OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1135

TITLE DAN V. McKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Petitioner v. CARL EDWIN WIGGINS

PLACE Washington, D. C.

DATE November 9, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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DAN V. McKASKLE, ACTING DIRECTOR, :
TEXAS DEPARTMENT OF CORRECTIONS, :
Petitioner, :
v. : No. 82-1135
CARL EDWIN WIGGINS :
Respondent. :

- -x

Washington, D.C.

Wednesday, November 9, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:05 p.m.

APPEARANCES:

MS. LESLIE A. BENITEZ, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of Petitioner.

CRAIG SMYSER, ESQ., Houston, Texas; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Ms. Benitez, you may proceed whn you are ready.

ORAL ARGUMENT OF MS. LESLIE A. BENITEZ, ESQ.,

ON BEHALF OF THE PETITIONER

MS. BENITEZ: Mr. Chief Justice, and may it please the Court:

This case is pending before the Court on the petition of Texas to review a decision of the United States Court of Appeals for the Fifth Circuit granting federal habeas corpus relief. The sole issue involved herein is whether a criminal defendant who invokes his Faretta v. California right of self-representation suffers a constitutional deprivation if standby counsel intermittently participates in the trial proceedings.

I will first briefly discuss the facts of the case and the holdings of the court below and then will urge the Court to reject the holding of the Fifth Circuit that when a defendant invokes his constitutional right of self-representation, standby counsel must in all circumstances be seen and not heard.

Respondent's first trial was in San Antonio, Texasl in January of 1973. He was convicted and received a life sentence. His conviction, however, was reversed due to a defective indictment.

His second trial, and that which is the subject of the instant proceedings, occurred in June 1973. Again, Respondent was convicted and received a life sentence. At this trial Respondent chose to proceed pro se and represent himself. The trial court, however, over Respondent's objections, appointed standby counsel. The record reflects that standby counsel participated intermittently in the trial proceedings. Counsel made some objections to evidence, he urged motions to the trial court and presented some argument to the jury.

QUESTION: Now, two counsel were appointed, weren't they?

MS. BENITEZ: That's correct, Your Honor.

QUESTION: Through the briefs I find small mention of Mr. Samples, was that his name? Did he just sit by and do nothing?

MS. BENITEZ: The record reflects that he participated to a very limited extent by occasionally bringing a matter or two to the attention of the trial court out of the presence of the jury. But he did participate hardly at all in the trial proceedings.

QUESTION: So your opposition would take the position that the two counsels stood in stark contrast one to the other.

MS. BENITEZ: I don't believe that Respondent has particularly made that argument, but the record does reflect that that is the case.

Some of the intermittent participation of counsel was overtly encouraged by Respondent, some was done without objection by him, and some was done over his objection. The record does reflect, however, that most of the assistance provided by standby counsel did occur out of the presence of the jury. The record also reflects that counsel inexcusably and indefensibly twice cursed, once in the presence of the jury.

QUESTION: Counsel?

MS. BENITEZ: That's correct, Your Honor.

More importantly, however, for this Court's analysis, the record reflects that Respondent himself made the decision to proceed to trial in this case, examined the jury panel and selected the jurors, argued both pretrial and trial motions to the court, cross examined the state's witnesses, chose his defensive theory and strategy, presented and examined his own witnesses, and argued his case to the jury. There were times during the course of the trial when conflict arose between standby counsel and Respondent. The record, however, reflects that the trial court always and without exception recognized Respondent's right to make

the necessary decisions and sustained the Respondent's position.

The District Court on federal habeas corpus review reviewed the entire record of the trial proceedings and held that on the record as a whole the Respondent in this case was accorded his right under Faretta v. California. The Fifth Circuit, however, reversed, holding that the limited participation of standby counsel constituted a denial of Respondent's Faretta right, and that the conviction must be set aside.

The opinion of the Fifth Circuit strictly applied Faretta and held that when a defendant invokes his constitutional right to self-representation under Faretta, standby counsel must be seen and not heard and that interference by standby counsel will result in a violation of the Sixth Amendment.

QUESTION: Ms. Benitez, under Faretta, do you think a trial judge is permitted, once a defendant invokes his right to represent himself, to say okay, fine, but you are on your own? I am not going to appoint any standby counsel because there are just too many problems such as might have emerged in this case.

Do you think the trial court is under any obligation to appoint standby counsel?

MS. BENITEZ: No, I don't believe that the trial court does have that obligation.

QUESTION: Why do so many of them do it, then?

MS. BENITEZ: I believe that the trial courts do it because it makes the trial in a case such as the instant case less burdensome to the trial court. For the trial court to have a party there who is present through the trial proceedings to whom he can refer the pro se defendant when matters arise that require that the defendant be advised of courtroom procedures or other matters which the trial court wants the defendant to be aware of. I believe that it is the interest -- that trial courts do it for, basically for two reasons: one, so that there will be an attorney there who can bring to the attention of the trial court necessary matters which, for example, counsel notices but the trial court doesn't notice.

QUESTION: Well, of course, when the defendant has elected to go on his own, I would think the trial court would feel relieved of that sort of responsibility.

