No. 12-382

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARSHALL, WARDEN, PETITIONER

VS.

OTIS LEE RODGERS, RESPONDENT.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is post-verdict, pre-appeal motion for a new trial, filed under California law, where the judge sits as "13th juror" and may order a new trial, inter alia, if the judge considers the verdict contrary to the law or to the weight of the evidence, a "critical stage," such that a defendant who conducted his trial through verdict pro se, must, under the Sixth Amendment, be permitted to request the appointment of counsel, which may not be arbitrarily denied, simply because the defendant "made his bed and must now lie it"?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the Central District of California were respondent OTIS LEE RODGERS (petitioner below) and petitioner JOHN MARSHALL, WARDEN (respondent below). In the state courts, the parties were respondent (then, the defendant-appellant) and the People of the State of California (then, the plaintiff and plaintiff-appellee).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondent, OTIS LEE RODGERS, respectfully prays that the petition for a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case be denied.

OPINIONS BELOW

The opinions of the courts below are reproduced as appendices to the Petition for Writ of Certiorari, to which the Court is respectfully referred. Appendix A to this response sets out the judgment of the district court denying the petition. Appendix B to this response sets out respondent's Notice of Appeal to the judgment of the district Court. Appendix C sets out the order of the California Supreme Court dismissing review of the judgment of the Court of Appeal.

JURISDICTION

The Court of Appeals for the Ninth Circuit filed an opinion reversing the judgment of the district court and granting a conditional writ of habeas corpus on May 17, 2012. (Cert. Pet. App. A.) Petitioner's petition for rehearing/rehearing en banc was denied on June 28, 2012. (Cert. Pet. App. K.) The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY AUTHORITIES INVOLVED

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 defence."

28 U.S.C. § 2254 (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

Respondent objects to the Warden's Statement of the Case because it is argumentative.

Respondent believes that the facts and procedural history of this case are correctly laid out by the Report and Recommendation filed by the magistrate-judge in this case :

"On June 27, 2003, a Riverside County Superior Court jury found Petitioner Otis Lee Rodgers guilty of assault with a firearm (Cal. Penal Code § 245(a)(2)), possession of a firearm by a felon (Cal. Penal Code § 12021(a)(1)), possession of ammunition by a felon (Cal. Penal Code § 245(a)(2)), and making criminal threats (Cal. Penal Code § 422). (Lodgment 1, Clerk's Transcript ("CT") at 491-94). The jury also found true the sentencing

enhancement allegations that 1) Petitioner personally used a firearm (Cal. Penal Code §§ 12022.5(a)(1), 1192.7(c)(8)) while committing the assault and making the criminal threats, and 2) that Petitioner was on bail pending trial for another felony offense when he committed the crime of being a felon in possession of ammunition (Cal. Penal Code § 12022.1). (CT at 495-97). Petitioner admitted that he had suffered two prior felony convictions, that he had been sentenced to prison on each of them, and that within five years of release from custody committed another felony offense (Cal. Penal Code § 667.5(b)). (CT at 84, 406; Lodgment 2, Reporter's Transcript, RT at 87-88, 244-45). Petitioner was sentenced to 16 years in prison. (CT at 526-28).

. . . .

Petitioner appealed the judgment to the California Court of Appeal. (Lodgment 3). On August 18, 2005, the California Court of Appeal affirmed Petitioner's convictions and sentence. (Lodgment 6). Petitioner filed a petition for review with the California Supreme Court. (Lodgment 7). The petition was dismissed on July 11, 2007. (Lodgment 26). Meanwhile, while the petition for review was pending in the California Supreme Court, Petitioner filed petitions for writs of habeas corpus with the California Court of Appeal and the California Supreme Court challenging the search of his vehicle. (Lodgments 9, 11 (citing, 547 U.S. 103 (2006)). These petitions were denied. (Lodgments 10, 15). Although Petitioner was represented by appellate counsel, Petitioner also filed numerous *pro per* motions, post-conviction pleadings and writ applications in the California Court of Appeal

and the California Supreme Court, including several motions for substitution of appellate counsel. (*See* Lodgments 25, 29, 36, 31, 33, 38; Supp. Lodgments 2, 3, 4, 5). These claims were rejected by the appellate courts. (Lodgments 27, 30, 32, 35, 36, 39; Supp. Lodgment 1, 6). Petitioner filed a Petition for Writ of Habeas Corpus with this Court on July 24, 2008, raising [] 21 claims for relief." (Cert. Pet. App. D at 33-34, 36-37.) (footnotes omitted.)

