

24-6642

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

October Term 2024

Case No: 7685, In Re: State v Sexton
Originating Case No: E2022-00884-CCA-R3-CD

Supreme Court, U.S.
FILED

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Case No: _____

Hubert Glenn Sexton, Jr. }
Petitioner

V }

State of Tennessee }
Respondant

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT
FROM THE TENNESSEE COURT OF CRIMINAL APPEALS
OPINION AND THE TENNESSEE SUPREME COURTS DENIAL
OF DISCRETIONARY REVIEW

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Pro Se Applicant

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QUESTIONS PRESENTED FOR REVIEW

Under Tennessee law, defense counsel in criminal trials has the power to make strategic decisions, including decisions to exercise or waive rights guaranteed under the federal constitution —with or without the client’s permission— whether it contravenes the client’s desires or not. Also, under Tennessee law, the trial courts, intermediate courts, and Supreme Court force defendants to forfeit Federal Constitutional rights, such as the sixth amendment right to counsel and self-representation, without due process. The Tennessee courts rely upon “mixed questions of law and fact,” such as a waiver of the right to counsel, to be reviewed de-novo, accompanied by a presumption that the trial court’s findings of fact are correct. In this context, the questions presented are;

- I. Whether consistent with the fifth, sixth, and fourteenth amendments, an indigent defendant can be denied the right to present his own defense and compelled to accept representation by appointed counsel over his objection without being afforded due process?
- II. Whether the Tennessee court’s procedures for forcing a defendant to forfeit the Federal Constitutional rights to counsel and self-representation are so ambiguous that the Tennessee Appellate Courts consistently hand down arbitrary rulings that contradict each other and require the U.S. Supreme Court’s clarification?

III. Whether the Tennessee courts are violating defendant's Federal Constitutional rights by reviewing self-representation waivers *de-novo*, in which each tier of appellate review can arbitrarily determine a new reason to force forfeiture without due process?

IV. Whether Tennessee's requirements to waive counsel and proceed *pro se* are so ambiguous that following step by step procedure amounts to judicial misconduct and results in the forfeiture of the U.S. Constitutional right under the Sixth Amendment to self-representation?

LIST OF PARTIES

All parties appear in the caption of the cover page.

OPINIONS BELOW

The denial of relief from the Tennessee Court of Criminal Appeals, Eastern Division, Knoxville, Tennessee, State of Tennessee V. Hubert Glenn Sexton Jr., No. E2022-00884-CCA-R3-CD. 2024 WL 390336 is found at **(App. A, Pg A 1-31)**, and reported at **2023 WL 2699973**. A timely Rule 11 Motion to Request Permission for Discretionary Review was denied without a hearing on July 2, 2024.

JURISDICTION

The Tennessee Court of Appeals denied a relief on February 2, 2024, unpublished **2024 WL 390336**, is found at **(App. A., Page A 1-31)**. a timely Rule 11, Petition to Request Permission for Discretionary Review to the Tennessee Supreme Court was denied on July 2, 2024.

The jurisdiction of the court is invoked under,

28 U.S.C. § 2104 which provides:

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States; and,

28 U.S.C. § 2106 which provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or Order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or Order, or require such further proceedings to be had as may be just under the circumstances.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the, Sixth Amendment, which provides in relevant part:

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 and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

It also involves the due process clause of the Fifth and Fourteenth Amendments.

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STATEMENT OF THE CASE

The petitioner was indicted by a Scott County, Tennessee Grand Jury in July of 2000, for two (2) counts of First Degree Murder under Tennessee Code Annotated (further known as T.C.A.) § 39-13-202. Approximately the same month, the 8th Judicial District's Attorney General requested the death penalty for each count under T.C.A § 39-13-204(i) (6).

The petitioner was convicted on both counts and sentenced to death on each, June of 2001.

The Tennessee Court of Criminal Appeals (further known as T.C.C.A.) affirmed the conviction and death sentences on December 7th, 2010 (State V. Sexton, No. E2008-00292-CCA-R3-DD).

The Tennessee Supreme Court (further known as TN Sup. Ct.) affirmed the convictions and vacated the death sentences May 29th, 2012 (State V. Sexton, No. E2008-00292-SC-DDT-DD:(TN 5-29-2012)).

September of 2012, the 8th District's Attorney General withdrew the aggravators and the petitioner was sentenced to consecutive life sentences, with parole, on January 2nd, 2013.

The petitioner filed a timely post-conviction petition under **T.C.A. §40-30-101** and a waiver of counsel under Tennessee Rules of Criminal Procedure (further known as **T.R.C.P.**), **Rule 44**, and proceeded *pro se*. The petitioner examined eleven (11) witnesses at the two (2) day evidentiary hearing. The Trial Court found no error, March of 2017.

