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No. _____

In the Supreme Court of the United States

LOLA SHALEWA BARBARA KASALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

FILED

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

- Whether the Federal Rules of Criminal Procedure 43, case law, and the United States Constitution permit the trial in absentia of a defendant who is not present at the time of commencement or any later stage of her trial?
 - Whether jury selection begins the trial proceedings?

LIST OF PARTIES

Petitioner is Lola Shalewa Barbara Kasali. Respondent is the United States of America.

RELATED CASES

United States of America v. Kasali, No. 4:21-cr-54 (December 8, 2021) (entering judgment of conviction after jury trial)

United States of America v. Kasali, No. 21-20681 (August 2, 2024) (affirming trial court judgment)

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PETITION FOR A WRIT OF CERTIORARI

Lola Kasali respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming petitioner's conviction (Appendix A) is reported at 111 F.4th 637 (5th Cir. 2024).

JURISDICTION

The Court of Appeals for the Fifth Circuit issued a final judgment affirming petitioner's conviction on August 2, 2024. The Court of Appeals for the Fifth Circuit denied the petition for rehearing on September 13, 2024 (Appendix B). The petition for rehearing was filed on August 16, 2024 (Appendix C). The Supreme Court granted an extension of time to file the petition for a writ of certiorari by February 10, 2025, in Application No. 24A561 (Appendix D). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE OF CRIMINAL PROCEDURE INVOLVED

The Fifth Amendment of the United States Constitution provides that “No person shall be deprived of life, liberty, or property, without due process of law.” The Sixth Amendment of the United States Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial and to be confronted with the witnesses against him.” The Federal Rule of Criminal Procedure 43(c) provides that continued presence is not required. A defendant who was initially present at trial (emphasis added), or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (emphasis added).

STATEMENT OF THE CASE

The district court began jury selection and trial in the petitioner’s absentia on the scheduled starting date, December 6, 2021. The jury returned its verdicts on December 8, 2021, finding Petitioner guilty of two counts of making false statements to a financial institution in violation of 18 U.S.C. 1014 and two counts of bank fraud in violation of 18 U.S.C. 1344. On April 7, 2022, the district court sentenced the petitioner to 70 months and placed the petitioner on probation for five years. As a condition of probation, the court ordered petitioner to pay restitution in the amount of \$2,027,686.64 during the period of her probation. Petitioner is presently serving her probation.

Petitioner appealed her convictions to the Fifth Circuit Court of Appeals. Her convictions were affirmed by a panel of that court on August 2, 2024. On August 16, 2024, Petitioner filed a petition for rehearing on the issue of jury selection and trial in absentia and the district court's failure to replace her attorney prior to trial because of an irreconcilable conflict. The Fifth Circuit denied the petition for rehearing in an order dated September 13, 2024. (See Appendix B). The facts related to her trial in absentia are stated in the Fifth Circuit's opinion.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit held that Ms. Kasali had voluntarily waived her right to be present for her trial based on the trial court's findings that it is not articulated when jury selection starts, her trial counsel waiving her right to be present at trial, even though she objected to trial counsel, the trial proceeding without her present, and a subsequent Beltran-Nunez inquiry. The same attorney who she objected to and sought to substitute, stated on the record that he hoped Kasali did not want to be present and proposed voir dire instructions regarding a defendant's absence before the trial date even arrived, which suggested that trial counsel intended and anticipated on proceeding to trial without Kasali present. On December 6, 2021, before jury selection and trial begun, Kasali willingly met with the Court, counsel, and the court reporter in a private room. Kasali expressed continued dissatisfaction, lack of trust, and irreconcilable conflict with trial counsel. However, the Court refused to inquire further into those issues that Kasali was experiencing with trial counsel and focused on her clothing instead of her constitutional rights. Kasali requested a slight delay to retain counsel. The Court denied her request and continued to focus on her clothing attire. Trial counsel told the Court to proceed to trial without Kasali present and the Court informed Kasali that jury selection and trial would proceed without her present. Kasali objected and stated that she "did not waive her appearance." Upon Kasali's counsel waiving her right to be present at trial, the Court ordered her to be escorted to the law clerk's office in the judge's chambers instead of being physically present at her jury selection and trial. The court intended to send Kasali to a room where she could hear the jury selection, but Kasali could not hear the jury selection in the room that she was escorted to. The court, counsel, and the court reporter were not present in this room. Kasali remained in this silent room where the U.S. Marshals lied to her and told her that the jury selection had not begun yet. After jury selection occurred in her absence, Kasali was escorted to another office. The office Kasali was relocated to belong to law clerk Jane West. The Court, trial counsel, and the Court reporter met with Kasali in the relocated office. Kasali requested to use a phone to hire counsel, however this request was denied. The Court proceeded to trial in her absence. She was not physically

