Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

ADNAN IBRAHIM HARUN A. HAUSA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FELDMAN and FELDMAN
Attorneys at Law
626 Reckson Plaza
West Tower, 6th Floor
Uniondale, NY 11556
(516) 522-2828

Arza Feldman
of counsel

QUESTION PRESENTED

1. Should a petition for writ of certiorari be granted to resolve a conflict between the Second and Eleventh Circuit Courts of Appeal on whether a defendant can be found to have waived his right to counsel, and proceed *pro se*, even if he declines to answer the district court's questions, because any other rule would force judges to ignore words, actions, and circumstances relevant to the Sixth Amendment *Faretta* inquiry?

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OPINION BELOW

There was one decision below, which is attached to this petition. *United States v. Hausa*, 922 F.3d 129 (2019). The order denying a rehearing, and a rehearing *en banc*, is also attached.

JURISDICTION

The order of the Court of Appeals was decided on April 24, 2019, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's Sixth Amendment right to waive counsel.

STATEMENT OF THE CASE

Adnan Hausa was convicted, after a jury trial, on five counts related to his attacks on United States soldiers: (1) conspiracy to murder U.S. nationals, in violation of 18 U.S.C. § 2332(b)(2); (2) conspiracy to bomb a government facility, in violation of 18 U.S.C. § 2332f; (3) conspiracy to provide material support to al-Qaeda, in violation of 18 U.S.C. § 2339B; (4) provision and attempted provision of material support to al-Qaeda, in violation of 18 U.S.C. § 2339B; and (5) illegal use of an explosive to commit a federal felony offense, in violation of 18 U.S.C. § 844(h). He was sentenced to life imprisonment.

On April 24, 2019, the Second Circuit Court of Appeals affirmed his conviction. *United States v. Hausa*, 922 F.3d 129 (2019). Petitioner thereafter moved for a petition for rehearing and for a petition for rehearing *en banc.* Both were denied on June 13, 2019.

STATEMENT OF FACTS

At trial, Adnan Hausa repeatedly asked to represent himself. He said "[i]f it's possible, the same way you gave me the attorney, in the same way you can take the lawyer away. Please take her--take my lawyer away." Lest there be any doubt after his use of the word "if," he then added, without condition: "I said I would represent myself. I don't want somebody else to represent me. I will stand up for myself ...."

Just over one month later, when the district court asked another defense counsel what "you want to do here," Petitioner interjected, insisting that "[h]e's not my lawyer. I represent myself."

Despite being found competent to represent himself, the district court still refused to allow Petitioner to proceed *pro se* unless he answered its questions. It asked him "[d]o you want to allow me to ask you questions which you will answer that I can make a judgment that you really want to waive your right to a lawyer or not?" After the defendant said, "[i]f that's the way you want to proceed * * * do whatever you like. That's fine. That's fine." The Court then replied: "So you don't want to let me go through a question and answer to be sure you know what you're doing?"

Based on this exchange, the Court said "I am not letting him waive his [right to counsel] ... because he won't even cooperate in my asking him questions that would allow me to make a preliminary judgment." Petitioner replied he did not care if the Court gave him a "life sentence ... it's fine [but] I'm not going to answer ... any questions."

The defendant previously explained to the Court why he would not answer its questions. He maintained that, because there was a continuing state of war between the United States and certain Islamic nations, only the International Court--rather than a United States district court--had jurisdiction to try him for combat and other related activities in both Afghanistan and Africa. He thus insisted the district court send him to the "international court," which would not have a similar conflict of interest because the United States was his "enemy" and "... my enemy [cannot give me] a [fair or] good judgment." He added that, "[t]he American marines, I killed five of and rhetorically asked "[but] [h]ow many people [has] America ... killed in Afghanistan?"

After the court would not permit self-representation without "questions and answers," Petitioner said "do what you want to" but, as

of "today, I [will] seal my mouth" because "I don't have anything to say." But he did, again insisting, just under one month later, that " ... I want to defend myself."

Petitioner also made his position clear to defense counsel who, in turn, related it to the district court. Or, as counsel explained to the court, "every time" he spoke with Petitioner, he made it "crystal clear," as "quite an intelligent person," with "a lot of experience in his life," that he wanted to represent himself.

