No. 10-241

In the Supreme Court of the United States

NATHAN A. CHAPMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's trial counsel rendered ineffective assistance of counsel by declining the district court's offer of a mistrial without prejudice, even though petitioner allegedly expressed a desire to accept the offer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 593 F.3d 365. A prior opinion of the court of appeals is not published in the Federal Reporter but is available at 209 Fed. Appx. 253.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2010. A petition for rehearing was denied on March 30, 2010 (Pet. App. 16a). On June 21, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 27, 2010. The petition was filed on August 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of 11 counts of wire fraud, in violation of 18 U.S.C. 1343; three counts of investment advisory fraud, in violation of 15 U.S.C. 80b-6 and 80b-17; six counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of making false statements on tax returns, in violation of 26 U.S.C. 7206(1); and one count of making false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. 1001. The court of appeals affirmed petitioner's convictions but remanded for resentencing in light of *United States* v. *Booker*, 543 U.S. 220 (2005). 209 Fed. Appx. 253 (4th Cir. 2006). This Court denied petitioner's petition for a writ of certiorari. 550 U.S. 949 (2007). Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his conviction. The district court denied the motion (Pet. App. 18a-23a), and the court of appeals affirmed (*id.* at 1a-15a).

1. Petitioner founded several financial services companies and was their chief executive officer. The companies provided him with "business development funds" that he actually spent on luxury vehicles, mistresses, meals, and other personal items rather than on business matters. Pet. App. 2a; see Gov't C.A. Br. 8-12.

For this scheme and related conduct, a grand jury in the District of Maryland charged petitioner with wire fraud, investment advisory fraud, mail fraud, false statements, and money laundering. Petitioner pleaded not guilty and the case proceeded to a jury trial. Petitioner's lead counsel at trial was William R. Martin, a well-regarded and experienced criminal defense attorney. See Gov't C.A. Br. 18-19 (discussing Martin's background, including his lengthy prior service as a federal

prosecutor, his high-profile representation of public officials and professional athletes, and his recognition in legal and other publications as one of the nation's best defense attorneys).

At trial, the district court allowed the government to introduce, as proof of petitioner's motive to defraud, evidence that petitioner borrowed nearly $1.3 million from his companies and never repaid the loans. Pet. App. 2a; see Gov't C.A. Br. 20. At the conclusion of the trial—which required 34 days of proceedings spanning seven calendar weeks (see *id.* at 4; C.A. App. 41)—the government commented during its rebuttal closing argument that petitioner's failure to repay the loans was relevant "in assessing [his] sense of his fiduciary obligations, in assessing his ability to live within his means." Gov't C.A. Br. 23; see Pet. App. 2a-3a. After the government had concluded its argument and the jury had left the courtroom, Marc Rothenberg, co-counsel for petitioner, contended that the court's decision to admit evidence about the loans for motive purposes did not permit the government's reference to "a breach of fiduciary duty." *Id.* at 31a. The court held the following colloquy with Rothenberg and Martin:

> THE COURT: I tell you what. You might be right. Draft a curative instruction. I'll be glad to give it to the jury. Can you ask them to come in?
>
> MR. ROTHENBERG: And, just for the record, we are moving for a mistrial based upon that.
>
> THE COURT: You want one?
>
> MR. ROTHENBERG: With prejudice.

> THE COURT: Nope. I'll give you a mistrial without one if you want one. I give mistrials regularly. If you want a mistrial, you'll get one.
>
> MR. ROTHENBERG: We're just preserving the record, and wanting one with prejudice, Your Honor.
>
> THE COURT: No. If you want a mistrial, don't play with me on that, because I'll give you a mistrial. I have nothing to do but be here again. If you want to try this at your client's expense again—do you want a mistrial?
>
> MR. MARTIN: No, Your Honor.
>
> THE COURT: I'm sorry. You want a mistrial?
>
> MR. MARTIN: Only with prejudice. If your Honor would consider with prejudice—
>
> THE COURT: No, no, no. I'll give you one without prejudice if you want.
>
> MR. MARTIN: No, Your Honor.
>
> THE COURT: Okay. Granting it would be worth it just to see the look on Mr. Gray's [the lead prosecutor's] face.
>
> (Laughter.)

