No. 18-656

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The purpose of this reply in support of the petition for writ of certiorari is to (1) emphasize the compelling reasons for certiorari; (2) refute the claim that the Sixth Circuit adequately considered and appropriately rejected the critical determination underlying the Kentucky Supreme Court's decision; (3) counter the notion that the Kentucky Supreme Court denied Ayers' Sixth Amendment right to counsel; (4) dispel the fear that the Kentucky Supreme Court's decision will result in the denial of constitutional rights to attorney-defendants; and (5) explain that the absence of a waiver of the Sixth Amendment right to counsel supports the Kentucky Supreme Court's decision.

ARGUMENT

1. The need to secure the finality of state court convictions and appropriately limit federal control over state court convictions are compelling reasons to grant the writ of certiorari in this case where the Sixth Circuit's reversal of Ayers' convictions rests on its disregard of the critical determination underlying the Kentucky Supreme Court's decision.

States have "a significant interest in repose for concluded litigation" and society has the right to punish convicted offenders. *Davila v. Davis*, 582 U.S. ___, 137 S.Ct. 2058, 2070, 198 L.Ed.2d 603 (2017)

(citations omitted). Federal habeas review "disturbs" these interests and "degrades the prominence" of the state court trial, "entails significant costs," "intrudes on state sovereignty," and frustrates States' "sovereign power to punish offenders" and "good-faith attempts to honor constitutional rights." *Id.* (citations omitted). Accordingly, the standard for relief in federal habeas review of state court convictions is high and necessary to enforce. *Virginia v. LeBlanc*, ___ U.S. ____, 137 S.Ct. 1726, 1729, 198 L.Ed.2d 186 (2017). In this case, the high standard was not met, yet the Sixth Circuit intruded upon Kentucky's sovereignty by reversing final convictions. A writ of certiorari is warranted.

2. The Sixth Circuit's rejection of the Kentucky Supreme Court's determinative finding that Ayers was never without counsel was not based on clearly established Federal law as determined by this Court.

Citing only *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), the Sixth Circuit rejected the Kentucky Supreme Court's finding that Ayers was not without counsel, writing: "Every defendant—*regardless of his profession*—is entitled to counsel unless he waives his right to counsel." App. 9-10 (emphasis added). However, *Carnley* did not address the professions of criminal defendants as it related to their right to counsel except to contrast laymen with lawyers, like Ayers. For example, the *Carnley* court pointed out that "a lawyer, but not a

layman" might perceive legal issues differently, *id.* at 508, 82 S.Ct. at 886, that trained counsel can "materially assist" a lay criminal defendant by knowing nuances of the law, *id.* at 509, 82 S.Ct. at 886, that criminal prosecutions abound with "procedural rights of which laymen could not be expected to know but to which defense counsel doubtless would have called attention," *id.* at 511, 82, S.Ct. at 887, and that while a lay defendant may not know "what consequences might follow if he did testify," "[f]or defense lawyers, it is commonplace to weigh the risk to the accused of the revelation on cross-examination of a prior criminal record, when advising an accused whether to take the stand in his own behalf," *id.*, 82 S.Ct. at 888. *Carnley* did not hold that all criminal defendants, regardless of their profession, are entitled to the assistance of counsel. It held that Carnley, a layman, unversed in the law, was improperly denied counsel.

Regardless, the Kentucky Supreme Court did not find that Ayers was not entitled to counsel because he was a criminal defense attorney. Rather, the Kentucky Supreme Court found that Ayers had counsel throughout the proceedings—himself. The Kentucky Supreme Court refused to "sanction a legal formalism over reality" (App. 41) by requiring a *Faretta*[1] hearing to ensure that Ayers knowingly and intelligently waived his right to counsel because Ayers

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[1] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

was not without counsel and "*Faretta* protections were intended to educate people who are not aware of the benefits of counsel." App. 45. *Carnley* does not authorize disregarding the Kentucky Supreme Court's critical determination that Ayers was never without counsel.

3. The Kentucky Supreme Court did not deny Ayers his Sixth Amendment right to counsel.

The Kentucky Supreme Court did not hold that because Ayers was a licensed and experienced criminal defense attorney he was precluded from having another attorney besides himself represent him. Rather, the Court found that because Ayers was counsel, he was never without counsel, and a *Faretta* hearing was not required to determine whether he was knowingly and intelligently waiving his right to counsel. App. 41. This is not contrary to clearly established Federal law as determined by this Court.

4. The Kentucky Supreme Court's decision will not lead to denial of constitutional rights to counsel for accused attorneys.

As described above, the Kentucky Supreme Court did not deny Ayers his right to counsel, and there is no reason to fear extension of its holding to deny accused attorneys their rights to counsel. The Kentucky Supreme Court strictly limited its holding to the "unique facts of this case" and found that Ayers

was "not entitled to a *Faretta* hearing" because Ayers was never unrepresented by counsel. App. 41. The Kentucky Supreme Court's decision does not erode an indigent-attorney-defendant's right to state-provided counsel or an attorney-defendant's right to *Miranda*[2] warnings in appropriate circumstances because entitlement to neither of those rights requires a waiver of counsel.

5. The absence of an explicit waiver of counsel supports the finding that Ayers was never without counsel.

As found by the Kentucky Supreme Court, Ayers was never without counsel. App. 43, 45. A right exercised is not waived. Thus, there was no need for the Kentucky Supreme Court to review the record to determine if a *Faretta* hearing was held. *Carnley* does not change this.

The *Carnley* court held that the Fourteenth Amendment guaranteed Carnley the assistance of counsel after it emphasized the defects in his trial which revealed, *without question*, that Carnley was *without* counsel. *Carnley*, 369 U.S. at 510, 82 S.Ct. at 887. The Court then asked whether the absence of counsel was the product of Carnley's intelligent and understanding waiver of his right to counsel. *Id.* at 513, 82 S.Ct. at 888. The Court rejected the state

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602,16 L.Ed.2d 694 (1966).

supreme court's presumption that the defendant waived the benefit of counsel because counsel was absent and discussed what was required for a valid waiver of counsel. *Id.* at 513-517, 82 S.Ct. at 888-890. In this case, there was no waiver of counsel and no need to comb the record in search of a waiver of the right to counsel because Ayers was never without counsel. The Court's concerns in *Carnley* are not present in this case. Ayers was not a layman without knowledge or counsel about the law. As even the Sixth Circuit acknowledged, Ayers was an experienced criminal defense attorney. App. 1, 3. Unlike Carnley, Ayers was not without counsel. The Kentucky Supreme Court's holding was not contrary to *Carnley*.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this 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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