present in the Court; however, she could hear the trial in the room that she was relocated to. Two witnesses gave testimony in violation of Kasali's constitutional right to confront witnesses against her. The first witness was the lending specialist from the Small Business Administration and the second witness was the senior business development manager from Radius Bank, who is the alleged victim in this bank fraud case. Kasali was not present at her jury selection at all, audibly, visually, or physically. She also was not visually or physically present on her first day of trial, which foreclosed her from confronting the two witnesses who gave testimony about the bank and lender being defrauded of \$1,937,500, which Kasali was on trial for. Kasali believes counsel was ineffective for proceeding to trial in her absence. If Kasali was present, she could have aided trial counsel in screening prospective jurors for bias and challenging jurors for cause as well as assisting counsel in directly questioning or cross-examining the witnesses, at which point she would have been able to challenge the witness's testimony herself and assess the witness's credibility face to face.

As trial progressed, the government's attorney felt less confident in their strategy and requested the Court to perform a subsequent Beltran-Nunez inquiry. The Court later attempted to perform a Beltran-Nunez inquiry on the record after (emphasis added) proceeding to trial without Kasali present. However, a Beltran-Nunez inquiry must be made prior to proceeding to trial without the defendant present. Applying the Beltran-Nunez inquiry any other way than prior to proceeding to trial without the defendant present is inapposite, defeats the purpose of it, and thwarts the actual inquiry itself because the purpose of the inquiry is to gauge whether the defendant can be afforded a slight delay to assure her physical presence. After all, it is her right to be present at jury selection and trial. The right to be present at jury selection cannot be waived as this is the commencement of the trial proceedings.¹ Moreover, there is no

¹ Lower courts are divided in when jury selection begins but it is plain language and clear reading of Rule 43 that jury selection begins when trial begins. The Fifth Circuit mentioned *United States v. Thomas*, 724 F.3d 632 (5th Cir. 2013). The reason *Thomas* did not prevail on his right to be present claim is because *Thomas* was initially present and then absented himself after trial begun in his presence. *Thomas* was only absent from an in-chamber conference when his lawyer exercised his peremptory challenges. 724 F.3d at 646. This is inapposite to *Kasali* because *Kasali* was absent from the entire jury selection including the peremptory challenges, which is what Rule 43 heavily safeguards against.

avoiding the plain fact that neither the inconvenience of retrying nor rescheduling the trial later once the defendant is present is relevant in applying Federal Rule of Criminal Procedure 43(c), which states:

(c) continued present not required. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (emphasis added).

The Writ should be granted because the Fifth Circuit has ignored the plain wording of Rule 43 and the analysis of the Supreme Court case that gave rise to the Rule, *Diaz v. United States*, 223 U.S. 442 (1912) and restatement in *Crosby v. United States*, 506 U.S. 255 (1993). *Crosby* is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has commenced in his presence. Although the application of Rule 43(c) may impose hardship on courts, prosecutors, and witnesses, the Supreme Court in *Diaz* and the drafters of Rule 43(c) decided to place a defendant's right to be present at his trial ahead of these considerations. Other circuits have refused to apply the Rule as written on grounds of expediency and have created rules that have no connection to the plain wording of Rule 43(c) for determining whether a court may proceed with a trial in the absence of a defendant, this does not justify ignoring the Rule. Our analysis of *Diaz*, *Crosby*, and Rule 43(c) makes this clear. The drafters of Rule 43(c) relied on *Diaz v. United States* because it stated the current law concerning the permissibility of trials in absentia. see, *Taylor v. United States*, 414 U.S. 17, 19 (1973). *Diaz* was charged with non—capital murder in the Philippines. On two occasions during the trial, he voluntarily absented himself, expressly waiving his right to be present. *Diaz*, 223 U.S. at 453. A Philippine statute required a defendant's presence at arraignment, at plea of guilty and judgment, and entitled him to be present at every other stage of the

proceedings. *Id.* The issue on appeal is not whether Diaz voluntarily waived his right to be present, but whether, under the applicable statute, he had the power to absent himself. *Id.* The Fifth Circuit stated that it had not been articulated when jury selection starts. However, this is inconsistent with the Fifth Circuit's earlier ruling in *United States v. Krout*, 56 F.3d 643. In *Krout*, for the purposes of Rule 43 and the right to be present at every stage of one's trial as enshrined in the Confrontation Clause, a trial begins when jury selection begins. 56 F.3d at 645-646. Therefore, trial had not begun when Kasali's absence began. Moreover, she could not have voluntarily waived her right to be present because it was not ripe to do so. Kasali's right to be present at trial was violated involuntarily and unknowingly.