The petitioner appealed to the T.C.C.A., and on November 25th, 2019 the convictions were vacated and the case remanded for a new trial on four (4) separate State and Federal Constitutional violations, including ineffective assistance by trial counsel (*Sexton V. State, 2019 WL 2320518, at #26 (TN.Crim. App. Nov. 25th, 2019)*).

June 18th, 2021 the petitioner, over seven (7) months prior to trial requested *substitution of appointed counsel* (APPENDIX F.). On August 13th, 2021 the Trial Court denied the motion (APPENDIX B.).

Immediately upon the denial to substitute counsel the petitioner submitted a *waiver of counsel* and request to proceed *pro se* (APPENDIX G.). The Trial Court, without a hearing, denied the motion (APPENDIX C).

The petitioner filed a *Tennessee Rules of Appellate Procedure* (further known as **T.R.A.P.**), **Rule 10, Extraordinary Appeal**, concerning the denial to allow the Defendant to proceed *pro se*. The T.C.C.A denied the appeal on September 14th, 2021.

The petitioner was convicted of two (2) counts of first degree murder under above referenced statute, and sentenced to consecutive life sentences without the possibility of parole, in January of 2022.

Motion for new trial was heard May 31st, 2022 and the Trial Court found as before, “The court did not err by denying the Defendant’s request to represent himself. The Court again referred to the hearing on August 13th, 2021, in which the Court ruled that the Defendant was not competent to represent himself on two counts of first-degree murder” (APPENDIX D., page #1, paragraph # 3).

The petitioner appealed to the T.C.C.A. and the Appellate Court affirmed the convictions on February 2nd, 2024 (see APPENDIX A.).

On March 18th, 2024, the petitioner filed a **T.R.C.P. 44, *Waiver of Counsel***, to proceed *pro se* on appeal. The Trial Court gave a proper *Faretta* hearing and granted the petitioner the right to proceed *pro se* to continue the appeal (APPENDIX J., page # 1).

The petitioner filed a timely **T.R.A.P. Rule 11** request for discretionary appeal and the Tn. Sup. Ct. denied review on July 2nd, 2024.

The petitioner now submits a timely request for *Writ of Certiorari* to this the United States Supreme Court.

RELEVANT FACTS

Tennessee has a general provision that dictates both a lead attorney and co-counsel be appointed in a capital case (*TN. Sup. Ct. Rule 13, Section 3 (b) (1)*). The defendant was appointed such in 2000. After the petitioner was convicted and sentenced to death, the petitioner requested an ineffective assistance of counsel issue to be pursued on direct appeal. The Trial Court, of its own accord, dismissed trial counsel Leif Jeffers and Larry Warner, and then appointed two (2) attorneys from Nashville, Tennessee; William Reddick, lead counsel, and Pete Heil, co-counsel. This replacement counsel was appointed in 2002.

Approximately 2005, attorney Reddick contracted terminal cancer and was forced to withdraw as lead counsel. The Trial Court —of its own accord— replaced attorney Reddick with Gerald Gulley from Knoxville, Tennessee. The petitioner immediately filed complaints with the Board of Professional Responsibility and sent copies to the Trial Court judge. The petitioner alleged missing funds for investigations.

In 2005, the Trial Court allowed both attorneys to withdraw —at the insistence of the Defendant— and appointed James Simmons of Hendersonville, Tennessee, and Richard Gaines of Knoxville, Tennessee. This team pursued the appeal from 2005 until 2012, through the motion for new trial, direct appeal in the T.C.C.A. and then the mandatory review by the TN Sup. Ct., where the death sentences were vacated.

In 2012, after approximately seven (7) years of representation, Attorney Gaines suffered heart issues and, due to his medical condition, was forced to withdraw prior to the new Sentence Hearing. The Trial Court —of its own accord— allowed Attorney Gaines to withdraw and appointed Attorney Paul Bruno to assist with the new Sentence Hearing. The petitioner then filed a post-conviction petition and the capital case attorneys were allowed to withdraw.

In summary, trial counsel was procedurally replaced due to filing I.A.C. on direct appeal. Attorney Reddick passed away. The petitioner requested Heil and Gully's removal; the Trial Court agreed. Simmons and Gaines then represented the Petitioner until completion of the capital case. When attorney Gaines withdrew for health reasons, the District Attorney had withdrawn the aggravators and the Trial Court appointed new co-counsel Bruno. However, this is the appointment of the eight (8) capital case attorneys in thirteen (13) years. The petitioner is only at fault for the substitution of Gulley and Heil.

In 2013 the petitioner filed a *pro se* post-conviction petition and the Trial Court appointed counsel. The petitioner rejected three (3) appointments of counsel between 2013 and 2015. Attorneys Mart Cizek, Ivy Gardner, and John Boucher were all three (3) appointed and —for various reasons— allowed to withdraw at the insistence of the Defendant.

