Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DELMART E.J.M. VREELAND, II,

Petitioner,

v.

DAVID ZUPAN; and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LYNN C. HARTFIELD
Counsel of Record
CJA Attorney for Petitioner
Law Office of Lynn C. Hartfield, LLC
387 Corona Street, Suite 617
Denver, Colorado 80218
(720) 588-0571
lynn@lhartfieldlaw.com

QUESTION PRESENTED

Whether a trial court violates this Court's requirement that any waiver of counsel be knowing, voluntary and intelligent when it forces a defendant to proceed to trial without counsel, without any forewarning that taking some action, or failing to take some action, will result in the loss of counsel, and in the absence of the court providing some avenue by which a defendant may retain his right to counsel, an issue on which federal and state courts have issued conflicting rulings?

PARTIES

The only parties to the proceeding are those named in the caption.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

State Appellate and Supreme Court Cases

Constitutional Provisions

Federal Statutes

Federal Rules

Other Sources

PETITION FOR WRIT OF CERTIORARI

Petitioner, Delmart E.J.M. Vreeland, II, respectfully petitions for a writ of certiorari in this case to review the published opinion of the United States Court of Appeals for the Tenth Circuit in *Vreeland v. Zupan*, 906 F.3d 866 (10th Cir. 2018).

OPINIONS BELOW

The Tenth Circuit Court of Appeals' opinion in *Vreeland v. Zupan*, Tenth Circuit No. 16-1503 (official publication at 906 F.3d 866 (10th Cir. 2018)) is appended at App. A. The order denying Vreeland's petition for rehearing *en banc* is appended as App. B. The Colorado Court of Appeals' unpublished opinion in Mr. Vreeland's direct appeal, Colorado Court of Appeals No. 08CA2468, is appended as App. C. Relevant trial court rulings are excerpted at Apps. D, E and F. The opinion of the United States District Court for the District of Colorado in *Vreeland v. Zupan*, USCO Colo. No. 14-cv-02175-PAB is appended as App. G.

JURISDICTION

The Tenth Circuit issued its original opinion on October 9, 2018. App. A. It denied Vreeland's petition for rehearing on November 19, 2018. App. B. This petition is therefore due on February 17, 2019. Because this date falls on a Sunday and the following date is a federal holiday, the petition is due on February 19, 2019.

The United States District Court for the District of Colorado had jurisdiction pursuant to 28 U.S.C. § 2254(d); the Tenth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a); and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

U.S. Const. Amend. VI.

INTRODUCTION

This case raises fundamental questions concerning whether a trial court may ever force a defendant to proceed to trial without counsel against his wishes and, if so, whether certain safeguards providing a warning and allowing a defendant an avenue by which he may retain his right to counsel must be employed before a court resorts to such an extreme sanction. For decades this Court has held in no uncertain terms that there is only one way an accused can lose his or her right to counsel: "the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not [a] waiver." *Carnley v. Cochran*, 369 U.S. 504, 516 (1962). Federal and state courts, however, have issued varying rulings employing inconsistent terminology and conflicting reasoning to either uphold or overturn a trial court's ruling in cases in which defendants complained they were forced to proceed *pro se* against their wishes.

This Court has observed, time and again, that the right to counsel at trial is one of the most fundamental, if not the most fundamental, of rights a criminal defendant possesses, explaining it is "by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S.

648, 653-54 (1984). Given its centrality to a fair system of justice, this Court has also said that defendants can surrender their right to counsel only "with eyes open" to the consequences of their actions, that is, only through a knowing, intelligent and voluntary waiver of that right. *Faretta v. California*, 422 U.S. 806 (1975). *See also*, *Freytag v. Commissioner*, 501 U.S. 868, 894 n. 2 (1991) (Scalia, J. concurring) (commenting that while some rights may be forfeited by means short of a waiver, the right to counsel may not). The Tenth Circuit below, upholding a decision by the Colorado Court of Appeals, violated law clearly established by this Court when it upheld the trial court's ruling denying Petitioner the right to retain counsel, where the trial court gave Petitioner neither forewarning of the impending loss of counsel (precluding a finding of knowledge) nor any opportunity to keep his prior retained counsel (precluding a finding of a voluntary or intelligent choice to waive counsel). Because of the fundamental importance of the right to counsel, and the confusion among lower courts surrounding the issue, this Court should grant review.

