ORIGINAL

No. 19-6995

In The
Supreme Court of the United States

RICHARD ALAN KING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, RICHARD ALAN KING, aka WILLIAM KEEGAN, pro se, respectfully petitions the United States Supreme Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for The Ninth Circuit and the district court in error in this honorable court.

OPINION BELOW

The Ninth Circuit summary denial of a Certificate of Appealability was not published. (Pet App 1 @ 4).

Petitioners suggestion for en banc determination was summarily denied without circulating the suggestion among the non recused active judges of the court. The decision was not published (Pet App 1 @ 4).

The District Courts order dismissing Petitioners first § 2255 with prejudice was not published (Pet App 1 @ 3,2,1).

Jurisdiction

The jurisdiction is invoked under 28 USCS § 1254 et seq.

RELEVANT STATUTORY PROVISIONS

21 USCS § 846 (Pet App 17)(Pet App 7 @ 47).

21 USCS § 841 A (a)(1) (Pet App 17)(Pet App 7 @ 38-9).

21 USCS 841 (b) (1)(A)(ii) (Pet App 17)(Pet app 38-9).

18 USCS § 1956 (h) and (a)(1)(a) (Pet App 16).

18 USCS § 3231 (Pet App 20) (Pet App 7 pg 37 L18 19, L14-28, pg 38 L1-9).

28 USCS § 2255 (Pet App19)(Pet App 3).

(Pet App) referrs to Petitioners Appendix. (TT) Trial Transcripts. (DC Doc) referrs to criminal case (2:08-cr-0045), (Doc) referrs to §2255 (2:16-cv-0086 PHX-SRB-(DKD). (NC) Indicates Ninth Circuit docket.

STATEMENT OF THE CASE

1. On January 24, 2008 in the District of Arizona the federal grand jury returned a single count indictment charging Petitioner and co-defendant Mr. Bolin with conspiring between November 2006 and January 2008 to possess with intent to distribute 5 kilograms or more of a **mixtrure or substance** containing a detectable amount of cocaine in violation of 21 USC § 846, 841 (a)(1) and (b)(1)(A)(ii)(DC Doc 2, 2:08-cr-00045-PHX-SRB),(Pet App 5 @ 57-58, Pet App 17).

2. On May 21, 2008 the government moved the grand jury to supercede. Charging Petitioner as William Wallace Keegan aka Richard King with the identical charge, and added its long time confidential informant Iran Cota as a co-defendant (DC Doc 55).

3. On September 16, 2008 the government again moved the grand jury to return a second superceeding indictment. (Pet App 2&17) which expanded the conspiracy dates back one year from 2006 to 2005 and added Mr. Hennessey as a co-defendant, and added four counts of actual possession with intent to distribute 5 kilograms or more of a **mixture or substance** containing a detectable amount of cocaine even though the government never found any person charged in actual or constructive possession of cocaine. No cocaine was produced at trial or any so called **mixture or substance** in support of the governments hypothetical **mixture or substance** prosecution in counts 1-5. The government further charged Count six a conspiracy to launder the alleged proceeds of the alleged **mixtures or substances** containing the detectable amounts of cocaine, i.e.;(counts 1-5) in violation of 18 usc § 1956 (a)(1)(A) and (h). (Pet App 2), (Pet App 16).

4. Twice between the original indictment and trial, the district court granted and once resinded at defendants request for permission to self represent (Pet App 11,12,13). Petitioner was pro se when the trial commenced on June 2, 2009 (Dc Doc 422), however, on day three of trial, Petitioner withdrew his waiver of counsel with leave of court. (Pet App 14).

5. The trial court re-appointed Petitioner's advisory counsel to lead counsel. Said counsel was familar with the case having been lead counsel from December 30, 2008 (Pet App 12) until May 4, 2009 (Pet App 13). Accordingly, as lead counsel for the second time (Pet App 14), lead counsel represented Petitioner for the balance of the ten days trial (TT 587-1657), that is from June 5, 2009 to June 17, 2009 when the jury returned guilty verdicts on all six counts. (Pet App 2).

6. The jury found by special verdict that counts 1-5 each involved 5 kilograms or more of cocaine (Pet App 2), even though the explicit terms of the indictment (Pet App 2) Petitioner was specifically charged with a **mixture or substance** containing a detectable amount of cocaine not 5 kg or more of cocaine. This means that the indictment affirmitively alleges conduct not violative of 21 USC § 841 (a)(1). Moreover the charging statute 21 usc § 846 and 841 A (a)(1) does not authorize anonymous **mixture or substance** prosecutions. Accordingly, lead counsel was constitutionally deficient meeting the cause and prejudice standards under Strickland for failing to object to the indictment, the special jury verdict and failed to to move the court during the Rule 29 hearing for a new trial. Counsel failed to inform Petitioner of these inherrent prejudicial defects.(Pet App 3, 5 @ 56-66).

7. On September 14, 2009 at Petitioners request the district court reinstated Petitioners pro se status (85 days post verdict) (DC Doc 500). On December 10, 2009 the court sentenced Petitioner to 5 life sentences (counts 1-5) and to 20 years on count six (Pet App 2).

