

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

No. _____

CORDELL MINOR,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. May counsel for a criminal defendant waive his client's right to testify where the record fails to establish that the defendant was present in the courtroom?
- II. Is defense counsel's waiver of a defendant's right to testify an adequate waiver of that right where the record reflects a severe breakdown of the attorney-client relationship and the defendant had previous occasions during trial affirmatively stated that he wanted to testify?

**LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT**

All parties appear in the caption of the case on the cover page. None of the parties included thereon have a corporate interest in the outcome of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Cordell Minor, respectfully prays that a writ of certiorari issue to review the judgment below of the Federal Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals, No. 16-4729, filed November 27, 2018, appears at Appendix A-1 to the Petition.

The Order of the Sixth Circuit Court of Appeals, No. 16-4285, denying rehearing, filed March 2, 2018 appears at Appendix A- 7 to the petition.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651 as a judgment of the federal court of appeals was entered on March 2, 2018.

RELEVANT CONSTITUTIONAL PROVISION

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A grand jury for the Northern District of Ohio indicted the defendant-appellant Cordell A. Minor for one count of Possessing a Firearm and/or Ammunition in or affecting commerce after the defendant had been convicted of a felony punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §922(g)(1). A jury found Minor guilty of the charge. The court sentenced Minor to serve a term of 120 months.

Minor did not testify. At multiple times during the trial, Minor insisted on the record that he intended to testify. However, after the Government rested its case, counsel for Minor indicated to the court that Minor had changed his mind and decided not to testify. This was in spite of the fact that at the close of the Government's case, Minor had specifically stated to the court that he wanted to testify. The record does not reflect whether Minor was in the courtroom at the time of counsel's pronouncement.

The district trial court did not inquire directly of Minor about his change of mind in relation to his Fifth Amendment protections, which is consistent with Minor's absence from the proceeding.

Once the court was placed on notice that Minor wanted to testify, it was incumbent on the court to determine why Minor had changed his mind to properly determine whether Minor's waiver had been voluntarily, knowingly and intelligently determined. This is particularly required where the record strongly establishes a strained attorney-client relationship, as was apparent here. A waiver by counsel, without affirmation from Minor, was insufficient to ensure Minor's waiver was valid.

The Sixth Circuit, as in other circuits, presume a waiver of a defendant's right to testify or

not to testify if the record is silent. United States v. Webber, 208 F.3d 545 (6th Cir. 2000), *citing* United States v. Joelson, 7 F.3d 174 (9th Cir. 1993). In Webber, the Sixth Circuit confirmed prior precedent and established that “although the ultimate decision whether to testify rests with the defendant, when a tactical decision is made not to have the defendant testify, the defendant’s assent is presumed.” In its opinion below, the circuit rested on this presumption and failed to address whether Minor was in the courtroom. Nothing in the record establishes that he was present at the time. The court did not directly address Minor, but only heard a statement from defense counsel.

There is no other essential right under the United States Constitution that a waiver is presumed by a silent record. In fact, except the Fifth Amendment protections, courts indulge in every reasonable presumption against waiver of fundamental rights, and may not “. . . presume acquiescence in the loss of fundamental rights.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The unwitting cooperation with counsel by the defendant does not equate to a knowing, intelligent waiver.

Minor’s guarantees under the Fifth Amendment to the Constitution were violated when his trial counsel waived his right to testify on his own behalf and the trial court failed to inquire whether the waiver was valid.

REASONS FOR GRANTING THE WRIT

- I. Is counsel for a criminal defendant waiver of his client’s right to testify valid if the record fails to establish that the defendant was present in the courtroom at the time of the waiver.**

Federal Rule of Criminal Procedure 43 firmly establishes the a defendant must be present in his trial proceeding for all essential stages of trial. This Court has noted that only on rare occasions may the trial proceed without the presence of the defendant, almost always occasioned by the misbehavior of the defendant resulting in the forfeiture of his right to be present. United States v Taylor, 414 U.S. 17 (1973). Fed. R. Crim. Proc. 43(C)(1).

In Minor's case, at the close of the Government's case, Minor indicated to the court that he wanted to testify. However, the very next day, when the defense case was to begin, defense counsel indicated to the court that Minor had changed his mind. The record does not reflect whether Minor was in the courtroom at the time of counsel's pronouncement.

The district court did not inquire directly of Minor about his change of mind in relation to his Fifth Amendment protections. Once the court was placed on notice that Minor wanted to testify, it was incumbent on the court to determine why Minor had changed his mind to properly determine whether Minor's waiver had been voluntarily, knowingly and intelligently determined. This is particularly required where the record strongly establishes a strained attorney-client relationship, as is apparent here. A waiver by counsel in this scenario was insufficient to ensure Minor's waiver was valid.

A defendant's right to testify is fundamental. The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." Faretta v. California, 422 U.S. 806, 819, n. 15 (1975). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. (Emphasis added.)

In re Oliver, 333 U.S. 257, 273 (1948). See also Ferguson v. Georgia, 365 U.S. 570, 602 (1961).

(Fourteenth Amendment secures “right of a criminal defendant to choose between silence and testifying in his own behalf.”)