Defense counsel told the Court that Petitioner " ... has made it crystal clear to us that he will not have us as lawyers" * * * but he at least indicated a few minutes ago that *he was prepared to answer questions about self-representation*" (emphasis added). Instead of then conducting the *Faretta* inquiry, the Court, for reasons unknown, adhered to its ruling that " ... I can't find that Mr. Hausa is knowingly and voluntarily waiving his right to counsel if I can't have the dialogue with him sufficient to allow me to determine if there's a basis for such a finding or not."

After the court insisted it saw "no alternative" to continuing counsel, and denying self-representation, defense counsel suggested that

he write and translate the *Faretta* questions to Petitioner, let him read and answer them, and then sign them under oath. The district court rejected his offer. It continued to believe that " ... he's still got to tell it to me, not just to his lawyers, that he wants to proceed without counsel."The Court acknowledged defense counsel's proposal was a "creative idea ... but I can't determine whether he is knowingly and voluntarily waiving his right to counsel based on sworn written answers."

It reasoned that "[a] *necessary part of the exercise* is for me to look him in the eye, assess what he's saying, and see if he understands well enough what he's doing in order to go ahead and make that decision *and to have the opportunity, really, to try to talk him out of it.* And I think I need to do that. I can't do that on paper" (emphasis added).

In fact, the district court did repeatedly try to talk the defendant out of it, telling him, in 2013, that he was making a "mistake," and noted he faced "life imprisonment" if he were convicted. It then told him what would happen following an uncounseled conviction, warning him that he would end up "inside a [prison located in a] mountain and never see anyone. So in a sense, it's like deciding to go through major surgery in

which you could lose your life and you decide to be your own surgeon. Now that doesn't make sense." Finally, it told him that " ... [i]t's exceptionally foolish of you to attempt to do it yourself and it [can] only redound to your detriment ... you could wind up spending your life in some unpleasant jail in the United States unless you cooperate with your lawyers and unless you have a lawyer representing you."

The Court later ruled "[t]hat [the *pro se* issue] is resolved. "The defendant," according to the Court, "refused to cooperate in allowing me to ask him the questions that would have enabled me to determine whether he could proceed *pro se*. And since he will not let me ask the questions, he has to proceed with counsel."

Defense counsel then said "[w]hen we were here last time, I tried to give Mr. Hausa copies of the translations of the questions that the [c]ourt might put to him. We had them translated into [both] Arabic and into Hausa [a language of West and Central Africa]. He refused to take them from me * * * Then[,] when I got back to the office that day, I put them in the mail and mailed him with an explanation [of] the English questions, the Arabic questions. And the [H]ausa questions, hoping ... perhaps[,] in a moment of reflection, he might read them on his own."

Defense counsel later told the Court that Petitioner " ... wants me to make sure you understand that he wants me to do nothing on his case, that he's directed me to do nothing on his case * * * And that he won't--although he doesn't want us to do anything, he also doesn't want to answer the questions that I've tried to tell him he needs to answer in order to represent himself."

Petitioner then boycotted the entire trial and sentence.

SUMMARY OF ARGUMENT

Certiorari should be granted to address a conflict between the Second and Eleventh Circuits on whether a defendant should be allowed to represent himself when his words, actions, and the relevant circumstances all establish a knowing, intelligent and voluntary waiver of his *Faretta* rights, even when, for political reasons, he refuses to engage the court in a colloquy because, as an enemy combatant, he refuses to recognize the jurisdiction of the United States of America.

ARGUMENT

POINT I

A PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE SECOND AND ELEVENTH CIRCUIT COURTS OF APPEAL ON WHETHER A DEFENDANT CAN BE FOUND TO HAVE WAIVED HIS RIGHT TO COUNSEL, AND PROCEED *PRO SE*, EVEN IF HE DECLINES TO ANSWER THE DISTRICT COURT'S QUESTIONS, BECAUSE ANY OTHER RULE WOULD FORCE JUDGES TO IGNORE WORDS, ACTIONS, AND CIRCUMSTANCES RELEVANT TO THE SIXTH AMENDMENT *FARETTA* INQUIRY.

