been informed by his attorney that he was facing, at most, twenty years if convicted. That advice was based on counsel's failure to realize that Mr. Duran's previous conviction for theft of a firearm constituted a 'strike" prior, which the state could add as a second strike, creating a maximum of life in prison. Aside from the effect that this misadvice had on Mr. Duran's waiver of counsel, it also caused him to reject a stipulated fifteen year plea offer because he reasoned that a conviction after trial would at most result in only five more years than the offer.

Three months later, and only ten days before trial, the state amended the Information to include a second strike allegation, which dramatically increased Mr. Duran's maximum sentencing exposure from twenty years to life in prison. While Mr. Duran was informed at that hearing that his exposure had increased to life in prison, the transcript reveals that Mr. Duran was confused about exactly what was transpiring. Speaking about Mr. Duran's previous conviction for grand theft of a firearm, the following exchange took place:

Court:	So the Penal Code section from the time that you got that conviction is grand theft, but its renumbered as 487(D).
Defendant:	Now renumbered as 487(D).
Court:	It is now renumbered is what he's saying.
Defendant:	So because the law changed after my conviction my charge --
Court:	The law didn't change. They just changed the number.
Defendant:	So it was 487. Then it was not a strike. Now, it's D., it's a strike.
Court:	No. That's not what he's saying. It's that they just changed the numbers, the code section numbers. That was the only thing that changed.
Defendant:	My plea is still not guilty, your honor.

Despite the facts, however, that (1) the seriousness of Mr. Duran's decision to proceed *pro se* and to proceed to trial had dramatically increased, and (2) Mr. Duran was obviously confused about the procedural posture of the additional strike allegation, the court did not advise Mr. Duran he could revoke his waiver and request counsel, obtain a renewed waiver of counsel from Mr. Duran, or ensure in any manner that Mr. Duran was still comfortable with proceeding *pro se*. In fact, the court never even mentioned Mr. Duran's right to counsel during the exchange.

Mr. Duran again raised his confusion during an exchange on January 25, 2004, after the state requested a continuance of trial due to witness problems. There, Mr. Duran stated, "Like I've stated before, I don't know the law, and I feel that I'm being taken advantage of, bamboozled. I'm not accusing the court of being a party to that." Rather than offer appointment of counsel or re-advise Mr. Duran of his right to counsel, the court simply reminded Mr. Duran that he had previously waived his right to counsel and that he was told it would be hard.

In the end, Mr. Duran represented himself and was convicted at trial. Instead of the twenty-year maximum he was told he could receive at the time he waived counsel, he was ultimately sentenced to thirty-five years to life in prison.

ARGUMENT

I.

BECAUSE THE STATE COURT'S DECISION REGARDING INEFFECTIVE ASSISTANCE WAS CONTRARY TO AND AN UNREASONABLE APPLICATION OF FEDERAL LAW, THIS COURT SHOULD GRANT CERTIORARI.

A. There is Clearly-Established Federal Law on this Issue.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set forth the general standard for assessing claims of ineffective assistance, holding that a petitioner must show (1) that "counsel's representation fell below an objective standard of reasonableness", and that (2) absent counsel's errors, there is a reasonable probability the result would have been different. *Id.* at 688, 694.

The state court in this case held there was no case law requiring defense counsel investigate the nature of prior convictions, stating,

> The duty to investigate and charge prior convictions is typically the responsibility of the prosecution. Petitioner cites no authority, and the court is aware of none, that requires defense counsel to independently investigate and inform clients of the potential consequences of enhancements based upon prior convictions that are either unknown or uncharged by the prosecution.

This Court, however, has long recognized that *Strickland* applies to the plea bargaining stage. For example, in *Missouri v. Frye*, the Court applied the *Strickland* analysis to the plea agreement context, holding that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." 132 S.Ct. at 1408.

