

CASE NO. 18-6749

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BARNES,

Petitioner,

v.

JULIE L. JONES, SECRETARY, DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether certiorari review should be denied where (1) Petitioner does not provide any compelling reason to grant the writ as required under Rule 10 of this Court's rules; and (2) the U.S. Eleventh Circuit Court of Appeals correctly ruled that the Florida courts did not violate Petitioner's Sixth Amendment right by appointing a special counsel to present mitigation over Petitioner's objection.

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CITATION TO OPINION BELOW

The decision of the United States Circuit Court of Appeals, Eleventh Circuit, is found at *Barnes v. Secretary, Department of Corrections, Attorney General, State of Florida.*, 888 F.3d 1148 (11th Cir. 2018).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on April 25, 2018. (Pet. App. A). Petitioner asserts jurisdiction under 28 U.S. § 1254. Respondents agree that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submit that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE

On April 20, 1988, Patricia Miller was raped and murdered in her home. *Barnes v. State*, 29 So.3d 1010, 1015 (Fla. 2010). Petitioner was initially a suspect in the crimes, but was not charged until 2005 after confessing to the crime. *Id.* at 1014. At the time he confessed, he was already serving a life sentence for murdering his wife in 1997. *Id.* He detailed what happened on April 20, 1988. That night, he entered Miller's apartment through her bedroom window with the intent of raping and killing her. *Id.* at 1015. Barnes took off his clothes in an attempt to not leave evidence. *Id.* He armed himself with a knife and surreptitiously watched Miller go about her normal activities before confronting her. *Id.* He forced her to her bedroom at knife-point where he sexually battered her multiple times, before and after trussing her up with shoelaces. *Id.* After raping her, his attempts to strangle her were unsuccessful, so he beat the back of her head with a hammer until she died. *Id.* Petitioner then collected everything he had touched in Miller's apartment, took her clothes, put everything in a bag that he took with him, and then set her bed and body on fire. *Id.* The injuries Miller sustained matched Petitioner's version of events, and DNA evidence from sperm found inside her was later tested and was a match to Petitioner. *Id.* at 1015-16.

Petitioner was indicted in 2006 after giving this confession. *Id.* at 1014. He immediately insisted on waiving counsel and requested speedy trial. *Id.* at 1016. After a lengthy *Faretta*¹ inquiry the judge found that Petitioner was "extremely

¹ *Faretta v. California*, 422 U.S. 806 (1975)

competent” and was making an unequivocal, knowing, free, and voluntary request to proceed *pro se*. *Id.* at 1016-17. At that same hearing, Petitioner stated he wanted to plead guilty to all the charges related to Miller’s death. *Id.* at 1017. The court held a plea colloquy wherein Petitioner made it clear he understood all the rights he was giving up, and that he was facing a potential death sentence; the court accepted his pleas. *Id.* at 1017-18.

Petitioner continued to waive counsel at every subsequent hearing, and informed the court he wished to waive a sentencing jury and the presentation of any mitigation. *Id.* at 1018. The judge proposed that she would appoint a special court counsel to investigate and present mitigation evidence. *Id.* Petitioner objected, stating he had a strategy in mind—to present nothing—which he wanted to follow. *Id.* The penalty phase began on January 22, 2007, and at the conclusion of the State’s presentation, Petitioner again indicated he was waiving the presentation of mitigation. *Id.* at 1018-19. Over his objection, the trial judge appointed a special mitigation counsel to investigate and present mitigation. *Id.* at 1019. The mitigation presentation started nearly a year later, on November 16, 2007. *Id.* at 1019-20. After special counsel presented evidence, Petitioner refused to provide any witnesses or evidence of his own. *Id.* at 1020.