At trial, Adnan Hausa, who fought on the battlefields of Afghanistan against United States forces, refused to submit to the jurisdiction of the United States of America, on the ground that, as an enemy, it could not be an impartial arbiter in a federal courtroom in New York. For the same reason, he refused to let an American represent him, and repeatedly insisted on representing himself. Because Hausa believed district court lacked jurisdiction, he refused to acknowledge, let alone answer, the court's *Faretta* questions about self-representation. The district court ruled that, if the defendant refused to answer its questions, it would not allow him to represent himself.

When this Court decided *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1974), the discussion of the right to self-representation presupposed a cooperative defendant, who was willing to engage in reciprocal dialogue with the court. Yet this Court has never been asked to determine whether an uncooperative defendant may waive counsel without answering the district court's questions.

In light of the *en banc* ruling in the Eleventh Circuit in *United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008), this Court should grant certiorari and find that, when faced with an uncooperative defendant who refuses to engage in a reciprocal dialogue with the district court regarding the hazards of self-representation, the refusal to cooperate does not automatically preclude a finding that he has knowingly, intelligently, and voluntarily waived his *Faretta* rights--especially where his words, actions, and the relevant circumstances establish there has, in fact, been a valid waiver.

Here, both the district and circuit courts believed that, unless Petitioner answered the *Faretta* questions, that *ipso facto* precluded his right to waive counsel and proceed *pro se*. They are wrong. The district court was unaware of the correct procedure to be followed under

Faretta, as set forth in *Garey*, and the Second Circuit misapplied that case to the facts here.

In upholding Petitioner's conviction, and denying *Faretta* relief, the Second Circuit held that, "[i]n short, Hausa prevented the court from assessing his purported waiver by refusing to answer any questions meant to assess his understanding of the risks of self-representation." *United States v. Hausa*, 922 F.3d 129, 135 (2019). It reasoned that " ... even if *Garey* were the law of this Circuit, its holding is consistent with the denial of Hausa's application because *Garey* required the very findings that the court in this case was unable to make." *Id*.

Garey, in fact, stands for the exact opposite proposition. Or, to quote the Court:

> ... an unwilling defendant can foil a district court's best efforts to engage in dialogue, thereby preventing the court from eliciting clear information regarding the defendant's understanding of the dangers of proceeding *pro se*. A dialogue cannot be forced; therefore, when confronted with a defendant who has voluntarily waived counsel by his conduct and who refuses to provide clear answers to questions regarding his Sixth Amendment rights, it is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a *pro se* litigant. So long as the trial court is assured the defendant (1) understands the choices

> before him, (2) knows the potential dangers of proceeding *pro se*, and (3) has rejected the lawyer to whom he is constitutionally entitled, the court may, in the exercise of its discretion, discharge counsel or (preferably, as occurred here) provide for counsel to remain in a standby capacity. In such cases, a *Faretta*-like monologue will suffice. *Id*. at 1267-68.

Garey is on all fours with this case. Like Garey, Hausa was an unwilling defendant, which prevented the court from eliciting clear information regarding his understanding of the dangers of proceeding *pro se*. It was enough for the district court to unambiguously inform Hausa of the penalties he faced if convicted, and to provide him with a general sense of the challenges he was likely to confront as a *pro se* litigant.

Here, it did both. First, it told the defendant he faced "life imprisonment" and second, it warned him "it's like deciding to go through major surgery in which you could lose your life and you decide to be your own surgeon. Now that doesn't make sense."

All three of the *Garey* tests were met. The district court was, or should have been, assured the defendant (1) understood the choices before him, (2) knew the potential dangers of proceeding *pro se*, and (3) rejected the lawyer to whom he was constitutionally entitled.

First, the district court was assured the defendant understood the choices before him by repeatedly warning him against proceeding *pro se*, calling it "exceptionally foolish" and a "mistake." The Court was also aware that defense counsel took the questions the Court wanted to ask, had them translated, and then mailed them, with an explanation of each question, to Petitioner, in prison. Second, Hausa knew the potential dangers of proceeding *pro se,* even telling the Court, at one point, that he did not care if it gave him a "life sentence ... it's fine [but] I'm not going to answer ... any questions." This statement definitively proves Hausa listened to the Court, heard its warnings and understood he faced life imprisonment if he were convicted after trial. Third, Hausa rejected the lawyer to whom he was constitutionally entitled, telling the court, "[i]f it's possible, the same way you gave me the attorney, in the same way you can take the lawyer away. Please take her--take my lawyer away," adding "I said I would represent myself. I don't want somebody else to represent me. I will stand up for myself ...."