8. For appeal, at Petitioners request the district court appointed a different advisory counsel (DC Doc 672).[1] Said counsel filed NOTICE OF APPEARANCE OF COUNSEL (DC Doc 692). Petitioner filed NOTICE OF APPEAL DC Doc (694, establishing (NC Case No. 10-10005). On June 11, 2012 Petitioner filed his pre appeal Rule 33 Motion for a New Trial (DC Doc 822) which was denied in a one paragraph order on August 20, 2012 (DC Doc 827). NOTICE OF APPEAL was timely filed (DC Doc 831) establishing NC Case No. 12-10622. Said appeals were consolidated (NC Doc 115). On May 4 2014 (NC Doc 166) said appeals were denied. This court denied certiorari on January 12, 2015, case # 14-7329, 190 L.Ed. 878.

9. Petitioner served his first §2255 habeas corpus petition on January 8, 2016, establishing 2:16-CV-00086 PHX-SRB-(DKD) (Pet APP 3).

10. The government filed its answer limited to affirmitive defenses urging the court to dismiss all of Petitioners claims on procedural grounds. "All of [Petitioners] claims are barred because defendant represented himself during significant portions of the pre-trial, trial , and post trial litigation--- thay are procedurally defaulted". (Pet App 4 Doc 32 pg 1-2, pg 3L22-23, pg 17, 18 and 19).

[1] The Ninth Circuit did not allow advisory counsel on appeal.

11. On April 9, 2018 Petitioner filed his pro se reply arguing inter alia the government waived its procedural default affirmitive defense by failing to make them during the relevant Faretta hearings pre-trial (Pet App 5 Doc 58).

12. On June 5, 2018 the magistrate filed his Report and Recommendation, recommending that Petitioners first § 2255 be dismissed with prejudice and leave to proceeed in forma pauperis be denied and any COA be denied " because the court can not consider post conviction claims of ineffective assistance counsel or advisory counsel...under long standing binding precedent King's claims of ineffective assistance of counsel can not stand." (Pet App 1@2 Doc 65 pg 3 L 14-27, pg 4 L 1-10.

13. In error the district court adopted the R & R "As the order of this court" (Pet App 1@ 3 Doc 73 pg3).

14. Petitioner moved the Ninth Circuit Case No. 18-16566 for 10 COA's in one petition. (Pet App 7 NC Doc 15) which the panel denied in a single paragraph short order (Pet App 8, NC Doc 16).

15. Petitioner moved for an en banc determination (Pet App 9 NC Doc 17) which the panel denied without circulating the said petition to the non-recused active judges of the Ninth Circuit and closed the case to any further filings in a one paragraph short order(Pet App 10 NC Doc 18-19), (Pet App 1 @ 5).

This Petition for a Writ of Certiorari, summary reversal and remand follows.

Reasons for Granting the Writ

1.) It is of critical national importance that the public have and hold confidence that the lower courts of the United States will apply the holdings of controlling Supreme Court precedents in every case.

2.) It is of critical national importance that the public have and hold confidence that federal prosecutors guiding the various grand juries are held to bring all criminal charges squarely within the terms of the applicable criminal statute.

3.) To correct a fundamental miscarriage of justice.

4.) To determine if petitioner is actually innocent.

I Was The Presiding Magistrate's Analysis So Flawed As To Warrent This Court To Reverse And Remand So That The Proper Legal Standard May Be Applied ?

The Magistrate's Analysis
(Doc 65 pg 3, L 13-27 pg4 L 1-2)

"Analysis"

King raises two claims for relief. First he argues that he received ineffective assistance of Counsel in various ways; and second, he argues that he should have been represented when he filed a motion for a new trial (doc 24). Responents argue That King cannot raise either claim. (Doc 32) The court agrees. (Pet App 3 & 4).

When a criminal defendant requests self representation, the district court must determine that the request is knowing and intelligent Faretta v California, 422 US 806, 819-20, 835 (1975). After that determination, the court can choose to appoint advisory counsel but a pro se defendant has no right to such counsel U.S v Moreland, 622 F3d 1147, 1155(9th Cir 2010); U.S. v Olano, 62 F3d 1180-1193 (9th Cir. 1995). "[A]defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel." Faretta, 422 US at 834 n 46. This means that the Court can not consider post-conviction claims of ineffective assistance of counsel or advisory counsel. Cook v Ryan, 688 F.3d 598-609 (9th Cir 2012); see also Wainwright v Torna, 455 US 586, 587-88 (1982). According ly, under long standing and binding precedent, King's claims of ineffective assistance of counsel cannot stand. (Doc 24 at 5-50). (Pet App 3).

Likewise, the court can not review Kings claim that he should have received Faretta warnings before he moved for a new trial . (Doc 24 at 51-52) King could have raised this claim in his direct appeal, when he was proceeding pro se but did not. Accordingly this claim is also barred from consideration."

