No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under Faretta v. California, 422 U.S. 806 (1975), a defendant in a criminal case has a virtually inviolable right under the Sixth Amendment to represent himself at trial. The Court in Faretta enumerated only two exceptions to this rule. First, the defendant "must knowingly and intelligently" decide to "relinquish[] . . . many of the traditional benefits associated with the right to counsel." 422 U.S. at 834. And second, and perhaps most importantly here, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." Id. at 834 n.46.

The question presented is as follows:

Did the Ninth Circuit's disposition of Petitioner's Faretta claim, which permitted the district court to deny it after determining that Petitioner had asserted it solely for dilatory purposes, conflict not only with Faretta itself, which had not enumerated that exception, but also opinions from at least one of its sister federal court of appeals and several state supreme courts?

LIST OF PARTIES

[X] 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:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Southern District of California, United States of America v. Willie Jones, Jr., No. 16-cr-1448-WQH-1. The district court entered judgment on February 28, 2018.

2. United States Court of Appeals for the Ninth Circuit, United States of America v. Willie Jones, Jr.., No. 18-50079. The Ninth Circuit entered judgment on May 30, 2019, and denied Petitioner's petition for rehearing en banc and petition for panel rehearing on July 10, 2019, after amending its earlier memorandum disposition.

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Petitioner Willie Jones Jr. respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on May 30, 2019.

OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished memorandum disposition and entered judgment on May 30, 2019, affirming Petitioner's conviction and sentence. That disposition is published at United States v. Jones, 771 Fed. Appx. 405 (9th Cir. 2019), as amended, 2019 U.S LEXIS

20523.[1] After amending the memorandum disposition, the panel later denied Petitioner's petition for rehearing en banc and panel rehearing on July 10, 2019 .[2] App. 24-29.

JURISDICTION

The Ninth Circuit entered judgment in this case on May 30, 2019, and denied rehearing and rehearing en banc on July 10, 2019. App. 1-4, 24-29. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

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[1] A copy of the memorandum disposition is included in the Appendix. See App. 1-4.

[2] A copy of the order denying rehearing, and amending the memorandum disposition is included in the Appendix. See App. 24-29.

STATEMENT OF THE CASE

Although Petitioner disputes that he was involved in this case's operative events, he will endeavor to – as the Court specified in Jackson v. Virginia, 443 U.S. 307 (1979) – present the facts pertinent to his petition in the light most favorable to the government.

A. Case Summary

In a nutshell, the indictment in this case charged Petitioner in the United States District Court for the Southern District of California with three counts of violating 8 U.S.C. § 1324(a)(1)(A)(ii) by transporting three undocumented persons from Mexico within the United States in a vehicle on June 11, 2016, after they had crossed the U.S.-Mexico border into Southern California and then walked for a few hours toward the northwest. App. 30-31. At trial, the government proffered circumstantial evidence during its case-in-chief that Petitioner, whom the undocumented persons did not identify post-arrest (see App. 37, 45, 51), had driven the three Mexican nationals to a point just east of a Border Patrol checkpoint in San Diego County, before instructing them to exit the vehicle. See App. 57-78, 84.

B. The District Court Denies Petitioner's Timely Motion to Proceed *Pro Se* After Finding That He Did So Purely to Delay the Trial

Considering that Petitioner had very specific expectations regarding his defense strategy, it is perhaps unsurprising that before the district court called prospective jurors into the courtroom on November 7, 2017, for the trial's first day, Petitioner then requested that he proceed pro se.[3] App. 11-18. Concomitantly, he requested a continuance so that he could investigate personally at least one potential defense that he wished to assert. App. 12.

But without even conducting a customary colloquy with Petitioner regarding his timely Faretta request (see, e.g., Faretta, 422 U.S. at 835), the district court instead denied it. Examining the case's overall circumstances and Petitioner's relationships with his different counsel (see App. 18-22), the district court found that Petitioner wished to proceed pro se purely for delay-related purposes, therefore warranting that it not honor his Faretta invocation:

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[3] Among other things, Petitioner stated as follows:

> I feel that all the previous attorneys that you have provided for me has damaged my case, and there is no way I can get a fair trial unless I address the illegalities in my case so it be can a truthful [sic] and the jury can see the whole picture of what has been – what took place on June 11th [2016].

App. 12.

