

19-7422

Supreme Court, U.S.
FILED

NOV 04 2019

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FOR THE FIFTH CIRCUIT

ANDRE A. FAIRLEY — PETITIONER
(Your Name)

vs.

STATE OF MISSISSIPPI — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Andre A. Fairley
(Your Name)

E.M.C.F 10641 Hwy 80 W
(Address)

Meridian, Ms 39307
(City, State, Zip Code)

(Phone Number)
ORIGINAL

QUESTION(S) PRESENTED

Whether trial court committed REVERSIBLE structural error,
by Failing to conduct a MANDATED ON-THE-RECORD colloquy
into a WAIVER OF COUNSEL, before allowing SELF-REPRESENTATION,
at May 1, 2017 motion hearing.

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:

1. Andre A. Fairley, (Petitioner) IN FORMA PAUPERIS
2. Honorable Roger T. Clark, Circuit Court Judge For the First Judicial District of Harrison County, Mississippi. (Respondant)
3. Honorable Joel Smith, District Attorney For the First Judicial District of Harrison County, Mississippi. (Respondant)
4. Honorable Jim Hood, Attorney General For State of Mississippi, (Respondant)

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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 _____ 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☐ is unpublished.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 _____ to the petition and is

- ☐ reported at _____; 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☐ is unpublished.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 E-1 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☒ is unpublished.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 _____.

☐ 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: _____, 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. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was May 2, 2019.
A copy of that decision appears at Appendix B-1.

☒ A timely petition for rehearing was thereafter denied on the following date: August 8, 2019, and a copy of the order denying rehearing appears at Appendix C-1.

☐ 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

On May 6, 2015, Federal Drug Enforcement Agents (DEA) arrested Andre A. Fairley, petitioner, for alleged (2) counts possession with intent; May 8, 2015 petitioner retained Jim Davis as counsel; March 28, 2016, Grand Jury brought back an indictment. On May 1, 2017, Pro Se Motion hearing commenced with improper self-representation; May 8, 2017, petitioner indicated to trial court Davis had been fired; May 15, 2017, trial court conducted waiver of counsel colloquy; June 22, 2017, trial court again conducted a waiver colloquy. On June 26, 2017 trial court appointed Stand by Counsel; June 27, 2017 a jury trial commenced; June 28, 2017, the jury came back with guilty verdict convicting petitioner.

On December 20, 2017 a timely Notice of Appeal was filed by petitioner to Mississippi Supreme Court; May 2, 2019 the Supreme Court of Mississippi denied appeal; May 16, 2019 a timely Motion for Rehearing was filed by pro se petitioner, and August 8, 2019, Motion for Rehearing was denied and case affirmed. The petitioner, with concise material fact from May 1, 2017, Motion hearing, hopes to establish the merits to the Court.

Introduction:

¶1. On May 1, 2017, a Pro Se Motion hearing commenced with petitioner asserting to trial court, "I'm here under a special appearance, in my propria persona." Trial court replying, "All right. What motions do you have Mr. Friedley." The court went on to allow petitioner's self-representation, neglecting it's constitutional duties to inquire and conduct an on-the-record waiver of counsel. Appx. F-3 at ¶4. A defendant in a state criminal proceeding may proceed pro se, if the defendant knowingly, intelligently, and voluntarily waives the right to counsel. Faretta v. California, 422 U.S. 806, 807, 45 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), "Once a defendant clearly and unequivocally asserts his right to self-representation, trial court must proceed with a hearing to make that determination." Id. at 826-32.

Further, Chapman v. United States, 553 F.2d 886, 892 (5th Cir. 1977) ("Because self-representation necessarily entails the waiver of the Sixth Amendment right, courts can commit reversible constitutional error by improperly granting a request to proceed pro se and thereby depriving the individual his right to counsel."), Appx F-5 at ¶4. Petitioner, as mentioned above, asserted this Sixth Amendment right in open court and by preparing before hearing pro se motions; but, the trial court neglected it's duty under Faretta.

