No. 21-7231

SUPREME COURT OF THE UNITED STATES

Caleb L. McGillvary,

Petitioner,

vs.

State of New Jersey,

Respondent.

On Petition for a Writ of Certiorari to
the New Jersey Superior Court – Appellate Division

PETITION FOR CERTIORARI

Caleb L. McGillvary
In Propria Persona
New Jersey State Prison
#1222665/ SBI #102317G
600 Cass Street
PO Box 861
Trenton, NJ 08625-0861

I. QUESTION PRESENTED

1.) If Defendant's motion to self-represent is denied without a Faretta inquiry, does his cooperation thereafter with defense counsel constitute a waiver of his right to self-representation?

II. LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

III. TABLE OF CONTENTS

IV. INDEX OF APPENDICES

Appendix A August 5, 2021 Per Curiam Opinion of New Jersey Superior Court – Appellate Division, "State of New Jersey v. Caleb L. McGillvary" Appellate Division Docket Number A-004519-18

Appendix B April 24, 2019 Judgment of Conviction from New Jersey Superior Court – Law Division, Criminal Part of Union County, "State of New Jersey v. Caleb L. McGillvary" Indictment No. 16-05-00344-I

Appendix C December 7, 2021 Order denying petition for certification from Supreme Court of New Jersey, "State of New Jersey v. Caleb L. McGillvary" Supreme Court Docket Number 086174

V. TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

VI. PETITION FOR WRIT OF CERTIORARI

Caleb McGillvary, an inmate currently incarcerated at the New Jersey State Prison in Trenton, NJ *in propria persona*, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the New Jersey Superior Court – Appellate Division.

VII. OPINIONS BELOW

The unpublished decision by the New Jersey Superior Court – Appellate Division denying Mr. McGillvary's direct appeal is attached at Appendix A. The New Jersey Superior Court – Law Division, Criminal Part of Union County's judgment of conviction is attached at Appendix B. The order of the Supreme Court of New Jersey denying Mr. McGillvary's petition for certification attached at Appendix C.

VIII. JURISDICTION

Mr. McGillvary's petition for certification to the Supreme Court of New Jersey was denied on December 7, 2021 Mr. McGillvary invokes this Court's jurisdiction under 28 U.S.C.S. §1257(a), having timely filed this petition for a writ of certiorari within ninety days of the Supreme Court of New Jersey's judgment.

IX. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> 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.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 within its jurisdiction the equal protection of the laws.

X. STATEMENT OF THE CASE

The same federal question in this case is occurring with differing results in every Circuit; splintering uniformity in application of this Court's decisions. The only difference between this case and scores of others in each Circuit; is how high profile it is: Netflix has filmed a movie about it, scheduled for release in March 2022, making it the perfect vehicle for this Court to exercise its power in enforcing uniformity and resolving conflicts amongst the Circuits.

Decades of percolation have elapsed since each of this Court's decisions involved in this case. In Faretta v. California, this Court held that the Sixth Amendment right to counsel implies also a right to self representation. Once this right is invoked, an inquiry by the trial Court is thereby mandated. 422 U.S. 806, 835 (1975). In McKaskle v. Wiggins, this Court held that said right can be waived by a defendant's acquiescence in standby counsel, appointed after a mandatory Faretta inquiry. McKaskle 465 U.S. 168, 184 (1984).

This case presents the question of whether a Court can simply ignore a Defendant's clear and unequivocal assertion of his Sixth Amendment right to self-representation; and thereafter characterize his cooperation with counsel he sought to waive as "acquiescence"; thereby waiving his Faretta rights.

1.) The Investigation and Defendant's Pro Se Motion

On May 13, 2013, Joseph J. Galfy III was found dead in his home. The Union County Prosecutor's Office found evidence that Mr. Galfy was last seen with Caleb L. McGillvary; who indicated being drugged and sexually assaulted by Mr. Galfy. The investigators returned to the crime scene on May 15, 2013, to collect evidence of drugs and sexual assault; but failed to collect or preserve samples of the carpet upon which Mr. Galfy was found, nor drinking glasses in the kitchen sink. On May 16, 2013, Mr. McGillvary was arrested and charged with murder in the death of Mr. Galfy. Mr. McGillvary gave a statement upon arrest that Mr. Galfy drugged and raped him; but the investigators never brought him thereafter to a medical professional for a rape kit nor drug testing.