"IT IS THEREFORE RECOMMENDED that Richard Alan King's Amended Motion to Vacate, Set Aside or Correct Sentence be **denied and dismissed with prejudice.**" (Doc 65 pg4 L 17-19).

"IT IS FURTHER RECOMMENDED that a Certificate of Appealability and leave to proceed in forma pauperis on appeal be **denied** because dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the ruling debatable." (Doc 65 pg 5 L 3-6)(Pet App 1 @ 2).

II Did The Government Waive Its Procedural Default Arguments By Failing To Raise Them In The District Court During The Relevant Pre Trial Hearings Pursuant To Faretta v California, 422 U.S. 805-835 (1972) ?

1. The Supreme Court has said that dismissal of a first federal habeas petition is a particularly serious matter. See Lonchen v Thomas, 517 U.S. 314 (1996).

2. Petitioner filed his first timely habeas corpus petition pursuant to 28 USC § 2255 on January 8, 2016. Case No. (2:16-CV-00086-PHX-SRB-(DKD)). In which Petitioner raised 18 claims of Ineffective Assistance of Counsel hereafter ("IAC") and one claim of structural error (Doc 1 amended at 24 pages 6-52)(Pet App 3).

3. The Magistrate ordered the government to file a response limited to affirmitive defenses (Doc 4@4, 23 @2). To which the government filed its answer (Doc 32) asserting inter alia that petitioner's claims all were procedurally defaulted, based on this court's decision in Faretta supra and Cook v Ryan, 688 F3d 598-609 (9th Cir 2012)(Pet App 4).

4. In opposition, Petitioner filed his inartfully drafted pro se reply (Doc 58) arguing inter alia that the government waived its procedural default defense arguments. (Pet App 5).

> "Respondents failure to object during the Faretta colloquies constitutes a waiver of that affirmitive defense" See (Doc 58 pg 19 @ L 18-20); See also pgs 4-27 Doc 58.(Pet App 5).

5. Petitioner affirmitively raised that argument (inartfully) but the record does not establish that either the magistrate (Doc 65) or the district judge (Doc 73), studied or considered Petitioner's waiver argument supra. (Pet App 1 @ 2 and 3)

6. In his inartfully drafted application for 10 Certificates of Appealability hereafter ("COA") in one petition Ninth Circuit Case No. 18-16566 2 (N.C. Doc 15) Petitioner again raised affirmitively (Pet App 7) in Issue Four (N.C. Doc 15 @pgs 24-30) that the government waived its procedural default arguments:

> "Respondent had multiple opportunities to object and make a discernable record as to the consequences of self representation regarding "IAC" claims in collateral proceedings. Said seasoned AUSA's failed to do so, thereby waiving Faretta/Cook arguments as affirmitive defenses" See (N.C. Doc 15 pg 25) (Pet App 9); (Pet App 7).

7. It can not be discerned from the panels short order of denial (Pet App 8), (N.C. Doc 16) that the panel studied or considered Petitioner's inartfull counter procedural default argument (N.C. Doc 15 pg 25), (Pet App 7);

8. Petitioner, then moved for an en banc determination and again asserted that the government waived its procedural argument:

> "The government was present at every Faretta Hearing and failed to object to any lack of Faretta advisements and thus waived any affirmitive defenses based on Faretta and Cook". See (N.C. Doc 17 pg 9 @ l 12-16). (Pet App 9)

9. Accordingly, inartfully acting in pro se, Petitioner said it three times. He asserted the government waived its procedural default affirmitiye defense in the district court by failing to raise them during the relevant pre-trial Faretta hearings See (DC Docs 199, 260, 352)(Pet.App. 11,12,13). This means, the government failed to challenge the scope of the district courts Faretta advisements at a time when the district court could have or would have addressed the issue if raised by the government pre-trial. See e.g.; Ritchie v United States 451 F3d 1019-26 n12 (9th Cir 2006).

10. Furthermore, it can not be discerned from the brevity of the denials in the district court (Doc 65 & 73) or in the COA court's single page short order's (N.C. Doc 16 & 19) (Pet. App 8, 10) that the panels actually studied Petitioners counter procedural default arguments. Which in light of the undisputed facts (Doc 58) and (N.C. Doc 15 & 17)(Pet. App 5, 7, 9) resulted in error, the dismissal of Petitioners first § 2255. Petitioner was thus, denied his Fifth Amendment due process rights when the lower courts overlooked his counter procedural default arguments supra.

III Was There A Departure From Established pro-se Liberal Pleading Standards ?

11. In light of the undisputed facts (Doc 24, 58, 69), (N.C. Doc 15, 17, 18), (Pet App 3, 5, 6, 7, 9). Petitioner, respectfully submits that there has been a departure from the clearly established liberal pleading standard's when construing this pro se prisoners inartfully drafted pro se pleadings in the courts below. This was a denial of due process that resulted in a fundamental miscarriage of justice in deciding and denying Petitioner's first Section § 2255 habeas corpus petition.