The Supreme Court looked to Section 5 of the Philippine Civil Government Act that granted a criminal defendant "the right to be heard by himself and counsel, 223 U.S. at 454. If the Act made Diaz's presence necessary, it was irrelevant that the Philippine Statute in question prevented a waiver, as it could not lessen the force of a superior law known as the Act. The Supreme Court characterized the Act like the Sixth Amendment right to be present at one's trial because the Act was intended to protect the United States citizen's constitutional rights. The Act should be interpreted just as the Sixth Amendment right to be present at trial would be interpreted in the United States. 223 U.S. at 455. The Supreme Court reviewed United States law concerning trial in absentia and concluded that the prevailing rule was "that if, after a trial has begun in the defendant's presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial" 223 U.S. at 455—56 (citations omitted). Therefore, the Philippine Statute requiring a defendant's presence at arraignment, plea, and judgment, and entitling him to be present himself at all other stages, was to be applied in the same fashion. It is understood to permit the continuation of a trial of a defendant, who was initially present and voluntarily absented himself in United States.

Rule 43, which incorporates Diaz,² does not permit the trial in absentia of a defendant who is not initially present. Numerous cases applying Rule 43 have read the rule this way.³ Diaz recognizes the problem that defendants who have absented themselves can create for the judicial system, but it didn't allow this to change what it recognized as a clear—cut rule. A trial that is pending before a jury may proceed as to an absent defendant only if he was initially present. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrongs. Yet, this would be exactly what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while on bail, during the pendency of a trial before a jury, to operate as a shield. 223 U.S. at 458 quoting Falk v. United States, 15 App. D.C. 446 460-61 (1899), cert denied, 180 U.S. 636 (1901).

Instead of applying Rule 43 as written and as it was intended to apply, the Fifth Circuit followed the reasoning of United States v. Beltran-Nunez, 716 F.2d 287, 291 (5th Cir. 1983) ruling in a more fatally flawed way to find that Petitioner's absence at trial, plus the inconvenience to the government in rescheduling the trial, allegations that it is not articulated when jury selection starts, and her trial counsel waiving her right to be present at trial, even though she objected to trial counsel as a valid waiver by Petitioner of her right to be present at trial. Ultimately, Kasali wanted to be present at trial. She did not want to be represented by trial counsel, who she heavily contested. At the very minimum, Kasali requested a slight delay to retain counsel, but this request was denied. The Fifth Circuit misreads Beltran-Nunez in reasoning erroneously to the conclusion that inconvenience to the government and witnesses constitutes a waiver. The following quotation from the Fifth Circuit proves that it misreads Beltran-Nunez: “Prior (emphasis added) to proceeding with trial in a

² A defendant who voluntarily absents himself must have been initially present before trial can proceed in his absence is not the result of unintentional action on the part of the Rule's drafters. Diaz v. United States, 223 U.S. 442, 455 (1912).

³ Cross v. United States, 325 F.2d 629, 631 (D.C. Cir. 1963); Cureton v. United States, 396 F.2d 671, 675 (D.C. Cir. 1968); Government of Virgin Islands v. George, 680 F.2d 13, 15 (3rd Cir. 1982); Parker v. United States, 184 F.2d 488, 489 (4th Cir. 1950); Pearson v. United States, 325 F.2d 625, 627 (D.C. Cir. 1963); United States v. Garcia-Turino, 458 F.2d 1345, 1346 (9th Cir. 1972); United States v. Hernandez, 842 F.2d 82, 84 (5th Cir. 1988); United States v. Hudson, 313 F. Supp. 422, 426, (D.C. Delaware, 1970). United States v. Miller, 463 F.2d 600, 603 (1st Cir.); cert. denied, 409 U.S. 956 (1972).