On December 27, 2018, Mr. McGillvary filed a pro se motion to dismiss the indictment for Brady[1] violations; or, in the alternative, for an adverse inference: with the Trial Court.

On January 7, 2019, at a pre-trial hearing, the transcript shows the following exchange:

> "CALEB L. MCGILLVARY, THE DEFENDANT, AFFIRMED
> THE DEFENDANT: I'd like to affirm.
> THE DEPUTY: Okay. State your name for the record.

[1] Brady v. Maryland 373 U.S. 83 (1963)

THE DEFENDANT: Caleb McGillvary.
THE DEPUTY: Alright.
THE DEFENDANT: For the record, judge, **I assert my Sixth Amendment right to litigate my motion pro se and I have requested pro se to argue my case.**
THE COURT: Sit down.
THE DEFENDANT: Thank you. For the record.
THE COURT: Gentlemen, welcome here. We're here for the issuance of a trial memorandum. This is the first time that Mr. McGillvary and I have set eyes upon each other, as far as I can recall.
MR. CITO: Yes.
THE COURT: The matter was, I believe, re-calendared to this Court, got to be about a year ago, give or take. Sound about right, Mr. Cito?
MR. CITO: About 11 months ago, yeah.
THE COURT: Yeah, Okay.
MR. CITO: I would say so.
THE COURT: And I've granted a new – a number of extensions of time due to the severity of the allegations, the severity of the punishments, which are at stake for Mr. McGillvary, in the event that he's convicted, the complexity of the case, and the need for various expert testimonies. Or experts' testimony, rather. We're here for the issuance of a trial memorandum. And I understand that Mr. McGillvary is refusing to sign same which, of course, is his right. The Court received on eCourts a filing of a motion pro se by the defendant. It's a motion to dismiss. First of all, while of course a motion to dismiss can be filed at any time, this matter has been pending for years. I know there was a prior motion to dismiss, I believe on different grounds, filed and Judge Caulfield had an evidentiary hearing and then issued a rather voluminous opinion on that. Correct, Mr. Cito?
MR. CITO: Yes, Your Honor.
THE COURT: I was advised by the – I don't even know the correct title for Ms. Howard. She is the deputy – what is Mr. Eppenstein's title? It's her deputy.
MR. CITO: Court Administrator?
THE COURT:
No, she's not a court administrator, but she's in charge of criminal. In any event, she advised us that the matter was mistakenly filed, that it was improperly filed in light of the fact that it was during basically a court hiatus with a skeletal staff. It was mistakenly filed. It would not have been filed – it never would have been filed on eCourts and I never would have known about it, frankly. It would have been returned to you, Mr. Cito. The Court will not accept the motion, will not entertain the motion. I am striking it. First of all, it didn't – it failed to comply with the rules. The filing itself. Secondly, **Mr. Cito, any and all motions**

will be filed through you, Okay? So I am striking it. I will issue an order to that effect." (emphasis added)

2.) The Jury Charge and Verdict

On April 22, 2019, a jury charge conference was held in this matter. Mr. McGillvary objected to defense counsel's inclusion of a burden shifting instruction on intoxication in the following exchange:

"THE COURT: ... Mr. Cito, are the proposed modifications, corrections, redactions acceptable to the defense?
MR. CITO: Yes, your Honor, it is to me, but I wanted to put in something my client requests which I am differing from. He wants me to not present to the jury the defense involuntarily intoxication.
THE COURT: On what grounds?
MR. CITO: Your Honor, the burden of proof is quite strong and he's concerned he hasn't met it, but my position the whole defense – not the whole defense but a lot of his testimony regarding that involuntary intoxication, a lot from my point was self-defense, but involuntary intoxication through a drug.
THE COURT: His testimony certainly alluded to what he viewed to be the odd manner in which Mr. Galfy poured his beer. He went through a number of descriptions that he would turn his back; and much of your cross-examination, Mr. Cito, to a number of State's witnesses, went to did you test the vitamins in the refrigerator, did you test the empty bottles. I think you even opened on this aspect.
MR. CITO: Yes, Your Honor. And also the other thing is when Dr. Wang – he even testified about the combination of alcohol and heart medication pills could cause dizziness and the like so –
THE COURT: Much of the defense's case is an attempt to portray the State's investigation as shoddy slip-shod.
MR. CITO: Correct, your Honor.
THE COURT: And an aspect of this, whether credited or not by the jury, is up to the jury. But included in that is that the State failed, including as recently as Friday afternoon outside the presence of the jury. Your argument to the court for an adverse inference[2] and frankly a dismissal of the indictment based on the State's failure to test a number of items and/or containers that – that clearly the inference from the defendant was that Mr. Galfy may indeed have had some sort of date drug secreted in a Vitamin C container or fish oil or one of the empty bottles and that the State in its slip-shod rush to judgment

[2] Of note, there was no adverse inference instruction provided to the jury in this case whatsoever

never properly tested it. Consistent with Mr. McGillvary's own recitation that he felt groggy, he made special notice, Mr. McGillvary, among other things in testifying that only one of the beers that Mr. Galfy gave him did he actually see Mr. Galfy pour, clearly drawing a distinction between that and the other times that Mr. Galfy presented him with a beer. He also made mention of some bitter tasting beer, clearly trying to suggest to the jury there was something in that beer. There's no other logical explanation for that. Again, what a jury does with this, it does with it. I'm frankly very surprised that Mr. McGillvary would seek the Court not to include that instruction. It's so clearly in his interests and it's so clearly consistent with your defense throughout, Mr. Cito, and I believe there's ample evidence in the record and so you've indicated as a representative of the court that you seek it.

MR. CITO: I seek it. I was putting the record clear what my client's position was for appellate reasons, but I believe it should be in.

THE COURT: And I couldn't agree with you more, Mr. Cito. It's clearly in Mr. McGillvary's interests to do so. Whether he meets the burden or not, there's no prejudice to him as I see it if the jury believes he didn't meet the burden. They need to still – the burden of proof is still on the State in terms of meeting the requisite elements and it's so consistent with the long-standing theory of the defense that I think for the Court not to include it at this juncture would be tantamount to me sending a signal to the jury that I, the Court, truncated the defense case because as a matter of law the defense didn't meet its burden, and I think that is an improper foreshadowing to this jury. So I've heard your argument espoused on behalf of your client. I agree, Mr. Cito, and you, Mr. Peterson, that the intoxication instruction stays." (footnote added)

On April 24, 2019, the jury returned a verdict of guilty of first degree murder. On May 30, 2019, Mr. McGillvary was sentenced to 57 years imprisonment with an 85% parole ineligibility period.

3.) Direct Appeal

On direct appeal, Mr. McGillvary argued that the failure of the Trial Court to conduct a Faretta colloquy, in response to his January 7, 2019 request; violated his Sixth Amendment right to self-representation. The New Jersey Superior Court – Appellate Division, in an unpublished opinion, held that: "Defendant's motion to

represent himself was denied on January 7, 2019, because of procedural missteps prior to the start of trial. Defendant never refiled even though the Judge clearly explained to him that the issue would not be reached at that point."

Mr. McGillvary thereafter filed a pro se petition for certification to the Supreme Court of New Jersey: renewing his arguments that the Trial Court's actions violated his Faretta rights under the Sixth Amendment. The Supreme Court of New Jersey denied the petition on December 7, 2021.

XI. REASONS FOR GRANTING THE WRIT

A.) THIS CASE IS THE PERFECT VEHICLE FOR THIS COURT TO RESOLVE CONFLICT AMONGST THE CIRCUITS ABOUT THE FEDERAL CONSTITUTIONAL QUESTION PRESENTED

There is no factual dispute about what the transcript in this case contains; and the transcript clearly shows the federal constitutional question presented. The very high-profile nature of this case, with an upcoming Netflix movie about it; creates an instant national significance for any decision this court may render.

