IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

LIZ VANESSA FRETES-ZARATE, Appellant, v. UNITED STATES OF AMERICA, Appellee.	No. 11-CM-74

UNOPPOSED MOTION OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC*

The American Civil Liberties Union of the Nation's Capital respectfully moves for leave to file the appended *amicus* brief in support of appellant's (defendant's) petition for rehearing or rehearing *en banc*. Appellant Fretes-Zarate consents to this motion. Appellee United States does not oppose this motion.*

POINTS AND AUTHORITIES

The American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the American Civil Liberties Union, a nonprofit, nonpartisan membership organization with more than 500,000 members nationwide, devoted to protecting and expanding the civil liberties and civil rights of all Americans. The American Civil Liberties Union of the Nation's Capital has often represented parties and filed *amicus* briefs in this Court in the pursuit of those goals.

* This Court's rules do not address the filing of *amicus* briefs with respect to petitions for rehearing or rehearing *en banc.*

This appeal presents the important and recurring question whether a defendant charged with a crime that is categorized as a "petty offense," so as ordinarily not to entitle her to trial by jury, is nevertheless constitutionally entitled to trial by jury because a conviction almost certainly would result in her deportation.

The Division failed to reach that question, holding only that denial of a jury trial in these circumstances was not clear error where the defendant had failed to demand one. In our proposed *amicus* brief we seek to show that the Court should decide whether the defendant had a constitutional right to a jury trial whether or not she had demanded one below, and also that the failure to provide one was clear error affecting her substantial rights. We hope that our brief may be of assistance to the Court.

CONCLUSION

For the reasons stated above, the motion for leave to file should be granted.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing motion upon Enid Hinkes, Esq., 231 Parker Street, N.E., Washington, DC 20002, and upon Elizabeth Trosman, Esq., Deputy Chief, Appellate Division, Office of the United States Attorney for the District of Columbia, 555 4th Street, N.W., Washington, DC 20530, by first-class mail, postage prepaid, this 12th day of June, 2012. I also sent courtesy copies by e-mail to ehinkes@aol.com and elizabeth.trosman@usdoj.gov.

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Arthur B. Spitzer

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11-CM-74

LIZ VANESSA FRETES-ZARATE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court
of the District of Columbia
(DVM 1909-10)

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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June 12, 2012

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INTEREST OF *AMICUS*

The American Civil Liberties Union of the Nation's Capital is the Washington, D.C., affiliate of the American Civil Liberties Union, a nonprofit, nonpartisan membership organization with more than 500,000 members nationwide, devoted to protecting and expanding the civil liberties and civil rights of all Americans. The American Civil Liberties Union of the Nation's Capital has often represented parties and filed *amicus* briefs in this Court in pursuit of those goals.

STATEMENT

This appeal presents the important and recurring question whether a defendant charged with a crime that is categorized as a "petty offense," so as ordinarily not to entitle her to trial by jury, is nevertheless constitutionally entitled to trial by jury because a conviction almost certainly would result in her deportation.

The Division failed to reach that question, holding only that denial of a jury trial in these circumstances was not clear error where the defendant had failed to demand one. We show below that the Court should decide whether the defendant had a constitutional right to a jury trial — both because it is important to the defendant here and to provide necessary guidance to trial counsel in future cases — and also that the failure to provide one was clear error affecting her substantial rights.

Factual background

The defendant in this case, Ms. Fretes-Zarate, immigrated from Paraguay about seven years ago. Tr. 108. She and the complaining witness, Mr. Johnson, are divorced, Tr. 20. They have a son who was four years old at the time of the relevant events, Tr. 14,

and who was at that time, and at the time of the trial, the subject of a custody dispute. Tr. 14, 104.

On August 16, 2010, Ms. Fretes-Zarate spent the night on Mr. Johnson's sofa, as she typically did a couple of nights a week at that time. Tr. 22, 78, 151. The next day tensions arose, for reasons the parties recounted quite differently, and eventually there was an incident during which Mr. Johnson was seated behind the wheel of his Cadillac Escalade SUV and Ms. Fretes-Zarate was standing outside the driver's window, Tr. 40. Crediting Mr. Johnson's testimony as true beyond a reasonable doubt, the trial court (Stuart Nash, J.) found that Ms. Fretes-Zarate "approached the car and began screaming at him. He took it for as long as he wanted to and then he said I'm going to leave, went to put the car in Drive, at which point she reached through the car and started scratching him." Tr. 186. The court found that Ms. Fretes-Zarate did not act in self-defense, Tr. 187, and accordingly convicted her of simple assault. *Id*. She was sentenced to 45 days incarceration, suspended, and one year of supervised probation. R. 11.[1]

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[1] Ms. Fretes-Zarate's testimony (given through an interpreter), which the trial court disbelieved, was that Mr. Johnson had pulled her hair and was choking her by pulling on the collar of her clothing "and that's when we were struggling." Tr. 140; *see generally* Tr. 137-145.

