

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

NO. _____

MARCUS BELTON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION OF WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENA MARIE YOUNG
Attorney at Law
CSB #215344
740 4th Street, Second Floor
Santa Rosa, California 95404
Telephone: (707) 528-9479
Email: dmyounglaw@gmail.com

Attorney for Petitioner
Marcus Belton

QUESTIONS PRESENTED FOR REVIEW

- 1) Whether it constitutes a denial of due process and a fair trial where a represented criminal defendant was denied the right to testify on his own behalf by an unnecessary order of the district court that he would have to examine himself in question-and-answer format should he wish to testify?

- 2) Whether the Ninth Circuit Court of Appeals' requirement that the criminal defendant must attempt to testify in order to preserve the question for appeal is inconsistent with Supreme Court precedent?

TABLE OF CONTENTS

	<u>Page</u>
<u>QUESTION PRESENTED FOR REVIEW</u>	i
<u>TABLE OF AUTHORITIES</u>	iv
<u>PETITION FOR WRIT OF CERTIORARI</u>	1
<u>OPINION BELOW</u>	2
<u>JURISDICTION</u>	2
<u>STATEMENT OF THE CASE</u>	2
<u>STATEMENT OF FACTS</u>	4
<u>BAIL STATUS</u>	5
<u>REASON FOR GRANTING THE WRIT</u>	5
<u>This Court Should Grant Certiorari to Determine Whether the Ninth Circuit Court of Appeals Decision Conflicts With Established United States Supreme Court Precedent and Undermines a Criminal Defendant’s Constitutional Right to Due Process and a Fair Trial</u>	5
A. <u>Importance of the Issues:</u>	5
B. <u>Application to This Case:</u>	8
1. <u>The District Court’s Ruling that BELTON Must Ask Himself Questions and Answer Them If He Wanted to Testify Violated BELTON’s Due Process Right to a Fair Trial by Effectively Preventing Him from Taking the Stand</u>	8

TABLE OF CONTENTS

2.	<u>The Erroneous Characterization of a Constitutional Error as an Evidentiary Ruling Results in a Grave Injustice to Criminal Defendants and Renders Meaningless the Right to Testify in One's Own Defense</u>	12
	<u>CONCLUSION</u>	16

APPENDIX

APPENDIX A

Memorandum Opinion, 9th Circuit Court of Appeals No. 15-10571

APPENDIX B

Order Denying Petition for Rehearing and Rehearing *En Banc*

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brooks v. Tennessee</u> , 406 U.S. 605 (1972)	9, 14, 15
<u>Chapman v. California</u> , 386 U.S. 18	9, 13
<u>Eslaminia v. White</u> , 136 F.3d 1234 (9th Cir. 1998)	13
<u>Greenway v. Schriro</u> , 653 F.3d 790 (9th Cir. 2011)	13
<u>Jones v. Barnes</u> , 463 U.S. 745 (1983)	9
<u>Luce v. United States</u> , 469 U.S. 38 (1984)	7, 10, 15
<u>McGautha v. California</u> , 402 U.S. 183 (1971)	9
<u>Neder v. United States</u> , 527 U.S. 1 (1999)	13
<u>New Jersey v. Portash</u> , 440 U.S. 450 (1979)	13, 14, 15
<u>Nix v. Whiteside</u> , 475 U.S. 157 (1986)	7, 8, 14, 15
<u>United States v. Lopez</u> , 500 F.3d 840 (9th Cir. 2007)	12
<u>United States v. Montalvo</u> , 331 F.3d 1052 (9th Cir. 2003)	13
<u>United States v. Recuenco</u> , 548 U.S. 212 (2006)	13
<u>United States v. Walters</u> , 309 F.3d 589 (9th Cir. 2002)	13
<u>United States v. Williams</u> , 939 F.2d 721 (9th Cir. 1991)	15
<u>Weaver v. Massachusetts</u> , 137 S. Ct. 1899 (2017)	7, 12

TABLE OF AUTHORITIES

<u>Statutes</u>	<u>Page</u>
18 U.S.C. §922(g)(1)	2
18 U.S.C. 924(c)(1)(A)	3
21 U.S.C. §860(a)	2-3
28 U.S.C. §1254(1)	2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

NO. _____

MARCUS BELTON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION OF WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, MARCUS BELTON, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered July 27, 2017.

OPINION BELOW

The Ninth Circuit Court of Appeals entered a memorandum opinion in United States v. Belton, 15-10571, on July 27, 2017. A copy of the Opinion is annexed hereto as Appendix A.¹

A timely Petition for Rehearing and Rehearing *En Banc* was filed on August 10, 2017. This petition was denied on September 7, 2017. A copy of the Order is annexed hereto as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This appeal in a criminal case is from a district court judgment and sentence following a conviction after jury trial.