In 2015, at the last substitution hearing, the petitioner submitted a **T.R.C.P., Rule 44, Waiver of Counsel** and proceeded *pro se*. In hindsight, rejecting three (3) attorneys seems excessive but the results are not debatable. The petitioner examined eleven (11) witnesses at the two (2) day evidentiary hearing and did challenge both trial attorneys, (which were found to be constitutionally ineffective) and three (3) of the appellate attorneys as an avenue for pursuing the adjudication of issues which should have been brought on direct appeal. The petitioner was successful at getting the conviction vacated *pro se* and was *pro se* from 2015 until 2021.

The petitioner submits that filing substitution of counsel motions on Gulley and Heil, and using the three (3) appellate counsels at post-conviction to qualify the material evidence, is not judicial misconduct. Of course, the T.C.C.A. found an I.A.C. claim against trial counsel and this and three (3) other, somewhat complicated jury issues, resulted in vacating the convictions. The petitioner admits to rejecting the three (3) attorney appointments on post-conviction, over six (6) years before the request to substitute James Hargis.

In 2020 the trial Judge, upon motion of the Defendant, recused himself for the possible appearance of bias. A special judge was appointed. The judge appointed counsel, Attorney James Hargis of Sparta, Tennessee, in January of 2021.

Attorney James Hargis failed to call witnesses favorable to the petitioner at an evidentiary hearing in June of 2021. The petitioner decided that being *pro se* was preferable to proceeding with Hargis. After researching self-representation and finding the leading Tennessee case, State V. Hester, 324 S.W. 3d. 1 (Oct. 5th, 2010), which states; “*Defendants, however, are free to seek to invoke a right of self-representation as an alternative should their request for the appointment of a different attorney be denied,*” (see e.g., State V. Blum, 682 N.W. 2d. 578, 613, Gallego V. State, 117 Nev. 348, P. 3d., 227, 236 (2001)). The petitioner —fully understanding that chances of success on a motion for substitution of appointed counsel would be slight— filed a motion for *substitution of appointed counsel* on June 18th, 2021, more than seven months prior to set trial date (see APPENDIX F.). The defendant made his intentions clear in the motion, APPENDIX F, pg F-8 paragraph 24, when all parties were put on notice that denying the defendants substitution motion would be forcing the defendant to proceed *pro se*.

The hearing was held August 13th, 2021, still over five (5) months prior to the set trial date. The petitioner fought furiously for substitute counsel. The court warned the defendant that filing motions to substitute counsel, filing I.A.C. claims on five (5) attorneys during post-conviction and filing three (3) complaints to the B.P.R. that; “if you continue to make attacks upon your attorney you may forfeit your right to be represented by an attorney in this case.” (see APPENDIX I, page I #39, lines 6 – 9). The court further warned; “...but you need to keep in mind

that if you continue – that your conduct in the future could result in a waiver or forfeiture of your right to counsel.” (See APPENDIX I., page I #39, lines 14-18).

The Trial Court found dismissing attorney James Hargis would not be proper and denied the Defendant’s motion to substitute counsel. Immediately after the hearing to substitute counsel, and the Trial Court’s threats to force forfeiture, “...if the Defendant continued.... in the future could arise to,” the Defendant —in open court— stated he wished to file a waiver of counsel. The Trial Court lost its composure and in an emotional state denied to accept the waiver (see APPENDIX I., page I #42, lines 2-23). Nonetheless, the Court eventually allowed the Defendant to file and have time stamped the pre-prepared *Waiver of Counsel* (APPENDIX G.).

The petitioner was admonished again and cowed into silence during the time it took to get the waiver time stamped in open court (APPENDIX I, page I #42 line 20 through page I #43 line 13). The Trial Court refused to provide a proper hearing and the mandated formal inquiry that T.R.C.P. rule 44 (a) requires when a defendant invokes his right to self-representation. Also, in the sixth circuit, the U.S. Supreme Court —using their supervisory powers— has mandated that Federal district judges must undertake to determine whether a waiver is proper. The Court, “must ask the defendant a series of questions drawn from, or

substantially similar to, the model inquiry set forth in the Bench Book for U.S. District Court Judges, U.S. v. McBride 362, I 3d. 360. 366 (6th Cir. 2004); also see U.S. v. Cromer, 389 F 3d at 682.

On September 2nd, 2021, the petitioner filed **T.R.A.P, Rule 10, Extraordinary Appeal**, challenging the Trial Court's order to deny the defendant's right to self-representation.

The Trial Court previously admonished the petitioner for filing *pro se* motions (see APPENDIX I, pages I #42, lines 24, thru pages I #43 lines 1-12). The petitioner repeatedly requested the written order and the transcript. The written order was withheld and eventually filed *non pro tunc*, on November 17th, 2021 (see APPENDIX C., page C # 1). Because the written order was withheld, the T.C.C.A. refused to act on the appeal and denied the Rule 10 filing for failure to follow procedure; procedure being the failure to file the challenged written order (see APPENDIX H, pages H, #3 - #4). The petitioner then filed a T.R.A.P. Rule 11 appeal to the TN. Sup. Ct. However, the petitioner was forced to trial with unwanted counsel before the TN. Sup .Ct. responded (see APPENDIX H, page H # 5).