STATEMENT OF THE CASE

State Trial Court Proceedings

Petitioner Delmart Vreeland was charged in Douglas County, Colorado, with multiple counts of sexual misconduct, centered around allegations that he solicited two 17-year-old boys to pose for photographs in their underwear, in exchange for cash and drugs. Under Colorado's sex offense and habitual criminal laws,[1] he faced hundreds of years in prison.

Mr. Vreeland was represented by a succession of retained attorneys who seemed more intent on collecting their fees than on representing his interests or adhering to standards of professional conduct. His first lawyer, after getting into a heated dispute with the trial judge, left the courtroom during a preliminary hearing, leaving his unprepared associate to complete the proceeding; the lawyer subsequently let a motions deadline lapse and moved to withdraw. His second lawyer, after filing several motions that exhibited a poor grasp of relevant law, asked the trial court to order a competency examination. Mr. Vreeland was not present at the hearing during which the lawyer made the request, and the timing and questionable basis for the request suggest the lawyer did not have any serious concerns about Mr. Vreeland's competency, but was instead seeking a basis to delay the trial.

[1] At the time of trial, Mr. Vreeland had prior convictions for offenses involving theft and bad checks.

Dissatisfied with the representation he received from these two attorneys, Mr. Vreeland asked to represent himself. He did so for a period of approximately six months, but found that the constraints of preparing a case for trial while incarcerated proved too difficult. With the trial court's permission, he revoked his waiver of counsel and retained a third attorney. (App. D at D-4-5). Although the trial court expressed frustration with the timing of the request for substitution of counsel, it commented that it believed it would be "setting up error" if Mr. Vreeland were not permitted to proceed with counsel. (App. D at D-4).

Eleven days before trial, that retained counsel, Attorney Scheideler, moved to withdraw, representing that Mr. Vreeland had threatened to file an administrative grievance and lawsuit against him. (App E at E-2-3). This lawyer had unsuccessfully moved to continue the trial two weeks earlier.

Although the court, having examined the relevant sources, found no pending grievance by Mr. Vreeland against Scheideler, it nonetheless permitted counsel to withdraw. (*Id.* at E-1-13). Significantly, the trial court never warned Vreeland he would lose his right to counsel if Scheideler withdrew, nor did it indicate that it would not allow a continuance to permit new counsel to prepare for trial. Instead, the court simply granted Scheideler's motion to withdraw, stating it was "not casting any particular aspersion on anybody." (*Id.* at E-11-13).

Only after granting Scheideler's motion to withdraw did the trial court consider Mr. Vreeland's motion to continue the trial in order to secure new counsel. Without ever having warned Mr. Vreeland that such a result might ensue, the court

denied the motion for continuance, accusing him of trying to delay the trial. (App E at E-15-33). Critically, however, the court told Mr. Vreeland that if he retained new counsel, it would consider any motions a new attorney might file. (*Id.* at E-33). Then, although Mr. Vreeland dutifully secured counsel within a week, the court denied new counsel's motion for a short continuance, leaving Mr. Vreeland with no alternative but to represent himself. (App F at F-1-19). And, despite that he exhibited signs of mental impairment during the trial, the trial court denied subsequent motions to continue the trial to allow retained counsel to represent him. Mr. Vreeland was, not surprisingly, convicted of all but one charge, and based on prior theft convictions, was sentenced to over three hundred years in prison.

State Appellate Proceedings

Mr. Vreeland appealed his convictions to the Colorado Court of Appeals ("CCOA"), which affirmed. In an ambiguously worded opinion, the CCOA upheld the denial of counsel in Mr. Vreeland's case, finding that he had "impliedly waived" or "forfeited" his right to counsel "as opposed to having made a deliberate decision to forgo the right." (App. C at C-2). In support of its finding of "implied waiver" or "forfeiture," the CCOA cited Mr. Vreeland's earlier, subsequently revoked, waiver of counsel; his alleged "pattern of threatening[2] counsel, filing meritless motions, and firing counsel as the date of the trial approached"; and a competency evaluation that concluded he was "manipulating and dominating," "highly intelligent" and had

[2] There is no evidence in the record of any physical threats. Rather, Mr. Vreeland allegedly threatened to sue his attorneys to recover fees he contended they wrongfully retained.

a "working knowledge of the legal system that surpassed [that of] most individuals." (*Id.* at C-5, C-7). These factors, the CCOA concluded, supported the trial court's findings that Mr. Vreeland "waived" his right to counsel. (*Id.* at C-7).

