No._____

In The

Supreme Court of the United States

KELVIN MELTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated October 2, 2019

QUESTIONS PRESENTED

Whether an appellant has the right to self-representation under the Sixth Amendment or the Due Process Clause of the Fifth Amendment.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, No. 16-4778, *United States v. Melton* (June 4, 2019 Order Denying Appeal)

United States Court of Appeals for the Fourth Circuit, No. 16-4778, *United States v. Melton* (October 11, 2017 Order Denying Motion to Proceed *Pro Se*)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kelvin Melton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The order of the United States Court of Appeal for the Fourth Circuit that is the subject of this appeal (App., *infra.* 1a) was unreported.

JURISDICTION

The final judgment of the court of appeals was entered on June 4, 2019. On August 30, 2019, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to and including October 2, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

INTRODUCTION

This case presents the question of whether a criminal appellant is entitled to represent himself on a direct appeal following a judgment of guilt in the district court. It is clearly established federal law that criminal defendants have a "fundamental" Sixth Amendment right to represent themselves at trial. *Faretta v. California*, 422 U.S. 806, 817 (1975). This Court has previously held that this Sixth Amendment right to self-representation does not extend to appellate proceedings, but did not exclude the possibility that a defendant may have a due process right to represent himself. *Martinez v. Court of Appeals of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000). It is the policy of the Fourth Circuit Court of Appeals that in a case where there is a right to counsel on appeal, the clerk automatically appoints the attorney who represented the defendant in the district court to continue that representation on appeal. The result is that appointed counsel who made errors at trial is unlikely to recognize and raise those errors on appeal. This Court should reconsider *Martinez* in light of actual appellate practice, or find a right to self-representation on appeal in the Due Process Clause of the Fifth Amendment.

STATEMENT OF THE CASE

Mr. Melton was convicted of four federal charges at trial: (1) conspiracy to commit violations of the kidnapping statute, 18 U.S.C. § 1201(c); (2) attempted kidnapping, and aiding and abetting the same, in violation of 18 U.S.C. § 1201(d) and 2; (3) kidnapping, and aiding and abetting the same, in violation of 18 U.S.C. § 1201(a) and 2; and (4) using, carrying, and brandishing a firearm during and in

relation to, and possessing a firearm in furtherance of, kidnapping, and aiding and abetting the same, in violation of 18 U.S.C. §§ 924(c) and 2.

On the first day of his trial, Mr. Melton requested that he be able to represent himself *pro se*, and the district court denied the request. *United States v. Melton*, ECF # 549, 5:14-cr-72 (EDNC June 6, 2016). Mr. Melton was convicted on all counts, and the district court later sentenced him to life imprisonment with a consecutive 84 months for the firearm conviction.

Mr. Melton filed a timely direct appeal to the U.S. District Court for the Fourth Circuit on November 28, 2016. The Fourth Circuit appointed his same counsel from trial to be his counsel on appeal. On April 27, 2017, counsel for Mr. Melton filed an opening brief raising only two evidentiary issues from trial. The brief did not address the district court's denial of Mr. Melton's motion to proceed *pro se*, or the denial of a motion to suppress.

After this, Mr. Melton motioned the Fourth Circuit on multiple occasions asking for permission to represent himself, or to supplement the briefs filed by his counsel with additional issues, or to have new counsel appointed. The first time Mr. Melton sought to represent himself was in May of 2017. App. 7a. The Fourth Circuit ultimately denied his motion for leave to proceed *pro se* on Oct. 11, 2017. App. 1a; 8a. This brief order is the subject of this petition. The Fourth Circuit simply reasoned that "there is no constitution right to self-representation on appeal, *Martinez v. Court of Appeal*, 528 U.S. 152, 161-64 (2000), and given the complexity of the case, we deny Melton's motion." App. 1a.

