No. 18-_____

In The Supreme Court of the United States

JOHNATHAN HALL, WARDEN,
Petitioner,

v.

WILLIAM O. AYERS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Kentucky Supreme Court rejected Respondent Ayers' claim that his Sixth Amendment right to counsel was violated by the failure to determine that he knowingly, voluntarily and intelligently waived his right to counsel because, as an "experienced criminal trial attorney" who represented himself at trial, Ayers was never without counsel. On federal habeas review, the Sixth Circuit Court of Appeals acknowledged that Ayers was "an experienced criminal-defense attorney in Kentucky" and that "the Sixth Amendment's waiver requirements apply only to uncounseled defendants." Then, rather than deciding whether the Kentucky Supreme Court unreasonably decided that Ayers was not without counsel, the Sixth Circuit held that the Kentucky Supreme Court acted contrary to federal law by failing to apply "a rule that plainly applies to all uncounseled defendants." The Sixth Circuit granted federal habeas relief under 28 U.S.C. § 2254(d)(1).

This case presents the following question:

> Was federal habeas relief improperly granted when, without basis in this Court's clearly established precedent, the federal court disregarded the determinative finding underlying the state court's decision in order to identify contrary federal law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISION

STATUTORY PROVISION

PETITION FOR A WRIT OF CERTIORARI

Johnathan Hall respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The Sixth Circuit's opinion is reported as *Ayers v. Hall*, 900 F.3d 828 (6th Cir. 2018); Petitioner's Appendix ("App.") 1-16.

STATEMENT OF JURISDICTION

The Sixth Circuit rendered its opinion on August 22, 2018. Kentucky sought a stay of the mandate, which was granted on September 17, 2018. App. 18. This Court has jurisdiction pursuant to 28 U.S.C. § 2254(d)(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Respondent Ayers was a practicing criminal defense attorney in Kentucky for more than 15 years when he was convicted of five counts of failing to file a state tax return. App. 40. He represented himself for nearly two years before, on the eve of trial, he requested another continuance, indicating that he wanted to be represented by other counsel. App. 39. The trial court denied his motion for an additional continuance, and trial began as scheduled. App. 39. Ayers was convicted and sentenced to concurrent sentences totaling three years. App. 40.

In his timely appeal to the Kentucky Court of Appeals, Ayers complained about the trial court's failure to conduct a hearing pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), and its denial of his most recent motion for a continuance of trial. App. 20-21. The Court of Appeals reversed Ayers' convictions due to the trial court's failure to determine whether Ayers properly waived his right to counsel. App. 4.

The Commonwealth timely and successfully petitioned for discretionary review in the Kentucky Supreme Court. App 4. The only issue before that court was whether a *Faretta* hearing was required. App. 40. The Kentucky Supreme Court reversed the Kentucky Court of Appeals and reinstated Ayers' convictions and sentence, reasoning that Ayers, a lawyer, was never without counsel so no inquiry as to whether he waived his right to counsel was required.

App. 43. Ayers' petition for rehearing was denied as was his petition for a writ of certiorari from this Court. *Ayers v. Kentucky*, ___ U.S. ___, 135 S.Ct. 86, 190 L.Ed. 38 (2014). App. 6.

Ayers then sought federal habeas relief in the United States District Court for the Western District of Kentucky, pursuant to 28 U.S.C. §2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). App. 6. The District Court denied relief explaining that Ayers was attempting to broaden the holding in *Faretta* by requiring a specific script or formula, that courts may consider factors such as a defendant's education and sophistication in deciding whether a waiver was valid, and that the United States Supreme Court "has not decided a case with a set of material indistinguishable facts from Ayers' case." App. 26. The District Court held that the Kentucky Supreme Court's decision was not an unreasonable application of this Court's well established law in *Faretta* and its progeny because, as an attorney Ayers "could already be protected by the safeguards that a *Faretta* hearing or *Faretta* questioning are meant to ensure." App. 27-28. The District Court granted a certificate of appealability on the *Faretta* issue, but denied it on the continuance issue. App. 35. The United States Court of Appeals for the Sixth Circuit expanded the certificate of appealability to include the continuance issue. App. 7.

The Sixth Circuit reversed and granted *habeas* relief. App. 1-16. It found that the Kentucky Supreme Court's decision was contrary to clearly established

federal law as determined by this Court. App. 10. Specifically, the Sixth Circuit believed the Kentucky Supreme Court's decision was contrary to this Court's decision in *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), which requires a record showing "affirmative acquiescence" in the waiver of counsel. App. 9-10. The Sixth Circuit held that the Kentucky Supreme Court acted contrary to binding United States Supreme Court precedent when it failed to apply "a rule that plainly applies to all uncounseled defendants." App. 10. The Sixth Circuit held that Ayers' Sixth Amendment right to counsel was violated by the absence of an express waiver of counsel. App. 12-14.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit disregarded the determinative finding of the Kentucky Supreme Court when it decided that the Kentucky Supreme Court acted contrary to clearly established federal law.

Acknowledging that the Federal Constitution entitles a criminal defendant both to the right to counsel and the right to proceed without counsel when he knowingly and intelligently waives the right to counsel, the Kentucky Supreme Court held that Ayers, an experienced, practicing criminal defense attorney, never proceeded without counsel when he represented himself during his prosecution. App. 43. According to the Kentucky Supreme Court, since

counsel was present throughout the proceedings—albeit the criminal defendant himself—there was no appearance without counsel and no inquiry into whether Ayers waived counsel was required. App. 43.

Despite agreeing with the Kentucky Supreme Court that "the Sixth Amendment's waiver requirements apply only to uncounseled defendants," the Sixth Circuit granted federal habeas relief finding that the Kentucky Supreme Court's determination was contrary to clearly established Federal law as determined by this Court, specifically in *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). App. 9-10. Because the clearly established federal law identified by the Sixth Circuit is not applicable unless a material, distinguishing circumstance as found by the Kentucky Supreme Court is disregarded and because there is no clearly established federal law as determined by this Court that justifies disregarding that circumstance, this Court should summarily reverse the Sixth Circuit's grant of federal habeas relief.

The Kentucky Supreme Court decided Ayers' constitutional claim on the merits, and AEDPA allows relief in federal court if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law" as determined by this Court. 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [this Court's] cases, or if it decides a

case differently than [this Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1853, 1850, 152 L.Ed.2d 914 (2002). A state court decision is an "unreasonable application" of clearly established federal law "if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Id.* The question in making this latter determination is whether the application of federal law is "objectively unreasonable," not whether the application is erroneous. *Id.* AEDPA "does not require state courts to *extend*" this Court's precedence or permit federal courts to grant relief for the failure to do so. *White v. Woodall*, 572 U.S. 415, 426, 134 S.Ct. 1697, 1706, 188 L.Ed.2d 698 (2014) (emphasis in original). In fact, "if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision," as required for relief under AEDPA. *Id.* (internal quotation marks omitted).

The Kentucky Supreme Court clearly identified the governing legal principle—that the United States Constitution entitles criminal defendants to be represented by an attorney or to proceed without an attorney, but that any waiver of counsel must be knowing and intelligent. The Kentucky Supreme Court referenced and discussed this Court's decision in *Faretta*. However, the Kentucky Supreme Court found that the condition precedent to an inquiry into

the validity of a waiver of counsel was not present. Ayers was not without counsel. App. 45.

The Sixth Circuit's grant of habeas relief rests upon its disagreement with this finding. The Sixth Circuit rejected the Kentucky Supreme Court's determination that Ayers was never without counsel without citation to any applicable law from this Court detailing how the determination as to whether one is proceeding with or without counsel is to be made. App. 9-10. Instead, the Sixth Circuit referenced cases from this Court containing no dispute regarding whether the criminal defendant was with or without counsel and emphasizing the differences between laymen and lawyers. App. 9-10; *see Faretta*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (concerning the right of self-representation by a high school graduate); *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (concerning waiver of counsel by a 21-year-old who was still financially dependent on his parents); and *Carnley*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (concerning waiver of counsel by an illiterate defendant).