After the incident, both parties drove separately to the MPD Fourth District, Tr. 89, 93, where they spoke with separate officers. Tr. 94-95. When asked "why did you place the Defendant under arrest?," MPD Officer Rudolph Best, who had spoken only with Mr. Johnson, answered, "Because all indication from what I got from Mr. Johnson, she was the aggressor." Tr. 96.

It was undisputed that Ms. Fretes-Zarate was taken from the MPD station to Providence Hospital, where she was given medication for pain and abrasions. Tr. 120-122. Mr. Johnson received no medical attention for the scratches on his arm, which he treated with "cool paper towels." Tr. 39.

In his oral decision, the trial judge did not comment on the possibility that the custody dispute over their son, which was ongoing at the time of the incident and at the time of trial, might have given Mr. Johnson a strong motive to want his ex-wife convicted of a crime and deported. *See* Tr. 178-187.

Proceedings below

The case was tried on January 10-12, 2011, to the bench. Ms. Fretes-Zarate's court-appointed lawyer, Thomas Farquhar, did not demand a jury, presumably because he believed she had no right to a jury trial on a charge of simple assault, punishable by fine and/or imprisonment for not more than 180 days. D.C. Code § 22-404(a)(1).

As noted, the trial judge believed Mr. Johnson, disbelieved Ms. Fretes-Zarate, and entered a judgment of conviction.

The Division decision

Represented by new court-appointed counsel, Ms. Fretes-Zarate argued on appeal that she had been entitled to a jury trial because the very serious penalty of deportation was a near-certain consequence of conviction. Brief of Appellant at 21-30. But the Division never ruled on that argument.

In the opening paragraph of its decision, the Division explained that "[d]efense counsel did not request a jury trial at any point in the proceedings, therefore, we review for plain error." *Fretes-Zarate v. United States*, 40 A.3d 374, 374 (D.C. 2012). Returning to that theme, the Division later explained:

> in outlining the uncertain dynamics of the question, we necessarily come to our review in accordance with the extremely limited plain-error standard. . . . In light of the settled law that simple assault is not a jury-demandable crime as well as this court's analysis in *Foote*, it was not plain, clear or obvious error in this case for appellant to be denied a jury trial. Accordingly, we hold that the trial judge did not commit plain error in failing, *sua sponte,* to impanel a jury.

Id. at 378-79 (internal quotation marks, citations and footnotes omitted). Thus the Division held only that denial of a jury trial was not plain error, not that it was not error.

ARGUMENT

With respect, we believe the Division should have decided, and the Division or the Court should now decide, whether Ms. Fretes-Zarate was entitled to trial by jury.

I. The Court should decide whether it was error to deny Ms. Fretes-Zarate a trial by jury

As the Division recognized, "[u]nder plain error review, this court considers whether there is (1) an error, (2) that is 'plain' or 'clear' or, equivalently, 'obvious,' and (3) that affects substantial rights." 40 A.3d at 379 (internal quotation marks and alterations omitted). Similarly, in *Davis v. United States*, 984 A. 2d 1255 (D.C. 2009), the Court noted that "[u]nder the test for plain error, appellant first must show (1) 'error,' (2) that is 'plain,' and (3) that affected her 'substantial rights.'" *Id*. at 1259 (quoting *In re D.B.,* 947 A.2d 443, 450 (D.C. 2008)).

The first element on these lists is "error." While that does not mean the Court must always address whether there was error before addressing the other elements, it would be beneficial — and not just to Ms. Fretes-Zarate — for the Court to do so in this case.