Id. at 31a-32a.

The district court thereafter read the jury a curative instruction concerning the government's reference to the loans. See Gov't C.A. Br. 29. The court "remind[ed]" the jury that petitioner was "not on trial" for the loans and that "the references were only for proof of another matter." *Ibid.* "[S]pecifically," the court stated, "the Government contends that this is evidence that

he needed money, and therefore, engaged in criminal conduct because of that need for money." *Ibid*.

The jury found petitioner guilty on 23 counts, but it acquitted him of money laundering and various fraud and false-statement counts, and it was unable to reach a verdict on two counts of making false statements on tax returns. Gov't C.A. Br. 4; see Pet. App. 18a n.1. In post-trial motions, the defense argued that the government's reference to the loans in its closing argument warranted acquittal or a new trial on the 23 counts of conviction. Gov't C.A. Br. 30. The district court denied the motions, stating: "I find no conduct on the part of the Government that deprived [petitioner] of a fair trial." *Ibid*. The court sentenced petitioner to 90 months of imprisonment, to be followed by three years of supervised release. *Id*. at 4.

On direct review, in an unpublished decision, the court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing in light of *Booker*, *supra*, which had been decided after petitioner was sentenced. 209 Fed. Appx. 253. This Court denied petitioner's petition for a writ of certiorari. 550 U.S. 949 (2007). On remand, the district court sentenced petitioner to 63 months of imprisonment, to be followed by three years of supervised release. See Gov't C.A. Br. 5; Pet. App. 19a n.2.

2. Pursuant to 28 U.S.C. 2255, petitioner collaterally attacked his convictions, claiming Martin had rendered ineffective assistance by declining the offer of a mistrial without prejudice.[1] Pet. App. 24a-27a; see *id*. at 21a-

[1] Petitioner also claimed counsel had been ineffective in failing to properly preserve an objection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the government's peremptory strikes of African-American jurors. C.A. App. 9-12. The district court rejected that claim (Pet. App.

23a. In support of that claim, petitioner alleged that when the district court "asked Mr. Martin if he wanted a mistrial," "I immediately told * * * Mr. Martin, Yes!, indicating my instructions to accept the mistrial." *Id.* at 24a. Petitioner also attached an affidavit of Nathaniel Jones, an attorney of petitioner's who was not at counsel table during the trial. *Id.* at 28a. According to Jones, when the court asked Martin if the defense wanted a mistrial, Jones "was seated in the first row of the gallery behind the defense table, approximately eighteen feet away," and he "heard [petitioner] say 'yes' to * * * Martin." *Ibid.* Jones further asserted that "[t]here was no discussion between [petitioner] and his defense counsel regarding whether or not to accept [the] offer to grant a mistrial." *Ibid.*

The government opposed petitioner's Section 2255 motion. C.A. App. 23-44. First, the government pointed out that the laughter and the district court's comments at trial—including "I give mistrials regularly," "I have nothing to do but be here again" for another seven-week trial, and "[g]ranting it would be worth it just to see the look on [the prosecutor's] face"—suggested the court had not been serious about granting a mistrial. *Id.* at 33-34 & n.3. Further supporting that view, the government noted, were the court's apparent incredulity when asking defense counsel if he really wanted to retry the lengthy case "at [his] client's expense," and the court's later decision denying petitioner's motions for an acquittal or a new trial, which were based in part on the government's rebuttal closing argument. *Ibid.*

20a), and the court of appeals refused to issue a certificate of appealability on that issue (*id.* at 17a). Petitioner thus did not renew his *Batson*-related claim in the court of appeals and he does not do so in this Court.