Notably absent from the CCOA's opinion was any finding that Mr. Vreeland *knew* that if Scheideler withdrew, he would lose his right to counsel; that he *voluntarily* chose a course of action that he knew would result in the loss of counsel; or that he made a decision, intelligent or otherwise, to forgo counsel. And although it relied heavily on portions of a Colorado Supreme Court opinion, *People v. Alengi*, 148 P.3d 154 (Colo. 2006), a case specifically stating that in order to find a valid implied waiver, "a court must properly advise the defendant in advance of the consequences of his or her actions," the CCOA pointedly ignored both its Supreme Court's directive and the undisputed fact that the trial court never advised Mr. Vreeland that Scheideler's withdrawal would leave him with no option to have retained counsel. Mr. Vreeland then sought review in the Colorado Supreme Court, which was denied.

Federal Habeas Corpus Proceedings

Mr. Vreeland next filed a petition for writ of habeas corpus in federal district court in Colorado, which was dismissed. (App. G). A panel of the Tenth Circuit, after granting a Certificate of Appealability, affirmed the denial of the petition. *Vreeland v. Zupan*, 906 F.3d 866 (10th Cir. 2018) (App. A).

The panel began by acknowledging that the CCOA had been unclear in its justification for upholding the denial of counsel in Mr. Vreeland's case, to the extent

that it cited both "implied waiver" and "forfeiture" of counsel. (App. A at A-14). Although related, the panel explained, waiver and forfeiture are distinct concepts, the former referring to "the intentional relinquishment or abandonment of a known right," and the latter referring to "the loss of a right when that loss is 'inadvertent.'" *Id.* at A-13. Waiver, the panel went on, may be either express or implied, with an implied waiver occurring when *either* "a court has expressly informed a defendant that a certain action or inaction will result in the loss of a particular right" *or* in scenarios in which a court has not so expressly informed the defendant "but the circumstances nevertheless demonstrate that the defendant is aware that [the right will be lost]." *Id.* at A-14. Applying its definitional structure, the panel said it was compelled to deny relief under 28 U.S.C. § 2254, because this Court has never addressed whether a defendant can "impliedly waive" counsel via his or her conduct. *Id.* at A-17. Consequently, it concluded, the CCOA's decision could not be contrary to clearly established federal law. *Id.*

The panel further rejected Mr. Vreeland's claim that the CCOA unreasonably applied clearly established law by finding an "implied waiver" in the absence of an express warning from the trial court that any action or inaction on his part would result in the loss of counsel. *Id.* at A-18-21. Relying on this Court's decision in *Taylor v. United States*, 414 U.S. 17 (1973), in which the Court found that a defendant impliedly waived the right to be present at trial in the absence of an express warning from the trial court, the panel concluded that "reasonable jurists

could conclude" that an express warning "isn't a necessary precondition for holding that a defendant impliedly waived his or her constitutional rights." *Id.* at A-21.

Mr. Vreeland petitioned for rehearing *en banc*, which the Tenth Circuit denied. (App. B). He now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review Because The Tenth Circuit's Decision Is Contrary To Clearly Established Federal Law Holding That The Right To Counsel May Not Be Lost Absent A Knowing, Voluntary And Intelligent Waiver

A. This Court Has Addressed What The Lower Courts In This Case Characterized As "Implied Waivers" Or "Forfeitures" of Counsel, And It Has Rejected Them

For decades, this Court has consistently held that the right to counsel is of such paramount importance that it is worthy of special protection and may not be lost absent a knowing, voluntary and intelligent waiver. In a series of cases beginning in the 1930s, this Court held that the right to counsel is a fundamental right that extends to the states through the Fourteenth Amendment, entitling every defendant, even those who cannot afford to retain counsel, the right to an attorney in any criminal case where there is a possibility of imprisonment. Following these cases, the Court carefully developed a set of requirements to ensure that no defendant would be forced to go to trial without counsel, absent a showing of a knowing, voluntary and intelligent relinquishment of that right.

The first in the line of cases was *Powell v. Alabama*, 287 U.S. 45 (1932), in which the Court set aside the convictions of eight Black youths who had been sentenced to death without the benefit of counsel. The Court weighed a series of

factors, including the age of the defendants, their illiteracy, and public hostility to their case, and held:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . .

Id. at 71.