MS. BENITEZ: Your Honor, I believe that the argument to that effect that the Respondent has made overlooks the fact that the trial court also has an

interest in the fundamental fairness of the trial proceedings and has an interest in ensuring that a criminal defendant who is going to be conficted pursuant to that court's judgment obtains a fundamentally fair trial.

QUESTION: Are you familiar with some of the cases in which after a defendant asserted his Faretta right to try his own case and the court did not appoint counsel to stand by, and then later that same defendant attacked the results on the grounds that the court should have appointed someone one a standby basis? Have you cited any of those cases here?

MS. BENITEZ: Your Honor, I believe that those that the -- that some of those cases have been cited. I believe so because that argument has been raised from time to time by pro se defendants.

We would urge the Court to reverse the decision of the Fifth Circuit and urge the Court to hold that the essence of the right protected in Faretta is the opportunity for the criminal defendant to manage, control and conduct his own defense, to personally participate in the proceedings, and to personally argue his case to the finders of the fact, and this opportunity the Respondent in this case clearly had.

Rather than adopt the opinion of the Fifth

Circuit, we urge the Court to adopt a standard of review which inquires into whether or not a pro se defendant had a genuine opportunity to act in his own behalf, to manage and control his own defense, and to reject the notion that some assistance provided by standby counsel, even that assistance provided over the objection of the defendant, constitutes constitutional error entitling the defendant to either habeas corpus relief or a reversal of his criminal conviction.

To hold otherwise, we submit, would totally bind the hands of standby counsel when counsel sees some matter occurring during the trial which might result in a serious due process violation from bringing that matter to the trial court's attention or, in fact, from interjecting himself into the proceedings in time to prevent such error from occurring.

More importantly, however, we urge that the rigid rule of the Fifth Circuit would place upon the trial courts in these cases the responsibility for sometimes acting in the role of an advocate for the criminal defendant where the court sees that some error is occurring or is about to occur which threatens to undermine the fundamental fairness of the proceedings.

An example of that happened in the instant case where the record reflects that the trial judge

trying this case usually sat to hear civil cases. When he brought the jury panel into the courtroom, he began to instruct them on basic principles of criminal law. The trial court then inadvertently and mistakenly advised that jury panel that the Respondent was being tried as a repeater, or a repeat offender, indicating to the jury that the Respondent had a prior criminal record

Standby counsel at that point made an objection and pointed out to the trial court that that was error. The trial court, recognizing that he had committed error inadvertently, then quashed the entire panel and seated another panel who eventually heard Respondent's case.

QUESTION: Ms. Benitez, let me take up once more the subject I asked you about earlier.

I gather from this last incident you have described that it is the general practice in Texas, the feeling of the trial judges, that a defendant who chooses to invoke his Faretta rights really can't get even a fundamentally fair trial without standby counsel?

MS. BENITEZ: No, Your Honor, I can't represent that that is the position of all the trial judges in Texas. I think it's important to note that in

this particular case which was tried in 1972, the trial judge was -- this was, of course, prior to Faretta and prior to this Court's opinion recognizing the federal constitutional right. However, in Texas for many, many years a defendant had had a right to proceed pro se, and the Fifth Circuit had long recognized a federally constitutionally protected right to act in his own behalf.

What I am urging is that the trial court -- the trial court should have the discretion to appoint standby counsel as he does, but also to allow counsel to act almost in the role of an amicus. If the trial court perceives that some error is occurring in the trial or if the trial court wants someone there who might bring to his attention error which the trial court commits and doesn't recognize at the time, such as the error which was committed in this case.

QUESTION: Well, what happened, if this was tried in 1972, if this is happening, the federal habeas is eleven years later? Do you happen to know off hand?

MS. BENITEZ: Yes, Your Honor. The Respondent in this case filed a direct appeal, has filed numerous, I believe, five or six state habeas actions and several federal actions also. The case is -- the Respondent has been litigating the validity of his conviction since

that time through the state courts and through the federal courts.

QUESTION: He finally made the grade.

MS. BENITEZ: That's correct, Your Honor.

QUESTION: Ms. Benitez, this is irrelevant, but what has happened to Mr. Estelle who is on so many cases here? Is he no longer in office?

MS. BENITEZ: Mr. Estelle has resigned as Director of Texas Department of Corrections, and Mr. McKaskle is now the Acting Director.

The Respondent in this case argues that there can be no valid reason for standby counsel ever to speak of and voice an objection to the proceedings citing this Court's procedural default cases such as Wainwright v. Sykes and Engle v. Isaac.

We urge, however, that this argument ignores doctrines recognized by the courts, both state and federal, of plain error and fundamental error, which is error requiring reversal even in the absence of any objection. It is also true that absent some ability on the part of standby counsel to speak up and bring to the attention of the trial court some matter which threatens to undermine the basic fairness of the proceedings, this would have the result of perhaps undermining the finality of criminal convictions also in that if some

error were occurring at the trial and standby counsel were permitted to voice objection to it at that time, the trial court would have the opportunity to take remedial action, thus removing error from the case before the individual was convicted and the case went up on appeal before a reviewing court.

QUESTION: Of course, another way of preventing relitigation of those things would be for it to be established that a Faretta defendant is genuinely on his own and that what he doesn't object to at trial he can't raise later.