Second, the government presented an affidavit from Martin, who attested that he had "t[aken] a moment" to confer with co-counsel and petitioner about the court's offer, and that petitioner had made clear that "he did not want a mistrial" because, in petitioner's view, "his best chance was with this jury." C.A. App. 57; see *id.* at 58 (Martin stating that petitioner "agreed with my view that we should not request a mistrial without prejudice, but instead should accept the curative instruction, preserve the claim of error, and proceed to await the jury's verdict"). Third, the government argued that even if the court's offer of a mistrial had been serious and even if petitioner had told Martin he wanted to accept it, petitioner's claim failed because (a) whether to accept a mistrial is a tactical decision committed to counsel's professional judgment (*id.* at 35-41), and (b) Martin's refusal of the offer was reasonable on the facts of this case (*id.* at 41-43).

Without holding an evidentiary hearing, the district court denied petitioner's Section 2255 motion. Pet. App. 18a-23a. The court noted the conflict between Jones's and Martin's accounts (*id.* at 22a nn.3-5) but did not reconcile the two or comment on whether its offer of a mistrial had been serious. Instead, the court simply observed that it had "offered to grant a mistrial without prejudice" (*id.* at 22a), and it apparently assumed *arguendo* that Martin's refusal of the offer "was against [petitioner's] wishes" (*ibid.*). Nevertheless, the court emphasized that criminal defense attorneys do not "have a duty to consult with their clients * * * on 'every tactical decision.'" *Id.* at 21a (quoting *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004), and *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988)). It held that refusing an offer of a mistrial without prejudice is just such a decision (*ibid.*) and

that Martin's refusal was reasonable on the facts of this case (*id.* at 22a). The court further concluded that, even assuming Martin had been ineffective in refusing the offer, petitioner "failed to show prejudice" because he did not "demonstrate[ ] that [a] trial before a different jury would have ended with [an] acquittal" on the counts of conviction. *Ibid.*

3. The court of appeals granted a certificate of appealability on petitioner's "claim that his counsel was ineffective for ignoring his direction to accept the district court's offer of a mistrial without prejudice" (Pet. App. 17a), and it affirmed (*id.* at 1a-15a).

a. "Because the district court rejected [petitioner's] claim[ ] without holding an evidentiary hearing," the court of appeals reviewed the record "in the light most favorable to" petitioner, and it assumed *arguendo* that (1) the district court "was serious in its offer of a mistrial," and (2) Martin "ignored [petitioner's] instructions to accept" the offer. Pet. App. 4a & n.*. The court nevertheless concluded that Martin had not been ineffective.

Citing *Florida* v. *Nixon*, 543 U.S. 175 (2004), the court of appeals emphasized at the outset that "defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant." Pet. App. 5a. It acknowledged that this Court has held that four "fundamental" decisions—whether to plead guilty, waive a jury, testify at trial, or take an appeal—all "belong[ ] exclusively to the defendant." *Ibid.* But it found no case holding that "decisions about mistrials are of such a moment that they can be made only by the defendant himself." *Ibid.* (internal quotation marks omitted). Indeed, the court pointed out that "every circuit to consider the question has concluded

that decisions regarding mistrials belong to the attorney, not the client." *Id.* at 5a-6a (citing cases from the Sixth, Seventh, Eighth, and Eleventh Circuits).

The court of appeals noted that petitioner did not contend "that decisions regarding mistrials are so fundamental that they must be made by the client rather than the attorney," but rather that any time a court offers a mistrial "*and* the defendant expresses his opinion on whether the offer should be accepted, counsel is obligated to follow the defendant's instructions." Pet. App. 7a. The court of appeals rejected such a bright-line rule, holding that "counsel's decision [to decline a mistrial] is not unreasonable simply because the client disagrees." *Id.* at 11a. In the court's view, petitioner's proposed rule would "reallocat[e]" "tactical" decisions from attorneys to their lay defendants and would undermine "the effective operation of our adversarial system." *Id.* at 10a; see *id.* at 7a-10a.