¶ 2. Retained counsel, DAVIS, was present at May 1 hearing, but; neglected to assist petitioner. U.S. Const. Amend. VI, XIV; Miss. Const. Art. 3 § 26, (Guarantees in a criminal prosecution, the accused shall enjoy the right.... to have assistance of counsel for his defense."). But, counsel "entirely failed to subject the prosecution's case to a meaningful adversarial testing, a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable." United States v. Cronic, 466 U.S. 648, 654, 80 L.Ed 674, 104 S.Ct. 2052 (1984). Appx. F-6 at ¶ 5. The trial judge, was responsible for DAVIS's above dereliction of duty, by improperly granting petitioner self-representation, without obtaining a knowingly and intelligent waiver of counsel. ("Because when an accused manages his own defense he relinquishes, as purely factual matter, many of the traditional benefits associated with the right to counsel."). Faretta 422 U.S. at 835. DAVIS nor the trial judge, informed or warned petitioner of his relinquished benefits. Faretta mandates, "an accused should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows....". Id. at 835. Miss. URCC Rule 8.05 provides Faretta's mandates or requirements to assist judges with defendants proceeding pro se, again the trial court failed to. SEE Patton v. State, 34 So. 563, 565 (Miss. 2010).

¶3. On January 8, 2019, petitioner Filed pro se Supplemental Brief, in the States highest court. (2017- KA-01754- SCT) CASE NUMBER. Petitioner presented the substantial Federal question in the lower court, he now presents to this Court. Appx. F-1. The above mentioned facts were argued on merits, also the fact trial court was on notice or aware petitioner was incompetent and needed assistance of counsel. The lower court, May 2, 2019, denied these claims basing it's decision on,

"-- NO REASON TO CONDUCT A RULE 8.05--" Appx. E-28 at ¶90., a holding, granting or implying discretion to trial courts, neglecting constitutional duties mandated by Faretta and Rule 8.05. Appx. F-5 at ¶15. And further, ruling to affirm conviction on facts based on alternative or incorrect hearings May 15, 2017; June 22, 2017, not the May 1 hearing, cited by petitioner. Appx. E-29 at ¶93; F-2 at ¶2, ¶3.

¶4. On May 16, 2019, pro se petitioner, Filed timely Motion For Rehearing to address the above issues, on the merits. Appx. F-10. August 8, 2019, lower court

¹ Uniform Rule of Circuit and County Court Practice. Appx. E-29 at N7.

DENIED MOTION FOR REHEARING AFFIRMING CONVICTION. Appx. C-1. The state highest court's adjudication of the case (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established United States Supreme Court precedent; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the presented evidence. See U.S. C. § 2254(d)(1) and (2); Schiro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L.Ed 2d 836 (2007).

PETITIONER, FOR ABOVE REASONS, PRAYS THE FIFTH CIRCUIT OF THE SUPREME COURT WOULD PLEASE GRANT CERTIORARI, TO PROTECT HIS AND OTHER DEFENDANTS LIKE HIM, RIGHT TO 'ASSISTANCE' OF COUNSEL UNDER FARETTA AND CRONIC PRECEDENTS. FURTHER, A REVIEW AND FINDING BY THE COURT WOULD RESTORE THE INTEGRITY OF AND PUBLIC CONFIDENCE IN THE SYSTEM, WHICH WAS UNDERMINED BY TRIAL COURT 'ABUSE OF DISCRETION' AND DERELICTION OF DUTIES, FAILING TO PROTECT SIXTH AMENDMENT RIGHTS.

REASONS FOR GRANTING THE PETITION

A. The Court's Discretionary Jurisdiction

1. LEGAL STANDARD

RULES OF THE SUPREME COURT OF THE UNITED STATES, RULE 10 AUTHORIZES THE COURT THAT, "REVIEW ON A WRIT OF CERTIORARI IS -- OF JUDICIAL DISCRETION -- GRANTED ONLY FOR COMPELLING REASONS -- THE COURT CONSIDERS:

-- (b) A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF A UNITED STATES COURT OF APPEALS --".