MS. BENITEZ: That's true, and I think under most circumstances that would be the result and that would be the holding of the reviewing court. There are some matters, however, which courts will find go -- infect the proceedings to such an extent that the trial was fundamentally unfair, and the reviewing courts will reverse the conviction absent any objection, whether the defendant was represented by counsel or not.

And we would submit that it is this interest of the courts and the state and also the defendants in some finality of the confictions to permit standby counsel to raise some objections to the trial court.

QUESTION: Well, the prosecutor as well has obligations to ensure a basically fair proceeding, isn't

that true?

MS. BENITEZ: Yes, that is true, and I think that there is, under most circumstances, a much greater burden on the prosecutor to make sure of the fairness of the proceedings when a defendant is acting pro se. But as this Court is aware, and as all courts are aware, error sometimes occurs, and sometimes even inadvertent error can do grave harm to constitutionally protected rights.

So we would ask this Court, in addition to recognizing the interest of the defendant in proceeding pro se, to also recognize the interests of both the state and the courts in ensuring that fundamental fairness occurs in criminal proceedings. While certainly these interests cannot override the interests of the pro se defendant, as this Court held in Faretta, we submit that all interests can be protected if this Court adopts a standard of review on a case-by-case basis which inquires into whether a pro se defendant had a genuine opportunity to manage, control and conduct his defense.

QUESTION: Ms. Benitez, to agree with you, do we have either to overrule Faretta or substantially to retreat from it?

MS. BENITEZ: No, Your Honor, I don't believe

that this Court would even have to substantially retreat from Faretta in order to reverse the decision of the Fifth Circuit because the position that we are taking is not inconsistent with Faretta.

The language which the Respondent relies upon heavily, found in a footnote in Faretta which states that standby counsel must be -- should be ready to provide assistance if and when the defendant requests it, I believe properly defines the role of standby counsel, but what issue -- what was not before the Court in deciding Faretta is what happens where the defendant proceeds pro se and is allowed to represent himself, clearly to make strategic decisions, to examine witnesses, to argue his case to the jury, but standby counsel is permitted intermittently to make objections and bring matters to the attention of the trial court. So --

QUESTION: Permitted, permitted, do you mean the judge just didn't tell him to sit down? Nobody gave him permission, especially the defendant, did they?

MS. BENITEZ: I would say in this particular case, counsel was not -- the trial court refused to instruct counsel not to make any objections.

Now, the record reflects that the trial court, towards -- after the proceedings had begun, the trial

court began to, if counsel made an objection, to say are you acting with Mr. Wiggins' permission or do you have the permission? We have some ground rules here, the court said. You have to have his permission before you can say anything. The court, the trial court -- and one of the bases of the complaint of the Respondent is that the trial court refused to issue a broad instruction telling standby counsel that he was not to speak up, that basically, that he must be seen and not heard.

QUESTION: What do you think about that reaction of the judge? Should he have told counsel to be quiet unless he's got permission?

MS. BENITEZ: I think that ideally the court, perhaps at an earlier point in the trial, could have adsvised counsel that he would not be heard --

QUESTION: Of course he could have -- he could have advised him any time, but should he, should he, should he have?

MS. BENITEZ: I believe that an appropriate way for the trial court to proceed, and one that I believe would clearly be consistent with the interets of the defendant in Faretta, would be for the trial court to advise counsel that he was not to speak up on the defendant's behalf unless either he had the permission of the defendant or there were some very serious matter

which threatened to undermine the validity of the proceedings or he perceived some grave error occurring.

QUESTION: But you don't think that desirable way of proceeding is constitutionally required, apparently, because that didn't happen here.

MS. BENITEZ: That?

QUESTION: I mean, the judge didn't follow that course here.

MS. BENITEZ: The judge -- the judge finally through -- after the proceedings had begun --

QUESTION: No, but he didn't early in the trial. He did not early in the trial.

MS. BENITEZ: He didn't at the beginning of the trial. I think that the colloquy between counsel and the trial court is printed in the very first portion of the Joint Appendix and reflects that clearly the judge understood that Mr. Wiggins was exercising his Faretta right, and he advised the Defendant that -- he advised counsel that counsel was present in an advisory capacity. But he refused, and I don't think that a judge under these circumstances should be constitutionally required to advise standby counsel not to speak up.

QUESTION: Well, the judge is dealing with a two-headed monster, basically. You don't know -- the

judge doesn't know who is in charge, the standby counsel or the defendant, it seems to me.

I wonder how easy to apply your test would be where you say serious, fundamental fairness is impaired. At that point the standby counsel may speak up.

Now, one of the colloquys is over whether the person should be cross -- a witness should be cross examined, and the defendant says I want to do it, and Mr. Graham says we'll get him later. Now, I suppose counsel could say, well, cross examination is a fundamental aspect of the trial.

MS. BENITEZ: That was -- the portion of the record to which you refer was a proceeding, a motion hearing outside the presence of the jury, and counsel at that point was explaining to the Respondent who was attempting to begin his examination prior to his turn, was explaining to him that it would be his turn later for him to examine or cross examine.

I believe --

QUESTION: I think -- finish.