The Sixth Circuit found that the Kentucky Supreme Court's decision was contrary to this Court's decision in *Carnley*, because that case required "'affirmative acquiescence' in [Ayers'] uncounseled state." App. 10. Rather than giving any deference to the Kentucky Supreme Court's determination that Ayers was not without counsel because he was a practicing criminal defense attorney or citing clearly established federal law to which this determination

was contrary, the Sixth Circuit completely disregarded the circumstance most critical to the Kentucky Supreme Court's decision and faulted the Kentucky Supreme Court for failing to apply "a rule that plainly applies" only to those cases where that most critical finding of the Kentucky Supreme Court does not exist—that is, those cases involving "uncounseled defendants." App. 10. The Sixth Circuit's disregard for the determinative, distinguishing finding in the Kentucky Supreme Court's decision is not the level of review of state court decisions intended under AEDPA, which "is designed to ameliorate the injuries to state sovereignty that federal habeas review necessarily inflicts by giving state courts the first opportunity to address challenges to convictions in state court" and to promote "comity, finality, and federalism." *Davila v. Davis*, 582 U.S. ____, 137 S.Ct. 2058, 2070, 198 L.Ed.2d 603 (2017) (internal citation omitted).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse the Sixth Circuit's grant of relief under 28 U.S.C. § 2254.

Respectfully Submitted,

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APPENDIX

App. 1

900 F.3d 829

United States Court of Appeals, Sixth Circuit.

William O. AYERS, Petitioner-Appellant,

v.

Johnathan HALL, Warden, Respondent-Appellee.

No. 17-5038

Argued: January 30, 2018 Decided and Filed: August 22, 2018

Appeal from the United States District Court for the Western District of Kentucky at Louisville. No. 3:15-cv-00772—Joseph H. McKinley Jr., Chief District Judge.

OPINION

KAREN NELSON MOORE, Circuit Judge.

William Ayers was an experienced criminal-defense attorney in Kentucky who found himself on the wrong end of counsel's table when he was indicted in 2008 on five counts of failing to file state tax returns. While Ayers undeniably represented himself throughout the twenty-one months between his indictment and his trial, it is undisputed that he never formally elected to do so: he never waived his right to counsel on the record, "file[d] a notice of appearance of any kind, appear[ed] with a co-counsel for any purpose, or file[d] a motion to be allowed to

proceed *pro se*" during that time. Despite Ayers's pro se status, the trial court allegedly failed to inform him at his arraignment that he had a right to counsel and never subsequently sought to determine whether Ayers's self-representation was a voluntary, intelligent, and knowing waiver of his right to counsel. Then, when Ayers asked for a continuance a day before his trial was scheduled to begin so that he could hire an attorney with whom he attested he was already in negotiations, the trial court denied his request and forced him to proceed pro se. Ayers was convicted on all five counts and now seeks habeas relief from these convictions.

Because the Kentucky Supreme Court acted contrary to clearly established Supreme Court precedent when it held that trial courts need not "obtain a waiver of counsel" before allowing "experienced criminal trial attorneys" to represent themselves, and because we conclude upon de novo review of the record that Ayers did not validly waive his right to counsel, we **REVERSE** the district court's denial of Ayers's petition under 28 U.S.C. § 2254 and remand with instructions to grant the writ unless the Commonwealth of Kentucky elects to retry Ayers within ninety days of this court's judgment. As Ayers is entitled to full relief on his waiver claim, we decline to decide whether the state trial court also violated Ayers's right to counsel of his choice by declining to grant a continuance so that he could secure counsel.

I. BACKGROUND

William Ayers, an experienced criminal-defense attorney in Kentucky, was indicted on April 10, 2008 on five counts of failing to file state tax returns. R. 11-2 (Indictment at 1–2) (Page ID #109–10). Ayers asserts that he was never informed at arraignment of his right to counsel, and the trial court never subsequently verified his intent to proceed pro se. *See* R. 11-2 (Ayers Br. to the Ky. S. Ct. at 4–5) (Page ID #288–89); Appellant Br. at 5. The Commonwealth has been unable to cite any portion of the record demonstrating that Ayers waived his right to counsel and, in fact, conceded at oral argument that no such waiver occurred. Nevertheless, the trial court allowed Ayers to represent himself throughout his pretrial proceedings.

The day before Ayers's trial was scheduled to begin, Ayers requested a continuance to secure counsel. R. 11-2 (Motion) (Page ID #111–13). The district court denied this motion, R. 12 (Video of Hr'g, Jan. 26, 2010, 11:18:18 AM–11:26:51 AM), and the case immediately proceeded to a four-day trial. The jury convicted Ayers of all five counts, and Ayers was ultimately sentenced to three years' imprisonment on each count, to run concurrently, R. 11-2 (Judgment of Conviction and Sentence) (Page ID #114–16). The trial court withheld imposition of the judgment of confinement, however, provided that Ayers served five years of supervised probation, served 90 days in Jefferson County Corrections, completed 100 hours of community service over the probation period, paid

various fines, costs, and fees, and discontinued the practice of law in Kentucky. *Id.*

Ayers appealed his conviction to the Court of Appeals of Kentucky, arguing that the state trial court violated clearly established Supreme Court precedent by failing to ascertain whether he had validly waived his right to counsel before allowing him to represent himself. *See* R. 11-2 (Ayers Br. to the Ky. Ct. App. at 8–9) (Page ID #130–31). Ayers also argued that the trial court violated his Sixth Amendment right to assistance from counsel of his choosing when it denied his pre-trial motion for a continuance to obtain counsel. *Id.* at 4–6 (Page ID #126–28). The Kentucky Court of Appeals ruled in Ayers's favor, reasoning that the trial court was required "to ascertain whether Ayers understood [ ]his right [to representation]," as well as "the consequences of declining to exercise it." R. 1-2 (Ky. Ct. App. Op. at 6) (Page ID #48).

The Commonwealth sought and secured discretionary review from the Supreme Court of Kentucky. *See Com. v. Ayers*, 435 S.W.3d 625, 626 (Ky. 2013). In its briefing, the Commonwealth acknowledged that no "formal" hearing had occurred in Ayers's case to determine whether he had knowingly, intelligently, or voluntarily waived his right to counsel. R. 11-2 (Commonwealth Br. to the Ky. S. Ct. at 8–9) (Page ID #255–56). Nevertheless, the Commonwealth argued that "an *experienced criminal defense attorney* was capable of representing himself, and waiving his right to counsel," without the typical protections required of the court "for

laymen." *Id.* at 12 (Page ID #259). In turn, Ayers acknowledged that a "full 'formal inquiry' may not be necessary when the trial court is dealing with a person who has a legal background," but he insisted that the trial court erred by making "ZERO inquiry" into whether he was "voluntarily, intelligently and knowingly waiving his right to be represented by counsel." R. 11-2 (Ayers Br. to the Ky. S. Ct. at 5) (Page ID #289). Ayers asserted that he "never affirmatively asserted his desire, willingness or intention of proceeding pro se" and "never acknowledged he knew the ramifications of proceeding pro se." *Id.* at 2 (Page ID #286). The trial court's failure to engage in any inquiry "about his right and/or decision to proceed pro se or his right to the assistance of counsel" was, according to Ayers, unconstitutional. *Id.*