The trial court found six aggravating factors, all of which were given great weight: (1) the murder was committed by one under sentence of imprisonment; (2) Barnes was previously convicted of another capital felony or felony involving use or

threat of violence (murder of his wife in 1997); (3) the murder was committed while Barnes was engaged in commission of a sexual battery and burglary; (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (5) the murder was especially heinous, atrocious or cruel; and (6) the murder was cold, calculated and premeditated. *Id.* at 1014 n.3. The trial court found one statutory mitigator, that Petitioner was under the influence of extreme mental or emotional disturbance, and gave it slight weight. *Id.* at n.4. The trial court found nine nonstatutory mitigators: (1) Barnes came forward and revealed his involvement in the unsolved crime (little weight); (2) he took responsibility for his acts (little weight); (3) he was under the influence of a mental or emotional disturbance (duplicating statutory mitigator and given little weight); (4) he has experienced prolonged drug use (little weight); (5) he did not have the benefit of a loving relationship with his mother (little weight); (6) he did not have the benefit of a loving relationship with his father (little weight); (7) he was sexually abused as a child (slight weight); (8) he has taken steps to improve himself (little weight); and (9) he is a functional and capable person and has demonstrated by his action and participation in this case that he has sufficient intelligence and capabilities to contribute to society (little weight). *Id.* at n.5. Petitioner was sentenced to death for the murder of Miller. *Id.*

Petitioner's conviction and sentences were upheld on direct appeal by the Florida Supreme Court. *Barnes v. State*, 29 So.3d 1010 (Fla. 2010). His petition for

writ of certiorari was denied on October 4, 2010. *Barnes v. Florida*, 563 U.S. 901 (2010). Petitioner filed a motion for postconviction relief which was denied on January 23, 2012. (*Petition* at 5). This denial was affirmed by the Florida Supreme Court. *Barnes v. State*, 124 So.3d 904 (Fla. 2013). Petitioner then moved to the federal courts, filing a writ of habeas corpus in the Middle District of Florida, which was denied. *Barnes v. Secretary, Department of Corrections*, No. 6:13-cv-1698-Orl-37DAB, M.D. Fla., 2016 WL 472631 (Feb. 8, 2016). The United States Court of Appeals for the Eleventh affirmed the District Court's ruling. *Barnes v. Secretary, Department of Corrections*, 888 F.3d 1148 (11th Cir. 2018). This appeal follows.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because (1) Petitioner does not provide any compelling reason to grant the writ as required under Rule 10 of this Court's rules; and (2) the U.S. Eleventh Circuit Court of Appeals correctly ruled that the Florida courts did not violate Petitioner's Sixth Amendment right by appointing a special counsel to present mitigation over Petitioner's objection.

First, the Eleventh Circuit's ruling and Barnes's writ challenging it provide this Court with no "compelling reason" that would justify granting discretionary jurisdiction. *See* U.S. Sup. Ct. R. 10. The primary purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the United States courts of appeals and state courts "concerning the meaning and provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 348 (1991). Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Insurance Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184, n. 3 (1987).

Barnes presents this Court with no compelling reason to grant certiorari relief. He does not point to any intolerable conflict among state and federal courts that requires this Court's intervention. Further, Barnes fails to articulate an important unsettled question of federal law that this Court must address.

Second, the Eleventh Circuit Court of Appeals correctly determined that the Florida Supreme Court did not unreasonably apply clearly established federal law. Barnes brings this petition from the Eleventh Circuit Court's decision affirming the denial of federal habeas relief; therefore, this Court's inquiry is limited by the

Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. § 2254(d)(1). Pursuant to the AEDPA, a federal court may not grant a state prisoner's habeas application unless the relevant state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "the state court's determination of facts was unreasonable in light of the evidence." *See Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (noting that the focus is on the state court's application of governing federal law).

The Eleventh Circuit correctly determined that the Florida Supreme Court did not unreasonably apply clearly established federal law as determined by this court because the Florida Supreme Court correctly identified *Faretta v. California* as the established law at the time it decided Barnes's case. "Clearly established federal law" for purposes of the AEDPA is this Court's governing precedent that existed at the time the state court rendered its ruling. *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); "Section 2254(d)(1) requires federal courts to 'focu[s] on what a state court knew and did,' and to measure state-court decisions 'against this Court's precedents as of the time the state court renders its decision.'" *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (internal citation omitted). The Eleventh Circuit found that the state court correctly identified *Faretta* as this Court's clearly established precedent. Further, the Eleventh Circuit correctly determined that the state court did not unreasonably apply *Faretta* and its progeny.