MS. BENITEZ: I believe that the trial court in the instant case illustrated a very clear understanding of who was in control at this trial as the trial court begin to inquire specifically, if counsel

made an objection, specifically began to inquire whether or not counsel had the permission of the Respondent.

At the guilt or innocense jury argument stage, the court inquired of the procedure. Counsel stated that he was going to argue. The trial court said do you have Mr. Wiggins' permission to argue, and Mr. Wiggins' said yes.

So the trial court I believe did illustrate an understanding of who was in control and several times specifically said, now, counsel, we have some rules here. Mr. Wiggins is representing himself. It is going to be his decision, and in fact, sustained the position of the Respondent every single time a disagreement occurred.

QUESTION: I don't -- earlier said that the standby counsel would certainly be obliged to move in if the judge had obviously made an inadvertent mistake.

Do you still say that?

MS. BENITEZ: Yes, Your Honor, and --

QUESTION: I can't conceive of what's wrong with that. Certainly the judge can get an amicus at any time on his own motion.

MS. BENITEZ: And that is part of what standby counsel did in the instant case.

QUESTION: That's right.

MS. BENITEZ: Counsel also made objections to things that the prosecutor had done such as leading the witness or introducing hearsay evidence.

QUESTION: We don't have to approve all that he did, though, do we?

MS. BENITEZ: Pardon me?

QUESTION: We don't have to approve all he did.

MS. BENITEZ: No, Your Honor.

QUESTION: I mean, some of his language.

MS. BENITEZ: No, Your Honor, certainly not the language, and we have never -- we have never contendedk that.

QUESTION: May I ask a question about the record? As I understand it, the trial lasted about three and a half days?

MS. BENITEZ: Approximately.

QUESTION: And we have about 30 pages of material in the appendix which contain a number of these incidents.

Are these representative of the entire trial, or are these all of the examples that support the lawyer's injecting himself into the proceeding?

MS. BENITEZ: Your Honor, I believe that that's all.

QUESTION: This is all there is in the whole three-day trial?

MS. BENITEZ: I believe that that's correct, that the portions -- the portions not contained in the Joint Appendix are portions of examination, cross examination of witnesses, but I believe that virtually every instance where counsel spoke on the record is reflected in the Joint Appendix.

QUESTION: Thank you.

MS. BENITEZ: Thank you.

CHIEF JUSTICE BURGER: Mr. Smyser?

ORAL ARGUMENT OF CRAIG SMYSER, ESQ.,

ON BEHALF OF RESPONDENT

MR. SMYSER: Chief Justice Burger, may it please the Court:

Respondent contends he was denied his constitutional right to represent himself and to present his own defense, and perhaps the best response to the State's arguments is to examine that document the State refers to in such vague terms and so infrequently, the record itself.

As the lower court found, the record demonstrates a pattern of constant, intentional, uninvited interruptions by standby counsel.

QUESTION: Maybe because he thought that the

man was ruining his own case.

MR. SMYSER: That is highly possible, Your Honor. However, to characterize those interruptions as intermitten when there were 74 in the course of a three-day trial, 74 uninvited interruptions, 32 of which occurred in the presence of the jury, 35 of which were not accepted by Mr. Wiggins or resulted in a direct conflict between Mr. Wiggins and standby counsel, twice the --

QUESTION: What was the demonstration of Mr. Wiggins' capacity, training and education to try to defend himself in a criminal case?

MR. SMYSER: I'm sorry, Your Honor?

QUESTION: What kind of education or experience was shown to suggest that he was qualified to try to his own case?

MR. SMYSER: Your Honor, at the hearing in which Mr. Wiggins, in which the trial judge determined that Mr. Wiggins was capable of conducting his own defense and waiving his right to counsel is not part of the record, so I do not know what his educational background is. I can represent to the Court that he is the editor of the legal column of the prison magazine, Joint Endeavor, at Huntsville. However, I don't know whether that qualifies him to represent himself.

QUESTION: May I ask, since you have enumerated the number of times, are all 74 of the examples that you referred to in the Joint Appendix?

MR. SMYSER: No, Your Honor.

QUESTION: Of what -- what proportion diod you bother to put in?

MR. SMYSER: Your Honor, I have not counted the number in the Joint Appendix as compared to the number in the record. The Joint Appendix contains the most egregious instances of the interruptions by standby counsel and also contains illustrations of those times when standby counsel was specifically requested to take some action, which I believe was some six times during the course of the trial.

Furthermore, although the state argues that in all instances the trial judge sustained Mr. Wiggins' position, this is incorrect. Mr. Wiggins was asked by his standby counsel numerous times to present evidence on the alibi defense. At the time of the presentation and preparation of the Court's charge, Mr. Wiggins specifically asked the Court not to include the alibi defense in the charge. That defense was included in the charge.

Three times --

QUESTION: You are not critical of the other

standby counsel?

MR. SMYSER: No, Your Honor. As far as Mr. Samples' representation is concerned, there were only two instances that I recall on the record in which Mr. Samples and Mr. Wiggins quarrelled.

QUESTION: Mr. Smyser, looking over the transcript, do you agree that this was a rather cumbersome way of trying a case?