Although the holding in *Powell* was narrow, to the extent that it reached only capital defendants and required a showing of prejudice from the lack of counsel, six years later the Court expanded on its ruling, holding that any defendant who could not afford to retain a lawyer in a federal criminal case was entitled to have counsel appointed. *Johnson v. Zerbst*, 304 U.S. 458 (1938). In reaching its decision, the Court first explained the importance of the Sixth Amendment right to counsel and the necessity of a waiver if counsel is to be denied:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. . . .

Id. at 463. Given the centrality of the right, the Court concluded, "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty *unless he has or waives the assistance of counsel*." *Id.* (emphasis added).

The Court rejected the state's claim that the defendants had waived counsel, noting first that courts must "'indulge every reasonable presumption against

waiver' of fundamental constitutional rights" and may not "'presume acquiescence in the loss of fundamental rights.'" *Id.* at 464. Further, the Court explained, the Sixth Amendment invokes a "protecting duty" on the trial court, which "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an *intelligent and competent* waiver by the accused." *Id.* at 465 (emphasis added). Although acknowledging that an accused could waive the assistance of counsel, the Court frowned on the notion of an implicit waiver, stating that "whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Id.* The Court concluded, "[i]f the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty." *Id.* at 468.

The Court revisited the issue of waiver of counsel in a second series of cases beginning in 1962. In *Carnley v. Cochran*, 369 U.S. 506 (1962), the Court rejected a claim that a defendant had waived the right to counsel, where the record showed neither an offer of counsel nor any declination of counsel by the defendant. *Id.* at 513. Noting that settled precedent did not require a specific request for counsel in order to invoke the right, the Court concluded:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Id. at 516.

The following year, in formally imposing on states the obligation to provide a lawyer to any indigent defendant accused of a crime, the Court reiterated that the fundamental nature of the right to counsel meant that it must be automatically bestowed on a criminal defendant unless "competently and intelligently waived." *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). In expanding the right to appointment of counsel to indigents in all criminal trials, regardless of whether the offense was a felony or misdemeanor, the Court again stressed that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 402 U.S. 25, 37 (1972).

In 1975, this Court considered the reverse question: whether, and under what circumstances, a defendant has a reciprocal right to decline counsel and represent himself. *Faretta v. California*, 422 U.S. 806 (1975). Concluding that such right does exist, the Court nonetheless recognized that because of the central importance of the right to counsel, the Sixth Amendment requires that "in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." *Id.* at 835.

This Court's jurisprudence thus makes clear that there is no support for the premise that a court may strip a defendant of his right to counsel as an unwarned sanction for misconduct. Rather, in order for a defendant to proceed to trial without counsel, the record must demonstrate that the defendant was offered counsel, and knowingly, voluntarily and intelligently rejected counsel. Indeed, in over 75 years,

this Court has never found the right to counsel relinquished on "anything less" than a record demonstrating a knowing, voluntary and intelligent choice to forgo counsel. *Carnley*, *supra*, 369 U.S. at 516.

The Tenth Circuit's formulation of what it calls an "implied waiver," which permits a finding of waiver *without* (1) an explicit statement from the court warning a defendant of the circumstances under which he may lose counsel and *without* (2) an explicit statement conveying to the defendant the options he has to maintain his right to counsel, is thus contrary to this Court's consistent demand for record evidence of a knowing, voluntary and intelligent waiver of counsel. For the absence of an explicit warning and instruction on how to maintain the right to counsel precludes a finding counsel was offered. It also precludes a finding that the defendant made a knowing, voluntary and intelligent choice to forgo counsel. Similarly, the CCOA's conception of a "forfeiture" of counsel, whereby a defendant can lose his right to counsel even if, as the court candidly admitted, he made no "deliberate decision to forgo the right" (App. C at C-2), is no less contrary to this Court's unwavering directive that counsel may not be denied absent a knowing, voluntary and intelligent decision to relinquish the right.

B. *Taylor v. United States*, 414 U.S. 17 (1973), On Which The Tenth Circuit Relied, Is Inapposite

Additionally, the Tenth Circuit's reliance on *Taylor v. United States*, *supra*, as an analog barring habeas relief is misplaced. In *Taylor*, the defendant, during a recess in his trial and after having been advised by the court and counsel to return at a time certain, left the courthouse and failed to return. There was no dispute that

the failure to return was voluntary. *Id.* at 17. This Court found that the defendant waived his right to be present because it was "wholly incredible" to suggest that he would not have known that a consequence of his failure to return would be the loss of his right to be present. *Id.* at 20.

