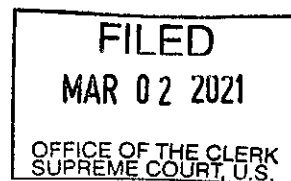


20-7573

No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

Marrickio D. Harris — PETITIONER
(Your Name)

vs.

State of Nebraska — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Nebraska Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marrickio D. Harris - #210267
(Your Name)

Nebraska State Penitentiary, P.O. Box 22500
(Address)

Lincoln, Nebraska 68542-2500
(City, State, Zip Code)

(402) 471-3161
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

This Court has held that an error may be ranked structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest" such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own choices about the proper way to protect his own liberty." Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017) (citing Faretta v. California, 422 U.S. 806, 834 (1975)).

In light of this Court's holding, this petition presents the following:

1) Whether the Nebraska State Courts committed structural error and violated the Petitioners' Federal Constitutional Rights to Self-Representation and Due Process of Law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

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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☐ is unpublished.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☐ is unpublished.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 B 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☒ is unpublished.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 Nebraska Court of Appeals court appears at Appendix A to the petition and is

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☒ is unpublished.

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 December 15, 2020.
A copy of that decision appears at Appendix B.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "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."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Neb. Const. art. I, sec. 11 provides that "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

On December 6, 2018, the Lancaster County Attorney filed an Information in the district court alleging Count I, Possession of Cocaine with the Intent to Deliver, 10.27 grams, a Class ID felony under section 28-416(7)(C); Count II, Possession of Money to be used Violating section 28-416(1), a Class IV felony under section 28-416(17), and Count III, Possession of a Controlled Substance with the Intent to Deliver, a Class II felony under section 28-416(1)(2)(A). (T34-35). A Class ID felony is punishable by a mandatory minimum three years imprisonment and a maximum fifty years imprisonment. Neb. Rev. Stat. section 28-105(1) (Cum. Supp. 2018). A Class IV felony, committed prior to September 1, 2019, is punishable by a maximum two years imprisonment and twelve months post-release supervision or up to a ten thousand dollars fine, or both and a minimum nine months of post-release supervision if imprisonment is imposed. section 28-105(1). A Class II felony is punishable by a minimum one year imprisonment and a maximum fifty years imprisonment. section 28-105(1). On June 14, 2019, the day of trial, the Lancaster County Attorney filed an Amended Information in the district court, adding an allegation of habitual criminal to each of the three counts in the Information, pursuant to Neb. Rev. Stat. section 29-2221 (Reissue 2016). (T98).

On April 3, 2019, the district court forcefully appointed trial counsel upon Harris and continued the case for determining Harris's "competency to stand trial." (Supp. (filed 12/16/19) 51:13-15, 55:11-14; T72, T74-76). On April 11, 2019, the district court found Harris competent to stand trial, but overruled his trial counsel's motion to withdraw as counsel and did so again on May 15, 2019, and on June 14, 2019, the

day of trial. (Supp. (filed 12/16/19) 57: 6-58: 24, 60: 8-62: 5; Supp. (filed 01/13/20) 2: 18-3: 5; T82-83; E1, Supp. (filed 12/16/19) 56). A jury trial began on June 14, 2019, and on June 18, 2019, the jury found Harris guilty of all three counts. (1: 1-176: 6; T130). On July 18, 2019, Harris' forced appointed trial counsel filed a Motion for a New Trial. (178: 1-195: 17). On July 30, 2019, the court overruled Harris' Motion for a New trial. (T141). On August 23, 2019, during an enhancement hearing, the district court found Harris to be a habitual criminal. (199: 8-14). On September 18, 2019, the district court sentenced Harris to fifteen to twenty years imprisonment on Counts I and III, and ten to twelve years imprisonment on Count II, all to be served concurrently. (220: 2-9; T148, T150-152). The court gave Harris credit for 101 days previously served. (220: 11-12; T151). On September 18, 2019, Harris' forced appointed counsel filed a motion to withdraw, and the district court granted the motion. (222: 22-223: 5; T146-147, T140). On October 11, 2019, the district court granted Harris' timely filed request to proceed on direct appeal in forma pauperis. (T174).

B. STATEMENT OF FACTS

On December 12, 2018, Harris had a hearing in Lancaster County District Court during which he appeared self-represented. (Supp. (filed 12/16/19) 1: 16-18). Harris stated that he had previously represented himself. (Supp. (filed 12/16/19) 1: 21-24). At this hearing, Peter Blakeslee (hereinafter "Mr. Blakeslee") entered his appearance as Harris's stand-by counsel. (Supp. (filed 12/16/19) 1: 12-15). Harris noted that the County Court of Lancaster County (hereinafter "County Court") "forced an attorney on" him, and that Harris "told [the County Court] that he could represent [himself]", "further noting that he has "rights to do that." (Supp. (filed 12/16/19) 2: 6-8). The district court explained to Harris that stand-by counsel is