The district court adopted the report and recommendation of the magistrate-judge and entered judgment denying the petition. (Cert. Pet. App. B.; the judgment of the district court is attached to this Response as Appendix A.)

PRESERVATION OF THE ISSUE

The issue of whether respondent was entitled by the Sixth Amendment to the appointment of counsel to assist him in the preparation of a motion for a new trial was presented to the California Court of Appeal (*see* Appellant's Opening Brief in the California Court of Appeal, appended hereto as Appendix D). The Sixth Amendment claim was presented to the California Supreme Court, which dismissed review on July 11, 2007. (Response, App. C.)

The Sixth Amendment issue was raised and considered in the district court, which denied the claim. (Cert. Pet. App. D at 57-68.)

The same issue was raised and found meritorious in the Ninth Circuit. (Cert. Pet. App. A.)

REASONS FOR DENYING THE WRIT

The question presented by petitioner is inapt. *Faretta v. California*, 422 U.S. 806 (1975) simply holds that the Sixth Amendment forbids forcing a lawyer on an unwilling defendant and that, as a consequence, the defendant, if found competent to do so, may waive the right to counsel and proceed pro se. *Id.* at 836.[1]

Petitioner's real quarrel is with the Ninth Circuit's holding that the post-verdict, pre-appeal stage of a California trial, where the defendant has an opportunity to file a new trial motion, is a "critical stage" of the proceedings, to which the right to counsel attaches and, further, that a defendant who has represented himself at trial has a Sixth Amendment right to ask that counsel be appointed, a request not to be denied absent a showing of bad faith. One must look beyond *Faretta* to determine whether the Ninth Circuit's holding was grounded in this Court's clearly established precedent.

Before turning to that question, however, it should be noted that the Ninth Circuit has hardly "gone rogue" in this case. In *United States v. Levato,* 540 F.3d 200 (3rd Cir. 2008), cert. denied, 129 S. Ct. 2790 (2009) the court stated what is probably the consensus of the Courts of Appeals, including the Ninth Circuit: "To the contrary we find wide agreement that, once waived, the Sixth Amendment right to counsel is no longer absolute. *See e.g.*

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[1] As will be discussed later in this pleading, The only mention that *Faretta* makes of terminating pro se status isthat the right to represent oneself may be terminated by the court for disruptive behavior. *Id.* at 834, n.46. It would seem somewhat anomalous if the court could do what the defendant, who holds the *FarettaI* right personally , could not – terminate self-representation under certain circumstances.

United States v. Solina, 733 F.2d 1208, 1211-12 (7th Cir.), *cert. denied,* 469 U.S. 1039, 105 S. Ct. 519, 83 L. Ed. 2d 408 (1984); ***Menefield v. Borg,*** 881 F.2d 696, 700 (9th Cir. 1989); *Brown v. Wainwright,* 665 F.2d 607, 611 (5th Cir. 1982); *United States v. Merchant,* 992 F.2d 1091, 1095 (10th Cir. 1993); *United States v. West,* 877 F.2d 281, 286 (4th Cir. 1989)." *Id.* at 207. For this reason, the court held that "we will not find a Sixth Amendment violation in a trial court's denial of a defendant's post-waiver request for counsel unless the district court's good cause determination was clearly erroneous, or the district court made no inquiry into the reason for the defendant's request." *Id.* at 207-208. (Citation and footnote omitted.) However, the court added, "We agree with the Court of Appeals of the Ninth Circuit that a constitutional violation occurs where a trial court's denial of a request for counsel is based purely in a punitive notion. *Menefield v. Borg,* 881 F.2d 696, 700 (9th Cir. 1989) ("A trial court cannot insist that a defendant continue representing himself out of some punitive notion that the defendant, having made his bed, should be compelled to lie in it.")." *Levato*, 540 F.3d at 208 n.5.