When tested against *Garey*, a *Faretta*-like monologue--as opposed to a colloquy--was sufficient here. The Second Circuit's failure to apply *Garey* to the facts of this case essentially resulted in the district

court denying *Faretta* relief only because it ignored the words, actions, and circumstances of Hausa, even though they were highly relevant to a reasonable Sixth Amendment *Faretta* inquiry. *See Meriwether v. Chatman*, 292 F. App'x. 806, 820 (11th Cir. 2008)("The en banc [*Garey*] Court explained that the problem with treating the express, affirmative request for self-representation discussed in *Faretta* as the exclusive means by which a defendant may waive the right to counsel is that it forces judges to ignore words, actions, and circumstances relevant to the Sixth Amendment inquiry, such as when a defendant makes repeated, unequivocal statements rejecting his lawyer even though he knew the court would not appoint another lawyer to represent him.").[1]

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1. *See also State v. Godley*, 2018 Ohio 4253 (Court of Appeals of Ohio, Third Appellate District, Hancock County October 22, 2018)(" ... Godley's disruptive, recalcitrant demeanor throughout the course of the trial court's attempted colloquy and his failure to acknowledge that he even heard the trial court's warnings do not undermine our conclusion that Godley knowingly, intelligently, and voluntarily waived his right to counsel. As other courts have previously recognized, most "cases discussing waiver of counsel and self-representation 'presuppose[] a cooperative defendant willing to engage in reciprocal dialogue with the court' rather than 'an uncooperative defendant [who] has refused to accept appointed counsel or engage in a colloquy with the court.'" *Tucker* at ¶ 13, *quoting United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir.2008). However, although a defendant may refuse to engage in a 'reciprocal dialogue' with the trial court regarding the defendant's right to counsel and the hazards of self-representation, the defendant's refusal to cooperate does not preclude a conclusion that the defendant knowingly, intelligently, and voluntarily waived his right to counsel.").

In denying *Faretta* relief, the district court ignored the most critical and obvious circumstances of this case. Not only did the district court find the Petitioner "competent * * * well beyond a preponderance of the evidence," but, more important, "quite calculating." Clearly, his calculating actions were an indignant response to being tried by what he perceived to be his enemy, and had nothing at all to do with his understanding of his *Faretta* rights.

The district court also ignored that Petitioner had a keen mind, and undoubtedly had a sufficient understanding of his *Faretta* rights. Indeed, in a letter, dated March 6, 2015, Dr. Mark Mills, a forensic psychiatrist, found that, "[w]hen [the Petitioner] is in what he considers a supportive environment without noticeable irritants, he is rational, thoughtful, convivial and seemingly blessed with a remarkable memory."

The district court repeatedly said it was disallowing self-representation because the Petitioner would not answer its questions, claiming, again and again: " ... if he's not going to let me ask him questions to get a waiver of his rights, then[,] as far as I'm concerned, that's the end of the discussion;" "I am not letting him waive his [right

to counsel] ... because he won't even cooperate in my asking him questions that would allow me to make a preliminary judgment;" " ... I can't find that Mr. Hausa is knowingly and voluntarily waiving his right to counsel if I can't have the dialogue with him sufficient to allow me to determine if there's a basis for such a finding or not;" "[t]hat [the *pro se* issue] is resolved. The defendant refused to cooperate in allowing me to ask him the questions that would have enabled me to determine whether he could proceed *pro se*. And since he will not let me ask the questions, he has to proceed with counsel."

In upholding the district court's view of *Faretta*, the Second Circuit misread *Garey*, because it mistakenly believed that, unless a defendant answers a district court's *Faretta* questions, a self-representation motion can be automatically denied. It is, however, legally irrelevant how a defendant knows the risks of self-representation--so long as he knows them. *See Stano v. Dugger*, 921 F. 2d 1125, 1145 (11th Cir. 1991)(en banc)("So long as a defendant knows the risks associated with self-representation, it is irrelevant for constitutional purposes whether his understanding comes from a colloquy, a conversation with counsel, or his own research and

experience--the core inquiry is whether the defendant understood the choices before him and the potential dangers of proceeding *pro se*.").