THE ERRONEOUS DECISION OF THE STATES HIGHEST COURT DENYING PETITIONER'S FEDERAL QUESTION PRESENTED ON APPEAL, AND MOTION FOR REHEARING, SATISFIES THE ABOVE COMPELLING REASONS FOR CONSIDERATION, BY COURT. APPX. E-23 TO E-29; C-1. THIS, A CASE WHERE THE TRIAL COURT FAILED IT'S MANDATORY RULE 8.05 OR FARETTA DUTY, TO OBTAIN A WAIVER OF COUNSEL AND WARN PETITIONER OF DANGERS BEFORE, ALLOWING SELF-REPRESENTATION. THE COURT'S DERELICTION OF DUTY WAS A STATUTORY AND CONSTITUTIONAL ERROR WHICH CAUSED RETAINED COUNSEL, DAVIS, TO COMMIT A CHRONIC VIOLATION DEPRIVING

petitioner's U.S. Const. AMEND. VI, XIV; Miss. Const. ART. 3 § 26 right to ASSISTANCE OF COUNSEL AT A CRITICAL STAGE. Appx. F-1 to F-9; SEE United States v. Hamilton, 391 F.3d 1066, 1070 (9th Cir. 2004) ("deciding on direct appeal that a pretrial motion to suppress evidence constitutes a "critical stage" of the proceeding.").

B. Why the DECISION of the Lower Court May be ERRONEOUS

On May 2, 2019 the lower court denied petitioner's Faretta claim, "Whether trial court committed REVERSIBLE ERROR by Failing to conduct -- WAIVER OF COUNSEL BEFORE ALLOWING SELF-REPRESENTATION." The court's decision was based ON,

(1) "-- NO REASON to conduct a Rule 8.05 colloquy at May 1 hearing BECAUSE Fairley still WAS REPRESENTED by DAVIS AND GAVE NO INDICATION that he INTENDED to FIRE DAVIS."; AND

(2) FACTS, FROM ALTERNATIVE HEARINGS May 15; JUNE 22, 2017, NOT FROM May 1 hearing assigned by petitioner.

THE REVIEW AND DECISION CONCERNING RULE 8.05 OR FARETTA'S MANDATED COLLOQUY, CONCERNS OR IGNORES THE FACT THE TRIAL COURT WAS AWARE, AT May 1 HEARING, OF AN ASSERTED RIGHT TO SELF-REPRESENTATION. Which should have triggered the trial court's Statutory; Constitutional duty. F-3 at 11 4.; SEE RULE 8.05 ("When the

Court learns that a defendant desires to act as his/her own attorney, the court shall on-the-record conduct an examination -- "); Also see Faretta, 422 U.S. at 826-32 ("Once a defendant clearly and unequivocally asserts his right to self-representation, trial court must proceed with a hearing to make that determination."). Instead, the lower court's decision granted or implied trial court had discretion to neglect this duty; ("Unlike the discretionary nature of 'may' the word 'shall' is a mandatory directive no discretion is afforded the trial judge.") Ivy v. Harrington, 644 So. 2d 1218, 1221 (Miss. 1994) (emphasis in original), Appx. F-5 at 115.

Further, the court's decision, "--no reason to conduct Rule 8.05 colloquy--", ("erroneously applied correct legal standard or law, and made an unreasonable determination of facts in light of the evidence presented.") U.S.C. § 2254(d) (1) and (2); Schiro, 550 U.S. at 473. This satisfies why the lower court's decision maybe or was erroneous. The above facts merit consideration for grant of certiorari, the petitioner prays.

The second decision based on alternative facts from incorrect hearings, the court knew or should have known, was not cited for Rule 8.05 or Faretta error. The petitioner in his claim was clear, the May 1 hearing he was deprived his right to assistance of counsel by trial court improperly allowing pro se

Representation without conducting an on-the-record waiver of counsel.