Taylor, however, involved a significantly less important right than the right to counsel. For more than one hundred years, this Court has recognized that the right to be present at trial is not absolute, and that if a defendant voluntarily absents himself from an ongoing trial, it operates as a waiver of the right. *Diaz v. United States*, 223 U.S. 442 (1912). The holding of *Diaz* was later codified in Federal Rule of Criminal Procedure 43, which specifically provides that a trial may be conducted *in absentia* if a defendant who is initially present voluntarily absents himself after trial has commenced. And, of course, a defendant who absents himself from trial may still be represented by counsel, who has the ability to protect the defendant's remaining rights by conducting cross-examination and presenting evidence.

By contrast, this Court has never even suggested, much less held, that a defendant may lose his right to counsel without explicit, record-based evidence demonstrating waiver. Instead, the Court has repeatedly stressed that the right to counsel is: 1) uniquely important (*see United States v. Cronic*, *supra*, 466 U.S. at 653-54 (1954) (right to counsel is "by far the most pervasive" of a defendant's rights, "for it affects his ability to assert any other rights he may have"); *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978) ("[i]n an adversary system of criminal justice,

there is no right more essential than the right to the assistance of counsel")); and 2) may not be lost absent a record demonstrating a knowing, voluntary and intelligent waiver (*see Carnley v. Cochran*, *supra*, 369 U.S. at 516 (court will not presume a waiver of counsel from a silent record); *Freytag v. Commissioner*, *supra*, 501 U.S. at 895 n.4 (Scalia, J. concurring) (noting that some rights – the right to a public trial, the right against double jeopardy and the right to confront adverse witnesses – may be forfeited by means short of a waiver, while others – the right to counsel and the right to trial by jury – may not). *Taylor* is thus inapposite, because it involves a qualitatively different right that has never enjoyed the same protections.

C. The Tenth Circuit's Conclusion That Mr. Vreeland "Impliedly Waived" Counsel In This Case Is Logically Incoherent

Finally, the Tenth Circuit's conclusion that Mr. Vreeland somehow "impliedly waived" counsel is both logically and factually unsupported. In justifying its conclusion, the court wrote that "it's clear from the record" that Mr. Vreeland knew his conduct "would result in the loss of counsel." (App. A at A-20). But if that were true, there would be no need to rely on an "implied waiver" theory, because the record would demonstrate an explicit waiver. Of course, the undisputed facts in the record demonstrate exactly the opposite: the trial court never advised Mr. Vreeland he would lose his right to counsel if his last lawyer withdrew. To the contrary, it encouraged him to hire new counsel after granting that lawyer's motion to withdraw, and it never advised him *until* he hired new counsel that he would be representing himself. Logic and common sense dictate that a defendant who responds to his lawyer's withdrawal by diligently retaining new counsel is scarcely

a defendant who intends to waive his right to counsel. Still less is he one who knowingly and intelligently waives his right to counsel. For this additional reason, the Tenth Circuit's decision conflicts with this Court's established law.

II. This Court Should Grant Review Because Lower Federal And State Courts Have Issued Conflicting Rulings On The Constitutionality Of So-Called "Implied Waivers" And "Forfeitures" Of Counsel

In holding that a defendant may "impliedly waive" his right to counsel without any explicit forewarning or option to retain his right to counsel, the Tenth Circuit added to the confusing jumble of standards applied in federal and state courts across the country.

As an initial matter, part of the confusion stems from the differing terminology that courts have employed to describe situations in which a court requires a defendant to go to trial without counsel in the absence of an explicit request. Courts have deemed such situations variously as "implied waivers," "constructive waivers," "waivers by conduct," "forfeitures," "unwarned forfeitures," or "forfeitures with knowledge," but have applied differing meanings to the terms. *Accord,* Sarah Gerwig-Moore, *Gideon's Vuvuzela: Reconciling the Sixth Amendment's Promises with the Doctrines of Forfeiture and Implicit Waiver of Counsel*, 81 Miss. L.J. 439, 442 (2012) (collecting cases and noting that court opinions on the topic contain "puzzling, contradictory definitions of both the terms and application of the doctrines").