"not forced" but "for the benefit of the court." (Supp. (filed 12/16/19) 2:9-11). Harris explained that he had already had a hearing to discuss his right to be represented and his decision to represent himself; at that hearing, Harris explained that he "defend[is himself] in most all [of his] cases and that [he] choose[s] not to have representation" because "the communication [with Mr. Blakeslee was] not there fully for [him] to have [his] involvement." (Supp. (filed 12/16/19) 2:15-3:15). The district court then asked Harris if he understood that he has a right to counsel "to make sure that [Harris had] been properly advised of [his] right to be represented by counsel and that [he] knowingly and voluntarily waived the right and decided to represent" himself. (Supp. (filed 12/16/19) 3:18-23). Harris repeatedly invoked his right to self-representation, explaining that he wanted to represent himself and did not want the assistance of stand-by counsel. (Supp. (filed 12/16/19) 4:16-23). Harris further noted that he had previously filed motions to dismiss, so the district court set a hearing to address those motions to dismiss, and the court continued arraignments "pending the decision on the motions to dismiss." (Supp. (filed 12/16/19) 5:7-8:3).

On January 16, 2019, Harris was present and "representing himself but [with] stand-by counsel present, as well." (Supp. (filed 12/16/19) 9:5-6). The district court vindictively overruled Harris' motions to dismiss without reaching any conclusions of facts or law with respect thereto and set the matters for arraignment. (Supp. (filed 12/16/19) 12:18-19). During arraignment, Harris explained to the court that because of his questions about the court's jurisdiction, he did not understand why he was being charged with the three counts. (Supp. (filed 12/16/19) 19:2-3). The district court asked Harris if he wanted to reconsider being represented by counsel, but Harris said "no." (Supp. (filed 12/16/19) 20:12-16). When asked how Harris would like to plead to the three charges, Harris stated "I don't plead," and the court ultimately let the record show that Harris "stood mute" and "enter[ed pleas] of not guilty on [his] behalf."

(20:22-22:19). Harris objected, arguing that entering pleas on his behalf constituted "practicing law from the bench." (Supp. (filed 12/16/19) 21:5-9). The court, again, without reaching any conclusions of facts or law with respect thereto, overruled Harris' objections. (Supp. (filed 12/16/19) 21:11).

On March 6, 2019, Harris appeared in district court pro se and with stand-by counsel. (Supp. (filed 12/16/19) 23:20-21). The hearing was in regards to Harris' motions to dismiss for lack of jurisdiction and a motion to withdraw plea. (Supp. (filed 12/16/19) 24:22-25:3). Harris explained that he would like his questions answered with regard to the court's jurisdiction. (Supp. (filed 12/16/19) 25:10-22). Harris stated that he "wanted [his] questions answered before [he could] move forward." (Supp. (filed 12/16/19) 22:22-24). Harris further stated, "Mr. Blakeslee is not my attorney. I represent myself." (Supp. (filed 12/16/19) 33:8-10). The court responded that it would not answer Harris' questions, explained that all of the discovery materials were also available to Harris, as well as Mr. Blakeslee, and overruled Harris' motions to dismiss for lack of jurisdiction and his motion to withdraw plea. (Supp. (filed 12/16/19) 29:20-35:8).

On April 3, 2019, Harris appeared pro se with stand-by counsel. (Supp. (filed 12/16/19) 35:16-17). The district court first took up Harris' two motions to dismiss for lack of jurisdiction and motion to withdraw plea. (Supp. (filed 12/16/19) 36:9-13). Harris argued that his questions about "proper jurisdiction" have "never been answered." (Supp. (filed 12/16/19) 39:16-19). Harris further stated that he was "not prepared because [he did not] know what jurisdiction [he was] under. [The court] refuse[d] to tell [him]." (Supp. (filed 12/16/19) 30:3-5). Harris explained, "I have the right to appear as myself in my own person without a licensed attorney. And in order to intelligently defend myself, I have to know the jurisdiction that this court is operating under." (Supp. (filed 12/16/19) 39:22-25). Again, without reaching any conclusions of facts or law, the district court overruled Harris' three motions. (Supp. (filed 12/16/19) 41:4-7). The court then inquired into Harris' choice to continue to represent himself and

explained that he could have appointed counsel to represent him. (Supp. (filed 12/16/19) 41:8-20). The district court asked Harris if he "still wish[ed] to represent [himself] in this case," to which Harris affirmed. (Supp. (filed 12/16/19) 45:4-5). Harris continued to state that he has "a right to represent" himself. (Supp. (filed 12/16/19) 45:14-15). The court questioned Harris' competence when Harris denied understanding what was going on. (Supp. (filed 12/16/19) 50:13-15). Harris stated that he did "not understand any of this... none of it" because the court was "not giving [him] what [he] need[s] to understand." (Supp. (filed 12/16/19) 50:17-20). Harris explained that "the questions that [he was] asking [the court] and the prosecutor [were] not being answered." (Supp. (filed 12/16/19) 50:22-23). Without reaching any conclusions of facts or law towards Harris' request in regards to jurisdiction, the district court told Harris that it could "not allow [him] to represent [himself]" and vindictively forced appointed counsel Mr. Blakeslee as counsel for Harris against Harris' wish, consent and objection. (Supp. (filed 12/16/19) 50:25-51:15). Harris argued that he has "that right" to self-representation and that he "refused" Mr. Blakeslee's representation. (Supp. (filed 12/16/19) 51:3-16). The court then told Harris that it would "not [talk] to [him] anymore" because he had "counsel to represent" him now. (Supp. (filed 12/16/19) 51:17-25). The State of Nebraska moved for Harris to complete a competency examination. (Supp. (filed 12/16/19) 53:2-5). Without legal consultation or Harris' consent, Mr. Blakeslee agreed that Harris ought to complete a competency examination and asked for a continuance to have the opportunity [to talk] to Harris, given he was just appointed counsel. (Supp. (filed 12/16/19) 53:25-54:15). The court reiterated its concern regarding Harris' competency and "order[ed] that Harris be evaluated... to determine whether or not Harris is competent," adding that "[i]n order to effectuate [the competency evaluation] in its most efficient fashion," it would "revoke [Harris'] bond." (Supp. (filed 12/16/19) 54:18-55:5). The district court continued the case "pending the evaluation of competency." (Supp. (filed 12/16/19) 55:11-14).