From the parties' briefing, the Kentucky Supreme Court identified "[t]he sole issue on appeal" as "whether the trial court's failure to conduct a *Faretta* hearing requires us to set aside Ayers' conviction and order a new trial." *Ayers*, 435 S.W.3d at 626. Typically, the term "*Faretta* hearing" refers to a colloquy between the trial court and a defendant in which the trial court warns the defendant about the "dangers and disadvantages of self-representation." *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). From the Kentucky Supreme Court's decision, however, it is plain that the state supreme court used the term "*Faretta* hearing" to include any on-the-record

determination that Ayers had validly waived his right to counsel. The Kentucky Supreme Court recognized that Ayers had not "exercis[ed] his right to proceed without a lawyer," but reasoned that the trial court was not required "to obtain a waiver of counsel in this case" because, "[a]s an attorney, Ayers never forewent the benefits of counsel. There was a lawyer and a defendant who, in this case, were uniquely one and the same." *Ayers*, 435 S.W.3d at 627–28. The Kentucky Supreme Court therefore "dispense[d] with the charade of combing the record for some shred of evidence that *Faretta* was satisfied" and instead held, as a matter of law, "that criminal defendants who are experienced criminal trial attorneys are not entitled to a *Faretta* hearing or inquiry prior to representing themselves." *Id.* at 629. The Kentucky Supreme Court thereby reversed the state court of appeals and reinstated Ayers's conviction. *Id.*

Ayers petitioned for a rehearing, which was denied, R. 11-2 (Order Denying Petition for Rehearing) (Page ID #340), and for a writ of certiorari from the United States Supreme Court, which was denied on October 6, 2014, *Ayers v. Kentucky*, —— U.S. ——, 135 S.Ct. 86, 190 L.Ed.2d 38 (2014). Ayers then petitioned for relief under 28 U.S.C. § 2254 in the U.S. District Court for the Western District of Kentucky, arguing (through counsel) that the trial court violated the Constitution (1) by failing to determine whether Ayers had ever knowingly and voluntarily "waiv[ed] his rights under the Sixth and Fourteenth Amendments to the assistance of counsel," and (2) by

denying Ayers's motion for a continuance to obtain counsel of his choice. R. 1-1 (Mem. in Support of Pet. for a Writ of Habeas Corpus at 2, 24–25) (Page ID #17, 39–40). The district court denied Ayers's petition, but granted a certificate of appealability as to the waiver issue. R. 23 (Order) (Page ID #502). Ayers filed a notice of appeal and moved before this court to expand the certificate of appealability to include the second issue (i.e., whether Ayers ought to have received a continuance to hire counsel of his choosing), which this court granted. *See* D.E. 7 (Order at 5). The present appeal followed.

II. DISCUSSION

A. Standard of Review

"We review the district court's legal conclusions in habeas proceedings de novo and its findings of fact for clear error." *Akins v. Easterling*, 648 F.3d 380, 385 (6th Cir. 2011). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") precludes federal courts from providing relief on habeas claims that were previously adjudicated on the merits in state court unless the state-court adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the

> facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state-court decision is "contrary to" clearly established precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Where the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," the state court has rendered "a decision 'involv[ing] an unreasonable application of ... clearly established Federal law.' " *Id.* at 407–08, 120 S.Ct. 1495 (quoting 28 U.S.C. § 2254(d)(1)) (alterations in original). If we conclude that the Kentucky Supreme Court acted contrary to clearly established federal law, we must "review the merits of the petitioner's claim de novo." *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006).

B. Failure to Obtain Valid Waiver of Counsel

The Sixth Amendment provides a criminal defendant both "the right ... to have the Assistance of Counsel for his defence," U.S. CONST. amend. VI, as well as "the right to self-representation—to make one's own defense personally," *Faretta*, 422 U.S. at 819, 95 S.Ct. 2525. Although defendants have both the

right to counsel and the right to waive their right to counsel, "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," and defendants who opt to go it alone "relinquish[ ], as a purely factual matter, many of the traditional benefits associated with the right to counsel." *Id.* at 834–35, 95 S.Ct. 2525. For this reason, the Sixth Amendment "require[s] that any waiver of the right to counsel be knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 87–88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Critically, "[p]resuming waiver [of the right to counsel] from a silent record is impermissible." *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962). Rather, "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Id.*

In light of the above principles, the Kentucky Supreme Court acted contrary to clearly established federal law when it held that trial courts need not "obtain a waiver of counsel" from "criminal defendants who are experienced criminal trial attorneys." *See Ayers*, 435 S.W.3d at 628–29. The Kentucky court derived its decision from the correct premise that the Sixth Amendment's waiver requirements apply only to uncounseled defendants and the incorrect premise that defendants who happen to be criminal trial attorneys are never without counsel. Every

defendant—regardless of his profession—is entitled to counsel unless he waives his right to counsel. *See Carnley*, 369 U.S. at 513, 82 S.Ct. 884 ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."). If a defendant is proceeding pro se, the record must reveal a defendant's "affirmative acquiescence" in his uncounseled state. *Id.* at 516–17, 82 S.Ct. 884. By expressly declining to "comb[ ] the record for some shred of [such] evidence" in this case, and by attempting to exempt uncounseled attorney-defendants from a rule that plainly applies to all uncounseled defendants, the Kentucky Supreme Court acted contrary to clearly established law. *Ayers*, 435 S.W.3d at 629.

Because a state-court decision that runs contrary to binding Supreme Court precedent is no longer owed deference, we now review de novo Ayers's Sixth Amendment claim. *See Dyer*, 465 F.3d at 284. Here, the record is devoid of any indication that Ayers was told of his right to counsel or that he affirmatively declined to exercise that right. Indeed, counsel for Kentucky conceded at oral argument that Ayers never "invoke[d] his right to proceed pro se" and never "validly waive[d] his Sixth Amendment right to counsel." Oral Arg. at 19:35–19:46, 22:19–22:35. As Kentucky seemed to recognize at oral argument, these facts decide the case.[1]

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[1] JUDGE: So, you concede there's no waiver on the record?

Perhaps seeking to bypass the above conclusion, counsel for Kentucky suggested at oral argument that Ayers had not raised this "waiver" argument earlier. We disagree. In his brief to the Kentucky Court of Appeals, Ayers made clear that he had "never ever indicated that his pro-se status was voluntary. Mr. Ayers wanted counsel, he used counsel in his other criminal proceedings and he wanted counsel again in this proceeding." R. 11-2 (Ayers Br. to the Ky. Ct. App. at 8–9) (Page ID #130–31). In the brief that he submitted to the Supreme Court of Kentucky, Ayers insisted that he was not informed of his right to counsel at his arraignment, and he argued that he "never affirmatively asserted his desire, willingness or intention of proceeding pro-se," and that "there is nothing in the record to substantiate the conclusion Ayers knowingly, intelligently and

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KENTUCKY: It's not on the record, no.
JUDGE: And you concede no warnings are given.
KENTUCKY: Right, no explicit warnings.
JUDGE: So why doesn't [*Carnley v. Cochran*] require we reverse the Kentucky Supreme Court?
KENTUCKY: Because he didn't waive his right to counsel; he was counsel, and he appeared as counsel. He had counsel—
JUDGE: What if we reject that? What if we just flat-out reject that? Do we have to reverse?
KENTUCKY: I'm not certain, it sounds—I believe you probably would.
Oral Arg. at 24:43–25:11.

voluntarily waived his right to counsel." R. 11-2 (Ayers Br. to the Ky. S. Ct. at 2–3) (Page ID #286–87). He reiterated these points in his habeas petition and in his briefing before this court, stressing that he had never "file[d] a notice of appearance of any kind, appear[ed] with a co-counsel for any purpose, or file[d] a motion to be allowed to proceed *pro se*" and insisting that the trial judge had never "obtained a waiver of Ayers's right to be represented by counsel." R. 1-1 (Mem. in Support of Pet. for a Writ of Habeas Corpus at 2) (Page ID #17); Appellant Br. at 5, 34. And Ayers asserted, as we now hold, that a trial court may not "assume the accused's silence constitutes a knowing and intelligent waiver of the right to counsel." Appellant Br. at 23. Ayers properly raised his ineffective-waiver claim, and the Kentucky Supreme Court improperly resolved it.