Appx. F-3 at ¶ 4. But, instead the court, reviewed the incorrect hearings, (-- and made an unreasonable determination of facts in light of the evidence presented.) U.S.C. § 2254(d)(2); Schiro, 550 U.S. at 473. Again, a decision that satisfies, the reasons why the lower court's decisions may be erroneous.

C. National Importance of Having the Supreme Court Decide the question Involved.

This Federal question involves a deprivation of petitioner's, U.S. Const. Amend. VI, XIV, right to assistance of counsel; violations of Faretta and Cronic at a critical motion hearing, as mentioned above. Appx. F-1 to F-9. See Hamilton, 391 F.3d at 1070 ("deciding on direct appeal that a pretrial motion -- constitutes a critical stage of the proceeding."). But, also see Marshall v. Rodgers, 133 S. Ct. 1446, 1451, 185 L. Ed. 2d 540 (2013) (per curiam) ("Circuit courts may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct."). The petitioner believes, the Fifth Circuit, has not decided or addressed such an issue on direct appeal. United States v. Ash, 413 U.S. 300, 310, 37 L. Ed. 2d 619, 93 S. Ct.

2568 (1973) ("RECOGNIZING the 'ASSISTANCE OF COUNSEL' GUARANTEED by the Sixth Amendment would be less than MEANINGFUL IF IT WERE LIMITED to formal trial itself."). For the reasons above, the petitioner prays, the Court is compelled to set its own precedent, on these fundamental issues of national importance.

D. Whether the Decision of the Lower Court is in Conflict with the Decision of Another Appellate Court.

The lower court's decision,

" -- May I hearing no reason to conduct Rule 8.05 colloquy because Fairley was still represented by Davis, and did not indicate to trial court that he intended to fire Davis." Appx. E-28,

is in conflict with long standing precedent Faretta, 422 U.S. at 826-32. ("Once a defendant clearly and unequivocally asserts his right to self-representation, trial court 'must' proceed with a hearing to make that determination."). And, because petitioner made such an assertion and trial court failed its duty, the lower court's decision was erroneous in conflict with, the appellate Court of Faretta. The conflicting courts decision is satisfied above.

E. THE IMPORTANCE OF THE CASE TO PETITIONER AND OTHERS SIMILARLY SITUATED.

THE U.S. CONST. AMEND. VI RIGHTS, ARE ESSENTIAL AND FUNDAMENTAL RIGHTS TO DEFENDANTS IN CRIMINAL PROCEEDINGS. NEITHER THE PETITIONER NOR DEFENDANTS IN SIMILAR SITUATIONS SHOULD BE PUT IN A POSITION, BY COUNSEL AND TRIAL COURT, TO PROTECT SUCH CONSTITUTIONAL RIGHTS. THAT IS THE ISSUE THAT LEAD TO FARETTA AND CRONIC VIOLATIONS IN THIS CASE. COUNSEL FAILED TO FILE AND BRING TO HEARING PROPER MOTIONS, AS REQUESTED BY PETITIONER. INSTEAD, THREATEN AND COERSED PETITIONER, IN HOPES OF A PLEA DEAL FOR STATE. SEE HAMILTON, 391 F.3D AT 1070 ("THE EVIL LIES IN WHAT THE ATTORNEY DOES NOT DO, AND IS EITHER NOT READILY APPARENT ON THE RECORD, OR OCCURS AT TIME WHEN NO RECORD IS MADE."). TR. 2 to 25

PETITIONER, REFUSED TO PLEA, WITHOUT INFORMING COUNSEL FILED HIS OWN MOTIONS, EXERCISING A FUNDAMENTAL RIGHT. COUNSEL, LEARNED OF FILED MOTIONS, AND ON HIS OWN PREPARED MOTION TO CALL THEM UP PRO SE, SET FOR MAY 1 HEARING, 2017. AT THIS HEARING, TRIAL COURT, WITHOUT A WAIVER OF COUNSEL OR WARNING OF DANGERS, ALLOWING SELF-REPRESENTATION OF PETITIONER, COMMITTED FARETTA ERROR, AS MENTIONED ABOVE. WHERE IN OR DURING HEARING THE PETITIONER