On November 13, 2017, Mr. Melton filed a motion for reconsideration of the court's denial of his motion to proceed *pro se* or, in the alternative, to be appointed new counsel and be permitted to file supplemental briefings to introduce other issues. App. 8a. That same day, the court deferring ruling on the motion to reconsider "pending assignment of the case to a panel for review." *Id.* On November 20, 2017, Mr. Melton filed a motion requesting the appointment of new counsel outside of his state and district of conviction. *Id.* That same day, the court filed an order stated that it "defer[red] consideration of the pro se motion to withdraw/relieve/substitute counsel pending review of the appeal on the merits." *Id.* On November 27, 2017, Mr. Melton filed a supplemental motion asking for the appointment of new counsel and opportunity to file supplemental briefing. *Id.* On December 4, 2017, Mr. Melton filed a motion for judicial intervention and assistance. *Id.* On December 12, 2018, the Fourth Circuit notified the parties that it would not take any action on Melton's request for reconsideration of the denial of the request to proceed *pro se*. *Id.*

An unpublished opinion affirming the district court was issued on February 21, 2019. App. 10a. Mr. Melton then, through the undersigned counsel, filed a petition for rehearing or rehearing *en banc* on May 24, 2019. App. 11a. The petition was denied on June 4, 2019. *Id.* This petition followed.

REASONS FOR GRANTING THE PETITION

The panel below denied Mr. Melton's request to represent himself based on *Martinez v. Court of Appeals of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000). In

Martinez, this Court held that criminal defendants do not have a Sixth Amendment right to self-representation in appellate proceedings, but did not exclude the possibility that a defendant may have the right to appellate self-representation under the Due Process Clause of the Fifth Amendment. This Court should revisit and clarify *Martinez*. The reasons the Court relied upon for denying the right of appellate self-representation to criminal defendants do not stand up to scrutiny– and, even should the Court choose not to recognize that right under the Sixth Amendment, the Court should recognize it under the Due Process Clause.

A. This Court Should Revisit Martinez Because the Sixth Amendment Supports a Right to Appellate Self-Representation

In *Martinez*, this Court reasoned that there is no Sixth Amendment right to self-representation on three primary bases: (1) that the historical foundations of the right to self-representation do not carry the same weight in appellate proceedings compered to trial; (2), that there are long-standing statutory limitations on the right of self-representation; and (3) that there is no long-standing practice of courts forcing counsel on appellants. *Martinez*, 528 U.S. 152. Each of these reasons is worthy of reconsideration.

In *Faretta*, this Court recognized a Sixth Amendment right to self-representation at trial. 422 U.S. at 822-23. The *Martinez* court refused to extend this right to appellate proceedings largely on the basis that a defendant's interests on appeal are not a weighty as their interests at trial. 528 U.S. at 156. Whereas *Faretta* held that need for self-representation arose from a time when "lawyers were scarce, often mistrusted, and not readily available to the average person accused of

crime," the *Martinez* court reasoned that the court system is no longer in the "years of Revolution and Confederation" when there was "an upsurge of antilawyer sentiment . . . of the old dislike and distrust of lawyers as a class." *Id*. at 156 n.3 (citing *Faretta*, 422 U.S at 826-27). As a result, this Court found that the decision to proceed *pro se* "more likely reflects a genuine desire to 'conduct his own cause in his own words'" rather than out of need. Thus, "the original reasons for protecting that right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need–although not always the desire–for self-representation." *Id.*

This analysis fails to account for the default practice of the Fourth Circuit Court of Appeals, which is to appoint trial counsel as appellate counsel absent a claim of ineffective assistance.[1] As a result, an error made by trial counsel, or an issue overlooked, is unlikely to be raised on appeal and therefore forfeited forever. A criminal defendant in this situation, like Mr. Melton, may frequently fit the *Faretta* court's exact description–being (rightfully) skeptical of his appointed counsel, and wanting to conduct his case to his own choosing. While it might be true that general public sentiment is more pro-lawyer than at the founding, the sentiment regarding court-appointed counsel is substantially less positive. And in the case of a criminal defendant who believes his appointed counsel made errors at

1 This policy is set forth on the Fourth Circuit's website: https://www.ca4.uscourts.gov/appointed-counsel/appointment-panels/cja-panel (last accessed September 27, 2019). Because orders denying an Appellant's request to proceed *pro se* will be unpublished, as this one was, other examples and the extent of the problem is unknown.

trial, the skepticism is rooted in experience.