On April 11, 2019, Mr. Blakeslee appeared on behalf of Harris who was present. (Supp. (filed 12/16/19) 56:2-3). Exhibit No. 1, Dr. Klaus Hartmann's (hereinafter "Dr. Hartmann") letter dated April 9, 2019, regarding Harris' competency, was marked, offered, and received. (E1, Supp. (filed 12/16/19) 56). After considering Exhibit No. 1, the court found Harris "competent to stand trial." (Supp. (filed 12/16/19) 57:6-8). The court reinstated Harris' bond. (Supp. (filed 12/16/19) 58:8-9). Mr. Blakeslee moved "to Withdraw as Counsel for" Harris because Harris "indicated to [him] that he... wants to continue to represent himself as he has from the start of the case." (Supp. (filed 12/16/19) 58:17-20). By abuse of its discretion, the district court overruled Mr. Blakeslee's motion to withdraw as counsel. (Supp. (filed 12/16/19) 58:23-24).

On May 15, 2019, Mr. Blakeslee appeared on Harris' behalf with Harris personally present. (Supp. (filed 12/16/19) 59:6-7). The district court took up Mr. Blakeslee's two filed motions. (Supp. (filed 12/16/19) 60:4-7). Regarding Mr. Blakeslee's written motion to withdraw, he explained that "according to the letter of Dr. Hartmann, [Harris] understood the various procedures and roles of the persons... during the conduct... of a trial. And since [Harris] was found competent... [Harris] 'wants' to represent himself." (Supp. (filed 12/16/19) 60:12-16). Mr. Blakeslee explained that for the following reason[s], he "should be allowed to withdraw": Dr. Hartmann found Harris competent, [the court] has found Harris competent to stand trial, Harris did "not want [me | Mr. Blakeslee] as his lawyer" which Harris has expressed "since the day [I | Mr. Blakeslee] was appointed to represent him in 'county court,'" Harris "[wants] to represent himself" which he has also expressed "from the first time he was in county court," and that because of the aforementioned reason[s], Mr. Blakeslee did not feel he could effectively represent Harris. (Supp. (filed 12/16/19) 60:21-61:8). The district court responded by differentiating between Harris' "competency to stand trial" and his "competency to conduct a trial and to represent himself." (Supp. (filed 12/16/19) 61:13-2). The court, again, denied Mr. Blakeslee's motion to withdraw because it could not find

that [Harris] is competent to represent himself in these matters." (Supp. (filed 12/16/19) 62:2-5).

On June 14, 2019, Mr. Blakeslee appeared on behalf of Harris who was personally present. (Supp. (filed 01/13/20) 1:4-5). Before voir dire, Harris told the court that he would like to enter "a motion for... ineffective counsel" because Mr. Blakeslee was not "cooperating" with what Harris asked him to do and "no one ever gave Harris any answer to anything." (Supp. (filed 01/13/20) 1:21-2:15). Harris further explained that he "asked [Mr. Blakeslee] for certain things to be done and... things to be on record as far as 'proof' [b]ecause [he did not] have any proof." (Supp. (filed 01/13/20) 2:3-6). Mr. Blakeslee then renewed his motion to withdraw as counsel for Harris. (Supp. (filed 01/13/20) 2:18-20). Mr. Blakeslee, again, explained that his reason[s] included that Harris did "not want [him] as his lawyer," Harris "[wants] to represent himself," and that "the attorney-client relationship has [deteriorated] to the point where [he could] not provide effective representation for" Harris. (Supp. (filed 01/13/20) 2:20-25). The district court, again, denied Mr. Blakeslee's motion to withdraw. (Supp. (filed 01/13/20) 3:4).