The situation here is analogous, in a general way, to the situation addressed in *Pearson v. Callahan*, 555 U.S. 223 (2009). That case involved a defense of qualified immunity to a claim of constitutional violation; immunity is available unless a defendant's conduct violated rights that were "clearly established" at the time. *See id*. at 231. In *Pearson*, the Supreme Court considered whether, in such cases, courts must first decide whether the defendant's conduct violated the plaintiff's constitutional rights before deciding whether those rights were clearly established at the time. Overruling *Saucier v. Katz*, 533 U.S. 194 (2001), the Court held that this procedure is not mandatory.

The Court nevertheless "recognize[d] that it is often beneficial," *id*. at 236, because it "promotes the development of constitutional precedent," which can be stymied by decisions holding that the law is not clear without ever clarifying what the law is. *Id*.

So here, the question whether a defendant charged with an otherwise petty offense is constitutionally entitled to a jury trial when a conviction will certainly, or all-but certainly, result in deportation, is an important one, especially in a jurisdiction with many immigrants such as the District of Columbia. Prior decisions do not supply a negative answer, because in prior cases the possibility of deportation was hypothetical and remote. *See Fretes-Zarate,* 40 A.3d at 378 (noting that in earlier cases deportations "were hypothetical penalties that could arise only in separate civil and administrative proceedings, 'which ha[d] not been instituted against [the defendant], and in most cases could not be brought against him.'" (quoting *Foote v. United States*, 670 A.2d 366, 372 (D.C. 1996)) (alterations by the Court). Even were Ms. Fretes-Zarate not to benefit from the answer, the prosecutors, defense counsel, and judges of this jurisdiction should know the answer. This Court need not wait for a case in which it must reverse a conviction in order to clarify the law.

However, as we show next, the conviction in this case should be reversed.

II. The Court should hold that trial by jury is available where conviction will result in deportation, and that the its denial here was plain error affecting the fairness of the proceedings

A. A defendant facing deportation has a right to a jury trial

In her briefs, Ms. Fretes-Zarate demonstrated that under recent federal law deportation is essentially mandated for non-citizens convicted even of simple assault in a domestic context, *see* 8 U.S.C. § 1227(a)(2)(E), and she showed that the Supreme Court

had recognized in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that deportation was both a serious and direct consequence of conviction for non-citizens. The Division accepted these facts, *see* 40 A.2d at 376-77, but discounted them on the ground that the D.C. Council had not made deportation a punishment for simple assault. *See id*. at 376 ("[a] defendant is entitled to a jury trial . . . only if he can demonstrate that any additional statutory penalties . . . are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one.") (quoting *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989)); *id*. at 378 ("Our inquiry was whether the statutory penalties were so severe that they clearly reflect a legislative determination by the D.C. Council that the offense in question was a 'serious' one.") (describing and quoting *Foote v. United States*, 670 A.2d 366, 373 (D.C. 1996)). But Congress is also a relevant legislature, particularly in the District of Columbia, and there is no good reason why its "legislative determination" that deportation should follow a non-citizen's conviction for simple domestic assault should be ignored. Labeling a consequence as "collateral" does not make it any less a consequence, or any less serious. As Justice Holmes advised long ago, "We must think things not words . . . if we are to keep to the real and the true." Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1899).

B. The denial of a jury trial was plain error

Once the congressional determination that deportation should be a consequence of conviction is taken into account, it is obvious, and therefore plain, that conviction is not a "petty" matter and that the Constitution gave Ms. Fretes-Zarate a right to a jury trial,

which the Superior Court was obligated to provide unless she waived it in open court. D.C. Code § 16-705(a).

C. The error affected Ms. Fretes-Zarate's substantial rights and the fairness of the proceedings

This Court has assumed that the erroneous denial of a jury trial affects substantial rights. *Davis v. United States*, 984 A.2d 1255, 1260-61 (D.C. 2009). That assumption is surely correct as a general matter and was certainly true here, where, for example, a jury might have taken into account in evaluating the credibility of the ex-husband — as the trial judge apparently did not — that he was in an ongoing custody fight with his ex-wife and had a strong motivation for her to be convicted and deported, so that he would automatically gain exclusive custody of (indeed, probably exclusive contact for many years with) their then-four-year-old son. For the same reason, the denial of a jury trial affected the fairness of the proceedings.

CONCLUSION

For the reasons stated above and in appellant's petition, the petition for rehearing should be granted. In the alternative, rehearing *en banc* should be granted.

Respectfully submitted,

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June 12, 2012

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I hereby certify that I served two copies of the foregoing brief upon each of the following counsel:

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