We recognize that defendants may waive their right to counsel through their conduct as well as through their words. *See Beatty v. Caruso*, 64 F. App'x 945, 951 (6th Cir. 2003). Defendants who fire or refuse to hire attorneys even after being warned that they may be required to proceed pro se if they continue their dilatory conduct, for instance, may be deemed to have validly waived their right to counsel. *See, e.g.*, *King v. Bobby*, 433 F.3d 483, 492 (6th Cir. 2006). But those are not the facts of this case, nor does the Commonwealth argue that Ayers waived his right to counsel through his conduct. To affirm the Kentucky Supreme Court's decision in this case, we would need to hold that a defendant who was allegedly never

informed of his right to counsel, never spoke of a desire to represent himself, and was never asked if he wanted to proceed pro se, had nonetheless waived his right to counsel simply by appearing alone. Such a holding would contradict *Carnley*'s prohibition against assuming waiver simply because the defendant appeared without counsel, 369 U.S. at 514, 82 S.Ct. 884, and would counter the Supreme Court's requirement that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... not presume acquiescence in the loss of fundamental rights," *id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Longstanding constitutional principles require defendants to do more than appear without counsel before they will be deemed to have waived their Sixth Amendment rights.

Kentucky nevertheless argues that Ayers's experience as a criminal defense attorney and his competent performance before and during trial establish that he waived his right to counsel "with eyes open." *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)); *see* Appellee Br. at 33 ("[B]y virtue of his law license and experience, it is beyond ken that [Ayers] would not have understood the pitfalls of self-representation."). This argument misses the mark. It is true, of course, that courts must consider "the background, experience, and conduct of the accused" when assessing whether a waiver of the right to

counsel was knowing, intelligent, and voluntary, *Zerbst*, 304 U.S. at 464, 58 S.Ct. 1019, and may "look to the entire record" to "assess the defendant's understanding of the risks of self-representation," *Glass v. Pineda*, 635 F. App'x 207, 215 (6th Cir. 2015). But such questions go to whether a waiver of counsel was valid, not whether a waiver was obtained in the first place. Kentucky would have us conclude from Ayers's assertedly able performance at trial that he did not need a lawyer, and thereby infer that he never wanted one. The Supreme Court endorsed a similar approach, once, in *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), by asking whether "the totality of facts in a given case" showed that a defendant who had been denied legal representation had nevertheless performed well enough to render his trial fundamentally fair. *Id.* at 462, 62 S.Ct. 1252. The Supreme Court then overruled *Betts* in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Thus, *Betts* is no longer good law.

At bottom, the record in this case simply does not allow the conclusion that Ayers validly waived his right to counsel. Indeed the government concedes the point. The Supreme Court has made clear that such a waiver was necessary before Ayers could proceed pro se. We therefore **REVERSE** the district court's denial of Ayers's habeas petition on this ground.

C. Denial of Motion for a Continuance

In his second claim for relief, Ayers argues that the trial court violated his Sixth and Fourteenth

Amendment right to assistance from counsel of his choosing when it denied his January 25, 2010 motion for a continuance to obtain counsel. *See* Appellant Br. at 40–55. As Ayers is entitled to full relief on his first claim, we need not reach the merits of this second claim, and we therefore decline to do so.

III. CONCLUSION

All criminal defendants, regardless of their professions or prior experience with the criminal justice system, are entitled to counsel. Defendants have no affirmative obligation to invoke their right to counsel; rather, courts must offer defendants the opportunity to hire or receive counsel, and defendants who wish to go it alone must "intelligently and understandingly reject[ ] the offer." *Carnley*, 369 U.S. at 516, 82 S.Ct. 884. For the past fifty-six years, it has been well-established in this country that "[a]nything less is not waiver." *Id.* As far less occurred in this case, we **REVERSE** the district court's denial of Ayers's petition under 28 U.S.C. § 2254 and remand with instructions to grant the writ of habeas corpus, unless the Commonwealth of Kentucky elects to retry Ayers within ninety days of this court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 17-5038

WILLIAM O. AYERS,
Petitioner-Appellant,
v.
JOHNATHAN HALL, Warden,
Respondent-Appellee

FILED
August 22, 2018
DEBORAH S. HUNT, Clerk

BEFORE: MOORE, THAPAR, and LARSEN, Circuit Judges.

JUDGMENT

On appeal from the United States District Court
For the Western District of Kentucky at Louisville
THIS CAUSE was heard on the record from the district court and was argued by counsel.
IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of William O. Ayers's petition under 28 U.S.C. § 2254 is REVERSED, and the case is REMANDED with instructions to grant the writ of habeas corpus, unless the Commonwealth of Kentucky elects to retry Ayers within ninety days of this court's judgment.
ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk
/s/ Deborah S. Hunt

Case No. 17-5038
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

WILLIAM O. AYERS,
Petitioner-Appellant,

v.

JOHNATHAN HALL, Warden,
Respondent-Appellee

TIM ANDERSON,
Respondent

BEFORE: MOORE, THAPAR, and LARSEN, Circuit Judges.

Upon consideration of the appellee's motion to stay the mandate,

It is ORDERED that the mandate be stayed to allow the appellee time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk
/s/ Deborah S. Hunt

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:15CV-00772-JHM-DW

WILLIAM O. AYERS PETITIONER

VS.

ROB RODRIGUEZ RESPONDENT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

In this 28 U.S.C. § 2254 petition for writ of habeas corpus, Petitioner William O. Ayers ("Ayers") has raised a novel issue: whether the trial court erred by failing to conduct a *Faretta* hearing before allowing him, an experienced criminal defense attorney, to represent himself in the proceedings below. Respondent Rob Rodriguez, Director of the Division of Probation and Parole of the Kentucky Department of Corrections ("Respondent"), has filed a response. (DN 11). Ayers has filed a reply. (DN 16). The District Judge referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §§636(b)(1)(A) and (B) (DN 4). This matter is ripe for determination.

FINDINGS OF FACT

William Ayers was a licensed attorney in

Kentucky for over fifteen years.[2] *Commonwealth v. Ayers*, 435 S.W.3d 625, 626 (Ky. 2013). His practice consisted primarily of representing criminal defendants in Jefferson County. *Id.* Unfortunately, as noted by the Kentucky Court of Appeals, Ayers' legal knowledge "appears remiss from his professional and personal choices." *Id*. On April 10, 2008, a grand jury in Jefferson County, Kentucky, indicted Ayers on five counts of willfully failing to file state income tax returns for the years of 2001- 2005. (DN 11-2, at pp. 1-2).

For the almost two-year-period between his indictment and his trial, Ayers appeared on his own behalf. Id. On January 15, 2010, Ayers filed a motion for continuance of trial based on the form and timing of the voluminous discovery produced by the state. (DN 11-2, at pp. 30-31). The trial court denied this motion. On January 25, 2010, the day before his jury trial was scheduled to begin, Ayers filed a second motion requesting a continuance of trial. (*Id*. at pp. 34-36). Ayers attached an affidavit to this motion, stating:

> 1. I expected to have Counsel; negotiations were on-going, meetings were held but no agreement has been reached as of this date.

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[2] On a petition for habeas corpus brought pursuant to 28 U.S.C. § 2254, a presumption exists that the factual findings of the state court are correct absent clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The undersigned, as such, has largely adopted the Supreme Court of Kentucky's factual finding

> 2. I will have Counsel for the new trial date, but will be prepared regardless.

(DN 11-2, at p. 5). This motion was Ayers' only expression of a desire to have counsel represent him. The trial judge again denied Ayers' motion.

Prior to proof being presented at trial, the court discussed the difference between typical *pro se* proceedings and this case, recognizing that Ayers was an experienced criminal trial attorney and well-versed in evidence and court rules. *Ayers*, 435 S.W.3d at 626. Beyond this discussion, no formal *Faretta* hearing was conducted at any stage of the trial court proceedings. *Id*.