Although the court of appeals thus held that a decision concerning a mistrial "remains counsel's to make even if the client expresses disagreement with the decision" (Pet. App. 11a), it also cautioned that "of course" "[t]he reasonableness of the tactical decision actually made by counsel is * * * subject to challenge" under the traditional ineffectiveness standard established in *Strickland* v. *Washington*, 466 U.S. 668 (1984) (Pet. App. 9a; see *id.* at 3a-4a). Concluding that Martin's refusal of a mistrial was "not unreasonable simply because [petitioner] expressed a contrary view" (*id.* at 9a), and apparently finding no other problem with Martin's decision, the court agreed with the district court that Martin had rendered effective assistance (*id.* at 11a). The court did not address whether, assuming Martin had been ineffective, his ineffectiveness prejudiced petitioner.

b. Judge Michael concurred in the judgment. Pet. App. 12a-15a. In his view, the court's opinion held "that a lawyer's decision to refuse a mistrial over his client's wishes and without consultation can never constitute ineffective assistance." *Id.* at 12a. Judge Michael would have resolved the case on what he believed to be the "narrower grounds" that it was "reasonable here for * * * Martin to refuse the [mistrial] offer against [petitioner's] expressed wishes and without consultation" because the record did not reflect that petitioner "even understood" the consequences of the decision in this case. *Id.* at 14a; see *ibid.* ("Under these circumstances, *following* [petitioner's] instruction might well have constituted ineffective assistance of counsel.").

ARGUMENT

Petitioner renews his contention that his trial counsel rendered ineffective assistance of counsel by declining the district court's offer of a mistrial without prejudice, given that petitioner expressed a desire to accept the offer. Pet. 1-3, 7-15. On the facts of this case, the court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court, another federal court of appeals, or a state court of last resort. Further review is unwarranted.

1. To prevail on a claim of ineffective assistance of counsel, a Section 2255 movant must demonstrate that (1) counsel's representation fell outside "the wide range of reasonable professional assistance," resulting in "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's deficient performance so prejudiced his defense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 687-694 (1984). This standard is necessarily a fact-intensive one, requiring a court to "consider[ ] all the circumstances" when evaluating counsel's performance. *Id.* at 688; see *id.* at 688-689 (a defined "set of detailed rules for counsel's conduct" could not "satisfactorily take account of the variety of circumstances faced by defense counsel"); see also *Rompilla* v. *Beard*, 545 U.S. 374, 394 (2005) (O'Connor, J., concurring) (noting that *Strickland* established a "case-by-case approach").

This Court has repeatedly admonished that, when applying the *Strickland* standard, courts should not adopt any "checklist for judicial evaluation of attorney performance," lest they "restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 688-689; see *Florida* v. *Nixon*, 543 U.S. 175, 178, 187, 192 (2004) (holding that, under *Strickland*'s case-by-case approach, "counsel is not automatically barred" by any "blanket rule" requiring the defendant's "express consent" from pursuing what counsel believes is "the most promising means to avert a sentence of death," because "an attorney has authority to manage most aspects of the defense without obtaining his client's approval") (citing *Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988)).

2. Petitioner does not dispute that the district court and the court of appeals applied the *Strickland* standard in evaluating his ineffectiveness claim. See Pet. App. 3a-4a, 19a-20a. Indeed, the petition does not even cite *Strickland*, let alone explain how, in petitioner's view, its reasoning does or does not bear on this case. Instead, petitioner faults the court of appeals for "depart[ing] from" "basic principles of agency law" in "broadly" hold-

ing that "defense counsel alone has the 'right' to make all * * * decisions regarding the conduct of a criminal trial, even over the defendant's express objections," so long as the decision is not one of the four decisions this Court has characterized as fundamental (see p. 8, *supra*). Pet. 1, 10 (emphasis omitted).[2]

Petitioner overstates the holding of the court of appeals. The court did not issue a sweeping decision about agency principles in the attorney-client context. It merely held that, where counsel makes a tactical decision regarding the conduct of trial (here, declining an offer of a mistrial), he is not ineffective per se because the defendant expressed a wish to pursue a different course. See Pet. App. 11a ("[C]ounsel's decision is not unreasonable simply because the client disagrees."); *id.* at 9a (same). That holding is not nearly so "broad[ ]" as petitioner suggests. Significantly, it does not dictate, as the concurrence below suggested, "that a lawyer's decision to refuse a mistrial over his client's wishes and without consultation can *never* constitute ineffective assistance." *Id.* at 12a (emphasis added). To the contrary, the court of appeals recognized that "[t]he reasonableness of the tactical decision actually made by counsel is of course subject to challenge." *Id.* at 9a. Given *Strickland*'s directive to "consider[ ] all the circumstances" when evaluating counsel's performance, 466 U.S. at 688, the reasonableness challenge the court of appeals envisioned could properly take account of, but would not be limited to, the fact that counsel overrode his client's wishes in making a tactical decision.