In *Lafler v. Cooper*,132 S. Ct. 1376 (2012), the companion case to *Frye*, this Court confronted a situation in which counsel's ineffectiveness caused the rejection of a plea offer. Specifically, counsel told the defendant to reject a plea offer because he was certain the prosecution would not be able to convict based on the facts of the case. *Id.* at 1383. In deciding in the defendant's favor, this Court again adapted the *Strickland* standard to the plea negotiation stage, and held that

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

132 S.Ct. at 1384; *see also Padilla v. Kentucky* 559 U.S. 356, 130 S.Ct. 1473 (2010) (holding that defendant is entitled to effective assistance of counsel in deciding whether to plead guilty, including competent advice regarding immigration consequences).[3/] The *Lafler* Court also set forth the prejudice standard to be applied when misadvice leads the defendant to reject a plea agreement, holding,

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[3] There is abundant circuit case law applying *Strickland* to the plea negotiation context and holding that counsel rendered IAC by failing to advise the defendant of the correct sentencing exposure. *See, e.g., Riggs v. Fairman* 399 F.3d 1179, 1183 (defendant told his maximum exposure was nine years but was sentenced to 25 to life) (9th Cir. 2005); *Holloway v. Terhune* 97 F.App'x 80, 82 (9th Cir. 2004) (defendant turned down a plea offer not knowing he was subject to a life sentence under Three Strikes law); *Jones v. Calderon* 116 F.App'x 868, 870 (9th Cir. 2004) (defense counsel failed to investigate and inform defendant that he had two previous strikes); *Villegas v. Yearwood* 131 Fed.Appx. 93 (9th Cir. 2005) (counsel rendered IAC by failing to inform defendant of mandatory life sentence before rejecting plea deal and proceeding to trial); *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir. 1981) (defendant told his maximum exposure was five years was sentenced to fifty years).

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

132 S.Ct. at 1387.

Under *Strickland*, *Lafler* and *Frye,* it is without question that clearly-established federal law requires defense counsel communicate the terms of, and circumstances surrounding, a plea offer, to the extent that the defendant can make an intelligent decision regarding that offer.

B. The State Court's Decision was Contrary to and an Unreasonable Application of the Federal Law Regarding the Application of *Strickland* in the Plea Negotiation Context.

Here, under *Strickland*, *Frye*, and *Lafler*, Mr. Duran received ineffective assistance because counsel misadvised him as to perhaps the most important piece of information he needed to make an intelligent decision regarding the fifteen year plea offer, i.e., his maximum potential exposure. It is clear from the October 28 *Farretta* hearing that the state had offered the fifteen year deal but Mr. Duran rejected it. It is also clear from Mr. Duran's declarations attached to his habeas filings that (1) counsel told him he would at most be facing twenty years if convicted[4], and Mr. Duran used that twenty-year maximum as the basis for his decision to reject the offer. Given his counsel's advice, Mr. Duran made the calculation that if convicted he would at most be facing only five years more than the amount being offered. With this understanding, Mr. Duran decided to "roll the dice" at trial.

Had counsel properly investigated Mr. Duran's prior conviction for theft of a firearm, however, he would have discovered that this conviction also qualified as a strike and could be alleged as the second strike against Mr. Duran at any time – resulting in a life maximum. Because counsel never conducted that investigation, however, he never advised Mr. Duran as to the true maximum he could be facing after trial. Had Mr. Duran known that a rejection of the plea offer could result in him spending the rest of his life in prison, rather than an only an additional five years, there is a reasonable probability he would have accepted the deal. Instead, Mr. Duran rejected the offer and ultimately ended up with a thirty-five years to life sentence. These facts establish that counsel's failure to investigate and properly advise Mr. Duran regarding a crucial aspect of the plea offer demonstrate that

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[4] The twenty-year advice is also evidenced from the contents of the waiver of counsel form Mr. Duran signed.

counsel's representation fell below an objective standard of reasonableness under *Strickland*. The state court's finding to the contrary was contrary to and an unreasonable application of clearly-established federal law.