At trial, the state presented evidence that Ayers illegally used his fiduciary status to launder money through his clients' bank accounts. *Id*. Both an IRS representative and a Kentucky Department of Revenue representative produced evidence of Ayers' mixed history of filing federal and state tax returns. (DN 11, at p. 6). Ayers testified in his own defense, acknowledging he knew he had a duty to file state income tax returns for the years at issue but alleging he did not know or did not remember why he failed to file the returns. (*Id*. at p. 8).

A Jefferson Circuit Court jury found Ayers guilty of all five counts of failing to file a state tax return and recommended he serve three years as to each count, to run concurrently. *Ayers*, 435 S.W.3d at 626. The Court sentenced Ayers pursuant to the jury's recommendation (DN 11-2, at p. 7). Ayers timely appealed his conviction to the Kentucky Court of

Appeals, raising three issues: (1) the trial court abused its discretion in denying his first motion for continuance; (2) the trial court denied his Sixth Amendment right to counsel; and (3) the trial judge failed to conduct a *Faretta* hearing before allowing him to act pro se in his proceedings. (DN 11-2, at p. 12). The Court of Appeals reversed Ayers' conviction. *Ayers*, 435 S.W.3d at 626.

The Commonwealth sought discretionary review from the Supreme Court of Kentucky on the sole issue of whether the trial court's failure to conduct a *Faretta* hearing required Ayers' conviction be set aside and a new trial be granted. *Id.* The Supreme Court of Kentucky reversed the Court of Appeals' decision and reinstated the Jefferson Circuit Court's judgment. *Id.* at 629. The Supreme Court of Kentucky determined that because Ayers was an experienced criminal defense attorney, he was not entitled to a *Faretta* hearing. *Id.* The court reasoned that Ayers was not exercising his right to proceed without a lawyer in that, as an attorney, he never forewent the benefits of counsel. *Id.* at 627. The court analogized the scenario to that of "hybrid representation," where *Faretta* warnings are unnecessary because the defendant is never without the assistance of counsel. *Id.* at 628. In emphasizing that *Faretta* protections are intended to educate those not aware of the benefits of counsel, the court concluded that requiring the trial court to obtain a waiver would have been a "vain and idle endeavor." *Id.* The court explicitly recognized that its holding

somewhat conflicted with other jurisdictions by citing cases that apply *Faretta* to defendants who are attorneys or have enhanced legal knowledge. *Id*. at 629.

Ayers petitioned for reconsideration to the Supreme Court of Kentucky, which was denied. (DN 11, at p. 10). On May 22, 2014, Ayers, represented by counsel, filed a petition for writ of certiorari at the United States Supreme Court. (DN 1-1, at p. 8). That petition was denied on October 6, 2014. *Id*.

At issue now is Ayers' 28 U.S.C. § 2254 petition for writ of habeas corpus asserting that the trial court erred in: (1) failing to conduct a *Faretta* hearing and (2) denying his second motion for a continuance of trial. (DN 1, at pp. 5, 7).

CONCLUSIONS OF LAW

A. Standard of Review

The federal habeas statute, as amended in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides relief from a state conviction if the petition satisfies one of the following conditions:

> The [state court's] adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court of the United States has carefully distinguished federal habeas review from review on direct appeal. Under the "contrary to" clause of § 2254(d)(1), a federal habeas court may grant the writ "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see also Tolliver v. Sheets*, 594 F.3d 900, 916 (6th Cir. 2010). Under the "unreasonable application" clause, the federal habeas court must ask "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. A federal habeas court may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id*. at 411.

Subsection (2) of § 2254(d) applies when the petitioner challenges the factual determinations made by the State court. *See Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001). A federal habeas court may not substitute its evaluation of the state evidentiary

record for that of the state trial court unless the state determination is unreasonable. *See Rice v. Collins*, 546 U.S. 333, 334, 337-38, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). The court may grant the writ if the State court's decision is based on an objectively unreasonable determination of the facts in light of the evidence presented.

B. Ground One: *Faretta* Claim

1. § 2254(d)(1)

The starting point for claims subject to § 2254(d)(1) is to identify the "clearly established Federal law, as determined by the Supreme Court of the United States" that governs the habeas petitioner's claims. *Marshall v. Rodgers*, 133 S.Ct. 1446, 1449, 185 L.Ed.2d 540 (2013). Here, the Supreme Court's holding in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) is the principle of law at issue.

In *Faretta*, the Supreme Court held that "the right to represent oneself in a criminal trial is an independent and affirmative right that inheres in the structure of the Sixth Amendment." *Jones v. Jamrog*, 414 F.3d 585, 591 (6th Cir. 2005) (citing *Faretta*, 422 U.S. at 819). The defendant must be free to "personally decide whether in his particular case counsel is to his advantage." *Faretta*, 422 at 835. On the one hand, a defendant representing himself is asserting his Sixth Amendment right to conduct his own defense, and, on the other, the defendant is choosing to forgo another Sixth Amendment right, the right to counsel. *See Jones*, 414 F.3d at 592. Because

the choice is in part a waiver, it must be made knowingly, intelligently, and voluntarily. *Faretta*, 422 U.S. at 835. In order to competently and intelligently choose self-representation, a 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*. (quoting *Adams v. United States v. ex rel McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

Ayers first claims that the Supreme Court of Kentucky's decision is contrary to *Faretta* because it specifically rejected the mandate of the United States Supreme Court that before a criminal defendant is allowed to proceed *pro se*, the trial judge must conduct a *Faretta* inquiry of the accused.[3] (DN 1-1, at p. 13).

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[3] In his reply, Ayers cites to three United States Supreme Court cases which he states "emphatically reinforced the need for the on the record judicial inquiry." (DN 16 at p. 9). Ayers misconstrues the applicability of these cases. In *Martinez v. Court of Appeal of California*, 528 U.S. 152, 164 (2000), the Court held the constitutional right to self- representation recognized in *Faretta* does not extend to direct appeal from a criminal conviction. In *Iowa v. Tovar*, 541 U.S. 77 (2004), the Supreme Court found a trial court need not give rigid and detailed admonishment of the usefulness of an attorney before accepting the defendant's waiver of counsel at a plea hearing. Finally, in *Indiana v. Edwards*, 554 U.S. 164 (2008), the Supreme Court held that states may insist upon representation by counsel of those who are competent enough to stand trial but still suffer from severe mental illness where they are not competent to conduct trial proceedings by themselves. Although these cases

Respondent argues that *Faretta* does not mandate any particular script or manner in which a petitioner must be made aware of the dangers and disadvantages of self-representation. (DN 11, at p. 22).

Respondent is correct that *Faretta* makes no such mandate. The Supreme Court's later decision in *Iowa v. Tovar*, confirms that the Supreme Court has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel" and explains that the information a defendant must possess to make an intelligent decision 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. 541 U.S. 77, 88 (2004). Ayers' attempt at broadening the holding in *Faretta* is unsuccessful, and the Kentucky Supreme Court's decision is not contrary to the United States Supreme Court's opinion on this particular issue of law. Additionally, the United States Supreme Court has not decided a case with a set of materially indistinguishable facts from Ayers' case. Ayers is not entitled to relief under the "contrary to" clause of § 2254(d)(1).

The more difficult inquiry is whether the Kentucky Supreme Court's decision involved an

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discuss *Faretta*, they do not go a step further and require any specific on the record judicial inquiry. *See Martinez*, 528 U.S. at 162; Tovar, 541 U.S. at 89; *Edwards*, 554 U.S. at 183.

"unreasonable application" of *Faretta*. Again, the Kentucky Supreme Court's application of Faretta must be "objectively unreasonable," rather than merely erroneous or incorrect. *Williams*, 529 U.S. at 365.