The petitioner was forced to trial, convicted and sentenced. Attorney Hargis filed a new trial motion containing the denial of the right to self-representation.

The Trial Court was consistent with the written order stating, “The Defendant is not competent to represent himself in a case, in which he was charged with two (2) counts of first-degree murder, where the State is seeking the sentence of life without the possibility of parole.” (see APPENDIX C, page C #1). The Trial Court further ruled —in the motion for new trial hearing order— that, “...the court did not err by denying the Defendant’s request to represent himself.” The Court again referred to the hearing on August 13th, 2021, in which the court ruled that the defendant was not competent to represent himself on two counts of first degree murder (see APPENDIX D, page D # 1, paragraph 3).

The Petitioner timely appealed to the T.C.C.A. At the oral argument phase, the Attorney General argued that the Defendant made a one sentence request to proceed *pro se*, and that the record did not have a time stamped *Waiver of Counsel*.

The Petitioner first filed a *pro se* motion to supplement the record with a copy of the time-stamped filed waiver after repeated attempts to contact the attorney of record. However, when the Attorney General responded, the Petitioner’s attorney re-submitted the request to supplement the record with the *Waiver of Counsel*.

This obviously upset the Appellate Court. It appears the T.C.C.A. had already begun to write the opinion. The court wrote: “...and the Defendant immediately

made an oral request for self-representation". The copy of the waiver, of course, shows the inaccuracy of the Attorney General's argument (APPENDIX A-page A-3).

The T.C.C.A. denied the supplement of the record stating it does not find the waiver "dispositive" (APPENDIX A- page A 19).

The Court then immediately states; "We agree with the State, that the Defendant's "one sentence" request to proceed *pro se*, without more, is not enough to unequivocally distance himself from his comments earlier...", at the substitute counsel hearing (APPENDIX A page A 19).

The T.C.C.A. failed to address the, "lack of technical knowledge" ruling the Trial Court relied upon. The T.C.C.A. failed to enforce the formal inquiry mandated by both **T.R.C.P. Rule 44**, and the mandate in this court under *U.S. v. McBride*. The T.C.C.A addresses the record *de novo* and finds judicial misconduct where the Trial Court only warned it could be... "in the future rise to".... the T.C.C.A. failed to enforce the State or Federal criteria that is so painstakingly addressed in the opinion.

The Petitioner submits, in theory only, that the ruling of the T.C.C.A. and the denial of discretionary review by the TN. Sup. Ct. is in direct relation to the

numerous vacations, reversals and remands, combined with the need to appoint a special judge officiate. The Petitioner would be considered difficult. The case itself would also be considered difficult.

LAW AND ARGUMENT

When we focus upon the requirements of the Federal Constitution as interpreted by the Supreme Court of the United States; the Sixth Amendment to the Constitution of the United States enumerates the essential rights of an accused in criminal prosecutions. Among other things, it guarantees that every criminal defendant 'have the assistance of counsel for his defense'. This basic right is a part of the 'due process of law' that is guaranteed by the Fourteenth Amendment.

In Faretta V. California, (Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d. 562 (1975)), the court put it beyond question that a criminal defendant has a constitutional right, knowingly and intelligently, to forgo his right to counsel and to represent himself, provided he is 'made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing'422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d. at 582. It also stands unequivocally for the proposition that he may not be required to accept the service of court-appointed counsel.

Tennessee claims to recognize and mirror the Federal Constitution with Article 1, section 9 of the Constitution of Tennessee.

The Tennessee Supreme Court's propaganda includes, but is not limited to, the

following: the standard of review for a defendant's exercise of the right of self-representation and the concurrent waiver of the right to counsel, is a mixed question of law and fact (State v. Hester, 324 SW 3d 1, 29 (term 2010)). Our review is *de novo* with a presumption of correctness as to the Trial Court's actual findings, (*Id.* at 29, 35) which state; "An error in denying the exercise of the right to self-representation is a structural constitutional error not amendable to harmless error review and requires automatic reversal when it occurs" (*Id.*(citing, State v. Rodriguez, 254 SW 3d 361, 371 (Tenn. 2008).

It has long been established that a criminal defendant has a constitutional right to proceed without counsel 'when he voluntarily elects to do so'. (Faretta v. California, 422 U.S. at 835, 95 S. Ct. 2525); see also, (State v. Small, 988 SW 2d. 671, 673 (Tenn. 1999)). The fact that a capital defendant faces the death penalty does not alter the availability of the right to self-representation (Hester, 324 SW 3d. at 32) stating, "While the trial courts added concern for assuring that [the defendant] is competently represented in a capital case is understandable, it is error to prevent [the defendant] from exercising his right to self-representation on this basis. A defendant does not lose his or her right to self-representation because he is tried for a capital offense." (citing Sherwood v. State, 717 N.E. 2d. 131, 135 (Ind. 1999, State v. Nems, 281 N.C. 658, 190 S.E. 2d.164, 173 (1972); Commonwealth v. Davido, 582, 868 S. 2d. 431, 444 (2005); State v. Brewer, 328 S.C. 117, 492 S.E.2d. 97, 98-99 (1997).