> But the issue is whether or not he has a right to represent himself, and certainly, you know, defendants do have a right. This is – I think this is just the rare, rare case where it is being made for purposes of delay, and the record being what it is, is that he was arrested in June of 2016, we're now the sixth lawyer, the issue whether he wanted to represent himself I raised on my own at least once, if not more than once. This is the third trial date that we've had – at least the third, and it is the second time – the second time that we've been set to go to trial, and the most recent time he absolutely just refused to come out, and rather, as I indicated, have him dragged out here, I thought it was better to have him evaluated.
>
> So I do think that in considering the entirety of the record that this is the rare, rare case where the record in my view demonstrates that this request to represent himself is being made entirely for the purposes of delay, and so for those reasons it is denied, and Mr. Zugman will continue to represent [Petitioner].

App. 21-22.

C. The Jury Convicts Petitioner on All Counts, and He Later Receives a 21-Month Custodial Sentence

Following a trial that lasted parts of two days, a jury convicted Petitioner on all three counts. App. 85-86, 94. The district court later sentenced Petitioner to a 21-month custodial term, followed by a three-year period of supervised release. App. 5-7, 97-99.

D. The Court of Appeals' Disposition

In a short unpublished memorandum disposition on May 30, 2019, a three-

judge panel of the Ninth Circuit affirmed Petitioner's conviction and sentence. Particularly, the Ninth Circuit determined that "the district judge did not abuse his discretion in denying [Petitioner's] motion to represent himself, made on the morning of trial, after finding that his purpose was to delay proceedings. Cf. United States v. Farias, 618 F.3d 1049, 1052-53 (9th Cir. 2010)." App. 3. The Ninth Circuit concluded that "[t]his was based on [Petitioner's] pre-trial conduct – such as continually substituting attorneys and refusing to leave his holding cell on a previous trial date – and the fact that he was asking for a continuance to prepare to proceed pro se at trial." App. 3 (citing Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982)).[4]

Significantly, then, the Ninth Circuit's unpublished deposition here appeared to resolve a question that Farias explicitly left open (see Farias, 618 F.3d at 1055): whether a defendant who invokes Faretta rights for dilatory purposes nevertheless can obtain a continuance to avail himself of a core Sixth Amendment right to proceed pro se. But see United States v. Maness, 566 F.3d 894, 896 (9th Cir. 2009). That is, because the Ninth Circuit specifically noted that Petitioner

[4] In its later order denying Petitioner's petition for rehearing en banc and panel rehearing, the Ninth Circuit amended its disposition, making plain that it would affirm the district court's order regarding Petitioner's Faretta motion regardless of the particular standard of review it applies. App. 24-25.

had requested such a continuance, Petitioner's doing so – if anything – ostensibly made it easier for the district court to make a dilatoriness finding, notwithstanding that virtually any defendant who avails himself of Faretta rights will necessarily need some time extension to prepare to defend against the government's considerable prosecutorial resources.

ARGUMENT

1. In Faretta, the Court emphasized the constitutional sanctity of a defendant's proceeding pro se voluntarily in a criminal trial, with only limited exceptions. Faretta, 422 U.S. at 835. Significantly, the Court did not enumerate a defendant's wanting to delay the proceedings as a rationale for denying his timely invoking pro se rights, perhaps recognizing implicitly that any defendant foregoing his Sixth Amendment right to appointed counsel necessarily would need some extension to prepare properly for such an onerous responsibility.

2. Consequently, the Ninth Circuit's disposition here conflicted with Faretta's core expansive rule regarding pro se availability under the Sixth Amendment. Further, it also conflicts with published opinions from at least one federal court of appeals (the Fourth Circuit) and several state supreme courts regarding whether Faretta requires a trial judge to give a continuance to a defendant who timely invoked his pro se rights, even if his predominant purpose

in so doing was to delay the trial's start. Thus, this case falls squarely within the Court's stated prioritized categories for review, and it accordingly should grant certiorari. See Sup. Ct. R. 10(c).

3. Further, this case presents an ideal vehicle for the Court to resolve the above-discussed conflicts. Although Petitioner has already completed his custodial sentence, he remains on supervised release, therefore making his underlying conviction amenable to challenge. And the Court has long held that Farreta violations are structural trial errors, therefore automatically resulting in a reversal here if the Court were to grant certiorari and agree with Petitioner and the Fourth Circuit and state supreme courts that have not adopted the Ninth Circuit's ostensible dilatoriness exception. Certiorari is therefore warranted. See Sup. Ct. R. 10(a) and (b).