Ayers believes the Kentucky Supreme Court's refusal to apply *Faretta* when the accused is an experienced criminal defense attorney constitutes an unreasonable application of *Faretta* and its progeny. (DN 16, at p. 8). Respondent asserts that the hazards meant to be avoided by formal inquiry under *Faretta* are not present in Ayers' case because he was an experienced criminal defense attorney capable of representing himself. (DN 11, at p. 22). Respondent believes that requiring a *Faretta* hearing in this factual scenario does nothing to further the intent of *Faretta* and would only give Ayers an undeserved and irrational windfall. (*Id*. at p. 23). Because this issue is fairly novel, Respondent argues, it required a novel solution by the Kentucky Supreme Court, and Ayers has failed to prove the solution was objectively unreasonable. (*Id*. at p. 24).

The Kentucky Supreme Court determined that *Faretta* did not apply to Ayers' case and no *Faretta* hearing was necessary because Ayers was a licensed attorney and, thus, was not without counsel. *Ayers*, 435 S.W.3d at 627. The Kentucky Supreme Court discussed the purpose of *Faretta* protections, to educate people who are not aware of the benefits of counsel, and found Ayers' case was distinguishable. *Id*. at 629. The court concluded that allowing Ayers to

avail himself of *Faretta* protections would offend the integrity of *Faretta* and its progeny. *Id.*

Once more, *Faretta* emphasizes that"[a]lthough 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.'" *Faretta*, 422 U.S. 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942)). A defendant who is an experienced criminal defense attorney (1) has the skill and experience of a lawyer; (2) is aware of the dangers and disadvantages of self-representation; and (3) knows what he is doing and makes his choice with eyes open. A defendant-attorney, thus, could already be protected by the safeguards that a *Faretta* hearing or *Faretta* questioning are meant to ensure. Based on this logic, the Court finds the Kentucky Supreme Court's analysis was reasonable.

Further, a number of federal courts have indicated that formal *Faretta* warnings are not necessary when the totality of evidence shows that a defendant, who is a criminal defense attorney, knowingly and intelligently waives his right to counsel. The First Circuit in *United States v. Campbell*, for instance, found that the defendant knowingly and intelligently waived his right to counsel because he was a member of the Maine Bar

and tried numerous criminal cases in both state and federal court. 874 F.2d 838, 846 (1st Cir. 1989). Based on his practice as a criminal defense attorney, the First Circuit held the defendant "certainly knew of the gravity of the charges facing him and of the types of defenses available to him," and, consequently, his decision to represent himself was made with eyes wide open. *Id*. In similar circumstances, the Second Circuit noted that when a defendant "is or has been a practicing attorney, it may well be possible to ascertain the state of his knowledge from the record," even when direct questioning did not occur. *United States v. Maldonado-Rivera*, 922 F.2d 934, 977 (2d Cir. 1990). In *Maldonado-Rivera*, the court found that the defendant's statements and conduct throughout the proceedings reflected familiarity with the legal system and awareness of the benefits of representation by counsel. *Id*. at 977-78.

The Supreme Court of Kentucky's analysis may or may not have been erroneous, but based on *Faretta*'s holding and federal cases with similar facts,[4] the undersigned cannot say it represented an

[4] The Court recognizes that the Kentucky Supreme Court indicated its holding was "somewhat" conflicting with *Maldonado-Rivera* and *Campbell* because those courts "purport to apply *Faretta*." *Ayers*, 435 S.W.3d at 629. Despite this distinction, the similarity of facts in these cases with the facts in Ayers' case provides guidance to the Court on habeas review.

objectively unreasonable application of clearly established Supreme Court precedent.

2. § 2254(d)(2)

Ayers also seems to seek relief under 2254(d)(2), arguing that the factual basis the Kentucky Supreme Court used in finding he was "an experienced criminal trial lawyer" was unknown and unavailable to the trial judge when she elected not to conduct a *Faretta* hearing. (DN 16, at pp. 13-14). Respondent counters that Ayers' status as an experienced attorney was well known to the trial court because Ayers routinely practiced criminal cases before the trial judge in his case. (DN 11, at p. 27).

To meet the "unreasonable determination of facts" standard in § 2254(d)(2), the State court's determination of facts must be more than incorrect, it must be objectively unreasonable. The Kentucky Supreme Court identified:

> Ayers had practiced criminal defense law in the Commonwealth for over fifteen years. It is undisputed that Ayers was a well-known criminal defense attorney who regularly practiced in the very court in which he was tried and convicted. In fact, over two-hundred pages of records from the Administrative Office of the Courts detailing Ayers' appearances as counsel in criminal cases were admitted into evidence.

Ayers, 435 S.W. 3d at 626-27. The Kentucky Supreme Court also noted prior to proof being presented at trial, the trial judge explained that defendant was an experienced criminal trial attorney and was well-versed in evidence and court rules. *Id*. at 626.

Ayers admits in the memorandum to his habeas petition that he has been a licensed attorney in Kentucky since 1994 and that his legal practice primarily consisted of representing criminal defendants in misdemeanor and felony cases in Jefferson County, Kentucky. (DN 1-1, at p. 2). During pre-trial proceedings Ayers' legal experience was evident: he objected to motions of the Commonwealth, filed *ex parte* motions, and filed motions for continuance of trial. Further, the testimony of Kentucky Circuit Judge Stephen Mershon and Kentucky Court of Appeals Judge Denise Clayton supported that Ayers appeared in Jefferson Circuit Court on numerous occasions representing clients in criminal cases. This information demonstrates it was not unreasonable for the Kentucky Supreme Court to determine Ayers was an experienced criminal defense attorney and the trial judge was aware of Ayers' experience prior to trial.

Ayers also claims it was unreasonable for the Kentucky Supreme Court to find he was competent to conduct a defense for himself in a complex tax fraud case. (DN 1-1, at p. 14). Ayers contends the trial court disregarded that his second motion for a continuance was accompanied by a lament that he was "incompetent to proceed pro se in this case." (*Id*.).

Ayers feels the trial judge erred in not inquiring as to whether he had any experience with cases involving tax returns or comparable offenses.[5] (*Id*. at p. 15).

Respondent counters that Ayers' case was not a complicated fraud case but rather a basic case involving the failure to file state tax returns. (DN 11, at p. 25). Respondent, citing *Faretta* and *Tovar*, explains that the skill at which Ayers could defend a tax fraud case is not relevant to whether he knowingly exercised the right to defend himself.

The Kentucky Supreme Court found that *Faretta* does not address the quality of counsel. *Ayers*, 435 S.W.3d at 629. The court explained:

> [*Faretta*'s] requirements are not invoked when a defendant is represented by a callow and inexperienced lawyer fresh from the bar exam. It would seem to be a glaring incongruity to invoke its requirements when a capable and

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[5] There is some question as to whether Ayers is actually challenging a "factual determination" of the Kentucky Supreme Court in his argument since it seems he is challenging the Kentucky Supreme Court's assertion that *Faretta* does not address the quality of counsel. *See Sanders v. White*, No. 03-455-ART, 2016 WL 3466138, at *3 (E.D. Ky. June 21, 2016) ("[A] 'fact' for habeas purposes means 'what happened' . . . a factual issue is an issue about 'basic, primary, or historical facts'—facts 'in the sense of a recital of external events and the credibility of their narrators.'" (citing *Thompson v. Keohane*, 516 U.S. 99, 111, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995))).

> experienced criminal lawyer is representing himself. Allowing Ayers to avail himself of *Faretta* protections would offend the very purpose and integrity of *Faretta* and its progeny.

Id.

In *Faretta*, the United States Supreme Court found it was error for the trial court to reject a defendant's waiver because of "how well or how poorly" the defendant had mastered certain legal intricacies. 422 U.S. at 836. Ayers' case is distinguishable. First, the trial judge did not reject a waiver by Ayers. Second, the trial judge found *Faretta* was *not applicable* based on Ayers' prior experience as a criminal defense attorney. The Kentucky Supreme Court, accordingly, did not use Ayers' ability (or inability) to defend tax charges in finding *Faretta* didn't apply. The Court finds these determinations are not objectively unreasonable in light of the record and Ayers is not entitled to habeas relief under § 2254(d)(2).

