

No. _____

19-6045

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT H. SUMMERHAYS

(Your Name)

PETITIONER

UNITED STATES OF AMERICA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED

SEP 12 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

United States Court Of Appeals For The Ninth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SCOTT H. SUMMERHAYS

(Your Name)

USP LOMPOC/3901 Klein Blvd.

(Address)

Lompoc, CA 93436

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Does a criminal defendant have a right under the Sixth Amendment to reassert his right to counsel at a critical stage (a change of plea hearing) after he had previously waived his right to counsel per Faretta?
2. Was Petitioner's Sixth Amendment right to effective assistance of appellate counsel violated when appellate counsel failed to argue that Petitioner's Sixth Amendment right to counsel was denied at a critical stage?
3. Was Petitioner's Sixth Amendment right to effective assistance of counsel violated when sentencing counsel failed to object to not only his criminal history, but also his criminal history category?
4. Was Petitioner's Sixth Amendment right to effective assistance of appellate counsel violated when appellate counsel failed to argue that his criminal history and criminal history points were miscalculated at sentencing?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at U.S. Dist. Lexis 216801 Dec. 26, 2018 or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 25, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 28, 2019, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES CITED

| CASES | PAGE NUMBER |
|--|-------------|
| Tollett v. Henderson, 411 U.S. 258 (1973) | 8 |
| Strickland v. Washington, 466 U.S. 688 (1984) | 10,11,12 |
| Rosales-Mireles v. United States, 138 S. Ct (2018) | 11 |
| Molina-Martinez v. United States, 136 S. Ct (2016) | 11 |
| Faretta v. California, 422 U.S. 806 (1975) | 8 |
| United States v. cronic, 466 U.S. 648 (1984) | 10 |

STATUTES AND RULES

28 U.S.C. §2255

28 U.S.C. §2253

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1. SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**
- 2. SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**
- 3. SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**
- 4. SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

STATEMENT OF THE CASE

Petitioner was charged with wire fraud, money laundering, identity theft and aggravated identity theft. On October 21, 2013 Petitioner asserted his Sixth Amendment right to proceed pro se.

On February 7, 2014 Petitioner, after finding out that his standby counsel, Scott Edwards, had failed to subpoena witnesses for him, asked to change his plea from not guilty to guilty, and told the court that he needed an attorney. Up to this point Petitioner had not ask the court for a continuance, the two continuances he had been granted were asked for by previous appointed counsel. The court denied his request for counsel, and would not accept the guilty plea. Trial began four days later on February 11, 2014. On the second day of trial, February 12, 2014, and fully realizing the extent of the damage of standby counsel failing to subpoena witnesses, including expert witnesses, Petitioner stopped the trial, and without the assistance of counsel, or a plea bargain, plead guilty to all charges; the court incorporated everything that took place on February 7, 2014 into the plea.

The Court, after denying Petitioner counsel for the change of plea, went ahead and appointed standby counsel Scott Edwards for sentencing, and on May 19, 2015, and without any objections to either Petitioner's criminal history points or his criminal history category, the court sentenced Petitioner to 234 months.

A direct appeal was filed on February 5, 2016--denied. On August 20, 2017 a 28 U.S.C. §2255 was filed--denied. Petitioner's Application for a Certificate of Appealability was denied on

**STATEMENT OF THE CASE
(continued)**

April 25, 2019, and the Motion for a Rehearing En Banc was denied on June 28, 2019.

Petitioner now brings this timely Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. Does a criminal defendant have a right under the Sixth Amendment to reassert his right to counsel at a critical stage (a change of plea hearing) after he had previously waived his right to counsel per Faretta?

* Trial transcripts of February 7, 2014, Change of Plea hearing.

Page 54, line 14: The Defendant: "I can't --"

line 16: The Defendant: "I can't represent myself."

Denying a criminal defendant counsel at a critical stage in the proceedings seriously affects the fairness, integrity, and public reputation of the federal courts.

In the district court's decision denying Petitioner's 28 U.S.C. §2255, the court stated that Petitioner didn't ask for counsel and that, "Had he done so, the court would have considered re-appointing standby counsel Edwards because Edwards was familiar with Summerhays' case and had been involved with representing him actively and as standby counsel in every hearing since September of 2013." See Appendix B, Order denying §2255. The transcripts of February 7, 2014 show a defendant almost begging the court for counsel. See Appendix G, pages 2,3,4,5,6,7,8,9,13,54, and 57 The court did not offer for standby counsel to step in and take over the case, which is usually the reason standby counsel is appointed. And, the court fails to mention the reason stated in Petitioner's §2255 brief, that Edwards, who the court pointed out had been involved in the case since 2013, had failed to subpoena

* Appendix G contains the pertinent pages from February 7, 2014: Petitioner supplied the complete transcripts of that day in his 28 U.S.C. §2255 brief, Appendix D, and also in his request for a C.O.A., Appendix E. He again supplied these pertinent pages in his request for a rehearing en banc, Appendix F.

any witnesses for the defense, nor any expert witnesses for the defense, and was the reason Petitioner was pleading guilty; because he had NO defense: (emphasis added) See Appendix D, Petitioner's §2255 brief, Page 3-7. See also Appendix E, Petitioner's Application for a C.O.A. in the Ninth Circuit, Page 3-6.