12. It is settled law that a document filed pro se "is to be liberally construed" Estelle, 429 U.S. @ 186. A pro se complaint, however inartfully pleaded, must be held to less stringent standards then formal pleadings drafted by lawyers" Haines v Kerner, 404 US (1972), Cf Fed. R. Cv. P. 8(f)("All pleadings shall be so construed as to do substantial justice"). See Erickson v Pardus, 551 US 89 (2007) ("Federal court of appeal determination that prisoners allegations...were conclusory held to depart from pleading standard mandated by F.R. Cv. P."). Petitioner, has been denied due process by the lower courts departure from the pro se pleading standard's.

IV Was The Lower Court's Reasons For Denying Petitioner A "COA" Flawed ?

1. In Support of its affirmitive defenses the government argued in error the following nine points.

Government's Points 1-9

> Point [1] "All of defendant's claims are barred because he represented himself during substantial portions of the pre-trial, trial, and post trial litigation". id (Doc 32 pg pg 7 @ L 21-24) (Pet. App 4).

2. That argument has never been the subject of a Supreme Court decision. Therefore, that precise question is an open question of Supreme Court jurisprudence. That argument is not supported by any case considered by the presiding magistrate (Doc 65) App1@2) or the district court (Doc 73). That novel legal theory has never before been litigated in the Ninth Circuit. Nor did the gov. cite judicial or statutory authority in support of its novel legal theory repeated throughout (Doc 32 pg 2@ L 1-2; pg 7@ L21-23; pg 17@ L 4-9; ; pg 19 @ L 1-4). (Pet App 4).

3. Even if such a judicial rule exists, its application would be subject to prior notice under the Faretta doctrine @ pg 835 [17]. In this case, the record fails to establish that petitioner was advised that his waiver of counsel and withdrawal of his waivers of counsel would bar him from later claiming "IAC" on collateral review for the majority of pre-trial and trial where he was actually represented by a lawyer. "...so that the record will establish that he knows what he is doing and his choice is made with eyes open". id Faretta @ pg 835 [17]. The record fails to establich such notice pre trial during the relevant Faretta hearings (DC Doc 199, 352) (Pet. App 11,13). Thus the Government waived that argument on §2255.

V Was The Government's Legal Standard Flawed ?

Government's Legal Standard

> Point [2]"In Faretta v California, 422 US 806, 834 n 46 (1975) the Supreme Court explained that, "A defendant who elects to represent himself can not thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel n 46." [SIC]. id Doc 32 pg 9 @ L 7-11). (Pet App 4).

4. Point [1] supra is not based on Faretta. In fact Faretta supra said nothing about an accused who represents himself for "a substantial portion" of the proceedings, or less than the entire criminal proceeding. Therefore, Point [1] supra is unsupported by Faretta supra, thus n 46 is not applicable to Point [1] or Petitioners first § 2255. (Pet App 3).

Government's Point [3]

> Point [3] "Faretta's prohibition on ineffective assistance claims also serves to bar claims that prior counsel was ineffective when a defendant assumes self representation Cook Ryan, 688 F3d 598, 609 (9th Cir 2012). id Doc 32 pg 9@ L 7-15, pg 12 L 11-12).(Pet App 4).

5. That argument, Point [3] supra, is not based on Faretta. 2) That precise question has not been decided by the Supreme Court therefore that issue is an open question of Supreme Court jurisprudence. 3) That argument was not raised pre-trial during the Faretta hearings (Doc 199, 260, 352) (Pet. App 11,12,13.) or on appeal. That argument is waived by the Government.

6. Moreover, Petitioners criminal case was litigated arrainment to verdict (Dc Doc 15-474) in 2008 and 2009. However, the erroneous Cook case Point [3] was not decided until 2012. In his inartfully

drafted pro se reply (Doc 58) to (Doc 32). Petitioner argued that Cook supra was barred by the expost facto clause(Doc 58 pg 3-4). However, in his inartfully drafted Application for COA's (NC Doc 15) on the same subject Petitioner argued that application of Cook supra "infringed upon Petitioners clearly established rights provided by the expost facto clause ...and the due process clause of the Fifth Amendment . (NC Doc 15 pg 23). (Pet App 5,4,7).

7. Which means the principle on which the ex post facto clause is based - namely, on the notion that persons have a right to fair warning and as such are also protected against ex post facto judicial action by the due process clause of the Fifth Amendment to the United States Constitution. Accordingly retroactive application of Cook (2012) (Doc 65 & 73) over his pro se objection violated Petitioner's right to fair warning in 2008 and 2009 from judicial action first created in Cook in 2012. Rendering a fundamental miscarriage of justice in Petitioner's first § 2255. (Pet App 1,3).

Government's Point [4]

> Point [4] " in Cook an attorney represented Cook [pre-trial] from August 1987 through April 1988 id. The Cook defendant elected to represent himself during his [entire] trial and sentencing in 1988 id." (Doc 32 pg 9 @ L 17-19)(Pet. App. 4).).