California, with some nuances, is in accord with the consensus of the federal courts. As the California Court of Appeal for the First Appellate District explained in *People v. Nguae,* 229 Cal. App. 3d 1115, 280 Cal. Rptr. 757 (Cal. App. 1991), the differences between California law and Ninth Circuit law, as expressed in the then recent case of *Menefield v. Borg*, 881 F.2d 696 (1989) are, as a practical matter, more illusory than real.

"Under California authority, a judge confronted with a defendant's request to

withdraw a *Faretta* waiver during trial should consider, among other factors, '(1) [the] defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." *People v. Ngaue,* 229 Cal.App.3d at 1124-1125, 280 Cal.Rptr. at 762-763 (internal quotation marks omitted.)

The same criteria are applicable at the post-trial, new trial motion stage. As the *Ngaue* court explained, "Application of these principles to the present case suggests counsel should have been appointed unless appellant was seeking representation for an improper purpose such as delay: Since he had already been convicted, granting appellant's request would cause less disruption than that considered acceptable in *Hill, Cruz* and *Elliott* (see *Menefield v. Borg, supra,* 881 F.2d at p. 701); the fact that appellant had made numerous requests for substitution before trial would not necessarily indicate that his request after "the unsettling experience of trial" (*Menefield v. Borg, supra,* 881 F.2d at p. 701) was for an improper motive, and appellant clearly could not effectively represent himself at this stage of the proceeding. [¶] Indeed, as a practical matter, consideration of the factors identified in *Hill, Cruz*, and *Elliott* in the posttrial context yields a result very similar to that reached in *Menefield*. While the California test is discretionary, *Menefield* describes why most of the

factors considered in the California cases would militate in favor of appointment at this stage. On the other hand, even under *Menefield*, the trial court retains discretion to deny a request for posttrial assistance of counsel where the request is made for a bad faith purpose, and factors such as the defendant's history in substitution of attorneys or purpose to delay further proceedings may bear on the determination whether such a bad faith purpose exists. (See 881 F.2d at pp. 700-701.) Rather than imposing upon the prosecution the burden of demonstrating an improper motive for the request for counsel, however, we view the defendant's motive in requesting to withdraw a *Faretta* waiver as one of the factors for the trial court to consider in exercising its discretion; clearly, a finding that the request was made for an improper purpose such as delay would militate against granting the request." *Id.*, 229 Cal.App.3d at 1125, 280 Cal.Rptr. at 763-764.

Indeed, the California Court of Appeal in the present case did not question the premise that respondent could withdraw his *Faretta* waiver. It simply held that respondent had not provided a good reason for such a move. (Cert. Pet. App. E, at 130: "From our review of the record it is clear that if there were legitimate reasons for the change from self-representation to counsel-representation, defendant was abundantly capable of expressing one. He nevertheless failed to do so. Because the court was not given any reason to grant the defendant's motion, we cannot find that the court abused its discretion in declining to do so." (Citation omitted.) (Cert.Pet. App. D at 130.)

Nor, if one looks closely, did the Court of Appeal reject *Menefield*'s holding that there

is a Sixth Amendment right to seek re-appointment of counsel at what *Menefield* considered to be a critical stage of the proceedings, and that request must be honored under proper circumstances. Rather, the Court of Appeal took issue with *Menefield*'s placing the burden of justifying a denial of appointment on the prosecution. (Cert. Pet. App. D at 130.)[2] The Court of Appeal went on to distinguish *Menefield* because in that case "the accused expressed his reasons seeking the appointment of counsel." (Cert. Pet. App. E at 131.) Under these circumstances, it is at least doubtful whether the Court of Appeal's opinion – the last reasoned state court opinion, *see Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), actually addressed respondent's Sixth Amendment claim, despite its head note, "Sixth Amendment Right to Counsel Regarding Motion for New Trial" (Cert. Pet. App. E at 126.) (Cf. *Chadwick v. Janecka,* 312 F.3d 597, 605-06 (3d Cir. 2001) (Alito, J.) (where state court fails to address properly presented constitutional claim, AEDPA deference does not apply).