However, there are three (3) essential prerequisites that must be present before the right of self-representation becomes absolute: (1) The right must be asserted in a timely manner; (2) the request must be clear and unequivocal; and (3) the defendant must knowingly and intelligently waive the right to counsel. *Id. at 30 – 31.* A defendant need not have knowledge of the law and the legal system equivalent to that of an attorney to knowingly and intelligently waive his right to counsel (*State v. Goodwin, 909 SW 2d. 35, 40 (TN. Crim. App. 1995) citing Faretta, 422 U.S. at 835, 95 S. Ct. 2525*). The record need only show that the defendant made his decision knowing the disadvantages and the dangers of self-representation. *Id.* “The accused lack of experience or professional capabilities is not a factor to be considered by the trial court when an accused invokes his constitutional right to self-representation.” (*State v. Herrod, 754 SW 2d. 627, 635 (Tenn. Crim. App. 1988) citing Faretta, 422 U.S. at 836, 95 S. Ct. 2525; Johnstone v. Kelly, 808 F. 2d. 214 (2nd Cir. 1986)*). In Faretta, the U.S. Sup. Ct. said that, “A defendant need not himself have the skill and experience of an lawyer in order to competently and intelligently choose self-representation.” (*422 U.S. at 835, 95 S. Ct. 2525*).

In other words, technical legal knowledge by the accused is irrelevant to the inquiry of whether an accused should be permitted to exercise his right to self-representation; and a court may not deny the accused the right to self-representation because the accused does not possess the basic knowledge of how a

jury trial is conducted or knowledge of his rights. (Herrod, 754 S.W. 2d. at 630,
(again citing Faretta, 422 U.S. at 836, 95 S. Ct. 2525)(Internal Quotation marks
omitted.))

Very notable here; when a defendant asks to proceed *pro se*, the Court must
conduct an intensive inquiry as to his ability to represent himself (see State v.
Northington, 667 SW 2d. 57, 61 (Tenn. 1984). To be valid, a defendant's waiver
of his right to counsel, "...must be made with an apprehension of the nature of the
charges, the statutory offenses included within them, the range of allowable
punishments there under, possible defenses to the charges and circumstances in
mitigation thereof, and all other factors essential to a broad understanding of the
whole matter." (Von Mocck v. Gillies, 332, U.S. 708, 724, 68 S. Ct. 316, 92 L.
Ed. 309 (1948). A judge can make certain that an accused [defendant's] professed
Waiver of Counsel is understandingly and wisely made only from a penetrating
and comprehensive examination of all the circumstances under which such a plea
is tendered." Id.

Tennessee Rule of Criminal Procedure 44 (b) (1) specifically provides that:

[B]efore accepting a waiver of counsel, the Court shall: (A) provide the
accused in open court of the right to the aide of counsel at every stage of
the proceedings; and (B) determine whether there has been a competent
and intelligent waiver of such right by inquiring into the background,
experience, and conduct of the accused, and other appropriate matters.

The first question presented for review #I, is whether a Tennessee Trial Court, regardless of previous intermediate and Supreme Court rulings, can force a Defendant to accept unwanted counsel after the Defendant (A,) tried to substitute counsel and when denied (B), filed a motion to waive counsel, without an inquiry to establish that the Defendant is knowingly, and voluntarily waiving his right to counsel.

In the instant case, the Petitioner would show in the *Writ of Certiorari* that the Defendant fought furiously for substitute counsel; that the Defendant informed the court —by motion— that a denial would result in a *Waiver of Counsel* motion; and that the Defendant filed the Waiver of Counsel motion upon denial of substitute counsel. The Court became unreasonably upset and refused to accept the waiver without due process.

The Trial Court eventually accepted the waiver being filed and ruled; “the Defendant was not competent to represent himself on two (2) counts of first degree murder when the State is seeking a sentence of life without the possibility of parole.”

The Petitioner would show Tennessee claims to mandate an “intensive inquiry”. That the trial court bears the serious and weighty responsibility of

determining whether there is an intelligent and competent waiver through this intensive inquiry. (State v. Prince, 2021 Tenn. Crim. App. Lexis 549 – No. 2020 – 01302 – CCA R3 – CD.).

However, the Trial Court and intermediate court attempts to satisfy the “Intensive Inquiry” by referring to a previously held substitute counsel hearing in which the Defendant was warned the Court would make the Defendant forfeit his Sixth Amendment right to counsel if the Defendant continued to complain about his court appointed attorney.