As an example, the Third Circuit has defined an "implied waiver" as one in which a defendant is first warned that a right will be lost through certain conduct

and then proceeds with that conduct. In contrast, that court understands a "forfeiture" as a situation in which a defendant is never warned and yet "regardless of knowledge" can lose a right. Continuing its taxonomy of waiver, the circuit views a "forfeiture with knowledge" as occurring whenever a defendant is not explicitly warned of the impending loss of a right but nonetheless knew he could lose the right. *United States v. Goldberg*, 67 F.3d 1092, 1100-01 (3d Cir. 1995). Other courts have employed the term "waiver by conduct" to cover situations in which a defendant is warned that certain conduct may result in the loss of his right to counsel, and the defendant ignores the warning. *See, e.g., Bultron v. State*, 897 A.2d 758, 764 (Del. 2006). Still other courts, like the CCOA below, have mixed and matched the two terms, making little or no attempt to differentiate the concepts. *See, e.g., State v. Carruthers*, 35 S.W.3d 516 , 549 (Tenn. 2000) (characterizing the distinction between forfeiture and implied waiver as "slight," and finding that the defendant in that case both "impliedly waived" and "forfeited" his right to counsel). And even within a particular court, the terminology is not applied consistently, as in the Third Circuit's decision in *Fischetti v. Johnson*, 384 F.3d 140 (3d Cir. 2004), a case decided after *Goldberg*. There the court of appeals held that a defendant had "forfeited" his right to counsel, even though the defendant had been offered the *choice* of proceeding with current counsel, having a new attorney appointed to assist as co-counsel, or representing himself, and had *chosen* to reject all three options. *Id.* at 146-47.

The Tenth Circuit below, although acknowledging a difference between "forfeiture" of counsel, which it declined to rule upon, and "implied waiver" of counsel, nonetheless created a category of "implied waiver," which requires no forewarning by the court. (App. A at A-13-14). Functionally, however, this *is* a forfeiture, because it is logically impossible for a defendant to "know" he is going to lose a right if the entity taking away the right never advises him that this is a possibility. And, it is impossible to find a defendant made a knowing, voluntary and intelligent choice to forgo counsel if he was never offered an avenue by which he could maintain his right to counsel.

Courts are similarly inconsistent in their willingness to uphold so-called "implied waivers" or "forfeitures" of counsel, regardless of what terminology is employed. Some courts have explicitly rejected the notion that a defendant may forfeit his right to counsel. *United States v. Ductan*, 800 F.3d 642, 651-52 (4th Cir. 2015). The vast majority of courts, however, have upheld the denial of counsel only in instances in which a defendant is warned that certain action or inaction will result in his having to represent himself, and the defendant proceeds with the conduct or fails to take the required action. *See, e.g., United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008) (holding that before finding a waiver, at a minimum, a warning is required); *Trujillo v. State*, 2 P.3d 567 (Wyo. 2000) (requiring explicit warning prior to a finding of waiver of counsel by conduct); *King v. Superior Court*, 132 Cal. Rptr. 2d 585 (Cal. Ct. App. 2003) (requiring warning before finding of implicit waiver of counsel unless a defendant's misconduct rises "to the most serious

level"). Confusingly, some courts have called these "forfeitures" of counsel, while others have called them "implied waivers." *Compare, e.g., Fischetti v. Johnson*, *supra*, 384 F.3d at 146-47 (finding defendant "forfeited" his right to counsel, where he refused to affirmatively choose between options of proceeding pro se or continuing with current counsel) *with United States v. Fazzini*, 871 F.2d 635, 642 (7th Cir. 1989) (finding "implied waiver" of counsel where, after being warned he would lose the right if he failed to cooperate with counsel, defendant continued to refuse to cooperate with several court-appointed lawyers in succession).

In a small category of cases, courts have permitted forfeiture of counsel without warning or opportunity to maintain the right to counsel, but only in cases involving physical threats of violence. *See, e.g., Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001); *United States v. Leggett*, 162 F.3d 237, 250 (3d Cir. 1998); *United States v. McLeod*, 53 F.3d 322 (11th Cir. 1995); *United States v. Thompson*, 335 F.3d 782 (8th Cir. 2003). Notably, these cases all involved the denial of counsel at ancillary proceedings rather than at trial. Courts have been more protective of the right to counsel in the face of physical violence where the proceeding at issue was the trial. *See, e.g., People v. Smith,* 705 N.E.2d 1205, 1206 (N.Y. App. 1998) (affirming reversal of forfeiture finding even though defendant threatened he "would put a knife in the attorney's head"); *State v. Holmes*, 302 S.W.3d 831, 848 (Tenn. 2010) (reversing determination that defendant forfeited counsel, even though he had threatened and physically attacked counsel); *State v. Hampton*, 92 P.3d 871, 872-73

(Ariz. 2004) (reversing denial of counsel even though defendant, a member of the Aryan Brotherhood, had made credible death threats against counsel).