I. FARETTA ESTABLISHED A FUNDAMENTAL, AND VIRTUALLY IMPREGNABLE, RIGHT UNDER THE SIXTH AMENDMENT TO REPRESENT ONESELF DURING A CRIMINAL TRIAL.

A. At bottom, Faretta is one of the Court's most-seminal criminal procedure opinions. Observing the then-extant jurisprudence, Faretta noted that there was "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." Faretta, 422 U.S. at 817.

Explaining this further, Faretta stated that "[t]o thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth Amendment]. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character of which the Amendment insists." Id. at 820. In sum, Faretta further explicated, "[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally decide whether in his particular case counsel is to his advantage." Id. at 834.

B. Having stressed the constitutional importance of a criminal defendant's right to proceed pro se, the Court in Faretta enumerated only two ostensible exceptions to that overriding Sixth Amendment rule. First, the defendant "must knowingly and intelligently" decide to "relinquish[] . . . many of the traditional benefits associated with the right to counsel." Faretta, 422 U.S. at 834. And second, and perhaps most importantly here, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." Id. at 834 n.46. Explaining further, the Court held that the "right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." Id.

C. Quite significantly, then, it is notable that the Faretta Court did not enumerate a purely dilatory intent by the defendant as a ground for forfeiting his constitutionally guaranteed right to represent himself. Indeed, one can readily presume that even defendants who seek pro se representation for non-dilatory reasons will invariably request a continuance to obtain more time to prepare themselves for the difficult task of defending themselves at trial against an experienced prosecutor. See Powell v. Alabama, 287 U.S. 45, 59 (1932) ("It is vain to give the accused a day in court with no opportunity to prepare for it . . . .").

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S DISPOSITION AND FARETTA ITSELF.

Thus, provided that a trial judge manages carefully a continuance's length under the case's factual and procedural circumstances, it would not make a functional difference to allow a defendant with dilatory intent to proceed pro se. He would not be able to delay a case anymore than one with pure intentions would, and if the defendant were to have waived his right to counsel knowingly and intelligently, the trial judge would have complied with Faretta's core condition precedent for self-representation. See Faretta, 422 U.S. at 834.

Consequently, by precluding a defendant such as Petitioner categorically from pursuing his constitutionally guaranteed right to proceed pro se if he

exercises it knowingly and intelligently, the Ninth Circuit's disposition conflicts squarely with Faretta. And the Court should – at the most elemental level – grant certiorari to resolve it. See Sup. Ct. R. 10(a).

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS REGARDING WHETHER DILATORINESS IS AN EXCEPTION TO FARETTA'S RULE.

A. Although the Ninth Circuit's disposition here does not explicitly cite to governing case law regarding a putative dilatory-purpose exception to Faretta, it has indeed in earlier published opinions adopted one. See, e.g., Maness, 566 F.3d at 896 (holding that a pro se request is viable if it is "timely, not for purposes of delay, unequivocal, voluntary, intelligent and the defendant is competent.") (emphasis added). Here, therefore, the Ninth Circuit ostensibly followed a longstanding Faretta exception by affirming the district court's order.

B. Petitioner's comprehensive survey of post-Faretta case law, however, illustrates that there is a definitive conflict among the federal courts of appeals regarding whether Faretta contemplated a dilatory-purpose exception. Compare United States v. Frazer-El, 204 F.3d 553, 558 (4th Cir. 2000) (holding that "[a]n assertion of the right of self-representation . . . must be (1) clear and unequivocal . . . knowing, intelligent and voluntary . . . and (3) timely.") (internal citations

omitted) with Jones v. Norman, 633 F.3d 661, 667 (8th Cir. 2011) ("'A request to proceed pro se is constitutionally protected only if it is timely, not for purposes of delay, unequivocal, voluntary, intelligent and the defendant is competent.'") (quoting Maness, 566 F.3d at 896); United States v. Mackovich, 209 F.3d 1227, 1238 (10th Cir. 2000) ("The district court did not err in rejecting Mackovich's request for self-representation when it found the request was made to delay the trial."); Buhl v. Cooksey, 233 F.3d 783, 797 (3d Cir. 2000) ("A court may conclude that a defendant who intends nothing more than disruption and delay is not actually tendering a knowing, voluntary and intelligent waiver of counsel, and has not unequivocally asserted the constitutional right to conduct his/her own defense."); Robards v. Rees, 789 F.2d 379, 383 (6th Cir. 1986) (observing that there is an "exception" to Faretta "when the prosecution makes an affirmative showing that the defendant's request for self-representation is merely a tactic to secure a delay in the proceeding"); Chapman v. United States, 553 F.2d 886, 895 (5th Cir. 1977) ("Finally, there is no suggestion in the record that Chapman's assertion of his pro se right was designed to achieve delay or tactical advantage, that it would in fact have resulted in any delay, or that the trial court denied Chapman's request on the assumption that it would result in delay.");