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[2] Petitioner does not claim the decision here was one on which counsel was required to obtain his consent. See, *e.g.*, Pet. 9 ("The problem here is not that defense counsel rejected the district court's offer of a mistrial without securing [petitioner's] consent.").

It is instead petitioner who proposes a bright-line rule at odds with *Strickland*. He argued in the court of appeals that "defense counsel has no discretion to disregard a defendant's instruction to accept a court's offer of a mistrial." Pet. C.A. Br. 18; see *id.* at 22, 26 (arguing that counsel is not "allowed to disregard" or "free to ignore" "his client's instructions once given," at least where those instructions concern a mistrial) (emphasis omitted). Likewise, in this Court, petitioner contends that criminal defense counsel necessarily "does not provide the 'assistance' guaranteed by the Sixth Amendment by making a tactical decision regarding the conduct of a trial over the defendant's objection." Pet. 7. In short, petitioner asked the court of appeals, and now asks this Court, for a holding that defense counsel is constitutionally deficient per se whenever, and for whatever reason, he disregards the defendant's expressed desire to pursue a given tactical course during trial.

Such a per se rule would conflict with *Strickland*'s "case-by-case" approach. *Rompilla*, 545 U.S. at 394 (O'Connor, J., concurring); see *Nixon*, 543 U.S. at 192 (relying on *Strickland* to reject a "blanket rule" of "explicit consent" in an analogous context). The inflexibility of such a rule would not account for situations where, as here, there is no reason to believe the defendant has any particular insight about the relative costs and benefits of a particular tactical choice. For example, in the context of a choice whether to accept a mistrial, petitioner's rule would not account for cases in which, contrary to the defendant's ill-founded beliefs, his objective best interests would demand continuing with the ongoing trial because of a comparatively favorable evidentiary record, well-received defense witnesses, a smoothly executed closing argument, an apparently sympathetic jury,

or other advantages he may not have on retrial. Cf. *Gonzalez* v. *United States*, 553 U.S. 242, 249 (2008) ("Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote."). The concurring judge below even suggested (Pet. App. 14a) that in this very case, petitioner's counsel might have been ineffective if he had *acceded* to petitioner's alleged desire for a mistrial. And, indeed, if petitioner had obtained a mistrial and proceeded through another trial before a different jury—at great expense to himself and the court system, given the complexity of the case—he may have been convicted on counts of which the jury here actually acquitted him. *Strickland* allows for a balanced consideration of such practical and varying realities; petitioner's approach would ignore them.

3. Contrary to petitioner's contention (Pet. 8-9), the court of appeals' rejection of his approach does not conflict with this Court's decision in *Faretta* v. *California*, 422 U.S. 806 (1975). *Faretta* addressed "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Id.* at 807. The Court concluded that "a State may not constitutionally do so." *Ibid.* As a narrow factual matter, *Faretta* is inapposite because petitioner does not contend he wished to proceed pro se at any point in the

trial, let alone that he expressed such a wish. Moreover, as a legal matter, *Faretta* does not speak to whether, once the defendant retains counsel, that attorney is per se ineffective if he disregards the defendant's expressed desire to pursue a particular tactical course (such as accepting a court's offer of a mistrial).