Moreover, Mr. Duran met the *Strickland* / *Lafler* standard for prejudice because the loss of the plea opportunity "led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *See Lafler*, 132 S.Ct. at 1387. Mr. Duran established that prejudice because (1) there was a reasonably likelihood he would have accepted the deal given competent advice, and (2) by rejecting the offer he received a second strike allegation and a sentence of thirty-five years to life. The likelihood that Mr. Duran would have accepted the deal is supported not only by his declarations but by the facts that (1) a life sentence is *dramatically* different than a twenty-year sentence, and (2) Mr. Duran engaged in additional plea negotiations with the state before the amended Information was filed. Were Mr. Duran wholly opposed to accepting a deal, he would not have continued to negotiate with the government after waiving counsel. Because Mr. Duran also established prejudice under *Strickland* and *Lafler*, the state court's finding to the contrary was an contrary to and an unreasonable application of clearly-established federal law.

C. **<u>The IAC Claim as it Related to Plea Negotiations was Adequately Raised in Mr. Duran's First State and Federal Petitions and was thus not Procedurally Barred.</u>**

In his initial state and federal habeas petitions, Mr. Duran argued he had received IAC because defense counsel had inaccurately told him he was only facing a twenty-year maximum. Although the state court addressed Mr. Duran's IAC/plea negotiations claim on the merits, it also found the claim was procedurally barred because Mr. Duran had not specifically argued that counsel's misadvisal caused him to reject the "stip 15" plea offer. Under this Court's precedent, however, the lower courts adopted an unreasonably strict standard for deciding whether Mr. Duran sufficiently raised the issue.

At the time he submitted his initial state petition, Mr. Duran was proceeding *pro se*, which this Court has held should result in a more liberal interpretation of a defendant's arguments. *See Haines v. Kerner*, 404 US 519, 520-21 (1972) ("We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "). Moreover, in his initial state petition, Mr. Duran (1) cited to the controlling case law, *Strickland*; (2) discussed the fact that he had received IAC because counsel misadvised him as to the true possible sentencing exposure, and (3) attached a transcript of the October 28 hearing at which the "stip 15" plea offer was discussed. Under this Court's precedent, Mr. Duran sufficiently pled the IAC/Plea negotiations issue sufficiently to avoid a procedural bar. Accordingly, the state court and federal courts' holding that the argument is procedurally barred, is incorrect and cannot be used as a basis to shield analysis on the merits.

II.

BECAUSE THE STATE COURT'S DECISION REGARDING THE WAIVER OF COUNSEL WAS CONTRARY TO AND AN UNREASONABLE APPLICATION OF FEDERAL LAW, THIS COURT SHOULD GRANT CERTIORARI.

A. There is Clearly-Established Federal Law on this Issue.

A defendant's Sixth Amendment right to assistance of counsel is one of the defining pillars of the United States criminal justice system. As this Court declared in *Adams v. United States ex rel. McCann*, 317 US 269, 279 (1942), "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice."

In light of the importance of providing assistance of counsel to the extent that it satisfies the "public conscience", this Court's criminal law jurisprudence is well-stocked with holdings that require substantial protections for defendants who voice a desire to relinquish their right to counsel. As far back as 1938, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), this Court stressed that while a defendant may waive his/her right to counsel, trial courts must take great pains to ensure such a waiver takes into account the unique circumstances of the case. There, this Court held,

> This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Id. at 465. Since then, the Court has expanded, rather than narrowed, the scope of the inquiry trial courts are required to conduct before satisfying themselves that a defendant knows what s/he is doing by waiving counsel. Therefore, in *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court held that

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent

> relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

Id. at 482 (quoting *Johnson* 304 U.S. at 464).

Therefore, by 1975, when this Court decided *Faretta v. California*, 422 U.S. 806 (1975), it was of little surprise when the Court held that before a valid waiver can be entered, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Id.* at 835 (quoting *Adams*, 317 U.S. at 279). Though *Faretta* is often cited as a seminal case in the waiver of counsel context, a complete review of this Court's cases reveal that *Faretta* is far from the first case to emphasize the courts' duty to ensure a defendant's waiver of counsel is knowing, intelligent, and voluntary.

