

20-7768

Supreme Court, U.S.
FILED

JAN 28 2021

OFFICE OF THE CLERK

Byron L. Hagans 120917

Florence South Unit

P.O. Box 8400

Florence Arizona 85132

ORIGINAL

UNITED STATES SUPREME COURT

Byron L Hagans

Petitioner

vs.

David Shinn et al.,

State of Arizona

Respondents

Case No.

Ninth Circuit No. 20-15715

District Court No. 4:19-CV-00475-JAS-LAB

AMENDED

PETITION FOR WRIT OF CERTIORARI

For the the reasons presented in this petition and the interest of justice Mr. Hagans is respectfully requesting this Court for a writ of Certiorari.

Mr. Hagans presented his claim (that having his trial in absentia violated federal law, clearly established United States Supreme Court rulings as well as the fifth, sixth and fourteenth amendments to the United States constitution) to the Arizona Superior Court, Court of Appeals, Supreme Court, the United States District Court and the Ninth Circuit Court of Appeals. None of which ruled on the merits of Mr. Hagans claim.

Thereby, in the interest of justice, Mr. Hagans respectfully request this Court to review the constitutional question that is presented in this petition De Novo, and make a factual determination as to whether it violates a defendants fifth, sixth and or fourteen amendment constitutional right to a fair trial in absentia when he is not present from the beginning.

RECEIVED

APR - 7 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Questions Presented

1. Does it violate a defendants fifth, sixth and or fourteenth amendment constitutional rights by having his trial in absentia when he is not present at its beginning?
2. Does a defendant knowingly, voluntarily and intelligently waive his fifth, sixth and fourteenth amendment constitutional rights to be present at trial when he is not informed of the constitutional rights he will be waiving if he does not show up for trial?
3. Does a state violate a defendants fifth, sixth and fourteenth amendment right to a fundamentally fair trial by having his trial in absentia when he is not present at its beginning?
4. Is the United States Supreme Courts ruling in Crosby and Fed. R. Crim. P. 43 clearly established federal law for the purpose of a Writ of Habeas Corpus (§2254)?

TABLE OF CONTEXT

Questions Presented for Review	2
Table of Authority	4
Opinions Below	5
Jurisdiction	6
Constitutional and statutory Provisions Involved	7
Statement of the Case	8
History of Case	8
Reason for Granting The Petition	10
Memorandum of Points and Authority	10
Constitutional Violations	12
Conclusion	15
Relief Requested	16
Oath	16
Certificate of Compliance	16
Certificate of Service	17

INDEX TO APPENDICES

Appendix A Ninth Circuit Court of Appeals opinion
Appendix B District Courts Judges order
Appendix C Magistrates opinion
Appendix D Lawyers objection before trial
Appendix E Arizona Superior Court Ruling
Appendix F Arizona Court of Appeals Ruling and Review
Appendix G Arizona Supreme Court Ruling

TABLE OF AUTHORITY

Crosby v United States	506 U.S. 255 (1993)	2, 9, 10
Fairey v Tucker	132 S.Ct. 2218, 2220 (2012)	11
Owens v U.S.	483 F.3d 48, 59 (1st Cir. 2007)	13
Strickland v. Washington	466 U.S. 668 687 (1984)	14
U.S. v Carridine	621 F.3d 575, 578-79 (6th Cir. 2010)	13
U.S. v Hantzis	625 F.3d 575, 579-80 (9th Cir. 2010)	13
U.S. v Long	597 F.3d 702, 724 (5th Cir. 2010)	13

UNITED STATES CONSTITUTION

Article VI clause 2	10
Fifth Amendment	1, 2, 11, 12, 15, 16
Sixth Amendment	1, 2, 11, 12, 14, 15, 16
Fourteenth Amendment	1, 2, 11, 12, 14, 16

Federal Rules of Criminal Procedures

Rule 43	2, 11
---------	-------

Arizona Constitution

Article 2 § 3	11
---------------	----

Arizona Rules of Criminal Procedure

Rule 9	11
--------	----

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished

The opinion of the Magistrate appears at Appendix C

JURISDICTION

The date on which the United States Court of Appeals decided my case was Reconsideration Nov 3, 2020

A timely petition for rehearing was denied by the United States Court of Appeals on the following date Oct 2, 2020

A timely petition for a writ of Certiorari was filed on the following date Oct 3, 2019

The United States Supreme Courts Clerk returned Mr. Hagans petition and gave him 60 days to correct the errors.