C. Additionally, state supreme courts that have opined on whether a

dilatory-purpose exception to Faretta exists are also in conflict. Compare State v. Christian, 657 N.W.2d 186, 191-93 (Minn. 2003) (adopting an then-extant Eighth Circuit rule that a defendant had an 'unqualified' pretrial right to proceed pro se (quoting United States v. Wesley, 798 F.2d 1155, 1155 (8th Cir. 1986)); Thomas v. Commonwealth, 539 S.E.2d 79, 82 & n.3 (Va. 2000) (declining to reach question of whether dilatory-purpose exception to Faretta exists, while simultaneously recognizing that the Fourth Circuit in Frazier-El declined to adopt one); People v. Clark, 833 P.2d 561, 587 (Cal. 1992) ("Although a defendant has a federal constitutional right to represent himself . . . in order to invoke an unconditional right he must assert it within a reasonable time prior to the commencement of trial.") (internal quotation marks and citations omitted, emphasis added); with Guerrina v. State, 419 P.3d 705, 709 (Nev. 2018) (holding that "[a] court may . . . deny a request for self-representation if the request is untimely, equivocal, or made solely for purposes of delay or if the defendant is disruptive.") (internal quotation marks omitted, alterations in original); Commonwealth v. Brooks, 104 A.3d 466, 474 (Pa. 2014) ("This Court has recognized that a request to proceed *pro se* must be made in a timely fashion, and not for purposes of delay, and the request must be clear and unequivocal.").

D. Consequently, to create uniformity among the federal courts of appeal

and state supreme courts, the Court should grant certiorari. See Sup. Ct. R. 10(a) and (b). At bottom, deciding the question of whether the dilatory-purpose exception – one that does not appear in Faretta itself (see supra at 9-10) – exists will impact Sixth Amendment jurisprudence dramatically, particularly considering how often the question likely arises daily in federal district and state trial courts.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Simply put, there are at least three reasons why this petition is an ideal vehicle for the Court to resolve the conflicts that Petitioner detailed supra.

First, although Petitioner has finished serving his custodial sentence, he remains on supervised release until approximately March 2022. Thus, as the Court has long held, the question that Petitioner presents is not moot. See, e.g.. Sibron v. New York, 392 U.S. 40, 57 (1968) ("[A] criminal case is moot only if it shown that there is no possibility that any legal consequences will be imposed on the basis of the challenged conviction."). Simply put, because a Faretta error is structural (see, e.g., McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018)), if the Court were to grant certiorari and reverse – holding that Faretta does not preclude a dilatory defendant from proceeding pro se at trial – that would result in Petitioner's conviction being reversed in its entirety.

Second, on hypothetical remand from the Court, the Ninth Circuit would not have any additional issues to address. And the Court's resolving the question presented in Petitioner's favor would necessarily result in his conviction's being reversed because, as the district court candidly acknowledged (App. 18), Petitioner otherwise timely asserted his Faretta request, and it therefore was otherwise ripe for the district court to have adjudicated.

And third, because Faretta claims arise frequently in criminal cases in federal district and state trial courts, resolving the conflicts among the federal courts of appeals and – separately – state supreme courts would provide judges with a clear rule to follow. That is, if the Court were to make plain that trial judges cannot deny a defendant's knowing-and-voluntary Faretta claim that he asserted timely except under exceptional circumstances.

Consequently, the Court should grant the petition.

V. CONCLUSION.

The Court should grant this petition for a writ of certiorari.

Dated: October 8, 2019

Respectfully submitted,

s/David A. Schlesinger

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on October 8, 2019, as required by Supreme Court Rule 29, I served Petitioner Willie Jones, Jr.'s MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to him, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

The Honorable Noel J. Francisco, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

Additionally, I mailed a copy of the motion and the petition to my client, Petitioner Willie Jones, Jr.., by depositing an envelope containing the documents in the United States mail, postage prepaid, and sending it to the following address:

Willie Jones, Jr.
13920 Chadron Avenue, Apt. 17
Hawthorne, California 90250

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 8, 2019

s/David A. Schlesinger
_____
DAVID A. SCHLESINGER
Declarant