Indicated to court conflicts between he and DAVIS. The court neglected to INQUIRE INTO conflict with counsel. Glasser v. United States, 315 U.S. 60, 71, 86 L. Ed 680, 42 S.Ct. 457 (1942) ("upon the trial judge rest the duty OF SEEING the trial is conducted with solicitude for the essential rights OF the accused."). PETITIONER ARGUED this issue on appeal, but; NO OPINION OR DECISION WAS GIVEN ON CLAIM. Appx E-23 to E-29. This claim is also GOVERNED by Faretta's precedent.

So, the importance of this case to petitioner and other's in similar situations as this, is guidance of and a precedent set by, the Court, on or for Faretta's mandates, motion hearings as critical stages in this Circuit, and chronic violations by counsel caused by trial courts. Where in Mississippi the States highest court and trial court's views and decisions on above fundamental issues, conflict with other appellate courts and the U.S. Const. Amend. VI, XIV right to assistance of counsel and fair proceedings.

F. The Ways the Decision of the Lower Court was Erroneous

First, the lower court's review of the May 1 hearings held that "-- NO reasons to conduct a RULE 8.05 colloquy --", is ERRONEOUS in this way.

Appx. E-28 at ¶ 90. The record reflects the petitioner asserting his desires, verbally and with pro se prepared motions, for self-representation. Appx. F-3 at ¶ 4. Putting trial court on notice, at the May 1 hearing, of desire for self-representation. This should have triggered Rule 8.05's Foretta mandated colloquy from the court, as enumerated in the statute. See Rule 8.05,

("When the court learns a defendant desires to act as his/her own attorney, the court shall on-the-record conduct an examination--")
The above is compelling evidence, it was reason, to conduct Rule 8.05 colloquy at May 1 hearing, contrary to the lower court's decision based on an erroneous review and application of correct legal standard.

Further, neither Rule 8.05 nor Foretta requires, when a defendant is represented by counsel he/she must indicate, to trial court, he/she intends to fire counsel; before the court shall provide such a colloquy. This is the first way the decision was erroneous by the court.

Secondly the court's holding,

("-- Fairley's claim that the trial court allowed him to proceed pro se without providing adequate warnings -- of self-representation is incorrect."),

was entirely and erroneously based on incorrect hearings May 15, 2017;

JUNE 22, 2017, AS MENTIONED ABOVE. APPX. E-23 TO E-29; F-2. MAKING
THE REVIEW OF PETITIONER'S CLAIM UNFAIR, BECAUSE, THE DECISION WAS BASED
ON ALTERNATIVE FACTS NOT FROM ANY HEARING. THIS DECISION BY THE COURT
WAS WITHOUT MERIT TO AFFIRM PETITIONER TRUE CLAIM AND ERRONEOUS IN THAT
WAY. PETITIONER HAS SATISFIED THE WAYS IN WHICH THE LOWER COURTS DECISIONS
WERE ERRONEOUS, AND PRAYS THE COURT WOULD NOW GRANT CERTIORARI.

IN CONCLUDING, PETITIONER PRAYS, THE COURT MAY REVIEW THIS A WRIT OF CERTIORARI FINDING IT'S SUBSTANTIAL FEDERAL QUESTION AND ARGUMENT COMPELLING ENOUGH, REASON TO GRANT PETITION. FURTHER PETITIONER BEGS THE COURT TO FIND AS IN UNITED STATES V. GONZALEZ-LOPEZ, 548 U.S. 140, 149-50, 126 S. Ct. 2557, 2566, 165 L. Ed. 2d 409 (2006) ("Faretta-type ERROR IS 'STRUCTURAL, AND REQUIRES AUTOMATIC REVERSAL."). Thus, REVERSING CONVICTION AND REMANDING FOR A NEW TRIAL.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ande L. F...

Date: October 31, 2019