In Rock v. Arkansas, 483 U.S. 44, 52-53, n.10 (1987), this Court reasoned that the right to testify was also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call “witnesses in his favor,” a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. The Court concluded that “[a]n accused’s right to present his own version of events in his own words “is even more fundamental to a personal defense than the right of self-representation.” See also Washington v. Texas, 388 U.S. 14, 17-19 (1967). Logically included in the accused’s right to call witnesses whose testimony is “material and favorable to his defense,” United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982), is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself.

Moreover, in Faretta v. California, supra, at 819 (1975), the Court recognized that the Sixth Amendment “grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’” (Citations omitted.)

Even more fundamental to a personal defense than the right of self-representation, which

was found to be “necessarily implied by the structure of the Amendment,” *Id.*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In *Harris v. New York*, 401 U.S. 222, 230 (1971), the Court stated, “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” *Id.*, at 225. “The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege.” *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

Finally, it must be stressed that this is not an occasion where a defendant waived his right to be present for the hearing because of his behavior. Although Minor did vent his frustration with the proceedings on occasion during the trial, he had not been banned from attending the hearing in question by the district judge. *Diaz v. United States*, 223 U.S. 442. Simply stated, the record does not establish that the waiver entered by Minor's counsel was countenance by Minor himself. Therefore, his waiver of the right to testify was invalid.

II. Is defense counsel's waiver of a defendant's right to testify an adequate waiver of that right if the record establishes a severe breakdown of the attorney-client relationship and that the defendant had previously stated on the record that he wanted to testify?

Perhaps Minor should have posited the question presented as whether defense counsel has the ability to waive his clients essential right to testify in any given situation, even if the defendant was present at the time of counsel's waiver. This Court has never countenanced a

counsel waiver of any such individual right or protection.

The waiver of Minor's right to testify is particularly egregious here, where the acrimony between Minor and his counsel were firmly established in the record. During the trial proceedings, the district court did attempt to discuss Minor's right against self-incrimination.

THE COURT: Second thing is, Mr. Minor, the law requires that I make this inquiry of you, is that you have a right to testify if you want and - -

THE DEFENDANT: Yes.

THE COURT: And if you choose not to - -

THE DEFENDANT: I'm choosing to testify.

THE COURT: You do?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. Well then we can do that tomorrow morning. Okay.

Counsel and client had had issues prior to the above colloquy. At one point in the trial, Minor had left the courtroom in anger. He accused his counsel of being a racist. He accused counsel of not asking the questions of witnesses that Minor wanted asked. He accused counsel that counsel was "throwing his life down the drain." Minor then voluntarily absented himself from the courtroom.

After a break, Minor returned. He informed the judge of an argument that he had with counsel at the Correctional Corporations of America facility, pre-trial.

During his discussion with the judge, Minor stated:
They raise the hand in school for them to lie. *I ask him can I take the stand*, he's telling me to shut up. Shut up. I'm a grown man. . . .

The very next morning defense counsel waived Minor's right to testify. The prosecutor

properly requested that she wanted Minor to place on the record that he understands that he has the right to testify and explain that he changed his mind. Defense counsel interceded. “ I don’t think that’s necessary, Judge. I can certainly speak on behalf of Mr. Minor, and I’m certain he is not testifying.” As stated addressed above, the record makes no suggestion of Minor being present in the courtroom. The district court accepted the statement of defense counsel about the waiver and made no inquiry of Minor.

It is established that a defendant has the “ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf.” The right is personal to the accused, and not capable of being waived by counsel on the defendant’s behalf. Jones v. Barnes, 463 U.S. 745, 751 (1983). This decision was based upon the recognition that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. *See* Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977).

Further, a personal waiver of this fundamental right, which protects the fairness of the criminal proceeding, must have been knowing and intelligent to be valid. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 241, (1973) “A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial.”

Generally the Presumption is Against Waiver

Courts indulge in every reasonable presumption against waiver of fundamental rights, and may not “. . . presume acquiescence in the loss of fundamental rights.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Thus, the circuits presumption of acquiescence of the right to testify

would seem to be at odds with the firmly established precedent of this Court.

A waiver of the right to testify may only be valid if it is done so in a knowing, intelligent manner. However, the Sixth Circuit, relying on its own precedent in United States v. Webber, 208 F.3d 545 (6th Cir. 2000), *citing* United States v. Joelson, 7 F.3d 174 (9th Cir. 1993), the circuit found the counsel waiver to be valid. Webber confirmed prior precedent and established that “although the ultimate decision whether to testify rests with the defendant, when a tactical decision is made not to have the defendant testify, the defendant’s assent is presumed.” *Id.*

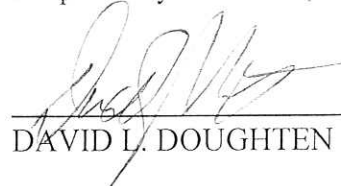
In Minor’s case, the court found that because Minor did not object when counsel waived the right, the presumption of waiver was valid. Minor at p. 2. This creates two problems. First, how could Minor object if he was not present with counsel? Second, is a presumption of waiver of the right to testify constitutionally valid? Its corollary, the right not to testify, is not subject to attorney waiver. Brooks v. Tennessee, 406 U.S. 605, 612 (1972) (“Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right.”)

Acceptance of this case would enable this Court to correct the current practice of many of the circuit courts to presume the waiver of an essential constitutionally protected right from a silent record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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