The State of Nebraska then made "a motion to amend the information to add the habitual criminal allegation." (Supp. (filed 01/13/20) 3:6-9). Mr. Blakeslee, opposing the motion on due process grounds, noted the late timing, and that they were only "minutes from starting the trial," and that the county attorney "only informed [him the previous day] that he intended to do this." (Supp. (filed 01/13/20) 3:16-21). The county attorney explained that during his preparation in the days right before trial, he expeditiously reviewed the entire file, including Harris' criminal history, and found "sufficient evidence to file the motion and to file the... amended information... with the [habitual criminal] allegation." (Supp. (filed 01/13/20) 4:2-18). Upon making this determination, the county attorney "immediately... prepared the motion, prepared the amended information, [and] provided copies of those to counsel as soon as they

were prepared." (Supp. (filed 01/13/20) 4:19-23). Harris asked if he could speak and object for himself, but the court told him "no" because he has counsel. (Supp. (filed 01/13/20) 5:8-13). Harris continued to argue that he did not ask for counsel and that counsel is "being forced" upon him. (Supp. (filed 01/13/20) 5:15-17). The district court [granted] the State's motion to amend the information, stating that it "affects the penalties and not the substantive charges." (Supp. (filed 01/13/20) 6:3-7). Mr. Blakeslee then asked that Harris "be entitled to service of the amended information and be entitled to the... 'statutory 24 hours waiting period' before he decides how he wants to plead to the amended information." (Supp. (filed 01/13/20) 6:9-13). The court [denied] Mr. Blakeslee's request, stating that "the request for service and the 24 hour waiting period" are not applicable. (Supp. (filed 01/13/20) 7:8-10). The district court then, addressing Harris, stated, "you are represented by counsel in this case. I understand that you don't wish to be represented by counsel." (Supp. (filed 01/13/20) 7:15-17). When Harris stated that being represented by counsel when he did not want to be "violat[ed] [his] due process," the court explained, "those are all arguments you can raise if you wish, on appeal." (Supp. (filed 01/13/20) 7:21-25). Harris responded, stating, "I don't understand what's going on... I don't even understand the jurisdiction. No one has explained it to me. [The judge] told me to ask [Mr. Blakeslee]. I asked [Mr. Blakeslee, but] he refused to tell me... So I don't know what's going on. Right now everything is being under... threat, duress, and coercion." (Supp. (filed 01/13/20) 8:6-13). Harris continued, stating, "I don't know what's going on. And we're about to [start trial] and I don't understand what it is. And you've got someone to fight for me that clearly is not fighting for me... I asked to withdraw his counsel. That... I don't understand. This is denying me due process." (Supp. (filed 01/13/20) 8:14-19). The district court then told Harris that "when we bring in the potential jury members, you will speak only through your counsel. So we cannot have these outbursts, and [you cannot speak

on the record]... If you refuse to follow these rules, you will be removed from the courtroom, [and] your bond will be revoked. And we will proceed with your trial, and you can participate by video." (Supp. (filed 01/13/20) 8:20-9:2).

The Lancaster County attorney then put on the record its offer for Harris "to plead to a Class 2A felony... attempted possession with intent to deliver cocaine," punishable by... zero to twenty" years, in exchange for the State of Nebraska "agree[ing] to dismiss the remaining" charges. (Supp. (filed 01/13/20) 9:20-10:11). The State explained that on June 13, 2019, the previous day, it communicated its plea offer to Harris' counsel, which it originally made on May 15, 2019, and it added that it also "would not [add the] habitual criminal allegation... in exchange for the one-count plea." (Supp. (filed 01/13/20) 10:14). After the State stated its plea offer on the record, the district court asked Harris directly, [not through counsel], if he understood the plea offer "to dismiss Counts [II] and [III] and not proceed with the habitual allegation," which was not an accurate recitation of the State's offer. (Supp. (filed 01/13/20) 10:25-11:4, 11:16-12:3). Harris explained, "I don't understand what's going on... As far as the jurisdiction... I'm trying to get it established. I've been trying to get the understanding of the jurisdiction so I can properly defend myself or at least alert... this attorney on the things that I need to be properly done." (Supp. (filed 01/13/20) 11:8-15). Harris further explained that he did not understand the offer "when [he] never contracted with anyone. So... that's [what he is] trying to get an understanding about." (Supp. (filed 01/13/20) 12:4-9). Jury selection commenced immediately after. (Supp. (filed 01/13/20) 12:12-94:20). Trial was held June 14, 2019 to June 18, 2019. (Supp. (filed 01/13/20) 95:3-102:15; 1:1-177:18).

On June 17, 2019, during the jury instruction conference, with regard to the wording of Instruction No. 2, [again] the district court directly asked Harris, "what do you want it to say, sir?" Harris responded that he wanted the instruction to read that he "never entered a plea of anything." (150:21-151:20). Harris said

the court never explained the jurisdiction to him so that he would "know how to fight [his] case when [he] was representing himself," and the court also "entering a not guilty plea on my behalf... I did not authorize that, didn't know anything about it." (151:10-16). Further, Mr. Blakeslee objected to Instruction No. 7, the definition of "possession," and asked "the court [to] give Mr. Harris Proposed Instruction No. 1" instead. (154:6-13). The court, however, overruled his objection "because the... instruction is consistent with NJI and the definitions set forth therein." (154:14-16). During the trial, the State called Ms. Rebecca Fox (hereinafter "Ms. Fox"). (56:16-23). Ms. Fox testified that when she and Harris were approached by the officers, they "were just about to walk in" to the Foxy. (59:7-9). When asked if the officers asked she and Harris to "step out of the vehicle" when they made contact with them, Ms. Fox said "yes," but then said "or, no." "We were actually walking already out of the car" when the officers approached. (59:20-24). After direct examination, Mr. Blakeslee did not [cross-examine Ms. Fox]. (62:19-20). On June 18, 2019, after the trial and following deliberation of the jury, Harris was found guilty on all three counts. (175:2-8; T130).