When Defendant then attempted to waive counsel the Court failed to offer due process in the manner of the “Intensive Inquiry” of Faretta inquiry mandated by Prince, in Tenn., or in the 6th Circuit and U.S. Supreme Ct. in United States v. Pryor 842 F. 3d. 441 (6th Cir. 11-22-2016), and United States v. McBride, 362F 3d. 360-366 (6th Cir. 2004).

The second question presented for review # II, is Tennessee’s ambiguous procedures, and the lack of consistency result in arbitrary rulings that violate Defendant’s constitutional rights. The Petitioner would show the Tennessee Courts fail to follow the rules of procedure and lack significant guidelines. In the instant case, the Petitioner followed the proposed guidelines to the letter and has never been discourteous, threatening or abusive in any manner to any attorney, yet was denied the constitutional right to forego appointed counsel and forced to

accept unwanted counsel the Trial Court deemed would be effective counsel.

However, a defendant in an adjacent district in Tennessee was found to be purposely delaying his case when he could not find a Public Defender or appointed counsel that satisfied his standards for competency. Even though at least one psychiatrist determined he should be committed for “further analysis” the Trial Court “forced” the Defendant to represent himself at trial by revoking his constitutional right to counsel. (*see State v. Parsons, No. 2010-02073-CCA-R3-CD.)(Tenn. 2011)*. Defendant Parsons repeatedly requested counsel before and during trial.

Further, you have a Tennessee defendant whom verbally threatened and physically assaulted his attorney and the Tennessee Courts, some how, determined that this conduct was not deemed serious enough to sanction the extreme measure of forfeiture of counsel, because the indigent defendant had not been previously warned that those actions would result in losing the right to appointed counsel.

By all appearances, the Petitioner has found that if a defendant in Tennessee desires to, has the knowledge and are prepared to represent themselves, they are denied. If the defendant understands they are, or would be, incompetent but refuses to accept appointed counsel that they deem are incompetent also, then the defendant is denied counsel and forced then to represent themselves. The courts

completely lack structure, guidelines, consistency, and due process in determining who gets these constitutional rights and who does not.

The third question presented for review, question # III, is whether a *de novo* review of the facts related to a loss of counsel or loss of the right to waive counsel is a due process violation.

Tennessee's standard of review claims, "a trial court's determination AFTER a hearing that a defendant has behaved in such a manner as to forfeit his constitutional right to legal counsel at trial is a mixed question of law and fact." See Abdur'Rahman v. Bredesen, 181 S.W. 3d 292, 305 (TN 2005) ("A constitutional claim that is resolved AFTER an evidentiary hearing generally presents a mixed question of law and fact".) The Tennessee Supreme Court claims it reviews mixed questions of law and fact *de novo*, accompanied by a presumption that the Trial Court's findings of fact are correct. (*Id.* at *838, see also U.S. v. Goldberg, 67 F. 3d. 1092, 1097, (3rd Cir. 1995); also, "factual findings related to the loss of right to counsel, such as voluntary waiver, are entitled to substantial deference, but we review claims of violations of the right to counsel *de novo*, making an independent determination of the correctness of the judge's application of the constitutional principle to the facts found."). Quoting Commonwealth v. Currie, 388 Mass. 776,448, N.E. 2d. 740, 745 (1983); also, State v. Carruthers, 35 S.W. 3d. 516, 546 (TN 2000). The Tn. Sup. Ct. deems, "a criminal defendant may be deemed to have forfeited the constitutional right to

counsel if he engages in “extremely serious misconduct,” or engages in an “egregious manipulation” of the right to counsel so as to delay, disrupt, or prevent the orderly administration of justice.”

The reasons reviewing these claims *de novo*, instead for an abuse of discretion, are a due process violation are that it results in the intermediate court’s finding and making the issues of rulings on proposed facts (correct or not) that the defendants or State have not had an opportunity to address at an evidentiary hearing.

In the instant case, the Petitioner will show that the Trial Court abused its discretion by, A; failing to give the Petitioner a mandated T.R.C.P. rule 44 inquiry concerning the stamped filed *Waiver of Counsel, (APPENDIX – I, I page # 42-43)* and B; abused its discretion by finding that the defendant was not competent to represent himself because it was a double homicide trial in which the State was seeking a sentence of Life without parole. **(APPENDIX C, C page # 1).**

However, during the previously held substitution of counsel hearing the Trial Court warned the Defendant that eight (8) death penalty attorneys and three (3) post-conviction attorneys, over twenty-one (21) years —in which the Defendant filed three (3) complaints, and filed five (5) ineffective assistance of counsel issues, on post conviction— “could, in the future, rise to judicial misconduct.” This warning could have, but did not result in the required (mandated) evidentiary

hearing. Therefore, the warning that, “if the Defendant continued, the conduct ‘could rise to’, is a finding that the conduct has “not yet arose to” judicial misconduct (APPENDIX – I, Page I # 39).