February 22, 2021

The jurisdiction of this court is invoked under 28 U.S.C. §1354(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI clause 2

Fifth Amendment

Sixth Amendment

Fourteenth Amendment

Fed. R. Crim. P. 43

History of Case

Mr. Hagans was indicted on several counts of DCA where Mr. Hagans pled not guilty. The trial date the Court set was vacated and reset several times.

On the first day of trial Mr. Hagans attorney Ms. Williams moved to vacate trial in absentia arguing that she never met the defendant and feels it would be ineffective assistance of counsel to proceed with trial; further, the last contact with defendant was in March, 1992, when Ms. Spear represented him, and a Bench warrant was issued for his arrest in May, 1992, and it is unlikely that defendant knew of today's trial date. The Court noted that there was a condition of release with the defendants apparent signature on it wherein he acknowledged that he must be present for trial or a Bench warrant will issue and trial proceeded in his absence; therefore, the motion to vacate trial in absentia is denied. Ms. Williams further argued that she feels it is ineffective assistance of counsel to represent a client she has never met. The Court held that the defendant not being present and not maintaining contact was his decision.

Several years later Mr. Hagans was sentenced to multiple life time sentences for his conviction. Mr. Hagans timely filed a Notice of Appeal where the Court granted him a Counsel to represent him. However, Mr. Hagans counsel did not present the issue Ms. Williams preserved.

Years later an inmate informed Mr. Hagans that under *State v. Brown* the sentence the Court imposed was illegal. Mr. Hagans filed an untimely notice of Post-Conviction relief claiming newly discovered material facts. He explained that another inmate recently informed him that an Arizona case, *State v. Brown*, held the way the court enhanced his sentence using bench priors was illegal. The Court

accepted Mr. Hagans untimely Notice of Post-Conviction Relief granted a counsel to represent him, and resentenced him without the use of Haggans priors.

Years later an inmate informed Mr. Hagans that the United States Supreme Court held in Crosby v United States that having a defendants trial in absentia was illegal. The Court in Crosby held that Fed. R. Crim. P. 43 prohibited trial in absentia when a defendant was not present at its beginning.

Mr. Hagans filed a notice of post conviction relief claiming newly discovered material facts. He informed the Court that an inmate informed him that the United States Supreme Court held in Crosby that having a Defendants trial in absentia when he was not present at its beginning was illegal. The Court dismissed Mr. Hagans petition as being untimely and precluded under Rule 32.

In 2020 the Arizona Supreme Court changed the rules governing Post-Conviction Relief proceedings. The new rules no longer preclude a defendant from bringing a claim of an illegal sentence and the court lacked subject matter jurisdiction in an untimely or successive notice of post-conviction relief. The Court held that the new rules applied to all cases that were pending at the time of the change of the rules.

However, Mr. Hagans has already presented this claim to the Arizona Court of Appeals, the Arizona Supreme Court, the United States District Court for the District of Arizona, the Ninth Circuit Court of Appeals thereby, preserving it for this court to review.

MEMORANDUM OF POINTS AND AUTHORITY

The Supremacy clause of Article VI clause 2 of the United States Constitution established that the United States Constitution, federal laws made pursuant to it, and treaties made under its authority, constitutes the Supreme Law of the Land. (Cornell University Law School "Supremacy Clause" law.cornell.edu.) It provides that state courts are bound by the Supreme Law; in a case of conflict between federal and state law, the federal law must be applied. Even state constitutions are subordinate to federal law. (Burham, Williams (2006) Introduction to Law and Legal System of the United States 4th ed. St. Paul: Thomson West, p. 41) See also the Arizona Constitution Article 2 §3 which states the United States Constitution is the Supreme Law of the Land.