On July 18, 2019, during Harris' Motion for a New Trial, Mr. Blakeslee argued that Harris had a constitutional right to represent himself, citing Faretta, 422 U.S. at 806. (179:4-9). Mr. Blakeslee noted that Harris was evaluated by Dr. Hartmann and "was determined to be competent to stand trial." (179:10-13). In addressing the district court's distinction between Harris competence to stand trial and his competence to conduct his own defense at trial, Mr. Blakeslee quoted U.S. Supreme Court in Faretta, which stated, "technical legal knowledge... was not relevant to an assessment of his known exercise of the rights to defend himself." Faretta, 422 U.S. at 836; (179:20-180:17). Mr. Blakeslee explained that simply because Harris does not know all of the trial procedures and rules, it does not disqualify him from being able to represent himself; under Faretta, Harris "was unconstitutionally deprived of his right to represent himself, and a new trial should be ordered so he can

do so." (180:18-23). Mr. Blakeslee then distinguished Harris' case from Indiana v. Edwards, 554 U.S. 1164 (2008) (finding that a court may impose counsel upon a defendant who wants to represent himself if the court finds that the defendant is so severely mentally ill that he is not competent to conduct trial proceedings himself even if he was found mentally competent to stand trial) by pointing out that Dr. Hartmann [did not find] Harris mentally ill. (El, Supp. (filed 12/16/19) 56; 181:1-11). Mr. Blakeslee further noted that the district court should not have [revoked Harris' bond] for the purpose of performing a competency evaluation. (181:12-17).

Harris, citing the Nebraska Constitution, stated that "[i]n all criminal prosecutions the accused shall have the right to appear and defend in person [or] by counsel, to demand the nature and cause of accusation, and to have a copy thereof..." Neb. Const. art. I, sec. 11 (1875); (183:6-10). Harris argued that he was never "fully aware of the nature and cause of the crime of the accusation" because no one ever "establish[ed] the jurisdiction, personal or subject matter... And... [he] never got the copy nor any verification... that shows the jurisdiction." (183:15-21). Harris stated that the district court "entered a plea against [his] will." (183:22-184:8). Harris further explained that his bond [should not have been revoked] for the purpose of the competency hearing because he has "a family and business and things [he] takes care of," including "a newborn" baby. (184:15-21). Harris stated that despite being found competent by Dr. Hartmann, the court nevertheless denied his right to represent himself, thus "[depriving [him] of [his] rights, of [his] constitutional rights." (184:25-185:12). Harris further noted that he was not aware of the habitual criminal charge until the day the trial was to begin. (185:13-18).

The State responded by first stating that the jurisdiction of Lancaster County, where the crime was committed, was proven at the trial. (186:26-25). Regarding Harris' right to self-representation, the State said, "each time the defendant came in for a hearing on this case, when being advised of his rights or any matters as it relates to preparation of trial, his statement to this court [was]... I don't understand, which also led to the

basis for the competency evaluation." (187:2-8). The State further stated that it is "not whether he lacked information on the hearsay rule or the laws of the State of Nebraska, but being advised of his rights, he continued to [say]... I don't understand. (187:11-14). The State said that in Faretta, the defendant did not tell "the court I don't understand just to delay or stall or complicate the issue... But Harris in this case continued to say he didn't understand." (187:18-23). As for the bond revocation for the purpose of Harris completing a competency evaluation, the State said that it was within the court's discretion to do so. (187:24-188:2). Concerning the late-added habitual criminal charge mentioned by Harris, the State explained it was "a penalty enhancement that is up to the court," not a jury. (188:16-22).

Mr. Blakelee responded to the State's comments on Harris' competency and his "I don't understand" statements, explaining that Harris made a mistake in saying that and showing that when "Dr. Hartmann" asked him those same questions,... Harris responded in an appropriate fashion, indicating that he did understand. (189:10-17). Mr. Blakelee further noted that revoking Harris' bond for the purpose of the competency evaluation constituted an abuse of the court's discretion and that many defendants "for whom competency evaluations have been ordered," are allowed to be out on bond. (189:22-190:4).

Harris then explained that jurisdiction was never established, I never had proof... There was nothing brought to me, nor presented to the attorney, stating that they have jurisdiction. And that is the reason why I kept noting from the beginning that I didn't understand the charges or anything against me because I never had the knowledge of the jurisdiction asserting these matters. That was my form of not understanding... all I was trying to do is get the jurisdiction established [first]. (190:19-191:11).

In regard to the habitual criminal charges, Mr. Blakeslee explained "that the accusation was added late in the morning before the jury selection that afternoon... And it was really an [ambush]." (191:23-192:2). The State did not allow "sufficient time for [Mr. Blakeslee] to discuss previous plea bargain offers... made to Harris and the consequences that would be associated if he didn't take the deal and he was alleged to be a habitual criminal." (192:7-13). Ultimately, "it was [unfair] under the circumstances." (192:16-17). On July 30, 2019, (without any conclusions of facts or law), the district court overruled Harris' Motion for a New Trial. (T141).