The *Martinez* Court looked to the Judiciary Act of 1789 and 28 U.S.C. § 1654 and found that it "expressly limited" a right to self-representation. The relevant part of Judiciary Act states:

> And be it further enacted, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as *by the rules of the said courts* respectively shall be permitted to manage and conduct causes therein.

1 Stat. 92, § 35 (emphasis added). This "as by the rules of the said courts" clause "expressly limit[s]" the statutory right of self-representation and gives courts discretionary power. Thus, self-representation is treated as an "opportunity" that is "consistently subject to each court's own rules." *Martinez*, 528 U.S. at 158. 28 U.S.C. § 1654 also provides a statutory right for self-representation "by the rules of such courts."

Congress may have provided the judiciary with the discretion to manage the parties–but that is a much different provision than providing the judiciary with the authority to *mandate* that a party be represented by counsel that denes his or her autonomous right of choosing how to conduct their own appeal. The Judiciary Act of 1789 should be understood to control the management and conduct of the parties, not denying a right of self-representation.

Next, the *Martinez* court found that no historical evidence of a state having "forced counsel upon a convicted appellant," saying the practice was neither "tolerable or advisable" one. *Martinez*, 528 U.S. at 159. However, Mr. Melton's case, disproves this assumption as he made repeated requests to represent himself, or to

supplement the filings made by his appointed counsel, and was repeatedly denied by the Fourth Circuit.

Finally, the Court held that the Sixth Amendment provides rights only available "in preparation for trial and at the trial itself" and "does not include *any* right to appeal." *Martinez*, 528 U.S. at 159-160 (emphasis added). But the ability to appeal to the Supreme Court has been available for nearly all of America's history. Federal District Courts were established in 1789 and the Supreme Court itself acted as an appellate court.[2] In fact, the Court specifically considers itself a "court of review, not of first view." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1516 (2018) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). The appellate courts have been in existence for over half of the country's history; they were first established in 1891.**3**

The practical reality that appointed trial counsel then become appointed appellate counsel supports reconsideration of *Martinez*.

B. In the Alternative, Due Process Supports the Right to Self-Representation on Appeal

Even if there is no Sixth Amendment right to self-representation in appellate proceedings, this Court should find such a right under the Due Process Clause. The *Martinez* court noted that "any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause." *Id*. at

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2 Federal Judicial Center, *Courts: A Brief Overview*. https://www.fjc.gov/history/courts/courts-brief-overview.
3 United States Courts, *The Evarts Act: Creating the Modern Appellate Courts*, https://www.uscourts.gov/educational-resources/educational-activities/evarts-act-creating-modern-appellate-courts.

161. "[T]he *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for individual autonomy" and this argument is applicable to appellants "seeking to manage [their] own case" as appellants are also subject to skepticism of counsel disloyalty and it is of consideration "that it is the appellant personally who will bear the consequences of the appeal." *Martinez*, 528 U.S. at 161.

In *Martinez*, the court weighed the interests of the defendant in acting as his own lawyer and the government's interest in ensuring the integrity and efficiency of the trial. *Id.* at 162. The Court asserted that in the appellate context, the balance between the defendant's and the government's competing interests tips in favor of the State–that an individual's interests lessen in the conversion of the presumed innocent individual at a criminal trial to a convicted individual attempting to overturn the conviction, and that the State has an interest in speedy proceeding. *Id.* at 161-163. In the nearly twenty years since *Martinez* was decided, there has been a growing appreciation that errors may occur at trial and that individuals can be wrongfully convicted. The National Registry of Exonerations currently registers 2,497 exonerations to date.[4] This tips the scale away from speedily preserving the judgment below.

For these reasons, the Court should recognize that Mr. Melton has a Due

4 The National Registry of Exonerations is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. https://www.law.umich.edu/special/exoneration/Pages/about.aspx

Process right to self-representation, and hold that the trial court erred in denying him the ability to represent himself on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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