It is also not the first (or last) case to hold that the waiver inquiry must not simply focus on the abilities of the defendant, but must involve *all* of the unique circumstances of the specific case. In *Iowa v. Tovar*, 541 U.S. 77, 88 (2004), this Court specified that "[t]he information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Tovar* further held that a defendant seeking to proceed *pro se* must be "warned specifically ***of the hazards ahead.***" *Id.* at 88-89 (emphasis added). Given the totality of this Court's precedent regarding the Sixth Amendment right to counsel and the protections against invalid waiver of that right, there is a clearly-established federal law that the trial court must rigorously apprise the defendant of *all* facts and circumstances of the case before it can be said that the defendant's eyes are open and his/her waiver of counsel is constitutionally valid.

B. <u>In Upholding the State's Decision as Reasonable, the Federal Courts Below Adopted an Unreasonably Narrow Interpretation of the Clearly-Established Federal Law on this Issue.</u>

On appeal below, the government's foremost argument against habeas relief was that it was precluded by AEDPA deference. More specifically, the government argued that because the Supreme Court had not found a *Faretta* violation where (1) the defendant was not informed of the possibility that the prosecution could add additional charges or enhancements at the time of waiver, or (2) the trial court failed to obtain a second waiver of counsel where the charges were amended to increase the sentencing exposure, the state court's decision could not have run counter to clearly-established federal law. According to this rationale, Mr. Duran would have to identify a Supreme Court case that was identical in every respect to the facts of his case (and where the case was resolved in the defendant's favor) in order to have any hope of obtaining habeas relief.

Although the Ninth Circuit's memorandum opinion is brief, it is sufficient to establish the court adopted the government's narrow interpretation of this Court's precedent regarding the right to counsel and the protections involving waiver of that right, as discussed above. As to the initial waiver hearing, the court held, "No Supreme Court case requires that the court advise a petitioner of the penalties associated with potential future amended charges." Mem. Op. at 2. As to the arraignment hearing where the maximum exposure was increased to life in prison, the court held, "[N]o clearly established federal law required the trial court to reaffirm petitioner's waiver of counsel after the charges against him were amended to include a second strike." *Id.* Thus, the Ninth Circuit adopted the government's view that AEDPA requires Mr. Duran show there is a case that mirrors his own, even though the precedent on this issue is not nearly so narrow.

Despite the Ninth Circuit's interpretation here, AEDPA and § 2254 do not require Mr. Duran to identify a Supreme Court case precisely "on point" with the facts of his own case in order to establish a clearly-established federal law. As this Court has held, "[T]he lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law." *Marshall v. Rodgers,* 133 S.Ct. 1446, 1449 (2013).

A general principle announced by this Court functions as federal law under AEDPA and does not require a specific set of narrow facts. Indeed, this Court has stated as much in its own cases. *See, e.g., Panetti v Quarterman*, 127 S.Ct. 2842 (2007). In *Panetti*, this Court explained, "That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' " *Id.* at 2858 (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (KENNEDY, J., concurring)). This Court continued, "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced" (*Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166 (2003)), and concluded that "[t]he statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.").

Here, the state court (and subsequently the district court and Ninth Circuit) interpreted AEDPA to mean Mr. Duran must first identify a Supreme Court case that involved (1) a trial court's failure to advise of the potential maximum sentencing exposure before accepting a waiver of counsel, or (2) the failure to mention the right to counsel after the sentencing exposure dramatically increased. That interpretation is neither required by AEDPA nor by this Court's interpretation of AEDPA. Therefore, the Ninth Circuit's opinion rested on an erroneous interpretation of the law by improperly narrowing the inquiry under § 2254. Under the proper interpretation, the question is whether the trial court rigorously apprised Mr. Duran of *all* facts and circumstances of the case before permitting the initial and continued waiver of counsel. [5]