On August 23, 2019, at the enhancement hearing, the district court, finding that Harris "has twice previously been convicted of a crime for which he was sentenced to more than one year to be served and at the time of each of these convictions... was in fact represented by counsel at all critical stages... deemed Harris a habitual criminal." (199:8-14; E7, 196; E8, 197). Before sentencing, Mr. Blakeslee raised concerns with the Presentence Investigation Report (PSI), including that the "Circumstances of this Offense" section incorrectly "indicates that Harris and Ms. Fox were in the car when the police got there," [but] "Ms. Fox testified under oath that both she and Harris were in fact outside of the car when the police arrived." (201:18-24). Further, referring to Exhibit No. 3, Mr. Blakeslee pointed out that the photograph was supposed to be "of [all] the evidence, minus the alcohol, that [Officer Baney] collected or... found outside of the vehicle or on Harris' person," [but] certain items such as a "razor blade and a scale," that Officer Aaron Douglas Baney (hereinafter "Officer Baney") testified to seizing from the car, were not included in the photograph. (35:18-21, 201:24-202:7; E3, 35-36).

Harris then told the court that he had not finish reading his PSI though he had used all the time allotted him to review it. (202:25-203:13). When asked if he had discussed the PSI contents with Mr. Blakeslee, Harris stated, "I tried, but he refused to give me direct counsel like I have been asking him about... he refused

to give me answers, or he [said] he [was] already doing other work while he was there. He was doing other cases while [he was] supposed to be attending to me." (203:14-21). When asked if he wanted "more time to review" the PSI, Harris stated that he would "only if [he had] another attorney that [was] willing to actually do what is needed... and willing to go over with [him] properly to answer questions and actually going to fight for [him] because [he did not] feel Mr. Blakeslee [wasn't] doing that at all." (206:1-6). Harris then stated that because his "Sixth Amendment Right has been taken away from [him] on [his] (pro se) status," he would like a different counsel to be appointed to him. (206:9-12). Harris explained that when he previously reviewed his PSI, he noticed things that were "not accurate," and that when he "expressed this with [Mr. Blakeslee]," counsel showed his lack of concern... nor did he take notes." (206:25-207:15). The court then told Harris he did not provide information "indicating that Mr. Blakeslee [was] not providing [him] competent counsel," so it continued sentencing until September 18, 2019 to give Harris more time to review the PSI. (208:5-209:17).

On September 18, 2019, during sentencing, Harris [again] expressed his desire to represent himself, stating that his "Sixth Amendment Rights have been constantly violated throughout this whole entire deal." (217:1-5). The district court sentenced Harris to fifteen to twenty years imprisonment on Counts I and III, and ten to twelve years imprisonment on Count II, all to be served concurrently and under the jurisdiction of the Nebraska Department of Correctional Services. (220:2-9; T148, T150-152). The court gave Harris credit for "101 days" previously served. (220:11-12; T151). On September 18, 2019, following sentencing, Harris' trial counsel filed a motion for trial counsel to withdraw, and the district court suddenly gave Mr. Blakeslee leave to withdraw as Harris' counsel; on September 27, 2019, the district court formally granted the motion. (221:12-223:5; T146-147, T160). On October 11, 2019, the district court granted Harris' timely filed request to proceed on direct appeal "in forma pauperis." (T174). On October 21, 2019, Harris filed a motion to request court-appointed

counsel, and on October 28, 2019, the court appointed the Lancaster County Public Defender's office. (T178, T180).

On October 20, 2020, the Nebraska Court of Appeals affirmed Harris' conviction and sentence on direct appeal in State v. Harris, No. A-19-973 (Neb. App. 2020), unpublished (Appendix A). The Nebraska Supreme Court denied further review on December 15, 2020 (Appendix B). The present petition for Writ of Certiorari is now before this court for its much needed consideration.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTING TO DETERMINE WHETHER THE NEBRASKA STATE COURTS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS IN DENYING HARRIS' REQUEST OF SELF-REPRESENTATION TO CONDUCT HIS OWN DEFENSE AND BY FORCING HARRIS AGAINST HIS WILL TO ACCEPT COURT-APPOINTED COUNSEL

The district court violated Harris' constitutional right when it denied his request to conduct his own defense, thus forcing court-appointed counsel upon him. "A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. Art. I, section 11." Jenkins, 303 Neb. at 693 (citing Ely, 295 Neb. at 607). This Court, in Faretta, "noted that it was a violation of the Sixth Amendment to 'thrust counsel upon the accused, against his considered wish.'" Lewis, 280 Neb. at 839 (quoting Faretta, 412 U.S. at 820). This Court further explained that "[a]n unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has [acquiesced] in such

representation, the defense presented is not the defense [guaranteed] him by the Constitution, for, in a very real sense, it is not his defense." Faretta, 422 U.S. at 821.