Petitioner correctly notes that *Faretta* recognizes a represented defendant's "power, if present [at his trial], to give advice or suggestion *or even to supersede his lawyers altogether*." Pet. 9 (quoting *Faretta*, 422 U.S. at 816) (emphasis added by petitioner). But petitioner omits the crucial concluding phrase of this sentence: a represented defendant has the power "to supersede his lawyers altogether *and conduct the trial himself.*" *Faretta*, 422 U.S. at 816 (emphasis added). *Faretta* thus does not hold, as petitioner suggests (Pet. 8), that a represented defendant's counsel (who is retained through the conclusion of the case and is not "supersede[d] * * * altogether") is ineffective if he does not obtain the defendant's consent to a tactical decision. To the contrary, *Faretta* admonishes that "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." 422 U.S. at 820. The court of appeals did not run afoul of *Faretta* in concluding that those "binding decisions of trial strategy" include the decision of whether to accept an offer of a mistrial.

Indeed, petitioner seems to envision a regime in which any counseled defendant can at any time and for any reason "limit [his counsel's] agency" (Pet. 1) by countermanding any mid-trial tactical decision by his counsel. But he offers no precedent supporting the view that the *Faretta* right can be invoked in such a piece-

meal fashion. *Faretta* surely permits a defendant to revoke his attorney's agency *entirely* (though there may be constraints on when and how such a revocation may be effected). But there is no authority from this Court that a defendant may selectively elect to proceed with counsel at one moment, pro se at the next moment, and again with counsel at the next. That is in every effect what petitioner contends should have occurred at his trial, but the Sixth Amendment does not give him that option. This Court's cases hold that he is guaranteed either the effective assistance of counsel to whose reasonable professional judgment tactical decisions are committed, or else the right to proceed pro se. Cf. *McKaskle* v. *Wiggins*, 465 U.S. 168, 183 (1984) ("*Faretta* does not require a trial judge to permit 'hybrid' representation.").

4. The court of appeals' decision does not conflict with the state court decisions petitioner cites (Pet. 2-3, 13-14). In general, those cases hold that a defendant does not necessarily receive ineffective assistance of counsel (or is not entirely deprived of counsel) when the defendant's attorney accedes to the defendant's wishes regarding trial tactics. But the inverse proposition petitioner advances—that a defendant's rights are *always* violated when his attorney *refuses* to abide by the defendant's tactical wishes—does not follow as a matter of law or logic. Accordingly, those cases are consistent with the decision below.

In *State* v. *Brown*, 451 S.E.2d 181 (N.C. 1994), cert. denied, 516 U.S. 825 (1995), the defendant argued on direct appeal that where he had "refused to cooperate" with his attorney "in the preparation of his defense"—including in making various strategic decisions—the trial court had "effectively allowed him to proceed with-

out counsel" in violation of the Sixth Amendment. *Id.* at 186. The North Carolina Supreme Court rejected this contention, pointing out that "[e]very time the trial court asked if he wanted to dismiss his attorney and represent himself, defendant chose to keep his attorney." *Ibid.* The defendant did not claim his attorney had been ineffective; rather, he claimed the trial court should have "ordered him to *abide* by the decisions of his attorney." *Ibid.* (emphasis added). The North Carolina Supreme Court had no occasion to apply, or even mention, *Strickland*. Much less did it hold, contrary to the court of appeals' decision in this case, that counsel is per se ineffective under *Strickland* whenever he disregards the defendant's expressed desire for a mistrial.

Similarly, in *State* v. *Ali*, 407 S.E.2d 183 (N.C. 1991), a case on direct appeal, the defendant claimed that the trial court and his attorneys "denied [him] the right to counsel" in allowing him "to make the decision not to peremptorily challenge a juror his attorneys had wanted to remove." *Id.* at 188. The North Carolina Supreme Court rejected his claim, holding that it was not unreasonable for the trial court or the defense attorneys to acquiesce in the defendant's wishes concerning the juror. *Id.* at 189-190 (rejecting any claim of ineffective assistance, and citing a similar case in which an attorney, despite his strategic inclinations to the contrary, reasonably acquiesced in his client's wishes to call a particular witness). The court of appeals' decision in this case does not conflict with *Ali*, because in both cases the courts found counsel to have acted reasonably. *Ali* does not hold that it would be per se ineffective assistance of counsel for an attorney to refuse to follow his client's instructions concerning a strategic trial decision. See *id.* at 189.