8. Based upon the facts in gov. point [4] Cook represented himself for his entire trial. Thus the gov's. Faretta/Cook hypothesis fails. Because as shown supra Petitioner was actually represented by lead counsel at his trial from day 3 through the end of trial on day 10.

9. This fact distinguishes King from Cook 2012. Thus based on Cook's self-representation for his entire trial Faretta's n 46 applied to

Cook. However, n 46 does not apply to Petitioner based on the fact of his withdrawal of his waiver of counsel and actual representation by lead counsel for the last 7 days of trial and lead counsels continued representation for 85 days post verdict (TT 587-1656) Pet App 14). Therefore, whatever errors made by the defense i.e.; be it Petitioner's errors,pre-trial,and during the first 3 days of trial,or lead counsels errors during represantation pre-trial,or first lead counsels errors, were lead counsels to correct upon reappointment, as lead counsel, no matter who made the errors, as lead counsel indicated to the district court,lead counsel would do. See (TT 587-591) (Pet App 14).

Government's Point [5]

> Point [5] "The Ninth Circuit rejected [Cook's] claim that his pre-trial lawyer was ineffective because Cook 'could have corrected those errors once he decided to represent himself". See (Cook id Sec B para 2 page 609).(Pet App 15).

However the following includes what the government omitted:

> "Cook could have corrected those errors once he decided to represent himself. [Faretta, therefore precludes Cook from complaining about his own defense]" (Pet App 15).

10. The Faretta case supra says nothing about that precise subject. Therefore that affirmitive defense is not based on Faretta. The government's "could have corrected" hypothesis is not binding on Petitioner because, it is not based on Faretta, and because, it it is a post factum judicial rule and because the government failed to raise that argument pretrial, during trial or on appeal. Therefore its 'could have corrected" argument was waived and thus procedurally defaulted.

Government's Point [6]

Point [6] "This bar applies even when advisory counsel assists a defendant" (doc 32 pg 9 @L 25) (Pet.App 4)

11. Said so called bar is not based on Faretta. That question did not arise in Faretta or Cook supra. The government points to no legal authority supporting point [6] and failed to raise the argument below it was therefore procedurally defaulted.

12. The type of error that occurred here was addressed by this court in an on point decision in **Kane v Garcia-Espitia**, 546 US 9 (2005) where this court reversed the Ninth Circuit after that court granted a writ of habeas corpus to a state prisoner in error based on Faretta supra. This court explained:

> "... It is clear that Faretta does not...clearly establish the law library access right. In fact Faretta says nothing about any specific legal aid the state [of California] owes to a pro se criminal defendant. The court below therefore erred in holding based on Faretta that a violation of law library access right is a basis for habeas review". id Kane 546 US 10 supra. [2]

13. The error that occurred in Kane supra was repeated here as Petitioner has shown antes in points 1-6 which are not based on Faretta.

14. Furthermore, it is the settled law of this court that "...Circuit precedent i.e.; (Cook) can not be used to refine or sharpen a general principle of Supreme Court precedent i.e.; (Faretta) into a specific legal rule[s] i.e.; (points 1-6 antes) that the Supreme Court has not announced" **Marshall v Rodgers**, 569 US 58 (2013. "we have cautioned the lower courts and the Ninth

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[2] Petitioner exhaustedly argued below the principle established in Kane supra (Doc 58)(Pet App 5)(NC Doc 15, 17, 18) (Pet App 7,9) in his inartfully drafted pro se pleadings but by mistake failed to cite Kane supra.

Circuit in particular against framing our precedents at such a high level of generality " Jackson v Navada, 569 US 505 (2013); same Lopez v Smith, 190 L.Ed 2d 1 (2014).

15. Based on the facts of this case and the established law of this court it is evident that neither Faretta or Cook supra applied to Petition's habeas corpus petition brought pursuant to 28 USC § 2255. The decisions below infringed upon petitioners Fifth Amendment due process rights.

The Government's Arguments Below; Points [7],[8],[9] Based On Orlano, Moreland, and Torna, Below Were Also Procedurally Defaulted And Inapplicable And Otherwise Irrelevant (Doc 32 pg 9 L 26-28, pg 10 L 1-7)(Pet App 4)

Government's Point [7]

Point [7] "A defendant has the right to represent himself...pro se or to be represented by an attorney. However, a defendant does not have a Constitutional right to hybrid representation at trial" United States v Olano, 62 F3d 1180-1193 (9th Cir 1995)". (Doc 32 pg 9 L 26-28, pg 10 L 1-2) **(Pet App 4)**.

1. Point [7] supra is not pertinent to petitioner's case because, Petitioner did not argue he was denied "Hybrid" counsel pre-trial, trial, or on appeal, or in his Sec § 2255. Petitioner is unaware of why the government would raise an Orlano argument or why the presiding magistrate would rely on Olano in his analysis (Doc 65) (Pet App 2) or why the district court would affirm (Doc 73) (Pet App 2) in light of Olano's absolute irrelevance to this case. See Doc 58 pg 23 L 1-6) (NC Doc 15 pg 15 @ 3) (**Pet App 7**).