Yet, the Tennessee Court of Criminal Appeals, by reviewing *de novo*, completely ignored the abuse of discretions. The failure of the Trial Court to determine whether the waiver was unequivocal, knowingly and intelligently submitted and the T.C.C.A. completely failed to acknowledge that the Trial Court ruled it was incompetence due to technical legal knowledge to perform at trial and the length of sentence that it based its denial of the constitutional right to self representation.

Instead, the Court —using a *de novo* review— was able to search the previously held *substitution of counsel hearing* and claim that the Defendant engaged in judicial misconduct due to the above stated Trial Court warning. The T.C.C.A. also stepped on the fact that the timing of a motion to waive counsel, per State v. Hester, 324 S.W. 3d (Tn. 2010), does not determine the fact of whether it is equivocal or not.

If this honorable Court grants Certiorari the Petitioner will show that the intermediate court’s in Tennessee are repeatedly making findings under “the guise of ‘*de novo*’ reviews” that had no bearing on the actual arguments made by the parties and failed to give the parties an opportunity to address the findings or the alleged facts the intermediate courts based their opinions on. This allows the

intermediate courts the opportunity to ignore the Trial Court's abuse of discretions that violate the Defendant's constitutional rights. This *is* a due process violation.

The Petitioner will also show the Tennessee intermediate courts tried to do this in other previously mentioned cases such as: State v. Hester; State v. Jones; and State v. Holmes.

Lastly, question # IV presented for review focuses on Tennessee's requirements and the process for obtaining *pro se* status. The State of Tennessee, Supreme Court, made the guidelines clear in State v. Hester . The Petitioner, after reading Hester, followed the guidelines to the letter and the Trial Court Judge became so irate that without forethought, immediately felt slighted and violated the Defendant's constitutional right to proceed *pro se*. It was then that the intermediate court (T.C.C.A.) found the Defendant's actions to be judicial misconduct.

If this honorable Court grants certiorari the Petitioner will show that after being *pro se* for over six (6) years, conducting a two (2) day evidentiary hearing on post-conviction and writing and filing *pro se* briefs, had the convictions and sentence vacated due to numerous constitutional violations, including trial counsel's ineffectiveness, attempted to follow Tennessee's guidelines and the Courts found those guidelines to be judicial misconduct.

The Petitioner determined Tennessee allows a Defendant to file a *Waiver of Counsel* if the Trial Court denies his motion to substitute counsel. The Defendant filed a substitution of counsel motion (APPENDIX - F – see F page #8 paragraph 24.) informing the parties the Defendant would proceed *pro se* if the motion was denied. The Defendant argued furiously for substitute counsel and was denied. Upon the verbal order and Trial Judges request for the written order, the Defendant requested to submit a *Waiver of Appointed Counsel* and proceed *pro se*. This legal maneuver —while proper— completely discombobulated the Trial Court Judge. The judge immediately became unreasonably angry and refused to accept the waiver. The Judge yelled the Defendant into silence, barely allowing the request to have the waiver stamped and filed, while failing to follow T.R.C.P. rule 44, inquiring into the equivocation of the request. Then immediately ruling “the Defendant was not competent due to the serious nature of the charges and sentence,” and “The lack of technical legal knowledge of how a trial is conducted”

The T.C.C.A. found the maneuver to be judicial misconduct, holding the timing of the maneuver shows equivocation and a desire to disrupt. The Tn. Sup. Ct. denied discretionary review.

The Petitioner followed the Sup. Ct. guidelines in Hester. Are the guidelines set out in Hester, Tennessee’s leading case on the subject of self-representation, a guideline for defendants to commit judicial misconduct and what would this honorable Court direct a Tennessee defendant do to obtain *pro se* status?

REASONS FOR GRANTING THE WRIT

There are not even any “minute differences” in Tennessee’s legal self-representation structure compared to the Federal Rule of Law and the U.S. Constitution. The Tennessee Legislature has mirrored Faretta v California, supra, with rulings of their own. See State cases such as State v Goodwin, 909 S.W. 2d 35, 40 (TN. Crim. App. 1995), and State v Hester, supra. Still the State has gradually departed from the proper process of upholding a defendant’s Sixth and Fourteenth Amendment rights to legal counsel, or (self-representation) and the Due Process of Law. In this instance, Tennessee has blatantly violated the Defendant’s constitutional rights by refusing to allow him his right to self-representation, or allow for a proper hearing to determine whether the defendant unequivocally requested self-representation.

This violation of a settled Tennessee procedure dictates an immediate reversal of the conviction and a remand to the trial court for a proper evidentiary hearing to determine if the defendant should properly be afforded his constitutional right to defend himself.