MR. SMYSER: Yes, Your Honor.

QUESTION: What can a trial judge do to protect himself as much as possible against this cumbersomeness? Can he simply refuse to appoint standby counsel, saying I know this kind of a conflict is going to occur, I have done it before and I'm not going to do it this time, and simply let the pro se defendant sink or swim?

MR. SMYSER: Yes, Your Honor, he can do that. There is not a constitutional right to have standby counsel.

QUESTION: No, but supposing the defendant afterwards comes in and says, well, if only I had known, I would have made these objections. I didn't know, so it ought to be set aside because there were these constitutional violations which I admittedly didn't object to at the time.

MR. SMYSER: And, Your Honor, it is Respondent's position that in that instance he should be bound, as Your Honor noted in examining the State, he should be bound by his decisions at trial just as if he had been represented by a lawyer.

QUESTION: Do you mean to sink or swim, or to sink?

MR. SMYSER: Pardon?

Probably to sink, Your Honor.

QUESTION: That's what I thought.

QUESTION: Now, let me take that last statement of yours.

Are you eliminating incompetence of representation, lack of adequate representation just because a layman has made that judgment that he wants to try his own case?

MR. SMYSER: Yes, Your Honor. When a layman undertakes --

QUESTION: You are saying he is forever foreclosed.

MR. SMYSER: Yes, Your Honor. When a layman undertakes to represent himself, that's the risk he runs.

QUESTION: Well, as you know, some courts have not agreed with that.

MR. SMYSER: Yes, Your Honor. It is Respondent's position, however, that the fundamental error which the State mentioned which it must be on guard for is the only instance in which a pro se defendant can escape the consequences of his own decision to represent himself.

QUESTION: Mr. Smyser.

QUESTION: Mr Smyser.

QUESTION: Go ahead.

QUESTION: How many petitions for habeas corpus, federal habeas corpus, has Petitioner filed -- or Respondent?

MR. SMYSER: I think the State was -- I think the State was correct in saying five, but I'm not positive, Your Honor.

QUESTION: Was this issue raised in any of those?

MR. SMYSER: Your Honor, it was raised on direct appeal.

QUESTION: Yes.

MR. SMYSER: I am not aware if it was raised in any of the other five habeas petitions. I have not read those.

QUESTION: How many state collateral proceedings were instituted by Respondent?

MR. SMYSER: I believe two, Your Honor.

QUESTION: Was the issue --

MR. SMYSER: No, excuse me, one direct appeal and one habeas appeal, as I recall.

QUESTION: Was this issue addressed in any of those, either of those?

MR. SMYSER: It's my understanding this issue was addressed below, Your Honor. Although Respondent --

QUESTION: It was raised and addressed in the state system on direct appeal.

MR. SMYSER: It is my understanding that it was, Your Honor.

QUESTION: Mr. Smyser, suppose during the trial that the trial court itself had raised some objections as the proceedings went along in an effort to ensure the defendant's rights were protected, or suppose even the prosecutor had undertaken to itervene at some point on the defendant's behalf, would his Sixth Amendment rights be violated by action of either of those?

MR. SMYSER: Your Honor, this is a much closer question. We would submit, however, that in the proper case, the trial court should not bring matters to the attention of the pro se defendant as that would

interfere with his right to represent himself unless those matters involve fundamental error, unless they involve something like a coerced confession. Otherwise, when a person elects to represent himself, if he is knowingly and intelligently waiving counsel, he forgoes all the advantages that counsel might give him in return for which he is able to present his own defense to the jury or the fact finder.

QUESTION: And you think --

QUESTION: Do you think the judge is obliged to tell him that he doesn't have to take the witness stand unless he wants to?

MR. SMYSER: No, Your Honor, I don't think the judge is obliged to tell him that.

QUESTION: You don't think that's a fundamental right, not to testify?

MR. SMYSER: I think it is a fundamental right to have the opportunity to testify. The judge cannot --

QUESTION: What if he doesn't know it?

MR. SMYSER: That's what he loses when he elects to represent himself. That should be part of the inquiry as to whether or not he is knowingly and intelligently waiving counsel.

QUESTION: What if prosecution witnesses

testify so that the judge sitting on the bench, presumably having had litigation experience and judicial experience, sees clearly that the prosecution witness is very vulnerable and could be destroyed on cross examination? There being no counsel, if the defendant himself, acting as his own Faretta counsel, doesn't cross examine, does the judge have any obligation to suggest that cross examination be conducted, or does he have an obligation to do the cross examining himself?

MR. SMYSER: No, Your Honor, I don't think the judge has any obligation to --

QUESTION: Even if he thinks that a conviction may be had that is wrongly resulting from this incompetence?

MR. SMYSER: Yes, Your Honor, unless it involves fundamental error.

Your hypothetical, I may not quite understand it, but it seems to me that if the State is presenting tainted evidence, if the State is presenting evidence that somehow is not --

QUESTION: Suppose the judge, to make it more concrete, suppose the judge knows firsthand from having tried the -- presided over the trial of the person who is the prosecution witness, that the man was convicted, when he was, he the judge was the presiding judge, and

at that time had three felony convictions before? The judge knows this. Are you suggesting that the judge should let this man blunder along and not see to it that that question about the credibility of that prosecution witness is called to the attention if the jury?