Government's Point [8]

> Point [8] "A defendant who waives his right to Counsel does not have a right to advisory counsel". **United States v Moreland**, 622 F3d 1147 (9th Cir 2010) id (Doc 32 pg 10 L 2-3)(Pet App 4)(Doc 58 pg 23-26) (Pet App 5).

2. Point [8] supra is irrelevant because, Petitioner did not argue he was denied the right to advisory counsel, in the district court, or appeal, or in his § 2255. Furthermore, even if Point [8] was relevant, the government waived that argument because, it failed to raise it pre-trial during the Faretta hearing (Doc 199, 260, 352,) (Pet App 11,12,13)(TT 587-591) (Pet App 14). See Faretta pg 835 [17].

Government's Point [9]

> Point [9] "Therefore because a defendant has no Constitutional right to advisory counsel he can not be deprived of constitutionally required effective assistance by any short commings of his advisory counsel, see **Wainwright v Torna**, 455 US 506 (1982)". (Doc 32 pg 10 L 5-7) (Pet App 4).

3. This argument Point [9] supra is also irrelevant because, the Torna defendant did not have or complain about advisory counsel. The Torna case involved post conviction proceedings, subsequent to direct appeal, when Sixth Amendment right to counsel ceases. However, this case involves pre-appeal proceedings when Sixth Amendment right to counsel attaches at every critical stage see **United States v Cronic**, 466 US 648 (1984). Accordingly, the argument made in Point [9] is not supported by Torna, is baseless, irrelevant and unsupported by any circuit decision or relevant

Supreme Court precedent. And otherwise was procedurally defaulted when the government failed to make that argument in the district court during the Faretta hearings supra. See (Doc 58 pg 26-27) (Pet App 5)(NC Doc 15 pg 15)(Pet App 7).

4. Accordingly, the governments arguments based on points [7] Orlano, Point [8] Moreland, and Point [9] Torna are groundless in light of the undisputed facts of this case. Petitioner's inartfully drafted counter default arguments liberally construed (Doc 58) (Pet App 5)(Doc 69)(Pet App 6) (NC Doc 15, 17, 18)(Pet App 7,9). should have been sufficient to show the district courts dismissal of petitioners § 2255 on the erroneous basis of Faretta, Cook, Orlano, Moreland, and Torna Points 1-9 supra was wrong.

5. The magistrate's R&R (Doc 65) tracked ver batim thes governments arguments and cases i.e, Faretta, Cook, Moreland, Orlano and Torna supra. (Doc 32). The magistrates laconic summary with no elaberation or explanation of the merits of or lack of merits of Petitioner's inartfully drafted pro se points and authorities (Pet App 5), (Doc 58) departed from the pleading standards mandated by the F.R. CV.P.8(f)(e) ("All pleadings shall be construed as to do substantial justice"). And the liberal construction pleading standard provided for pro se litigents. Supra. The lowers court's legal standard was flawed "the high court may reverse and remand so that the correct legal standard may be applied" Ayestas v Supra, 200 L Ed 2d 376 584 US (2018).

VI Was The District Court's Decision Adopting The Magistrates Report And Recommendation So Flawed As To warrant Summary Reversal And Remand ?

"Because the court agrees with the Magistrate Judge's Report and Recommendation that this court cannot consider his claims of ineffective assistance of counsel and is procedurally barred from considering his claim that could have been, but was not raised on appeal this objection is also overruled. The court finds itself in agreement with the Report and Recommendation of the Magistrate Judge .
IT IS ORDERED adopting the Report and Reccomendation of the Magistrate Judge as the Order of this Court.
IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to proceed in forma pauperis on appeal because dismissal of the Motion is justified by a plain procedural bar and jurists of reason would not find the ruling debatable". (Doc 73 pg 3-4) (Pet App 1 @ 3)

Based on the facts of this case supported by (Pet App 5, 7, 9) supra, and the instant foregoings @ pgs 8-18, there was no basis in fact or law for the district court to adopt the magistrate judges erroneous R & R supra @ pg 7. Thus in light of Ayestas supra this court may reverse and remand so that the correct legal standard may be applied.

VII Did A Fundamental Miscarriage Of Justice Occur When The Lower Courts Failed To Follow Controlling Supreme Court Precedent ?

1. This Court unequivocally taught in 2003:

> In Massaro v United States , 538 US 500 (2003) "We hold that ineffective assistance of counsel claims maybe brought in a collateral proceeding under § 2255. Whether or not the petitioner could have raised the claim on direct appeal". id 504.

2. The Massaro court further explained:

> "Under the rule we adopt today ineffective assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to develop ing the facts necessary to determining the adequacy of representation during the entire trial". id [1e] 505.

3. The Massaro court did not refer to any "substantial portion" of representation but rather the "entire trial" supra. Moreover, the Massaro court explicitly explained:

> "We do not hold that ineffective assistance claims must be reserved for collateral review." id 508[1g].

4. Furthermore, in the Massaro Courts conclusion it materially restated its holding:

> "We do hold that the failure to raise an ineffective assistanse of counsel claim on direct appeal does not bar the claim from being brought in a later appropriate proceeding under § 2255". id509[1g].