The district court repeatedly admonished Petitioner for being pro se, but denied him counsel at a critical stage. The constitutional rights a criminal defendant relinquishes once he pleads guilty are immense, because "he may not thereafter raise independent claims relating to the deprivation of constitutional claims before the guilty plea." Tollett v. Henderson, 411 U.S.

Once Petitioner told the court, "I can't represent myself." the proceedings should have been stopped and a Fareta hearing should have been held. Both briefs, Appendix D, and E, go into detail on this subject, but the district court and the Ninth Circuit denied relief. See Appendix D, Page 14-15; Appendix E, Page 10-23

The district court pointed out three things on February 7, 2014. See Appendix G: Page 9: "He is not representing you as your attorney, (referring to Edwards) but he is there for purposes of standby counsel, which means his legal expertise is available to you if you would like to ask him a question."

See Appendix G: Page 54: "you've pushed the Court to the position where you have no choice but to represent yourself."

See Appendix G: Page 57: You're on your own here. You understand that."

This was Friday February 7, 2014, the court could have granted a continuance without prejudicing the government. See Appendix G, Page 57: Mr. Rachow: -- we have witnesses getting on

airplanes stating tomorrow morning coming in. And we're going to be ready on tuesday."

The Supreme Court has divided constitutional errors into two categories: trial errors, which are subject to harmless error review, and structural errors, which require automatic reversal. Most constitutional errors can be harmless. These errors are deemed trial errors because the errors occurred during the presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless. In contrast, structural errors defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself. Structural errors include the denial of counsel of one's choice, racial discrimination, in grand jury selection, and proceeding before a conflicted or biased judicial officer. The United States Supreme Court's Sixth Amendment jurisprudence has long recognized that a defendant's right to counsel is a fundamental component of the criminal justice system. Indeed, without the aid of counsel, a defendant may be unable to prepare an adequate defense and though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence. For that reason, the right to counsel, which originated as a trial right, has been extended by the United States Supreme Court to various critical stages, which the Court defines as any stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

The district court denied Petitioner an attorney at a critical stage, denying him his Sixth Amendment right to counsel.

2. Was Petitioner's Sixth Amendment right to effective assistance of appellate counsel violated when appellate counsel failed to argue that Petitioner's Sixth Amendment right to counsel was denied at a critical stage?

Appendix G, Page 7: line 22:

That's just an example. So if it's your desire to proceed with the pleas at this time, I would -- I certainly would tell you that you would be free to retain counsel for sentencing or to represent yourself, just as

Page 8:

you have.

And the court also recognizes that you have Mr. Edwards here, who is available as stand-by counsel, to provide similar assistance at public expense.

Page 54: line 16: The Defendant: I can't represent myself.

Appellate counsel failed to argue a Sixth Amendment violation of such magnitude that prejudice would have been presumed. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it effects his ability to assert any other rights he may have. United States v. Cronic, 466 U.S. 648..

Appellate counsel was ineffective. See Appendix D, pages 7-14 and Appendix E, pages 6-10 Per Strickland v. Washington, 466 U.S. Petitioner was denied a Constitutional right.

3. Was Petitioner's Sixth Amendment right to effective assistance of counsel violated when sentencing counsel failed to object to not only his criminal history, but also his criminal history category?

Petitioner detailed the errors in his criminal history calculations as they pertained to 4Al.2(a)(b)(2) in his supplemental brief.

See Appendix H. Scott Edwards, who had previously been standby counsel, and then appointed counsel for sentencing, failed to object to any of Petitioner's priors or how they were calculated. This failure resulted in Petitioner points being 18 instead of 11, and Petitioner should have been a category 5 instead of 6. This constitutes ineffective assistance of counsel, a Sixth Amendment violation; Strickland v. Washington, 466 U.S 688.

These errors constituted Plain Error; Molina-Martinez v. United States, 136 S. Ct 1338 (2016); Rosales-Mireles v. United States, 138 S. Ct 1897 (2018). The district court, in its Order denying Petitioner's §2255, See Appendix B, the court stated: "Finally, even if the criminal history were calculated incorrectly and petitioner should have been a history category V instead of VI, petitioner was not prejudiced by the error."

Does this statement by the district court completely go against what the United States Supreme Court ruled in the 2016 Molina-Martinez and the 2018 Rosales-Mireles ?

4. Was Petitioner's Sixth Amendment right to effective assistance of appellate counsel violated when appellate counsel failed to argue that his criminal history and criminal history points were miscalculated at sentencing?

Appellate counsel for Petitioner failed to raise not only the denial of counsel, but also Petitioner's criminal history. These calculations were part of the record and were ripe for direct appeal. See Appendix H. Failing to argue miscalculated point in direct appeal constitutes ineffective assistance of counsel.

Strickland v. Washington, 466 U.S. 688.

SUMMARY ARGUMENT

The Supreme Court Justices have seen and heard cases that span from a.1. through zygote intrafallopian transfer. That being said, a case of whether or not counsel was denied at a critical stage is something they should not have to rule on; these cases should be dealt with in the lower courts. The problem is that tens of thousands of cases pass through the district and appellate courts each year and some do not get thoroughly read, either by the clerks vetting the cases for the judges, or by the judges themselves. Petitioner only asks that his briefs be read.

CONCLUSION

Petitioner should have been granted a C.O.A. in the Ninth Circuit Court of Appeals, per 28 U.S.C. §2253

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT H. SUMMERHAYS

Date: September 10, 2019