Even if the Petitioner had merely rejected counsel, and had not invoked his *Faretta* rights, a valid waiver of counsel still could have been found, thus further undermining the district court's exclusive reliance on its questioning as a pre-condition of *Faretta*. *Garey*, 540 F.3d at 1265 ("Today we recognize it is possible for a valid waiver of counsel to occur not only when a cooperative defendant affirmatively invokes his right to self-representation, but also when an uncooperative defendant rejects the only counsel to which he is constitutionally entitled, understanding his only alternative is self-representation with its many attendant dangers."). *See also Meriwether,* 292 F. App'x. at 806 ("The trial court told Meriwether he had a fine lawyer representing him and explained to [him] his two options: proceed either with Rasnick as counsel or *pro se* * * * Meriwether never affirmatively requested to represent himself, but he rejected his appointed counsel without cause and thereby voluntarily waived his right to counsel through his conduct, the same as if he had affirmatively requested to represent himself.").

The Second Circuit also misapprehended *Garey* because the ultimate test of whether a defendant's choice is knowing is not the adequacy of the trial court's warning but, rather, the sufficiency of the defendant's understanding. Here, it is clear that Petitioner fully understood he faced a life sentence, and understood the grave peril he faced by proceeeding *pro se*. *See Jones v. Walker*, 540 F.3d 1277, 1293 (11th Cir. 2008)("The warnings given (or not given) to a criminal defendant are relevant to whether the defendant knowingly waived his right to counsel; however, the failure to provide on-the-record warnings is not conclusive proof that a defendant's waiver of counsel was unknowingly made. We require trial courts to warn defendants of the dangers of self-representation not because the warnings are an end in themselves, but because they are a means to the end of ensuring defendants do not waive fundamental constitutional rights without an adequate understanding of the consequences of their choices. Despite our strong admonition that trial courts provide on-the-record warnings to all defendants who wish to waive their right to counsel, the 'ultimate test' of whether a defendant's choice is knowing is not the adequacy of the trial court's warning but the defendant's understanding. So long as

a defendant knows the risks associated with self-representation, it is irrelevant for constitutional purposes whether his understanding comes from a colloquy with the trial court, a conversation with his counsel, or his own research or experience. The core inquiry is whether the defendant understood the choices before him and the potential dangers of proceeding *pro se*. If so, his waiver is valid")(citations and internal quotation marks omitted). Simply put, on the highly unusual facts of this case, it was constitutionally irrelevant that the defendant refused to answer the Court's *Faretta* questions.

Ironically, the district court erred, and the Second Circuit then failed to consider that Petitioner was, at a certain point, willing to answer the court's questions, yet the court failed to do so. Indeed, defense counsel said the defendant " ... has made it crystal clear to us that he will not have us as lawyers" * * * but he at least indicated a few minutes ago that *he was prepared to answer questions about self-representation*" (emphasis added).

The Second Circuit's alternative holding--namely, that " ... Hausa's obstruction is independent support for the denial of his purported waiver of counsel," because his "misconduct was egregious

and intolerable by any measure," *Hausa*, 2019 U.S. App. LEXIS 12105, at *13-14--simply misreads the record. In fact, Hausa became increasingly more agitated each time the Court denied his legitimate request to represent himself, to the point that he boycotted the trial and sentence. Contrary to the Second Circuit's holding, therefore, the denial of self-representation resulted in the misconduct; the misconduct did not result in the denial of self-representation.

Taken together, this Court should grant certiorari to resolve a conflict between the Second and Eleventh Circuits, and find that words, actions and circumstances are relevant to the Sixth Amendment *Faretta* inquiry, even when a defendant refuses to engage in a reciprocal dialogue.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: June 17, 2019
Uniondale, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

ADNAN IBRAHIM HARUN A. HAUSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on June 17, 2019, we served a copy of Petitioner's petition for writ of certiorari, by first class United States mail, on the United States Attorney for the Eastern District of New York, 271 Cadman Plaza East, Brooklyn, NY 11201, on the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, and on Adnan Imrahim Harun A. Hausa, Metropolitan Correctional Facility, 150 Park Row, New York, NY 10007. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court.

Arza Feldman
Arza Feldman