C. <u>**The State Court's Decision was Contrary to and an Unreasonable Application of the Federal Law Regarding the Sixth Amendment Right to Counsel and the Protections Surrounding the Waiver of that Right.**</u>

When the federal law, as discussed above, is properly identified, it is manifest that the state court's denial of Mr. Duran's habeas petition was contrary to

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[5] Notably, the Ninth Circuit ended its inquiry at the "clearly-established federal law" step and did not proceed to analyze whether the state court's denial of the petition would have been contrary to or an unreasonable application of the law if it were clearly established.

and an unreasonable application of that law. At the moment of Mr. Duran's initial waiver of counsel, he was giving up a crucial constitutional right with the understanding that he would, at most, be facing a twenty-year sentence. He was not informed in any manner by the court, defense counsel, or the prosecutor, that the state could easily enhance the potential maximum sentence by alleging one of his "prison priors" as a "strike prior". That omission was particularly striking given that Mr. Duran's conviction for grand theft (which was ultimately used as the second strike) was not a secret. It is also not a secret that prosecutors often withhold additional charges or enhancements as a bargaining chip during plea negotiations, and typically file such enhancements only if the defendant proceeds toward trial.

It is illogical to conclude that a defendant has validly waived his right to counsel with his "eyes open" where he is not even aware of what sentence he may ultimately be facing if convicted at trial. It is similarly illogical to conclude that a defendant has been "warned specifically of the hazards ahead" or of "the particular facts and circumstances surrounding" the case without any mention of the possibility of a life sentence. Mr. Duran has never argued in his habeas proceedings that the Court should devise a bright-line rule requiring all defendants be advised of the possible maximum. Rather, he simply argues that under the facts of his case, this Court's precedent required that he at least be made aware of the specter of a life sentence.

Moreover, even assuming, *arguendo*, that Mr. Duran's initial waiver of counsel was constitutionally valid, *Von Moltke*, *Faretta*, et al, required that he be – at a minimum –advised of his right to counsel when the potential maximum sentence went from twenty years to life in prison. Mr. Duran has never argued that the trial court was required to conduct a full-blown *Faretta* hearing during the January 14 arraignment hearing, nor that this Court establish a bright-line rule requiring such a hearing under these facts. Rather, Mr. Duran simply argues that when taking into consideration the general standard established by *Faretta*, and the cases preceding and following *Faretta*, Mr. Duran's Sixth Amendment rights were violated when the trial court not only failed to even *mention* Mr. Duran's right to counsel but suggested he could not reconsider his decision to proceed *pro se* by noting he was told representing himself would be hard during the initial waiver. This violation is made even clearer by the fact that Mr. Duran twice expressed confusion regarding the proceedings after his sentencing exposure was increased.

It bears repeating that the sentence disparity in this case was not trivial or even moderate in degree. Mr. Duran went from a definite cap of twenty years to facing the very real possibility of spending the entirety of his life in prison. This Court's precedent regarding IAC in plea negotiations reveals that constitutional errors involving the possibility or instance of dramatically increased sentences must be viewed with particular care. *See, e.g., Lafler v. Cooper*, 132 S. Ct. 1376 (2012). Here, there would be only one more dramatic difference than one that creates the possibility of life in prison (i.e., the death penalty).

Because the Ninth Circuit unreasonably narrowed the federal law regarding the right to counsel and the protections surrounding the waiver of that right, and because the state court's denial of Mr. Duran's habeas petition was contrary to and an unreasonable application of that law, this Court should grant certiorari to address this issue of unquestioned constitutional importance.

CONCLUSION

This Court should grant certiorari to address whether, under the facts of this case, the lower courts decided an important federal question in a way that is contrary to or constitutes an unreasonable application of the decisions of this Court. Mr. Duran prays the writ be issued.

Respectfully submitted,

Respectfully submitted,

Date: January 13, 2018

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