The very common nature of this case is also the epitome of why the common American "feels that the law contrives against him." Faretta v. California 422 U.S. at 834. First, a defendant stands up in court and asserts his Sixth Amendment right to litigate his pretrial motions and argue his criminal case pro se. The trial court ignores him and foists counsel upon him against his will; specifically forbidding him from filing any further pro se motions to renew his request. At trial, that very counsel asks for a jury instruction that shifts the burden of proof onto the defendant; despite the record showing the defendant's urgent objection to having to meet that shifted burden. That shifted burden fell upon the shoulders of one hobbled by the destruction of exculpatory evidence by the State, which he hoped to remedy with his pre-trial motion. It fell upon the shoulders of one hamstrung by the Trial Court's failure to remedy that destruction with an instruction to the jury: that they could draw adverse inferences to meet that burden, upon the evidence the

State destroyed. This shifted burden fell upon one who was denied the right to litigate and argue his case the way he wanted to.

The State Appellate Court acknowledged the denial of this defendant's Faretta rights; but held that they were voided by the Trial Court's "procedural missteps prior to the start of trial." The Appellate Court further reasoned that this defendant "did not renew his request"; despite the Trial Court having forbidden any further pro se motions. The Highest State Court declined to review this prime example of a recurring American Nightmare.

So from the investigators destroying evidence at the crime scene; all the way to the Highest State Court denying review of a structural error in the verdict; this common defendant received abundant proof that "the law contrives against him." Faretta 422 U.S. at 834.

There are defendants like this in every county of every State; in every District of every Circuit; State and Federal defendants from all walks of life. Many of whom have requests to self-represent ignored; and later found upon, ex post facto, not to require a Faretta colloquy. Many of whom have burden-shifting affirmative defenses foisted upon them, against their will. Many of whom suffered a verdict of guilt because they couldn't prove their innocence.

This issue is so pervasive that public groups ranging in agenda from Planned Parenthood to the Westboro Baptist Church; from Black Lives Matter to the Ku Klux Klan; from Greenpeace to the National Rifle Association; all agree and coincide on the term coined for this:

"In America today, you are **guilty until proven innocent.**"

This erosion of due process is recognized by all races, religions, genders, and social classes existing in America today. This case is as common as Kentucky blue grass and as American as apple pie; yet such a perfect vehicle for the court to reach the public with their decision has never appeared until now.

B.) THERE IS A GENUINE SQUARE CONFLICT BETWEEN MANY CIRCUITS AND THIS COURT SPECIFICALLY CONCERNING THE NATIONALLY SIGNIFICANT QUESTION PRESENTED

Not only is there conflict between the Circuits on this important Federal question; not only is there conflict between this Court and the lower Court's decisions on this question; but there is long-standing and continuous square conflict between many Circuits and this Court on this very question.

Uniformity amongst the Circuits has been splintered by the split; between Circuits who allow Trial Courts to brush off Faretta invocations, and thereafter claim that defendants waived their Faretta rights under McKaskle, by cooperating with defense counsel:

1.) United States v. Barnes 693 F.3d 261 (2nd Cir. 2012) (Request under Faretta which is not explicitly denied; but not thereafter reasserted: constitutes waiver of Faretta rights); See also Williams v. Bartlett 44 F.3d 95 (2nd Cir. 1994); Wilson v. Walker 204 F.3d 33 (2nd Cir. 2000).

2.) United States v. Campbell 659 F.3d 607 (7th Cir. 2011) (Subsequent cooperation with defense counsel after denial of Faretta request held to

waive Faretta rights); See Also Imani v. Pollard 826 F.3d 939 (7th Cir. 2016); Tatum v. Foster 847 F.3d 459 (7th Cir. 2017)

3.) United States v. Stanley 739 F.3d 633 (11th Cir. 2014) (Failure to conduct a Faretta colloquy upon request held not to be error as a matter of law); See also Dorman v. Wainwright 798 F.2d 1358 (11th Cir. 1986); Gill v. Mecusker 633 F.3d 1272 (11th Cir. 2011)

Circuits who do not consider subsequent cooperation with counsel as waiving Faretta rights:

4.) United States v. Gerhard 615 F.3d 7 (1st Cir. 2010) (Waiver of Faretta rights must be explicit); United States v. Proctor 166 F.3d 396 (1st Cir. 1999); Tuitt v. Fair 822 F.2d 166 (1st Cir. 1987); United States v. Hafen 726 F.2d 21 (1st Cir. 1984)

5.) Buhl v. Cooksey 233 F.3d 783 (3rd Cir. 2000) (Once denied, defendant held not to be obliged to renew his Faretta request; nor to have acquiesced by cooperating with defense counsel thereafter); Alongi v. Ricci 367 Fed. Appx. 341 (3rd Cir. 2010); United States v. Jones 452 F.3d 223 (3rd Cir. 2006); United States v. Peppers 302 F.3d 120 (3rd Cir. 2002)

6.) United States v. Farias 618 F.3d 1049 (9th Cir. 2010) (Failure to Conduct full Faretta colloquy held to be error that cannot be vitiated by subsequent cooperation with counsel); United States v. Mendez-Sanchez 563 F.3d 935 (9th Cir. 2009); United States v. Robinson 913 F.2d 712 (9th Cir 1990); Harding v. Lewis 834 F.2d 853 (9th Cir. 1987)

And even the Fifth Circuit, which takes the third way. See Batchelor v. Cain 682 F.3d 400 (5th Cir. 2012) (Holding that subsequent cooperation with counsel constitutes waiver of Faretta rights; but only if a Faretta colloquy has actually taken place, and the request has been denied); See also Scott v. Wainwright 617 F.2d 99 (5th Cir. 1980); Brown v. Wainwright 665 F.2d 607 (5th Cir. 1982).

C.) UNDISPUTED FACTS MAKE THIS CASE THE PRIME EXAMPLE OF THE QUESTION PRESENTED

The undisputed record below provides a clear illustration of the question presented; and pits the decision of the Court Below in square conflict with this Court's holdings.

The New Jersey Superior Court – Appellate Division held that, "Defendant's motion to represent himself was denied on January 7, 2019, because of procedural missteps prior to the start of trial. Defendant never refiled even though the Judge clearly explained to him that the issue would not be reached at that point." See Appendix A, P. 34. Although this Court has never held that a defendant is required to refile a denied Faretta request; the Trial Court's specific ruling that, "Mr. Cito, any and all motions will be filed through you"; made such a refiling by Mr. McGillvary impossible.

This Court in McKaskle held that filing pre-trial motions is an integral structural right under Faretta; McKaskle 465 U.S. at 174; so the Trial Court's

denial of Mr. McGillvary's January 7, 2019 request is in square conflict with this Court's decisions in Faretta and McKaskle.

The right to self-representation created by Faretta can be waived by a defendant's acquiescence in standby counsel; McKaskle 465 U.S. at 182; but that presupposes a "standby counsel" was actually appointed as a result of a proper Faretta colloquy. McKaskle 465 U.S. at 170-171. Without a proper Faretta colloquy, the counsel which a defendant seeks to waive does not suddenly become "standby counsel" for the purpose of a waiver of self-representation.

Indeed, the very premise of waiver-by-acquiescence, as held by this Court in McKaskle; is that the Trial Court first conducted a Faretta colloquy; then appointed standby counsel; thereafter the defendant acquiesced to standby counsel's representation. This case, like so many others in the Circuits (See "B." above for examples); is in square conflict with the 3 stages of acquiescence as held by McKaskle: there was no Faretta colloquy on January 7, 2019 accompanying the Trial Court's denial of Mr. McGillvary's request to self-represent. There can therefore be no waiver-by-acquiescence under McKaskle; because standby counsel was never appointed after a proper Faretta colloquy.

XII. CONCLUSION

For the foregoing reasons, Mr. McGillvary respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the New Jersey Superior Court – Appellate Division.

DATED this 24 Day of JANUARY, 2022

Respectfully Submitted,

Caleb L. McGillvary
In Propria Persona
New Jersey State Prison
#1222665/ SBI #102317G
600 Cass St.
PO Box 861
Trenton, NJ 08625-0861