On November 20, 2014, BELTON was charged in a four-count Superseding Indictment with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §922(g)(1) [Count 1]; possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 21 U.S.C.

¹ The caption of this Opinion contains the name of the parties to the proceedings.

§860(a) [Count 2]; possession with intent to distribute cocaine within 1,000 feet of a school in violation of 21 U.S.C. §860(a) [Count 3]; and possession of a firearm in furtherance of drug trafficking in violation of 18 U.S.C. 924(c)(1)(A) [Count 4].

Following a hearing on January 2, 2015, the court permitted BELTON to represent himself at trial. Standby counsel was appointed to assist BELTON on March 23, 2015. On June 22, 2015, immediately before the start of *voir dire*, BELTON indicated that he could not represent himself at trial. Standby counsel agreed to try the case. Counsel's request for a brief continuance was denied.

On June 29, 2015, the jury returned a verdict of guilty on all charges.

On November 20, 2015, the district court sentenced BELTON to a term of 240 months, consisting of 120 months on Count 1 and 180 months on Counts 2 and 3 to run concurrently; and 60 months on Count 4 to run consecutively.

The judgment of conviction and sentence was filed on November 23, 2015.

The notice of appeal was filed on December 1, 2015.

On July 27, 2017, this Court issued a Memorandum Opinion, affirming the judgment of the District Court.

STATEMENT OF FACTS

On October 14, 2013, Officer Pheareak Phan of the Oakland Police Department observed BELTON while conducting surveillance from an unmarked car in East Oakland. Phan was in contact with arrest teams consisting of other police officers via radio. During this surveillance, Phan observed BELTON interacting with others in ways which led him to believe that BELTON was engaged in selling drugs out of a blue car.

As a result of these observations, BELTON was arrested, and the car was searched. A loaded handgun was found in BELTON's waistband. Inside the car, officers found a which contained 69 twists of cocaine base, 2 large chunks of cocaine base, 29 twists of powder cocaine, 5 green ecstasy pills, and a small bag of marijuana. A digital scale, sandwich bags, lactose powder, money, and a second magazine for the handgun were also located in the car. The location where the arrest was made was determined to be less than 1,000 feet from a nearby elementary school.

BAIL STATUS

BELTON is currently incarcerated at the Federal Correctional Institution at Victorville, California, pursuant to the district court's order with a projected release date of March 18, 2031.

REASON FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Determine Whether the Ninth Circuit Court of Appeals Decision Conflicts With Established United States Supreme Court Precedent and Undermines a Criminal Defendant's Constitutional Right to Due Process and a Fair Trial

A. Importance of the Issues:

The question of whether a district court order actively interferes with the right of a criminal defendant to testify on his own behalf is an issue of national importance. The additional question of whether a defendant must try to testify in order to preserve his claim that the district court's order renders such testimony impossible is also one of national importance because issues involving the rights of defendants to testify at trial, and whether or not the courts have interfered with those rights, are commonplace in the criminal courts. The right of a criminal

defendant to testify in his own behalf is one of the most important rights critical to a fair trial. It is a fundamental right, implicit in due process of law. Any order of the court which interferes with the right to testify undermines the very structure of a criminal trial, rendering it fundamentally unfair. If proper standards are not consistently defined and applied, the end result is that many criminal defendants, like BELTON, are denied their right to testify in their own defense, and their right to a fair trial.

In its Memorandum Opinion, the Ninth Circuit Court of Appeals panel denied BELTON's challenge to the district court's ruling that, if he were to ultimately testify at trial, he would be required to examine himself in question-and-answer format, because BELTON failed to preserve the issue by not taking the stand. However, the panel decision disregarded the procedural fact that no such ruling was necessary at the time it was made. Nor does the panel decision account for the true impact of the district court's ruling which interfered with the attorney-client relationship, and put BELTON in a position which made it impossible for him to even attempt to testify.

By requiring BELTON to testify in order to preserve this issue, the panel decision effectively equated the denial of the right to testify with an evidentiary ruling on admissibility of prior convictions. See, *e.g.*, Luce v. United States, 469 U.S. 38, 41-43 (1984). While an order that a prior conviction is admissible might serve to impeach a testifying defendant and make it less desirable to testify, it does not foreclose a defendant's testimony in its entirety. In this case however, the district court's order served as an insurmountable barrier to testimony. Therefore, the order should have been characterized as structural in nature, and not subject to harmless error analysis. See, *e. g.*, Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-1908 (2017); Nix v. Whiteside, 475 U.S. 157, 164 (1986).