The Eleventh Circuit stated:

We first note that the Florida Supreme Court reasonably construed the Supreme Court precedent derived from *Faretta* and its progeny. See *Barnes*, 29 So.3d at 1025–26. As correctly summarized by the Florida court, *Faretta* establishes a right to self-representation for criminal defendants, but the right is not absolute. See *id.* In particular, and as further recognized by the Florida court, the participation of standby counsel, even over the objection of a pro se defendant, is consistent with *Faretta* as long as counsel does not seriously interfere with the defendant's opportunity to present his own case or undermine the jury's perception that the defendant is representing himself. See *id.* at 1026 (citing *Martinez*, 528 U.S. at 162, 120 S.Ct. 684 and *Wiggins*, 465 U.S. at 187, 104 S.Ct. 944). Because the Florida court identified *Faretta* as the controlling precedent, and accurately characterized the protections set forth in *Faretta* and developed in subsequent Supreme Court case law, it cannot be said that the Florida court's decision was "contrary to" clearly established federal law.

Nor was the Florida Supreme Court's decision an "unreasonable application" of *Faretta*. Again, to trigger habeas relief under the "unreasonable application" clause, a state court's ruling must contain an error that so obvious that it is "beyond any possibility for fairminded disagreement." *Woodall*, 134 S.Ct. at 1702 (internal quotation marks omitted). Applied in the context of *Faretta* and subsequent Supreme Court precedent such as *Wiggins*, such an error would require, at the very least, the unsolicited participation of standby counsel in a manner that (1) patently interfered with a pro se defendant's right to be heard or to present his own case, (2) resolved a disagreement between counsel and the pro se defendant in counsel's favor when the defendant's choice would normally govern, or (3) "destroy[ed] the jury's perception that the defendant [wa]s representing himself." See *Wiggins*, 465 U.S. at 174, 178, 104 S.Ct. 944. In rejecting Petitioner's *Faretta* claim, the Florida Supreme Court reasonably concluded that special counsel's participation in Petitioner's trial did not violate any of these.

Barnes v. Sec'y, Dep't of Corr., 888 F.3d 1148, 1159 (11th Cir. 2018).

Nonetheless, Petitioner continues to argue that his Sixth Amendment right to represent himself was violated when the trial court appointed special counsel to

aid in mitigation, citing *Faretta*. Petitioner argues that he provided mitigation on his own behalf in the form of his confession and acceptance of responsibility. He argues that any consideration beyond that, and particularly the appointment of additional mitigation counsel, violated his constitutional right of self-representation.

As the Florida Supreme Court concluded, the fact that Barnes took responsibility for the murder amounted to nothing more than the fact of his guilty plea. *Barnes*, 29 So. 3d at 1024. Noting that while presentation of evidence of remorse could constitute mitigation evidence, the Florida Supreme Court found that Barnes never offered remorse as an element of his mitigation strategy. *Id.* Barnes explained that his confession and guilty plea were prompted by his conversion to the Muslim religion and his desire to have the benefit of doing a good deed during Ramadan. *Id.* The mitigation evidence presented by independent counsel in this case did not conflict with anything presented by Barnes and did not violate his right to self-representation.

The Sixth Amendment implies a right of self-representation; however, the State may—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused. *Faretta*, 422 U.S. at 834, n.46. Counsel need not be excluded altogether, especially when the participation is outside the presence of the jury. *McKaskle v. Wiggins*, 465 U.S. 168, 188, 104 S. Ct. 944, 956 (1984). *See also Moody v. Comm’r, Ala. Dep’t of Corr.*, 682 Appx. 802, 810 (11th Cir. 2017) (“where it is

necessary, a trial court may appoint standby counsel over the objection of a defendant who has chosen not to have the assistance of an attorney.”).

In determining whether a defendant’s *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way. *McKaskle*, 465 U.S. at 177. Standby counsel is prohibited from conduct that substantially interferes with the defendant’s trial strategy. *Id.* at 178. However, “*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the pro se defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the pro se defendant are resolved in the defendant’s favor whenever the matter is one that would normally be left to the discretion of counsel.” *Id.* at 179.