The right to self-representation is not absolute, however. In Faretta, this Court "noted that a 'trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct' or that a court may appoint standby counsel to aid the defendant 'if and when the defendant [so chooses]'" Lewis, 280 Neb. at 252 (quoting Faretta, 422 U.S. at 834 n. 46). Further, "under the Sixth Amendment to the US Constitution" and "under Neb. Const. art. I, section 11, a criminal defendant's right to conduct his or her own defense is not violated when the court determines that a defendant [competent to stand trial] nevertheless suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel." Lewis, 280 Neb. at 254 (citing Edwards, 554 U.S. 177-178). "The question of competency to represent oneself at trial is one of fact to be determined by the court and... the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding." Lewis, 280 Neb. at 838.

"In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review." Jenkins, 303 Neb. at 692 (citing Hessler, 274 Neb. at 478). "The [two part inquiry] into whether a court should accept a defendant's waiver of counsel is, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing, intelligent, and voluntary." Jenkins, 303 Neb. at 693 (citing Hessler, 274 Neb. at 478).

Since Harris' first district court hearing, on December 12, 2018, Harris challenged the jurisdiction of the court to hear his case. (Supp. (filed 12/16/19) 5:18-19).

Harris explained that he "defend[ed] himself" in most all [of his] cases and that [he] choos[es] not to have representation." (Supp. (filed 12/16/19) 3:10-12). On January 16, 2019, during arraignment, Harris explained that until he had his questions about the court's jurisdiction in this case answered, he would not understand why he was being charged with these three counts." (Supp. (filed 12/16/19) 19:2-3). On March 6, 2019, Harris explained that he would like his questions answered with regard to the court's jurisdiction and that he "want[ed] [his] questions answered before [he could] move forward." (Supp. (filed 12/16/19) 28:22-24). On April 3, 2019, Harris continued to argue that his questions about "proper jurisdiction" had "never been answered." (Supp. (filed 12/16/19) 39:16-19). Harris explained that "in order to intelligently defend [himself], [he had] to know the jurisdiction that [the] Court [operates] under." (Supp. (filed 12/16/19) 39:22-25). When the district court asked Harris if he "still wish[ed] to represent [himself] in this case," Harris affirmed, noting that he has "a right to represent [himself]." (Supp. (filed 12/16/19) 45:4-5). When the court questioned Harris' competence when Harris stated that he did "not understand any of this... none of it," Harris explained that was so because the court was "not giving [him] what [he] need[ed] to understand" and that his questions about jurisdiction were "not being answered." (Supp. (filed 12/16/19) 50:22-23).

Harris' repeated non-answers to the court were all made in the context of him wanting to understand the district court's jurisdiction, not that he did not understand the charges against him or how to represent himself and try a case. This case is analogous to Faretta, in which this Court explained that "a defendant need not himself have the [skill and experience of a lawyer in order competently and intelligently to choose self-representation" as long as he "knowingly and intelligently" relinquishes the benefits of counsel. Faretta, 422 U.S. at 835. Just like in Faretta, Harris consistently, "clearly and unequivocally declared to the trial judge that [he want[ed]] to represent himself and did not want counsel. The record affirmatively

shows that [Harris] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.* For months, Harris represented himself pro se, researched caselaw, and filed his own motions; it is clear Harris not only wanted to represent himself but he was able to do so. Harris did not have an understanding about jurisdiction, but Faretta did not have an understanding of "the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire." *Id.* at 836. As this Court explained, Harris' "technical legal knowledge... was not relevant to an assessment of his knowing exercise of the right to defend himself." *Id.* Harris' repeated statements of a lack of understanding of jurisdiction was not a valid reason to "deprive him of his constitutional right to conduct his own defense." *Id.*

On April 3, 2019, after nearly four months of Harris expressly stating that he only wished to represent himself, the district forcefully appointed counsel, ordered a competency evaluation, and [revoked Harris' bond] to complete the evaluation, which is in violation of Harris' federal constitutional rights [against cruel and unusual punishment], self-representation, and due process of law. First, Harris' competency is evidenced in the fact that he fully answered the same questions when asked by Dr. Hartmann to which he said "I don't understand" when asked by the court. (189:15-17). Harris understood the questions when asked by the court but was saying "I don't understand" with regard to the particular jurisdiction query. Second, Harris' evaluation by Dr. Hartmann concluded that "as a result of the examination, [he] consider[s] [Harris] to have the capacity to stand trial." (E1, 1:Supp. (filed 12/16/19) 56). During Harris' evaluation, Harris denied any history of mental issues, was able to explain the three charges and the sentence that he would face, the roles of everyone in a courtroom, who will testify, and available plea options. (E1, 2:Supp. (filed 12/16/19) 56). Dr. Hartmann further noted, during his mental status examination, that Harris was "affable, cooperative, friendly,

and talkative." (E1, 3: Supp. (filed 12/16/19) 56). Further, Dr. Hartmann found "[no evidence] that [Harris] is subjected to internal stimuli, i.e., experiences hallucinations and no delusional thought content is present. Id. Harris "answer[ed] questions in a logical, goal-directed fashion and his vocabulary is ample, allowing him to express himself well." Id.