MR. SMYSER: Yes, Your Honor, and the same situation would arise if the man had ineffective counsel and the counsel did not know it, this Court would be called upon to determine whether or not that counsel, by not having found out that this prosecution witness had three previous --

QUESTION: That's another question. That's another question.

MR. SMYSER: Yes, Your Honor.

QUESTION: I'm speaking, a lawyer in the case is presumed to know something about what he is doing. There can hardly be any presumption that this man knew how to try a criminal case.

MR. SMYSER: Yes, Your Honor.

QUESTION: And you say the judge has no obligation whatever to step in at that point?

MR. SMYSER: Yes, Your Honor, I would say so, and I feel as if I am perhaps rearguing Faretta here, but I do feel that the --

QUESTION: Which side are you on?

QUESTION: Yes.

You are arguing perhaps the dissents in Faretta.

MR. SMYSER: Yes, Your Honor, it does at times seem that I am arguing the dissents in Faretta.

QUESTION: Well, may I ask you the question I asked your colleague?

Do you think that if the State is to prevail here we have to overruled Faretta?

MR. SMYSER: Yes, Your Honor, I do. I think, although it was dicta, the footnote 46 in which this Court held the State may appoint standby counsel even over the objection of an accused, to aid the accused if and when the accused requests help or to take over the trial if the accused becomes unruly, is a clear, unambiguous language. It clearly states the standard that -- the standard applies to protect the accused's right to present his personal defense.

There is no need for a new standard. This Court has elaborated the standard in Faretta, and there is no need to posit this standard of a genuine opportunity to conduct one's defense.

Furthermore, Respondent would contend that under the facts of this case, whatever standard the Court adopts, the facts in this case are so egregious

that it should be -- the opinion of the Fifth Circuit should be affirmed.

QUESTION: Mr. Smyser, when you said we would have to overruled Faretta if we conclude to overrule the Fifth Circuit in this case, one of the things that troubles me is that a number of judges have held after reviewing the record which we have not had an opportunity to do, that there was no violation of Faretta. We start at the magistrater court in which he concludes that Wiggins was indeed allowed the right to conduct his own defense, and then Circuit District Judge Spears said he had reviewed the record carefully and fully agreed with the magistrate's conclusion.

Then the panel, three judges on the panel of CA 5 disagreed, but five judges joined Judge Jolly, four joined Jolly making a total of five, at the Court of appeals level who thought Faretta had been complied with.

So if you just took a Gallup Poll, you would have a vote of seven to three, and I wonder whether appellate courts have to get into this sort of business case after case whenever this issue is raised, and should we leave it to the trial judge to decide?

MR. SMYSER: Well, Your Honor, I believe that the State's standard would in fact open the door to a

case-by-case examination of the record.

QUESTION: What do we have here?

MR. SMYSER: What we have here, if this Court announces a standard that standby counsel should aid only if and when requested to do so, we have a bright line rule which is easy of application, which everyone then knows their position in a criminal trial, and --

QUESTION: Faretta didn't say that. You want us to --

MR. SMYSER: No, I believe, Your Honor, maybe I'm wrong. I thought Faretta said that the state may appoint standby counsel to aid the accused if and when the accused requests help. I think that is in Footnote 46 of Faretta, and that is, I submit, the standard the Fifth Circuit applied and the proper standard that should be used to review the facts in this case.

QUESTION: Well, CA 5 did say counsel should be seen and not head.

MR. SMYSER: Yes, Your Honor.

QUESTION: Not a word.

MR. SMYSER: Yes, Your Honor.

My position is actually a little more flexible than that. I believe that if there is -- if any words uttered by standby counsel only constitute an incidental interference with the presentation of the defense, that

it should not be reversible error. The judge has the ability to instruct the jury to disregard the remarks, or if counsel is attempting to sandbag, which is one of the arguments the state raises, attempt to sandbag the proceedings, the trial judge can use contempt or order counsel to resume his seat.

QUESTION: Well, are there circumstances in which under your view standby counsel without consulting the defendant and without his approval, without asking the judge, may intervene?

MR. SMYSER: Yes, Your Honor. I would say that standby counsel, if appointed, as a traditional friend of the court has the duty to attempt to prevent fundamental error.

QUESTION: Then you would --

QUESTION: So the bright line isn't very bright, is it?

MR. SMYSER: Pardon?

QUESTION: I said the line isn't very bright.

MR. SMYSER: Your Honor, I would submit that in most cases fundamental error is pretty easily identifiable. I may be wrong, but it would seem to me that the ordinary type of error we are talking about should not sanction the interference by standby counsel.

QUESTION: Well, apart from fundamental error, is it your position that counsel must remain mute unless the defendant asks for help?

MR. SMYSER: Yes, Your Honor.

QUESTION: So that if the lawyer is sitting there, thinks of a real good question to ask on cross examination, he may not even tap him on the shoulder and say I have a suggestion to make?

MR. SMYSER: Yes, Your Honor, I would say that he should not do that.

QUESTION: He should not do that.

MR. SMYSER: He should not do that.