In affirming the denial of habeas relief, the Eleventh Circuit agreed that Barnes did not establish that the trial court’s appointment of special counsel to investigate and present mitigation evidence was contrary to, or an unreasonable application of *Faretta*. Barnes was allowed to represent himself throughout the state court proceedings, including filing and arguing numerous motions, making objections, arguing points of law, questioning witnesses, and addressing the court. Barnes was allowed to present his theory of mitigation and that the evidence presented by special counsel did not contradict Petitioner’s mitigation strategy or the evidence Petitioner presented. In accordance with *Faretta*, Barnes was allowed to present his case in the manner that he chose. He fully participated in the

proceeding and the work of the special counsel did not take away from his presentations to the court. Consequently, Petitioner's Sixth Amendment rights were not violated.

Petitioner's argument that the special counsel's mitigation allowed the court to hear aggravating and damaging information is not supported by the record. Almost all of the mitigation found by the trial court was the result of the special counsel's efforts, as eight out of the ten mitigators, including the only statutory mitigator, were the result of the mitigation presentation. Even if the information had been more damaging than helpful, the trial court had obtained all of it from other sources than the trial counsel, and so the trial counsel's presentation did not add anything more damaging. *Barnes*, 888 F.3d at 1161.

In view of the "well-established general requirement of individualized sentencing," *Stringer v. Black*, 503 U.S. 222, 231 (1992), the trial court was required to conduct an individualized inquiry into Barnes' background in order to have sufficient mitigation evidence to consider. In *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 841 (1987), Justice O'Connor, in a concurrence, stated that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." As stated in *Wiggins v. Smith*, 539 U.S. 510 (2003), "investigations into mitigating evidence

‘should comprise efforts to discover all reasonably available mitigating evidence,’ covering topics as diverse as “medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.” *Id.* at 524.

This Court has recognized that the penalty phase of a capital case necessitates a “heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case.” *Sumner v. Shuman*, 483 U.S. 66, 72, 107 S. Ct. 2716, 2720 (1987). The Eighth and Fourteenth Amendments require that the sentencer “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Because of the trial court’s requirement to safeguard against the arbitrary application of the death penalty, it correctly appointed special counsel to present mitigation evidence on behalf of Barnes.

Additionally, the procedure followed by the trial court was created by the Florida Supreme Court as a result of what occurred in *Muhammad v. State*, 782 So.2d 343 (Fla. 2001). In *Muhammad*, the defendant waived the presentation of any mitigation. *Id.* at 350. The jury gave a recommendation of death without the benefit of hearing any mitigation, and the judge sentenced Muhammad to death reviewing only the mitigation gathered in a presentence investigation report. *Id.* The Florida

Supreme Court remanded the case for a new sentencing phase and directed the trial court, and all future trial courts in a similar situation, to call its own mitigation witnesses or appoint a special counsel for that purpose. *Id.* at 363-64. Faced with Petitioner waiving mitigation just as Muhammad did, the trial court appointed a special counsel to investigate mitigation. This procedure is a construction of purely state law and precedent, and therefore provides adequate and independent state law grounds to deny certiorari. *See Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

Finally, Petitioner's argument that having to cross-examine the witness, Dr. Riebsame, called by special counsel, was a violation of his Sixth Amendment rights has no merit. Petitioner exercised his right to represent himself when he was allowed to question the witness. Furthermore, Barnes' argument that his autonomy was undermined is belied by the fact that the proceeding took place only in the presence of a trial judge. Since there was no jury present, any possible confusion as to the identity of Barnes' adversary was nonexistent.

There has been no determination by this Court that the Sixth Amendment is violated when a trial court appoints special counsel to provide mitigation evidence in a capital defendant's non-jury penalty phase proceeding. This case does not present this Court with any compelling reason to grant certiorari. There is not intolerable conflict among state or federal courts, nor is there an important unsettled question of federal law for this Court to address. Further, the Eleventh

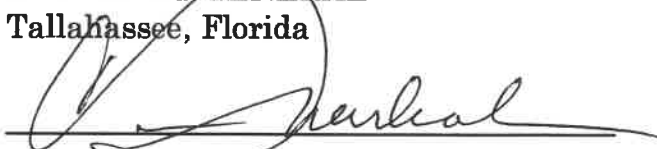
Circuit Court of Appeal decision correctly determined that the state court's decision is not contrary to, or an objectively unreasonable application of clearly established Supreme Court precedent and is not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Petitioner has failed to establish any basis for this Court to grant certiorari.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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