C. Ground Two: Motion for Continuance Claim

In Ayers' second claim, he asserts that the trial court denied him his Sixth Amendment right to retain counsel of his choice by denying his second motion for a continuance. (DN 1-1, at p. 23). Ayers accuses the trial judge of not treating his motion as an assertion of his right to choose representation but, rather, treating it as a simple motion to continue, which was overruled "in a perfunctory manner." (*Id*. at p. 24). Respondent counters that Ayers' last minute motion

to continue was a delay tactic because Ayers provided no concrete evidence of an attempt to secure the services of an attorney.[6] (DN 11, at p. 32).

After a defendant has been given a fair or reasonable opportunity to obtain counsel of choice, the decision to grant or deny a continuance to permit a further opportunity to do so rests within the broad discretion of the trial court. *Neal v. State of Te*x., 870 F.2d 312, 315 (5th Cir. 1989) (citing *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)); *United States v. Moore*, 419 F.2d 810 (6th Cir. 1969). Yet the trial court must articulate its reasons for denying a motion to continue and must exercise care when a defendant's Sixth Amendment rights may be impacted. *See Morris v. Slappy*, 461 U.S. 1, 11, 103 S. Ct. 1610, 75 L.Ed.2d 610 (1983) (an unreasoned and arbitrary insistence on expeditiousness violates the Sixth Amendment right to assistance of counsel.).

Here, the trial judge discussed numerous reasons for denying Ayers' motion, including that Ayers previously represented himself for two years through the pre-trial proceedings, that he never requested appointment of counsel, and that he could

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[6] Respondent also notes that Ayers' claim is unexhausted and procedurally defaulted because he didn't raise this specific claim to the Kentucky Court of Appeals. (DN 11, at p. 31). Yet Respondent goes on to state that the Kentucky Court of Appeals, by implication, decided the claim in reversing Ayers' entire conviction on the *Faretta* issue. (Id.). The Court will address Ayers' claim on the merits.

produce no concrete evidence that he obtained representation of his choice. (DN 13, Trial Record at 11:15:00). Although Ayers had almost two years from the time he was indicted to the starting date of his trial during which he could have retained counsel of his choice, he waited until the eve of trial to allegedly assert his Sixth Amendment right. Under these circumstances, the undersigned cannot conclude the trial court's refusal to grant a continuance was objectively unreasonable.

D. Certificate of Appealability

When the Court rejects a claim on the merits, the petitioner must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong in order for this Court to issue a Certificate of Appealability. *Slack v. McDaniel*, 29 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Because Ayers' *Faretta* claim is sufficiently novel in the question it presents to be debatable among reasonable jurists, the Court recommends granting a certificate of appealability with respect to Ground One. The Court, however, does not believe reasonable jurists would find its assessment of Ayers' motion for continuance claim is debatable or wrong and does not recommend a certificate of appealability issue as to Ground Two.

RECOMMENDATION

For the foregoing reasons, the Court **RECOMMENDS** Ayers' petition for writ of habeas corpus be **DENIED** (DN 1). It is further recommended

that a Certificate of Appealability be **GRANTED** as to Ground One of Ayers' petition but **DENIED** as to Ground Two.

/s/ Dave Whalin
Dave Whalin Magistrate Judge
United States District Court
August 16, 2016

NOTICE

Therefore, under the provisions of 28 U.S.C. Sections 636(b)(1)(B) and (C) and Fed.R.Civ.P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir.), aff'd, U.S. 140 (1984).

/s/ Dave Whalin
Dave Whalin Magistrate Judge
United States District Court, August 16, 2016

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:15CV-00772-JHM

WILLIAM O. AYERS PETITIONER
VS.
ROB RODRIGUEZ RESPONDENT

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, objections having been filed thereto, and the Court having considered the same, adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS THEREFORE ORDERED that the petition for writ of habeas corpus (DN 1, DN 5) is DENIED.
IT IS FURTHER ORDERED that a Certification of Appealability is GRANTED as to Ground One but DENIED as to Ground Two.

/s/ Joseph H. McKinley, Jr.
Joseph H. McKinley, Jr., Chief Judge
United States District Court
December 12, 2016

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY LOUISVILLE DIVISIONCIVIL ACTION NO. 3:15CV-00772-JHM

WILLIAM O. AYERS PETITIONER
VS.
ROB RODRIGUEZ RESPONDENT

JUDGMENT

In accordance with the order of the Court it is hereby ORDERED AND ADJUDGED as follows:

(1) The petition for writ of habeas corpus (DN 1, DN 5) is **DISMISSED** with prejudice and judgment is entered in favor of Respondent.

(2) A Certificate of Appealability is **GRANTED** as to Ground One but **DENIED** as to Ground Two pursuant to 28 U.S.C. ' 2254; and

(3) This is a **FINAL** judgment and the matter is **STRICKEN** from the active docket of the Court.

/s/ Joseph H. McKinley, Jr.
Joseph H. McKinley, Jr., Chief Judge
United States District Court
December 12, 2016

435 S.W.3d 625
Supreme Court of Kentucky.

COMMONWEALTH of Kentucky, Appellant

v.

William AYERS, Appellee.

No. 2012–SC–000261–DG.
Nov. 21, 2013.
Rehearing Denied Feb. 20, 2014.

Opinion of the Court by Justice CUNNINGHAM.

Appellee, William Ayers, was an attorney licensed in Kentucky with extensive experience in the practice of criminal law. However, such knowledge appears remiss from his professional and personal choices. On April 10, 2008, a Jefferson County grand jury indicted Ayers on five counts of failure to file Kentucky tax returns for the years 2002–2006.

For the nearly two-year period between indictment and trial, Ayers appeared on his own behalf without expressing a desire for counsel until the day before a previously continued jury trial was scheduled to begin. Only at this delinquent date did Ayers request yet another continuance for the stated purpose of possibly retaining private counsel, which was overruled by the trial judge. Prior to any proof being presented at trial, the court noted the difference between typical pro se proceedings and this case, in which the defendant is an experienced

criminal trial attorney and well-versed in evidence and court rules. However, no formal *Faretta* hearing was ever conducted at any stage of the trial court proceedings. *See Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). At trial, evidence was presented that Ayers used his fiduciary status to launder money through clients' bank accounts. Most damning, he perpetuated his scheme through the misuse of his status as power of attorney for his client Robert Miller, a homeless man.

A Jefferson Circuit Court jury found Ayers guilty of five counts of failing to file a state tax return and recommended a sentence of three years on each count, to run concurrently. The trial court then sentenced Ayers in accord with the jury's recommendation. The Court of Appeals reversed the conviction and we granted discretionary review. The sole issue on appeal is whether the trial court's failure to conduct a *Faretta* hearing requires us to set aside Ayers' conviction and order a new trial. After reviewing the record and the law, we reverse the decision of the Court of Appeals and reinstate Ayers' conviction.

Faretta Hearing

At the time of his conviction, Ayers had practiced criminal defense law in the Commonwealth for over fifteen years. It is undisputed that Ayers was a well-known criminal defense attorney who regularly practiced in the very court in which he was tried and convicted. In fact, over two-hundred pages of records from the Administrative Office of the Courts

detailing Ayers' appearances as counsel in criminal cases were admitted into evidence. Taken in this context, we refuse to sustain Ayers' rigid interpretation of our prior decisions requiring a *Faretta* hearing. Any result to the contrary would have us sanction a legal formalism over reality. "Common sense," as spoken so eloquently by former Chief Justice John Palmore, "must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Ins. Comm'n,* 450 S.W.2d 235, 237 (Ky.1970). Under the unique facts of this case, we hold that Ayers was not entitled to a *Faretta* hearing.