5. Nevertheless, in 2017 in disregard for this long standing controlling precedent the governmet argued in error:

> "All of defendant'd claims are procedurally defaulted. Because defendant had a full opportunity to raise any of his claimed deficiencies while he represented himself during the pre-trial, trial and post trial phase of this litigation, the procedural default doctrine bars any claims that have not been raised".
> (Doc 32 p 17 L 3-9)(Pet App 4).

6. This argument is not valid because it predates the Massaro case. While the governments quotes Massaro. It does so based on the law that Massaro overruled.

> "As a general rule any claims not raised on direct appeal may not be raised on collateral review" **Massaro v United States**, 538 US 500-504 (2003), (Doc 32 id pg17 L 14-16)(Pet App 4).

7. In manifest error the government further misconstrues the Massaro case asserting the opposite of what the Massaro court ruled:

> "This doctrine commonly reffered to as procedural default..." (Doc 32 pg 17 L 16) with limited exceptions, the doctrine applies to all claims that were not raised and preserved during the direct review process. Olano 507 US (1993)"

8. In the wake of Massaro that argument was invalid. The government then urged another obsolete argument:

> "In Order to present any cognizable claims in a § 2255 proceeding a defendant must raise it before the district court(whether by motion, objection, or otherwise) and on direct appeal. Carrier, 477 US 478 (1986). (claim not raised on on direct review is procedurally defaulted); See Bousley 523 US 614 (1998) same." (Doc 32 id pg 17 L 23-28)(Pet App 4).

9. The Massaro case made a controlling exception nevertheless the government argued in error:

> "Normally, IAC is one of the limited exceptions that may excuse a procedural default Massaro 538 US 504. However, if a defendant failed to litigate claims during ~~during~~ periods of self representation his pro se status will not excuse procedural default" Hughes, 800 F2d 905 (9th Cir 1986) (Doc 32 pg18L 1-6) (Prt App 4).

10. The government's arguments based on Massaro are Totally incredible. There is no "may" in Massaro. The law changed. Every case cited by the government in support of its

erroneous Massaro claims supra predates Massaro's pallucid holdings rendering those cases inapposite to the extent that they contradict Massaro's (2003) holdings at 504 and 509.id supra.

11. The massaro precedent clearly allows a criminal defendant to choose the forum in which he decides to bring his "IAC" challenge. His choice, either on direct appeal or on §2255.

12.It follows that the controlling Massaro decision, also serves implicitly to ensure a criminal defendant's Sixth Amendment Right to his protected autonomy. In this case, it was Petitioners sole prerogative to litigate his 18 claims of "IAC" and structural error -which did not occurr until after trial- on collateral review § 2255.

13. When the district court adopted the Magistrates R&R finding Petitioners "IAC" claims were procedurally defaulted over Petitioners objection(Doc 58 and 69). (Pet App 5,6). Petitioners protected autotomy was usurpted and the Sixth Amendment violated. Petitioner submits that a violation of secured autonomy ranks as a structural error. Where prejudice is presumed and the only legal remedy is reversal. See **McCoy v Louisana**, 200 L ED 2d 821 (2018).

14. Inartfully, Petitioner asserted his rights under the controlling Massaro decision. (Doc 58 pg 29 L 1-13; pg 30 L 4-7; pg 47 L 1-23).(Pet App 5). The court in error did not apparently rule on the merits of Petitioners Massaro claim. See (Doc 65 & 73) Supra. **(Pet App 1).**

15. In his petition for 10 "COA's" (NC Doc 15 at pages 31,32,33). Petitioner moved the Ninth Circuit for a "COA" based on Massaro. which was denied by short order without discussion of the merits (NC Doc 16) (Pet App 7, 8).

16. Petitioner moved for en banc determination asserting Massaro (NC Doc 17 pg 10) which the court dismissed by short order without discussion of the merits or even circulating the en banc suggestion to the non recused active judges of the court. (Pet App 9 & 10).

17. Petitioners right to claim "IAC" on collateral review § 2255 under the Massaro precedent were denied violating the due process clause of the Fifth amendment and Petitioner's substantial right to redress his grievance in a court of the United States.

18 The lower courts failure to respect the long standing Massaro precedent caused two fundamental miscarriages of justice to wit a denial of his first § 2255 without a merits determination and a manifest Sixth Amendment violation of Petitioners protected or secured autonomy.

19. This court should intervene, because, the district court has so far departed from the accepted and usual course of judicial proceedings that the Ninth Circuit has sanctioned as to call for an exercise of this courts supervisory power.

> "The United States Supreme Court may review the denial of a Certificate of Appealability by the lower courts. When, lower courts deny a 'COA' and the court concludes that their reason for for doing so was flawed, the court may reverse and remand so that the correct legal standard may be applied" Ayestas v Davis, 584 US 200 L.Ed 2d 376 (2018).

Petitioner respectfully urges this honorable court to do so here.