In 1993, in the case of Crosby v. United States No. 91-6194, this Court held that Rule 43 prohibited trial in absentia of a defendant who was not present at the beginning of trial.

To reach this conclusion this Court looked for guidance at the existing law, which the Rule meant to restate, at the time of its adoption in 1944. See Advisory Committee's Note on Fed. R. Crim. Proc. 43, 18 U.S.C. App., §821. After doing a thorough research on this issue this Court held, "It is well settled that... at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony... if he is absent... a conviction will be set aside." W. Mikell, *Clark's Criminal Procedure* 492 (2d ed. 1918) (hereafter Mikell). Accord, Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18, 20 (1916); F. Wharton *Criminal Pleading and Practice* 388 (9th ed. 1889) (hereinafter Wharton); 1 J. Bishop, *New Criminal Procedure* 178-179 (4th ed. 1895) (hereinafter Bishop), and cases cited there. The right generally was considered unwaivable in

felony cases Mikell 492; 1 Bishop 175 and 178. This cannon was premised on the notion that a fair trial could take place only if the jurors met the defense face to face and only if those testifying against the defendant face to face and only if those testifying against the defendant did so in his presence. See Wharton 392; 1 Bishop 178."

However, because Rule 43 was dispositive this Court did not reach the constitutional question as to whether the constitution prohibited trial in absentia when a defendant was not present at its beginning.

At the present time the state of Arizona does not acknowledge Rule 43 and the Supreme Courts interpretation of that rule. In addition, even though Arizona Rules of Criminal procedure 9 prohibits trial in absentia when, as here, the defendant was not present at the beginning of trial and he did not have personal knowledge of the exact time and date of the proceedings, the Arizona Courts are still having trials in absentia in violations of its own law.

Mr. Hagans contends that the state of Arizona, by having a defendants trial in absentia, when he is not present at its beginning, violates the protection guaranteed by the United States Constitution fifth, sixth and fourteenth amendment to a fundamentally fair trial.

In 2012 in the case of Faircy v. Tucker, 132 S. Ct. 2318, 2320 (2012) Justice Sotomayor, dissenting from denial of certiorari, urged this Court to address this issue.

Mr. Hagans is respectfully requesting, in the interest of justice, and to end the conflict between state and federal law as well as protect a defendants constitutional right to a fair trial, to grant certiorari and address the constitutional question.

CONSTITUTIONAL VIOLATION

Let me clarify how Mr. Hagens fifth, sixth and fourteenth amendment constitutional rights were violated by the State Court by having his trial in absentia.

The United States Constitution fifth, sixth, and fourteenth amendments guarantee a criminal defendant basic fundamental rights including but not limited to:

- right to present evidence to support or defend a claim
- right to testify on ones own behalf
- right to confront the witnesses against him
- right to cross examination of witnesses
- right to effective assistance of counsel
- right to the fundamental fairness of the trial by jury proceeding
- right to offer testimony of witnesses is in plain terms right to present a defense, these rights are a fundamental element of Law.

These rights are so basic and fundamental and so deeply rooted in our society to be truly "essential rights" and can only be waived knowingly, voluntarily and intelligently.

The trial court did explain to Mr. Hagens if he did not show up for trial trial would start without him.

However, the Court nor Counsel discussed or advised Mr. Hagens of the constitutional rights he would be waiving.

It is well established in order for a defendant to knowingly, voluntarily and intelligently waive a fundamental constitutional right, he must be informed of the right he is waiving.

For instance, when a defendant accepts a plea agreement the trial court must have him state for the record that he read and has discussed the case and constitutional rights with his attorney.

That he understood by pleading (guilty) (no contest) he will be giving up his right to determination of probable cause, to a trial by jury, by a judge, to confront, cross-examine, and compel the attendance of witnesses, to present witnesses on his behalf.

In addition, a counsel must avow that he/she discussed the case with their client in detail and advised their client of their constitutional rights and all possible defenses. Counsel believes that the plea is knowingly, intelligently and voluntarily and that the plea and disposition are consistent with law. See form 18 (b) for plea agreements.