Harris' mental capabilities stand in stark contrast to the defendants in Edwards and in Lewis who were both found to suffer "from severe mental illness." Lewis, 280 Neb. at 254. Edwards was found to suffer from schizophrenia and delusions, and his psychiatric evaluations fluctuated between being competent enough to stand trial and not. Edwards, 554 U.S. at 167-169. Lewis was "diagnosed with a psychotic disorder, Schizophrenia, paranoid type." Lewis, 280 Neb. at 254. The court found that although he was competent to stand trial, Lewis' "history of becoming disruptive during hearings to the point that the court ordered [him] removed from the courtroom," and his mood swings having the "potential to become... assaultive," he "was not competent to represent himself." Lewis, 280 Neb. at 254-256. In Edwards, this Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Edwards, 554 U.S. at 177. Harris [was] found competent to stand trial and there [is no evidence] that supports a reasonable conclusion that Harris suffers from severe mental illness. Therefore, Harris should have been allowed to conduct his own defense at trial.

Throughout the course of Harris' case, the district court violated [his] right to represent himself a number of times, including by forcing and appointing counsel upon him despite Harris' objections on April 3, 2019. (Supp. (filed 12/16/19) 50:25-51:25). On April 11, 2019, despite the court finding that Harris [was] "competent to stand trial," and Mr. Blakelee moving to withdraw as counsel for Harris, the court overruled

Mr. Blakelee's motion. (Supp. (filed 12/16/19) 58:23-24). On May 15, 2019, the court [again] denied counsel's motion to withdraw despite counsel arguing that Harris was found competent, Harris has expressed that he wanted to represent himself and [did not want] Mr. Blakelee as his lawyer, and the deterioration of the attorney-client relationship. (Supp. (filed 12/16/19) 62:2-5). Without any findings of facts and conclusions of law with respect thereto, the district court erroneously denied Harris his right to self-representation while also failing to consider Dr. Hartmann's competency evaluation that concluded Harris was competent to stand trial. The court merely noted that "competency to stand trial is different from competency to represent himself in this matter without providing any further explanation. (Supp. (filed 12/16/19) 61:13-25). On June 14, 2019, the district court [again] denied counsel's motion to withdraw despite both his and Harris' explanation for why Harris should represent himself. (Supp. (filed 01/13/20) 3:4). Harris' desire to represent himself never wavered. Harris [was] found competent to stand trial, and he is competent to represent himself and the district court erred in denying him [his constitutional right] to do so.

Despite forcing court-appointed counsel upon Harris, the district court, on multiple occasions, bypassed counsel and addressed Harris directly during hearings. The court even committed error by practicing law and participating in plea negotiations. On June 14, 2019, immediately after the court threatened to revoke Harris' bond for any "outburst," the State put on the record its offer for Harris "to plead to a Class 2A felony," Attempted Possession with Intent to Deliver Cocaine, which reduced Count I in the original Information, while agreeing to then dismiss the remaining charges, including the habitual criminal allegation. (Supp. (filed 01/13/20) 10:25-11:4). The court [then] directly addressed Harris to ask if he understood the offer. (Supp. (filed 01/13/20) 11:16-12:3). Not only did the district court communicate with Harris as if he was unrepresented, but [the court] also misstated the offer as pleading to Count I of the original information,

Possession of Cocaine with the Intent to Deliver, 10-27 grams. (Supp. (filed 01/13/20) 11:16-12:3). [Again], on June 17, 2019, during the instruction conference, the district court directly asked Harris "what [he] wanted the wording of Instruction No. 2 to be." (150:21-151:20). The district court tried to have it both ways, saying Harris was not competent enough to represent but then speaking directly to Harris to participate in plea negotiations and to discuss the wording of the jury instructions. Forcing counsel upon Harris but then [repeatedly speaking to Harris] as if he was representing himself cuts against the court's determination that Harris was unable to represent himself and further demonstrates its violation of Harris' rights under the Sixth Amendment and Neb. Const. Art. I, Section 11.

Furthermore, the district court also violated Harris' Federal Constitutional Rights against cruel and unusual punishment and due process of law when it threatened to revoke Harris' bond to coerce him from insisting that his right to self-representation not be violated. Such threat had a extreme chilling effect on Harris' ability to participate during trial. Harris knew that the words, "if you refuse to follow [the] rules, you will be removed from the courtroom, your bond will be revoked... we will proceed with your trial, and you can participate by video" were not empty threats. (Supp. (filed 01/13/20) 8:23-9:3). This threat, coupled with Harris' prior bond revocation on April 3, 2019, for the competency evaluation, effectively removed Harris from his own trial. (Supp. (filed 12/16/19) 54:18-55:5; Supp. (filed 01/13/20) 8:20-9:2). Such a coercive technique is not only unjust, but unconstitutional and prejudicial, particularly in light of Harris' desire to insist upon his own rights. The district court should not have threatened to revoke Harris bond and committed error by doing so.

Certiorari should be granted to address whether the procedures in Nebraska with respect to self-representation violates the Sixth and Fourteenth Amendments. This Court's discretionary intervention is severely necessary to address this very important issue that will undoubtedly recur in future cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 15, 2021