It is of national importance that criminal defendants must be allowed to choose whether or not to testify without the district court creating unreasonable and improper barriers to that testimony. The additional requirement that the defendant must at least try to testify in order to preserve the issue for appeal is so fundamentally unfair as to deny any realistic opportunity for appellate review. Review of these issues is, therefore, necessary to the preservation of a criminal defendant's right to testify in their own defense, and the rights to due process and a fair trial.

B. Application to This Case:

1. The District Court's Ruling that BELTON Must Ask Himself Questions and Answer Them If He Wanted to Testify Violated BELTON's Due Process Right to a Fair Trial by Effectively Preventing Him from Taking the Stand.

Shortly before the close of the government's case, the district court (at the request of the government) asked BELTON's counsel whether he would examine BELTON if he were to testify. Counsel said that he would not and that it was a "sticky situation." Counsel also made it clear that no decision had been made, and the court's question was merely hypothetical at that time. Without any further inquiry as to the reason counsel might not examine BELTON, the court ordered that if BELTON was going to testify, and counsel was not in a position to ask him questions, that he would have to ask himself questions and answer them on the witness stand. Both counsel and BELTON objected to this procedure as unfair and highly prejudicial. BELTON ultimately chose not to testify at trial.²

The right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right. See, e. g., Nix v. Whiteside, 475 U.S. 157, 164

² There is admittedly nothing in the record to show why BELTON chose not to testify.

(1986). The defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf." Jones v. Barnes, 463 U.S. 745, 751 (1983). "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." Brooks v. Tennessee, 406 U.S. 605, 612 (1972). A defendant's choice to take the stand carries serious risks of impeachment and cross-examination. Brooks at 610-611; see also McGautha v. California, 402 U.S. 183, 213 (1971)(a defendant's testimony "may open the door to otherwise inadmissible evidence which is damaging to his case."). It stands to reason that a defendant trying to make the difficult decision whether or not to testify should not have to factor into that decision a trial court ruling that so destroys his credibility as to render his testimony moot. An error which so fundamentally undermines the defendant's Fifth Amendment rights is constitutional in nature and implicates a "structural" right so basic to a fair trial that, by definition, it can never be harmless. The error is deemed harmful *per se*. In these instances, the error is not subject to harmless error analysis and requires automatic reversal. See *e.g.*, Chapman v. California, 386 U.S. 18, 23-24 & n.8 (1967).

The panel decision characterized the district court's ruling as trial management, equivalent to an evidentiary decision on admissibility of a prior conviction. See, *e.g.*, Luce v. United States, 469 U.S. 38, 41-43 (1984). This characterization of the ruling minimizes its impact, and ignores the fact that the ruling was premature and unnecessary. The panel decision failed to take into account the severe burden that the ruling placed on BELTON, making it impossible for him to testify in his own defense.

The trial court's ruling was both premature and unnecessary. It came at a time when BELTON had not yet decided whether to testify. There was no actual issue pending before the court. Second, the trial court did not make inquiry as to why counsel might not examine BELTON. Given the short time that counsel had been attorney of record (all of it while actively participating in a jury trial) counsel may simply not have had any opportunity to discuss potential testimony with BELTON, and may not have been able to construct an examination for that reason. If that were the case, a brief continuance might have solved the problem without any prejudice to BELTON.

It is also possible, as the trial court clearly believed, that counsel thought that sponsoring BELTON's testimony might have been inconsistent with his

ethical duties as an attorney. If that were the case, there are established procedures for dealing with that situation in order to effectuate BELTON's right to testify. If counsel believed he could not ethically examine BELTON, the proper course would have been to move to withdraw. If that motion was denied, the next step would be to ask the court to allow BELTON to testify in the narrative. Instead, the trial court decided to rule in a vacuum without any further inquiry.

The procedure ordered by the court, where BELTON was to pose questions to himself and then answer them, was entirely unworkable. First, it would make BELTON look like he was insane, destroying any credibility he might have had right from the outset. More importantly, BELTON was not acting as his own attorney. He had already told the court he was not capable of doing that. He had no understanding of the rules of evidence. To ask BELTON to construct an examination according to the rules of evidence, so that the trained lawyers working for the government would have an opportunity to object in a timely fashion, placed an unfair and impossible burden on him and effectively denied him the right to testify on his own behalf.³

³ Nor would the ruling have served to assuage the government's concern that
(continued...)

The record is admittedly silent as to why BELTON chose not to testify, but given the choice between silence and the court's impossible procedure, it is not difficult to understand why he chose silence.

2. The Erroneous Characterization of a Constitutional Error as an Evidentiary Ruling Results in a Grave Injustice to Criminal Defendants and Renders Meaningless the Right to Testify in One's Own Defense

In its Memorandum Opinion, the Ninth Circuit Court of Appeals panel equates the district court's ruling to an evidentiary ruling on the admissibility of evidence. In doing so, the panel requires that the criminal defendant must attempt to testify in order to preserve the issue for appeal. This is an erroneous application of the law and is contrary to United States Supreme Court precedent.