There is one final observation before turning to this Court's precedents. It is this:

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[2] It is somewhat misleading, if literally true, to say, as petitioner does, that *Ngaue* rejected *Menefield*.. "*Menefield* in effect holds that a defendant should be allowed to withdraw a *Faretta* waiver in circumstances substantially identical to those presented here. Though decisions of the federal courts are entitled to great weight, we hesitate to follow *Menefield* because in a related context our state Supreme Court has allowed trial courts greater discretion than have the federal courts." *Ngaue*, 229 Cal.App.3d at 1124, 280 Cal.Rptr. at 762. In addition, it should be noted that *United States v. Tajeddini*, 945 F.2d 458, 469-470 (1st Cir. 1991), cited by the California Court of Appeal in this case, is not on point. In that case a defendant who waived appeal sought appointed counsel to assist him in presenting new evidence by way of a motion for a new trial. However, the "new trial motion" at issue was one normally brought after the appeals process was completed and was thus a form of collateral attack on the judgment, for which the Sixth Amendment does not require appointment of counsel. The First Circuit saw no reason to apply a different rule simply because the defendant had waived appeal and sought to attack the judgment collaterally by bringing new evidence.

Petitioner has not suggested to this Court that the Ninth Circuit reached the wrong result in holding that a pro se defendant is forever chained to his *Faretta* waiver, which was basically the ruling of the California trial court, although not mentioned in the Court of Appeals opinion: "You are not going to get counsel, Mr. Rodgers. You made this election to represent yourself. Everybody tried to talk you out of it at the time. You insisted you wanted to do it. You are doing it. We aren't going to substitute in an attorney at this time." (2RT 387; appended hereto as Appendix E.) Later, when respondent expressed confusion about aspects of the California Penal Code, the judge became almost taunting: "Mr. Rodgers, if you had a lawyer, he could explain it to you." (2RT 395; App. E (also not mentioned by the California Court of Appeal.) Rather, petitioner insists that, whether the trial judge (and by extension the Court of Appeal) acted arbitrarily or not, there was no Sixth Amendment violation, because the matter was entrusted to the trial judge's discretion. (Petitioner mischaracterizes the Ninth Circuit's holding as "no discretion rule." Rather, the Ninth Circuit held that "trial courts cannot deny a defendant's timely request for representation without a sufficient reason." (Cert. Pet. App. A at 26.))

The framework for deciding the question of whether the Ninth Circuit's opinion is supported by this Court's cases is provided by this Court's opinion in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). "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." *Carey v. Musladin,*

549 U.S. 70, 81, 127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (Kennedy, J., concurring in judgment). 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." *Lockyer v. Andrade, 538 U.S. 63, 76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).* The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, *e.g., Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389* (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).* These principles guide a reviewing court that is faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling."

The first issue, whether the post-trial, pre-appeal motion for a new trial under California law is a critical stage requiring the assistance of counsel requires "an examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973). Put another way, "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134. *See also United States v. Wade,* 388 U.S 218, 226-227 (1967) ("It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at

any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Footnote omitted.))

There can be no serious doubt that, under these standards, the California new trial motion constitutes a critical stage. There are various grounds for a new trial motion under California law, Cal. Pen. Code, § 1181[3] However, the one most relevant to this discusion is

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[3] Section 1181 provides: When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: 1. When the trial has been had in his absence except in cases where the trial may lawfully proceed in his absence; 2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property; 3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; 4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors; 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury; 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed; 7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed; 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.

9. When the right to a phonographic report has not been waived, and when it is not possible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law

(continued...)