defendant's absence, 'the district court must first (emphasis added) determine whether the defendant's absence is 'knowing and voluntary' by 'inquiring into the reason for the defendant's absence.' Id. If it is knowing and voluntary, the court must then consider the inquiry into 'whether the public interest in the need to proceed clearly outweighs' the defendant's voluntary absence. Id. In doing so, the district court must 'balance the likelihood that the trial could soon take place with the defendant's presence against the undue inconvenience or prejudice occasioned by a slight delay or a rescheduling of the trial.'" *United States v. Beltran-Nunez*, 716 F.2d 287, 291 (5th Cir. 1983). The Court did not consider any of this before Kasali's absence began. Therefore, the absence was not voluntary or knowing. In fact, before the Court involuntarily had Kasali escorted to the judge's chambers, despite her objection, the Court denied her the opportunity for a slight delay to retain counsel. The *Beltran-Nunez* case agrees that a defendant's Rule 43 right to be present at trial is intended to be broader than his constitutional right, which is deeply rooted in the 5th and 6th Amendments to be present at trial. *United States v. Alessandrello*, 637 F.2d 131,138 (3rd Cir. 1980), cert. denied, 451 U.S. 949 (1981). *United States v. Brown*, 571 F.2d 980, 986 (6th Cir. 1978).

The point of *Diaz* is that this ruling led the Supreme Court Advisory Committee to draft Rule 43 in a way that limits trials in absentia to defendants who voluntarily absent themselves after their trials commence. Therefore, the decision in the panel's opinion in this case, is not rooted in law and should not be followed.⁴ The *United States*

⁴ Kasali asserts her argument that rehearing should be granted primarily upon the Fifth circuit's incorrect application of *Beltran-Nunez* and Rule 43 on this case. Kasali also points out that the panel opinion misconstrued at least one important fact in deciding that the District Court had proceeded reasonably in trying Kasali even though she was not initially present. The panel opinion mentioned speculation of fear for an alleged potential disruption, there was no disruption that occurred. The Court of Appeals conceded and foreclosed their theory of an alleged potential disruption by refusing to justify a valid waiver based on the allegations of a potential disruption in the Fifth Circuit's opinion. "Because we find the district court's exclusion proper under Rule 43(c)(1)(A), we need not reach whether the exclusion was also justified under Rule 43(c)(1)(C)" (See Appendix A). The Fifth Circuit mentioned *United States v. Lucky*, 569 F.3d 101 but *Lucky* is inapposite to Kasali because unlike *Lucky*, Kasali, protested her right to be present. *Lucky* did the exact opposite and left the courtroom on his own after he was present in the Courtroom and trial had begun. Kasali was ordered to go to the judge's chambers only after her trial counsel, who she heavily contested, requested the Court to proceed to trial without her present. Even after trial counsel made this grave mistake, Kasali still protested her right to be present. Kasali was also not present in the courtroom and trial hadn't begun when her absence began, unlike *Lucky*. In anyway, a defendant must first be initially present to voluntarily absent herself thereafter. Kasali was not present or disruptive at trial. The Fifth Circuit's opinion rested on a voluntary waiver, not a disruptive defendant. Therefore, the fear of an alleged potential disruption was not addressed in full detail. Kasali does

Constitution and our common law places a high value upon a defendant's opportunity to observe all stages of his trial and to assist counsel in his defense that it is willing to permit a trial to proceed in a defendant's absence only if that absence is voluntary. United States v. Gregorio, 497 F.2d 1253, 1258-59 (4th Cir. 1974), cert. denied, 2d 1253, 1258-59 (4th Cir. 1974), cert. denied, 419 U.S. 1024 (1974). The presence of a defendant at the beginning of trial helps guarantee that any later absence is voluntary. Rule 43(c) makes a defendant's initial presence necessary to a continuation of the trial in his later absence. The Fifth Circuit's decision in petitioner's case is inconsistent with the plain meaning of Rule 43(c), its common law, and constitutional antecedents. Therefore, the Court has not ruled upon it and it is likely to happen again if action is not taken. For these reasons, this Court should grant the writ.

reserve the right to retain counsel, especially when her trial counsel worked counter productively against her and requested to proceed to trial in her absence. This same attorney prayed that she did not want to go to trial with him (on the record, through proposed voir dire instructions and on the day of trial in a private room before Kasali even had an opportunity to speak on her own behalf) before the trial date because he intended to go to trial without her from the very beginning. Kasali also reserves the right to address the Fifth Circuit if the opinion is modified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Lola Kasali", is written over a horizontal line.

LOLA SHALEWA BARBARA KASALI

Date: February 10, 2025