The fact that a defendant cannot waive a constitutional right, unless he knowingly, voluntarily and intelligently waives it, is not limited to plea agreements. For instance when a Defendant wants to represent himself at trial the court must conduct a *Faretta* hearing, cautions the defendant about self-representation and establishes, on the record, that the defendant makes a knowingly and voluntarily choice. *U.S. v. Long*, 597 F.3d 702, 724 (5th Cir 2010). The court must ensure defendant understands nature of charges, possible penalties, and danger and disadvantages of self-representation. *U.S. v. Hantzis*, 625 F.3d 575, 579-80 (9th Cir. 2010). It is well established that the right to counsel may not be knowingly and intelligently waived when a defendant does not understand nature of the charges, statutory offenses, range of allowable punishment and possible defenses. *U.S. v. Carridine*, 621 F.3d 575, 578-79 (6th Cir 2010).

In addition, the court has held in numerous cases including but not limited to *Owens v U.S.* 483 F.3d 48, 59 (1st Cir. 2007) counsel's failure to inform defendant of the right to testify was unreasonable.

Strategy because right is so fundamental and can only be waived by knowingly defendant.

The sixth amendment guarantees a criminal defendant the right to counsel for his defense. The United States Supreme Court has held in numerous cases, including but not limited to *Strickland v Washington* 466 U.S. 668, 687 (1984), that the sixth amendment right to counsel encompasses the right to effective assistance of counsel. It is established on the record that Ms. Williams never met Mr. Hagens and Ms. Williams admitted on the record to proceed to trial for a client she has never met was ineffective assistance of counsel. Mr. Hagens was never informed, by the court or counsel, of the fundamental constitutional rights he would be waiving if his trial was held in absentia. Thereby, he did not knowingly, voluntarily and intelligently waive his fundamental constitutional rights.

Note: It is my opinion that the effective assistance of counsel during trial and the fundamental fairness of the trial by jury process cannot be waived.

Conclusion

Certain wrongs affect more than a single right and, accordingly, can implicate more than one Federal constitutional command, where as here multiple violations are alleged, this court must not identify as primary matter claims dominant character, but rather must examine each constitutional provision in turn, thus in respect to a trial in absentia claim, that implicates three explicit textual sources of constitutional protection, namely, the fifth, sixth and fourteenth amendment, the proper question is not which amendment controls but whether any amendment was violated by the state court having Mr. Hagans trial in absentia.

The fifth amendment provides that no person shall be deprived of life liberty or property without Due Process of Law.

The sixth amendment provides, In all criminal prosecutions the accused shall enjoy the right 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 defense.

The fourteenth amendment provides ... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of law.

These provisions were put in place to insure a criminal defendant would receive a fair trial. By the state court having Mr. Hagans trial in absentia violated his fifth, sixth and fourteenth amendment rights to a fair trial, thereby, his conviction violated the United States Constitution, Fed. R. Crim. P. 43 and the United States

Supreme Court ruling in Crosby.

The importance for this Court to finally answer this constitutional question cannot be over stated. One of the basic and essential right the constitution guarantees is an individuals right to a fundamentally fair trial. The State and Federal Courts are in direct conflict with the meaning of a defendants right to a fair trial. It is finally time for this Court to put an end to this conflict by answering this Constitutional question.

Does it violate a defendants fifth, sixth and fourteenth amendment constitutional right to a fair trial by having his trial in absentia when he is not present at its beginning?

For the reasons stated in this petition Mr. Hagans is respectfully requesting, in the interest of justice, for this Court to grant his petition for a writ of Certiorari and answer his constitution question.

Relief Requested

- A new Trial

- or in the alternative because of the passage of time

- to be sentenced to time served.

Respectfully submitted this 29 day of March 2021 x Byron Hagans

OATH

I swear under oath and penalty of perjury that everything written in this petition is true to the best of my knowledge or belief.

x Byron Hagans

CERTIFICATE OF COMPLIANCE

This petition was handwritten and contains no more than 17 pages not including attachments

x Byron Hagans