The decision of the Tennessee Court of Criminal Appeals, if left unresolved, will foster continued confusion in other states as well. Tennessee relies on such precedent as, Gallego v State, 117 Nev. 348, 23 P. 3d 227, 336 (2001); and State v Blum, 682N.W. 2d 578 (Minn. 2004). Blum states and Tennessee quoted in

Hester, supra, “A motion for self-representation is not equivocal simply because it is made as an alternative plan in case the trial court does not grant the defendants motion for a different attorney.” **U.S.C.A. 6, 14**

Still, the Tennessee courts are violating their defendant’s constitutional right to represent themselves and to be represented by counsel in contravention of the Sixth Amendment, causing enormous disruption of the criminal justice system, by failure to follow either their own settled procedure or that of this court. Accordingly, this court should grant this petition for Writ of Certiorari.

A. THE TENNESSEE COURT OF CRIMINAL APPEALS DECISION IS IRRECONCILABLE WITH THIS COURT’S DECISION IN FARETTA AND PRYOR, AS WELL AS, WITH THE TENNESSEE SUPREME COURT’S HOLDING IN HESTER

For instance, this court stated in Pryor that, “In the Sixth Circuit, [we] have mandated a former inquiry, using our supervisory powers, that federal District judges [must] undertake to determine whether a waiver is proper. Where a request to self-representation is clear, unequivocal and timely, the court “must ask the defendant a series of questions drawn from, or substantially similar to, the model inquiry set forth in the Bench Book for U.S. District Judges.” United States v McBride, 362 F. 3d 360, 366 (6th Cir. 2004).

Farettta, supra, states, “The Sixth Amendment requires a right to self-representation.” Pryor, *supra*, mandates a searching or formal inquiry. Tennessee’s constitution under **Article § 9** mirrors the Federal constitution and

has its own settled procedure under **T.R.C.P. Rule 44**, which requires the trial judge to follow **Pryor** and **McBride**. The Supreme Court of Tennessee set out its guidelines in **Hester, supra**, quoting **Blum** and **Gallego, Supra**.

The Tennessee Court of Criminal appeals in this case at bar, has now decided the State and Federal procedure is in effect judicial misconduct. The defendant followed **Hester, supra**, and after (6) six years of enjoying the constitutional right of self-representation gained relief in the form of a reversal and mandate for a new trial. The trial court appointed counsel and the defendant, (7) seven months prior to the set of the new trial date filed a motion to substitute counsel with a more qualified trial attorney. The trial court ruled after an hour long hearing that trial counsel would not be substituted. The defendant immediately requested to file a waiver of counsel to proceed pro se. The trial judge became irate and refused to entertain the submitted waiver, provide a formal inquiry, and forced the defendant to accept appointed counsel to continue to represent the defendant on previously filed motions.

The Tennessee Court of Criminal Appeals ignored the fact the hearing was held over (5) five months prior to the set of the trial date, or that it was proper to file the waiver after the trial court ruled it would not allow counsel to be substituted. The Tennessee Court of Criminal Appeals reviewed *de novo*, with no input from the defendant and found the actions of the defendant to suggest no actual desire to represent himself, and settled procedure was judicial misconduct.

**B. THE TENNESSEE COURT OF CRIMINAL APPEALS DECISION
DIRECTLY CONFLICTS WITH THE TENNESSEE SUPREME
COURT AND OTHER STATE SUPREME COURTS
INTERPRETATION OF BLUM AND GALLEG**

Review is appropriate here because of the split of authority among the states that this ruling creates. Both the Federal District Court and State Supreme Courts in Minnesota and Nevada dictate that a formal inquiry [must] be had upon the filing of a waiver to waive the constitutional right to counsel.

These states rule that the timing of such a waiver, in and of itself, will not determine equivocal or unequivocal fact of the waiver. That it is proper to submit the waiver as an alternate plan to a court's refusal of different counsel, without the submission of said waiver being considered judicial misconduct. According to the Tennessee Supreme Court precedent, there is not a superficial difference between these states procedures to waive counsel and proceed pro se. However, the Tennessee Court of Criminal Appeals finding the procedure amounts to judicial misconduct because the waiver was filed immediately after the ruling on the substitute counsel hearing is irreconcilable with all the previously mentioned precedent.

The mischief caused by the T.C.C.A.'s obviously incorrect interpretation of this courts ruling is incalculable, and this court should intervene and remedy the error before further damage is done.

B. CONCLUSION

Tennessee has not only violated the State and Federal constitutional rights of the petitioner but are actively denying criminal defendants the basic sixth amendment right to both assistance of counsel and self-representation.

The intermediate courts in Tennessee, under the guise of a *de novo* review consistently make opinions that are ambiguous and arbitrary.

This certiorari should be accepted because this, the honorable United States Supreme Court's supervisory authority is desperately needed concerning these issues.

Respectfully submitted,

John J. Smith

CERTIFICATE OF COMPLIANCE

No. _____

Hubert Glenn Sexton Jr.,

v.

State of Tennessee

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 6,340 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on FEB. 3rd, 2025


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