Now, this -- the --

QUESTION: Even if it is perfectly obvious, it is not fundamental in any constitutional sense but it might be the difference between a not guilty verdict and a guilty verdict, he had still better keep his mouth shut?

MR. SMYSER: The point --

QUESTION: I find that --

QUESTION: You don't certainly need to go that far.

MR. SMYSER: Sir?

QUESTION: You don't need to say that the lawyer can't even consult with his client, or with his

friend?

MR. SMYSER: No, Your Honor, what I would say is -- and the important thing to realize on the facts of this case as well is that it is the accused's defense and it is his request. He can ask the standby counsel, you know, I want to conduct my defense but I went you to tap me on the shoulder and tell me when I've got a good argument to make or a good cross examination to make.

In the facts of this case, he specifically asked to be relieved of standby counsel's interruptions. He specifically asked that standby counsel not move for mistrial. Three times after the specific request, standby counsel stood up and moved for mistrial.

These are instances not where the standby counsel has a rapport with the defendant. It is a case where the standby counsel and defendant were like cats and dogs in the courtroom.

QUESTION: Let me take your recent statement, your recent standard that you announced, back to the hypothetical I gave you earlier. The standby counsel, like the trial judge, is fully conscious that the prosecution's witness is very vulnerable and can be destroyed on cross examination, so he taps his friend on the shoulder and says this man ought to be cross

examined, and I know how to do it. Will you let me go ahead? and the man says no, no. What's the obligation of that lawyer at that point? Should he remain mute or should he go to the bench and say to the Court, I have just advised the defendant, describing what happened, and I know the man has a criminal record. I can destroy him on cross examination, and I want the record to show that he won't let me do it.

Is that -- is the lawyer entitled to do that to protect himself?

MR. SMYSER: Your Honor, I don't think he had that obligation. I would --

QUESTION: Has he a right to do it to protect himself?

MR. SMYSER: Your Honor, I don't think he has a right to do that if it interferes with the presentation of the defense. If the defendant is outside the courtroom and he wants to dictate something in the record to protect himself, I personally don't think standby counsel has anything to protect.

QUESTION: Well, let me try one. Standby counsel says that this government witness was found guilty of perjury last year, and the reason I know, I defended him.

Now, he can't do anything about that?

MR. SMYSER: Your Honor, again, it would depend on the relationship between the accused and standby counsel. If the accused has said specifically, I don't want to hear from you --

QUESTION: The accused, he tells the accused, and the accused said so what?

MR. SMYSER: I think that's the end of it, Your Honor. I think

QUESTION: You mean, that's the end of the trial?

MR. SMYSER: No, Your Honor, I'm sorry.

QUESTION: That's the end of all decency in --

MR. SMYSER: No, Your Honor. I think --

QUESTION: You have convicted somebody on perjured testimony.

MR. SMYSER: Your Honor, if it is perjured testimony and the government is aware that it is perjured testimony, I submit the prosecution has the duty, the ethical duty, not to put perjured testimony on the stand.

QUESTION: You're introducing another element. If the prosecution knows about it, and Justice Marshall is trying to get some way of letting the Court and the prosecution know.

QUESTION: Well, let me ask you something. If you were trying a case and you were a lawyer, and you were the judge, and the lawyer said this man was convicted of perjury, would you let that question be asked?

MR. SMYSER: Would I require that the accused ask it?

QUESTION: Would you, yes?

MR. SMYSER: No, Your Honor, I would not, because the --

QUESTION: You wouldn't let it, you wouldn't let the question be asked?

MR. SMYSER: No, Your Honor.

QUESTION: You wouldn't ask it yourself either, would you?

MR. SMYSER: Your Honor, it would depend on the --

QUESTION: Would tou?

MR. SMYSER: As the judge? No, Your Honor.

QUESTION: No, sir, I said you're the lawyer, and you tell the judge that this witness is a convicted perjurer and that question should be brought out.

Could he do that?

MR. SMYSER: No, Your Honor. I would say --

QUESTION: And the judge couldn't either?

MR. SMYSER: No, Your Honor.

QUESTION: Couldn't ask that question.

MR. SMYSER: Although I submit --

QUESTION: The question is, were you convicted of perjury?

MR. SMYSER: Yes.

QUESTION: You couldn't do that.

MR. SMYSER: No, Your Honor, because this goes to the very notion of why a person elects to represent himself. That defendant may have no interest in acquittal. He may be making --

QUESTION: He may have no interest in acquittal?

MR. SMYSER: In a hypothetical case, he may have no interest in acquittal. He may he making as in --

QUESTION: He likes jail.

MR. SMYSER: No, Your Honor, as in U.S. v. Dougherty, the Second Circuit decision, some defendants elect to make a political statement. They want to represent themselves because they have knowingly broken the law, but they want to bring their position to the court. In that instance, the defendant has no interest in his guilt or his innocense.

QUESTION: Mr. Smyser, that illustrates a

point that I haven't heard you discuss, and that is the extent to which the public interest in having a fair trial should -- is sufficiently great that maybe the participation of counsel, even when the accused doesn't want it, is appropriate to vindicate the public interest in having a fair proceeding and preventing making a mockery of the judicial system, and I think your view is a little simplistic to ignore that public interest.