Zagorski v. *State*, 983 S.W.2d 654 (Tenn. 1998), cert. denied, 528 U.S. 829 (1999), is likewise distinguishable from the decision below. In *Zagorski*, the defendant was convicted of capital murder and "unequivocally" told his attorneys not to present any mitigating evidence at sentencing because "he preferred death instead of a possible sentence of life in prison." *Id.* at 656. He later collaterally attacked his death sentence, arguing that his attorneys had been ineffective "in failing to investigate and present mitigating evidence despite his instructions to the contrary." *Id.* at 657. The Tennessee Supreme Court rejected the claim. *Id.* at 658. "Under these exceptional circumstances," the court reasoned, "the critical issue" was whether the attorneys could reasonably "follow the lawful demands of [their] client." *Ibid.* Relying heavily on Tennessee's code of professional responsibility, the court concluded that it was not unreasonable for the attorneys to abide by the defendant's wishes not to present mitigating evidence. *Ibid.* Again, that does not conflict with the decision below because the court below said nothing about the effectiveness *vel non* of an attorney who *follows* his client's self-defeating strategic instructions.[3]

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[3] The decisions in *Brown*, *Ali*, and *Zagorski* each contain broad language indicating that it is ultimately the defendant's wishes, rather than counsel's professional judgment, that should govern in the event of a disagreement. See *Zagorski*, 983 S.W.2d at 658-659; *Brown*, 451 S.E.2d at 186-187; *Ali*, 407 S.E.2d at 189. But that broad language is primarily focused upon a determination of the ethical duties of counsel under the applicable ethical rules. See *ibid.* This Court has made clear that counsel's ethical responsibilities under applicable local rules are distinct from the constitutional requirement of effective representation. See, *e.g.*, *Nix* v. *Whiteside*, 475 U.S. 157, 165 (1986) ("Under the *Strickland* standard, breach of an ethical standard does not necessarily make out

Petitioner cites only one case, *United States* v. *Burke*, 257 F.3d 1321 (11th Cir. 2001), cert. denied, 537 U.S. 940 (2002), that squarely addresses whether "defense counsel [is] per se ineffective" where he overrides his client's "request to consent to a mistrial." *Id.* at 1323 & n.2. And as petitioner notes (Pet. 7-8, 12-13), *Burke*, like the decision below, answered that question in the negative. 257 F.3d at 1323-1324. Accordingly, there is no conflict of authority calling for this Court's review.

5. Even if there were a conflict, this case would be a poor vehicle for resolving it, for two reasons.

First, even if this Court were to grant review and hold that defense counsel is per se ineffective under *Strickland* whenever he disregards his client's expressed desire for a mistrial, it is not at all clear that that is what happened in this case. Both the district court and the court of appeals assumed as true petitioner's (and attorney Jones's) allegation that petitioner expressed a desire to accept a mistrial and that Martin disregarded the instruction. Pet. App. 4a & n.*, 22a. But Martin attested that he had conferred with co-counsel and petitioner about the district court's offer of a mistrial, and that petitioner had made clear that "he did not want a mistrial" because, in petitioner's view, "his best chance was with this jury." C.A. App. 57; see *id.* at 58 (Martin stating that petitioner "agreed with my

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a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.").

view that we should not request a mistrial without prejudice, but instead should accept the curative instruction, preserve the claim of error, and proceed to await the jury's verdict"). The courts below did not resolve this evidentiary conflict, and thus, even if this Court accepted petitioner's legal submission, there is considerable doubt whether petitioner would ultimately be able to establish his counsel's ineffectiveness after further proceedings on remand.

Second, even if this Court accepted petitioner's legal contention, and even if his version of the facts prevailed, petitioner would still be required to prove under the second part of the *Strickland* test that he was prejudiced. But the district court has already concluded, correctly, that petitioner suffered no prejudice. Pet. App. 22a. The court based that conclusion on petitioner's failure to "demonstrate[ ] that [a] trial before a different jury would have ended with [an] acquittal" on the counts of which he had been convicted. *Ibid*. Petitioner has not challenged that conclusion in this Court, and thus offers no reason to believe that even a favorable decision here would ultimately lead to any meaningful relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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