Whether there has been a violation of a defendant's Fifth Amendment right is reviewed *de novo*. United States v. Lopez, 500 F.3d 840, 844 (9th Cir. 2007).

When an error is constitutional in nature and implicates a "structural" right so basic to a fair trial that, by definition, it can never be harmless, the error is deemed harmful *per se*. See Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-1908 (2017).

³(...continued)

BELTON would make inappropriate comments. The opportunity to do so remained the same.

In these instances, the error is not subject to harmless error analysis and requires automatic reversal. See Chapman v. California, 386 U.S. 18, 23-24 & n.8 (1967); see also United States v. Recuenco, 548 U.S. 212, 219 (2006); Neder v. United States, 527 U.S. 1, 7 (1999) (defining structural error); Greenway v. Schriro, 653 F.3d 790, 805 (9th Cir. 2011); United States v. Montalvo, 331 F.3d 1052, 1057 (9th Cir. 2003) (listing structural errors); United States v. Walters, 309 F.3d 589, 593 (9th Cir. 2002) (same). Structural errors “are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible.” Eslaminia v. White, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998).

Rather than find the district court’s ruling constitutional in magnitude, and therefore, prejudicial *per se*, the panel likened the ruling to an evidentiary ruling, and found that it could not assess the prejudice to BELTON because he chose not to testify. This is an erroneous application of Supreme Court precedent.

In New Jersey v. Portash, 440 U.S. 450, 453 (1979), the defendant testified before a grand jury under an immunity agreement that his grand jury testimony could not be used against him in any future criminal proceeding. He was

subsequently charged with a crime. At his trial, he sought an *in limine* ruling preventing any use of his grand jury testimony. The trial court ruled that, if he testified in a way which was materially inconsistent from his grand jury testimony, that testimony could be used to impeach him. Based on this ruling, the defendant did not testify. He was convicted and appealed the conviction. Portash at 451-452. The Supreme Court upheld the state appellate court's reversal of the conviction. Id. at 453. The state argued that Portash should have testified and been subject to any impeachment in order to preserve the issue for appeal. Id. at 507. The Portash court, citing Brooks v. Tennessee, rejected this contention.

In Brooks v. Tennessee, 406 U.S. 605, 612 (1972), the Supreme Court held that a state statute which required a criminal defendant to testify before any other witnesses for the defense violated his right to due process. In that case, the defendant requested the permission of the trial court to testify after other defense witnesses had testified. The trial court denied his request. The defendant did not testify and appealed his conviction. Id. at 605-606. The Brooks court found that the defendant was deprived of his constitutional rights when he

was denied the right to testify if he did not testify first. Id. at 613. Such an error could not be harmless, and required reversal. Ibid.

In Luce v. United States, 469 U.S.38, 43 (1984), the Supreme Court held that a defendant who wishes to challenge the improper admission of impeachment evidence under Federal Rule of Evidence 609(a) must testify in order to preserve the issue. Otherwise, the reviewing court is unable to properly assess the impact, if any, the challenged impeachment material had on the trial as a whole. Luce at 41-42; see also United States v. Williams, 939 F.2d 721, 724-725 (9th Cir. 1991). However, the present case is more in line with Brooks and Portash than it is with Luce. Brooks and Portash were based on constitutional due process violations which were structural in nature. Therefore, the defendants were not required to testify in order to establish prejudice.⁴

The present case, is far more analogous to Brooks and Portash, than it is to Luce. Too hold otherwise, discounts the effect of the insurmountable barrier to testimony imposed upon BELTON by the district court, and renders meaningless his right to testify. To require a represented defendant to independently construct

⁴The Luce court distinguished its decision from those in Brooks and Portash on the same basis. Luce at 42-43.

an examination consistent with the rules of evidence is just the first barrier. The additional requirement that a defendant ask himself questions and then answer them as if having a discussion in the third person, serves no purpose but to make the defendant look insane in front of the jury. To further require that he attempt to comply with the district court's order to show prejudice before he can challenge it on appeal flies in the face of common sense. Review is necessary to correct this injustice.

CONCLUSION

For the foregoing reasons, petitioner MARCUS BELTON, respectfully suggests a writ of certiorari should issue in this case.

Dated: December 5, 2017

Respectfully submitted,



DENA MARIE YOUNG

Law Offices of Dena Marie Young
740 4th Street, Second Floor
Santa Rosa, California 95404
Telephone: (707) 528-9479
Email: dmyounglaw@gmail.com

Attorney for Petitioner
MARCUS BELTON