VIII Was 21 USC § 846 & § 841A (a)(1) Unconstitutionally Applied To Petitioner Rendering Him Actually Innocent of Violating Those Specified Statutes ?

1. In Count 1, in error, Petitioner was charged with a conspiracy:

> "...did knowingly and intentionally...conspire...to knowingly and intentionally possess with intent to distribute 5kg or more of a **mixture** or **substance** containing a detectable amount of cocaine...". Pet App 2 & 17), (Pet App 5 @ pgs 56-66), (Pet App 7 @ 36-49).

2. In counts 2-5, in error, Petitioner was charged with possession:

> "...did knowingly and intentionally possess with intent to distribute 5kg or more of a **mixture** or **substance** containing a detectable amount of cocaine....All in violation of 21USC § 841 (a)(1) & (b)(1)(A)(ii)". (Pet App 2 & 17)(Pet App 3 @ pgs 6-9),(Pet App 5 @56-66)(Pet App 7 36-49).

3. The error ? Each count was drafted in the likeness of the penalty provision, subsection (b). The prejudice ? Inter alia, subsections (a) & (b) are not fungible. They are each distinct subsections, each enacted by congress for a different purpose. What's the harm ? Drafting counts 1-5 in the likeness of subsection (b) affirmatively alleged a course of conduct not in violation of either § 846 or §841 A (a)(1) that unjustly reduced the government's burden of proof to no proof or mere innuendo. How ? When Congress enacted 21 USC § 841 A (a)(1) Congress plainly stated:

> "It shall be unlawful for any person knowingly or intentionally-- (1)....to possess with intent to distribute a controlled substance...". (Pet App 2 & 17), (Pet App 5 @ 57 L 11-15)(Pet App 5 @ 56-66), (Pet App 7 @ 36-49).

4. This court has said time and again that "congress says in a statute what it means and means in a statute what it says there" 469 U.S. 189 (1985), 503 U.S. 249 (1992), 530 U.S. 1, 6 (2000), 545 U.S. 353 (2005). Only Congress has the power to make the broad terms **mixture** or **substance** controlled within the meaning of § 841 A (a)(1) & §846. Thus, the scope of § 841 A (a)(1) limits its application to only controlled substances listed on the federal drug schedules I, II, III, IV, & V. But not just any broad

vague unnamed, uncertain **mixture** or **substance**. Section 802 limits the term "controlled substance" to a drug or other substance included in one of the five federal schedules, supra, see 21 USC § 802 (6). The, terms **mixture or substance** fails to meet the definition of a controlled substance. The jury, however, was led to believe otherwise on day one of trial, when the trial court read the charges to the jury verbatim, thereby putting upon the charges the trial courts official, judicial imprimatur. (Pet App 7 TT 15 @ 49). This was inherently prejudicial because juries have a legal duty to follow the trial courts instructions and are presumed to follow them. 483 U.S. 756 n 8 (1987).

5. All five CSA counts affirmatively alleged conduct not proscribed within the ambit of §846 & § 841 A (a)(1). In error the jury was not informed as to that fact. Alleging conduct not defined or proscribed rendered the proceeding a legal nullity. Rendering Petitioner actuallly innocent of a violation of those specified statutes. Rendering Petitioners imprisonment not pursuant to an act of congress and thus contrary to 18 USC § 4001 (a)(Pet App 16), in manifest violation of the due process clause of the Fifth Amendment to the United States Constitution. A clear showing of Ineffective Assistance of Counsel supra @ pg 3. See (Pet App 3 @ pg 6-9), (Pet App 5 pg 56-66), (Pet App 7 @ 36-49). Petitioner made a substantial showing of the denial of a Const. right (Pet App 3,5, 7,9 supra). The lower courts denial of a COA was wrong Ayestas supra. Denial of Petitioners first Sec 2255 on erroneous procedural grounds violated Petitioners 5th & 6th Amendment due process Rights. Faretta, Massaro, Ayestas all supra, even setting those cases aside. Put simply, § 846 & § 841 A (a)(1), do not authorize anonymous **mixture** or **substance** prosecutions. If fairnees is the standard this honorable court should grant vacate and remand.

6. Moreover, it follows that a conspiracy to launder the proceeds of any indefinite mixture or substance charged in counts 1-5 fails to fall within the express terms of 18 USC § 1956 (h). Thus count six can not stand. (Pet App 16), (Pet App 5 @57)

7. Moreover, the unprescribed conduct alleged failed to invoke the express terms of 18 USC § 3231 over proscribed conduct but not over any innocent conduct. (Pet App 20), (Pet App 5 @56-66)

8. Petitioner stands convicted by a jury of innocent conduct that no properly instructed rational jury could have convicted him of bv proof beyond a reasonable doubt. (Pet App 5 @ 56-66).

9. To correct this fundamental miscarriage of justice Petitioner respectfully urges this honorable court to remand this case with instructions to dismiss the indictment with or without prejudice to protect Petitioners Fifth Amendment Right to due process of law.

It is so prayed

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted

RAK 9-23-19

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