§ 1181(6): "The court extends no evidentiary deference in ruling on a section 1181(6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a "13th juror." If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is contrary to [the] ... evidence. In doing so, the judge acts as a 13th juror who is a "holdout" for acquittal. Thus, the grant of a section 1181(6).motion is the equivalent of a mistrial caused by a hung jury." *Porter v. Superior Court*, 47 Cal.4th 125, 133, 211 P.3d 606, 610 (Cal. 2009). There can be no doubt that the new trial motion is a "critical stage" for purposes of the constitutional right to the appointment of counsel.

The next question – and the principal one raised by this case – is whether a *Faretta* waiver, once uttered, constitutes an extinction of the right to counsel until the trial ends in a judgment of conviction or acquittal . As earlier indicated, *Faretta* itself strongly suggests that the answer is no. A judge can terminate *pro se* representation. *Faretta*, 422 U.S. at 834 n.46. Moreover, even over the defendant's objection, a court can " appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to

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[3](...continued)
or by rule because of the death or disability of a reporter who participated as a stenographic reporter at the trial or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the trial court or a judge, thereof, or the reviewing court shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding.

represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.* A Sixth Amendment rule which would enable a defendant who has executed a *Faretta* waiver to obtain counsel by bad behavior but not by a timely request made in good faith would not seem to make much sense.

As this Court has recently re-iterated: "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an 'obvious truth' the idea that any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. Effective trial counsel preserves claims to be considered on appeal, see, e.g., Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, Edwards v. Carpenter, 529 U. S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)." *Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2011). Also, as this Court stated in *United States v. Cronic*, 466 U.S. 648, 659 (1984): "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." It is hard to see how this principle can be applied unless the waiver of one constitutional right can be withdrawn to secure another. Indeed, this Court has stated quite clearly that even if a constitutional right is waived, that waiver can be withdrawn. *Stevens v. Marks,* 383 U.S. 234, 243-244 (1966).

Respondent is not claiming that there is an absolute Sixth Amendment right to the

appointment of counsel for a previously pro se litigant. That is not what the Ninth Circuit held and that is not, apparently what respondent is opposing. Any right, even the right to counsel, can be lost. *See Ungar v. Sarafite,* 376 U.S. 575-590 (1964). The Ninth Circuit's holding recognized this when it held that a request for counsel to assist in a California new trial motion can only be denied for sufficient reasons. This holding was well grounded in this Court's precedents: it established federal law, as defined by this Court, that a criminal defendant has a right to counsel at every critical stage of the proceedings and that he can withdraw a previous waiver of constitutional rights in order to request the assistance of counsel. The principles enunciated by this Court, as set forth above, compel this conclusion and bring the Ninth Circuit's holding in this case comfortably within the folds of AEDPA.

CONCLUSION

Petitioner respectfully requests that the Court deny the petition.

Respectfully submitted,

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No. 12-382

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARSHALL, WARDEN,

Petitioner,

v.

OTIS LEE RODGERS,

Respondent.

On Petition for Certiorari
to the Court of Appeals for the Ninth Circuit

RESPONDENT OTIS LEE RODGERS'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (RULE 39 – CJA APPOINTMENT)

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RESPONDENT OTIS LEE RODGERS'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS (RULE 39 – CJA APPOINTMENT)

Respondent Otis Lee Rodgers, pursuant to Supreme Court Rule 39 § 1, moves for leave to proceed *in forma pauperis*. Mr. Rodgers is incarcerated in the Riverside County Jail, Riverside, California. The undersigned was appointed by the Court of Appeals for the Ninth Circuit to represent Mr. Rodgers pursuant to 18 U.S.C. § 3006A(a)(2)(B).

Respectfully submitted,

John Ward
Attorney for Respondent Otis Lee Rodgers

November , 2012

CERTIFICATE OF SERVICE

I, John Ward, declare under penalty of perjury that I have mailed a copy of the attached motion to proceed in forma pauperis to David Delgado-Rucci, Deputy Attorney General, 110 West "A" Street, San Diego, California 92101, first-class postage prepaid on November , 2012.

_____
John Ward