"The Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution guarantee criminal defendants the right to counsel[.]" *King v. Commonwealth,* 374 S.W.3d 281, 290 (Ky.2012). Additionally, a defendant has a constitutional right to proceed without counsel when the defendant knowingly and intelligently elects to do so. *Faretta,* 422 U.S. at 835, 95 S.Ct. 2525. This directive is well-established in the Commonwealth. *See, e.g., Depp v. Commonwealth,* 278 S.W.3d 615, 619 (Ky.2009); *Grady v. Commonwealth,* 325 S.W.3d 333, 342 (Ky.2010). Although our prior decisions prove instructive, a closer look at the purpose of *Faretta* is dispositive of our decision in the present case.

The right of a criminal defendant to proceed without counsel is not a textual directive of the Sixth Amendment, but is rather a judicial interpretation. In so holding, *Faretta* has created a Janus-faced quandary for trial judges. They must look in two

directions at once. They must avoid erroneously denying the defendant the right to proceed without counsel. And at the same time, they must avoid erroneously concluding that the defendant has effectively waived his right to counsel. *See Martinez v. Court of Appeal of California,* 528 U.S. 152, 164, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) ("[J]udges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*].") (Breyer, J., concurring); *see also United States v. Farhad,* 190 F.3d 1097, 1107 (9th Cir.1999). Such difficulty in navigating the Sixth Amendment's dueling rights has often forced courts, including this one, to walk a fine line. Appearing to recognize this conflict, the Supreme Court has offered only tepid support for *Faretta* in its more recent opinions. For example, in *Martinez,* the Court held that there is no constitutional right to proceed without counsel on appeal. In arriving at this conclusion, the wisdom of *Faretta* was called into question. *Martinez,* 528 U.S. 152 at 161, 120 S.Ct. 684 ("No one ... attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient."). The majority specifically cast doubt on *Faretta's* strong reliance on the colonial and pre-colonial English legal traditions as sufficient justification. *Id.* at 156–57, 120 S.Ct. 684.

No matter the historical underpinnings upon which this seminal case was decided, "*Faretta* applies only where a defendant ... foregoes the benefits associated with the right to counsel." *United States v. Leggett,* 81 F.3d 220, 224 (D.C.Cir.1996). A

Faretta hearing was unnecessary in the present case because Ayers was not exercising his right to proceed without a lawyer. As an attorney, Ayers never forewent the benefits of counsel. There was a lawyer and a defendant who, in this case, were uniquely one and the same. The analogy of "hybrid representation" proves instructive.

Kentucky is within the minority of jurisdictions that recognize a criminal defendant's right to make a limited waiver of counsel and accept representation in certain matters. *Wake v. Barker,* 514 S.W.2d 692 (Ky.1974) (citing Ky. Const. § 11) ("[T]here is no valid basis for interpreting ['by himself and counsel'] as meaning that the only right guaranteed is to appear with counsel."). This limited waiver is sometimes known as "hybrid representation" and requires trial courts to conduct a *Faretta* hearing to determine whether the waiver is made knowingly, voluntarily, and intelligently. *Hill v. Commonwealth,* 125 S.W.3d 221, 226 (Ky.2004) (overruled on other grounds by *Grady v. Commonwealth,* 325 S.W.3d 333 (Ky.2010)). In contrast, the majority of federal and state courts hold that there is no constitutional right to hybrid representation. *See, e.g., McKaskle v. Wiggins,* 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *United States v. Mosely,* 810 F.2d 93, 97–98 (6th Cir.1987). Accordingly, most trial courts permit hybrid representation only as a "matter of grace." *State v. Melson,* 638 S.W.2d 342, 359 (Tenn.1982). Since our predecessor Court has recognized the right to hybrid representation,

primarily under our own Kentucky Constitution, we may construe such matters, either directly or by analogy, with greater constitutional latitude than if we were strictly beholden to a federal directive. *Peters v. Commonwealth* is one such example. No. 97–SC–000316–MR (Ky., Feb. 19, 1998) (unpublished).

In *Peters,* we held that *Faretta* warnings were unnecessary because the defendant received hybrid representation and therefore was never without the assistance of counsel. *Peters, id.* After an appeal from a habeas corpus petition, the United States Court of Appeals for the Sixth Circuit agreed, noting that no Supreme Court precedent clearly requires *Faretta* warnings in these circumstances. *Peters v. Chandler,* 292 Fed.Appx. 453, 457–58 (6th Cir. 2008) (unpublished).

Similarly, in *Metcalf v. State,* a case in which hybrid representation had been granted, the Supreme Court of Mississippi stated that since the defendant "was never without the advice and expertise of his attorney ... there was no need for a waiver instruction." 629 So.2d 558, 566 (Miss.1993). The Court held that waiver was not even an issue, "[r]egardless of how we label the representation [the defendant] received[.]" *Id.*

Further, in *People v. Lindsey,* the Illinois appellate court held that the defendant had not waived counsel in a manner required by the Illinois rule of procedure. 17 Ill.App.3d 137, 308 N.E.2d 111, 115 (1974). Instead, the court found that the trial judge had utilized his discretion in granting the

defendant "the best of both worlds: freedom to conduct his own defense and benefit from the assistance of counsel." *Id.* Other jurisdictions have arrived at a similar conclusion. *See, e.g., United States v. Cromer,* 389 F.3d 662, 680 (6th Cir.2004); *Phillips v. State,* 604 S.W.2d 904, 908 (Tex.Crim.App.1979). Most notably, the above-cited hybrid representation cases all involve non-lawyer defendants. Yet, these courts still held that, under the circumstances, *Faretta* did not apply. Therefore, this logic applies to the present case with even greater force because Ayers was himself an attorney. Thus, from indictment through sentencing, Ayers was never without the benefit of counsel—an experienced criminal counsel no less.

Moreover, requiring the trial court to obtain a waiver of counsel in this case would have been a vain and idle endeavor. *Faretta* protections were intended to educate people who are not aware of the benefits of counsel. Clearly, this is not the case here. *See Depp,* 278 S.W.3d at 619 ("[t]o the extent [Kentucky case law] purports to require a rigid, formulaic review of waiver of counsel, it is modified to comport with common sense.").

We fully recognize that our holding here today is somewhat conflicting with other jurisdictions. Some apply *Faretta* in cases involving defendants who are attorneys, as well as defendants with enhanced legal knowledge. *See, e.g., Butler v. State,* 767 So.2d 534 (Fla.Dist.Ct.App.2000); *U.S. v. Maldonado–Rivera,* 922 F.2d 934 (2nd Cir.1990); *Neal v. State of*

Texas, 870 F.2d 312 (5th Cir.1989); *U.S. v. Campbell,* 874 F.2d 838 (1st Cir.1989). While these courts purport to apply *Faretta* (most likely out of an abundance of caution), they apply a bare minimum standard based on the defendants' superior legal acumen. *See Iowa v. Tovar,* 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (recognizing a pragmatic approach to *Faretta* inquiries based on "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").

Unlike other jurisdictions, we dispense with the charade of combing the record for some shred of evidence that *Faretta* was satisfied. Instead of reducing the standard for a *Faretta* inquiry to an unrecognizable level, we expand this reasoning to its logical and more appropriate end.

Lastly, *Faretta* does not address the quality of counsel. Its requirements are not invoked when a defendant is represented by a callow and inexperienced lawyer fresh from the bar exam. It would seem to be a glaring incongruity to invoke its requirements when a capable and experienced criminal lawyer is representing himself. Allowing Ayers to avail himself of *Faretta* protections would offend the very purpose and integrity of *Faretta* and its progeny.

Therefore, we hold that criminal defendants who are experienced criminal trial attorneys are not entitled to a *Faretta* hearing or inquiry prior to

representing themselves. This holding is not intended to disturb our prior decisions relating to various forms of hybrid representation as applied to non-attorneys.

Conclusion

For the foregoing reasons, we reverse the Court of Appeals and reinstate the Jefferson Circuit Court's judgment.

All sitting. All concur.