MR. SMYSER: No, Your Honor, I don't mean to ignore that public interest at all. I think it is a very important public interest, but I think it was the interest that was argued in Faretta and was decided in Faretta.

The trial process itself has built into it --

QUESTION: Well, Faretta doesn't have to be overruled for the State to win in this case, does it?

MR. SMYSER: Your Honor, I think Faretta -- Faretta does not have to be overruled in the sense that the accused can have the right to represent himself. I think that that language in Faretta where it says if and when an accused requests help, that language must be disapproved. I do not think Faretta, the entire decision, has to be overruled.

And I think, to further answer Your Honor's

question as to the societal interest, which I think is the hardest question in this case, I think those guarantees of fairness are built into the trial process and that the pro se defendant will be bound by his trial decisions just as a defendant represented by a lawyer. If there is a fundamentally unjust incarceration, if there is a fundamental miscarriage of justice, he will meet the cause and actual prejudice standard, if he has a procedural waiver of one of his rights at trial, as announced by this Court.

The trial judge likewise has the duty to prevent fundamental error, and the prosecution, as I have mentioned, has a duty not merely to obtain a conviction, but to obtain a just conviction.

QUESTION: Well, I think that is the point. Each of them can interfere perhaps to the same extent as standby counsel did in this case.

MR. SMYSER: Well, Your Honor, I would submit under even the State's analysis, even under their analysis of the opportunity to control his defense, that the facts of this case are too egregious to fit even under that standard. The standard I am advancing here is the standard which was promulgated by the Fifth Circuit and which I believe this Court announced in the footnote in Faretta which I previously referred to.

Even under the state standard, Your Honor, I think the facts of this case are clear that he was denied his right to represent himself.

QUESTION: Mr Smyser, who has the burden of proof on this issue?

MR. SMYSER: I think the State does, Your Honor.

QUESTION: The State?

MR. SMYSER: Yes. I think --

QUESTION: At the threshold?

MR. SMYSER: Well, as a threshold determination to determine that he was violted --

QUESTION: The defendant makes a charge that he has been denied the right --

MR. SMYSER: Yes, yes, Your Honor.

QUESTION: The right to counsel guaranteed by Garetta.

MR. SMYSER: Yes, Your Honor.

QUESTION: And the State has the burden of disproving that charge?

MR. SMYSER: No, no, Your Honor. The initial burden is on the defendant to show that his constitutional right was violated. I think this case has a second issue which was not addressed by the State, and that issue is, as was raised by Justice Blackmun in

his dissent in Faretta, can a violation of the right to self-representation ever be harmless error?

QUESTION: Right, but on the first issue, you agree that the defendant has the burden of proof?

MR. SMYSER: Yes, Your Honor.

QUESTION: And on the second issue, the Court of Appeals put the burden of proof on the state.

MR. SMYSER: Yes, Your Honor. The Court of Appeals -- the Respondent contends that the harmless error rule should not apply to denials of the right to conduct one's own defense. It is one of those constitutional rights so basic to a fair trial that its infraction can never be treated as harmless error. It's most obvious logical counterpart is the right to counsel, and this Court in Holloway v. Arkansas -- it involved a question of whether the denial of the right to counsel could ever be harmless error, and in holding that it couldn't be, this court held and noted that in the normal case where the harmless error rule is applied, the error is readily identifiable. But that was not the case with the right to counsel.

Likewise, in this case, the error is not readily identifible.

Furthermore, the harmless error rule, at least in its traditional application, involves a

result-oriented inquiry. The constitutional right at stake here, denial of the right to represent yourself, is not a result-oriented right. It is given to the accused to present his personal defense. Therefore the traditional notion of the harmless error rule is inapplicable.

The Fifth Circuit in this case, however, did apply another version of the harmless error rule in which the focus was on the impact on the defense rather than the impact on the result at trial.

Respondent submits that if the harmless error rule is applied, this is the correct application of that rule.

Since this case involves a man's right to represent himself, I think it only appropriate that I conclude with a brief statement authored by Mr. Wiggins which he ask I read to the Court. For sake of perspective, Mr. Wiggins says, I respectfully request the Justices to consider a hypothetical case in which a trial judge forces a defense attorney who is representing a client to accept two other counsel for standby purposes against the wishes of the attorney and allows interference by standby counsels to the same extent as in the instant case. If this situation were ever to occur in a trial, it can be seen more clearly

that the state's genuine opportunity to defend argument is without merit and totally unworkable. If an American citizen's right to present a defense without counsel is at least equal to one's right to have counsel, then that defendant should not be required to have an albatross about his or her neck any more than should the attorney who would be trying to defend a client.

For these reasons, Respondent respectfully prays that this Court affirm the judgment of the Fifth Circuit?

CHIEF JUSTICE BURGER: Do you have anything futher, Ms. Benitez?

MS. BENITEZ: Your Honor, I believe that we have presented our argument. So if the Court has no additional questions, we have nothing further.

CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

[Whereupon, at 2:53 p.m., the case in the above-entitled matter was submitted.]

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1135 - DAN V. McKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Petitioner v. CARL EDWIN WIGGINS

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BY Pierce Hammond

(REPORTER)