The inconsistency and confusion among lower courts calls for this Court to reaffirm the fundamental principles set forth in *Powell, Johnson, Gideon* and their progeny, that no person may constitutionally be convicted of a crime without counsel, absent an offer, and a knowing, voluntary and intelligent choice to forgo counsel. This Court must make explicit that no defendant may be stripped of his right to counsel without, as a minimum requirement, an explicit warning on the record that such result may ensue if a defendant persists in certain actions, or fails to act, coupled with an opportunity for the defendant to make a choice to act or not act in order to preserve his right to counsel. Anything less offends the Sixth Amendment guarantee of the right to counsel.

III. This Case Presents The Appropriate Vehicle To Review The Issue

This case presents an appropriate vehicle for reaffirming the requisites of the Sixth Amendment. Despite the confusing terminology employed by lower courts, the vast majority have only found "implied waiver" or "forfeiture" of counsel in cases in which a defendant had prior forewarning that the loss of the right was a possibility *and* the defendant had an opportunity to make a choice to take some action or refrain from some action in order to maintain that right. Because the trial court in Mr. Vreeland's case did neither, this case presents an appropriate vehicle for the Court to reaffirm the principle and set minimum standards to satisfy the dictates of

the Sixth Amendment, which must include a warning and a pathway by which a defendant may still keep counsel.

This Court has recently been confronted with similar issues at least twice in the last year and a half. *See Suriano v. Wisconsin*, Supreme Court No. 17-5452, (*cert. denied* January 8, 2018); *Carruthers v. Mays*, Supreme Court No. 18-708 (petition pending). Mr. Vreeland's petition presents the Court with the cleanest factual posture, for several reasons.

First, in both *Suriano* and *Carruthers*, there was evidence in the record that the trial courts explicitly warned the defendants that continued refusal to work with court-appointed counsel might result in the loss of the right to counsel. *See State v. Suriano*, 374 Wis.2d 683, 690 (Wis. 2017), *cert. denied*, 138 S. Ct. 638 (2018) (at the time Suriano's second attorney moved to withdraw, trial court advised the defendant he should "call the public defender's office" because asking for a third attorney would trigger what the court believed was a "three strike rule," disallowing further appointed counsel); *Carruthers v. Mays*, 889 F.3d 273, 280-82 (6th Cir. 2018) (court gave defendant multiple warnings that he either needed to work with his court-appointed attorneys or he would have to proceed without counsel: "these are the attorneys that will represent these men at trial. It's going to have to be one gigantic conflict – one gigantic and real proven, demonstrated conflict before any of these men will be relieved from representation in this case. . . . You either work with them or you don't. It's up to you"; "in my judgment, the only option that is still available if Mr. Curruthers chooses not to work with [his attorneys] in going

forward with this case next Monday, is for him to represent himself"). Thus, in spite of the courts' characterization of the denial of counsel in these cases as "forfeitures" or as denials of counsel as a sanction for misconduct, the courts arguably did not run afoul of the Sixth Amendment, because the denial of counsel was preceded by a warning which enabled the defendants, in both cases, to make a choice to continue with their court-appointed counsel.

Second, in both *Suriano* and *Carruthers*, there were allegations that the attorneys felt physically threatened by the defendants, either by the intensity of their hostility or because of direct physical threats. *Suriano,* 37 Wis.2d at 696 (third attorney stated that Suriano's hostility caused him not to meet with him in any location without a screening metal detector); *Carruthers*, 889 F.3d at 278 (second attorney permitted to withdraw due to "personal physical threats" by the defendant such that attorney did not "feel comfortable or safe" in continuing the representation; third attorney then represented that he "fear[ed] for his safety and those around him," and cited threatening letters describing the car the attorney's daughter drove). To the extent lower courts have suggested that forfeiture of counsel as a sanction for misconduct is constitutional, it has been for "extreme" misconduct involving physical violence or threats of physical violence. Mr. Vreeland's case, however, presents no allegation of violence, or threats of violence, against his counsel. The only alleged "threat" Mr. Vreeland made to his counsel – which the trial court found no evidence to support – was a threat to complain to the Attorney Regulation Counsel and/or file a lawsuit to recover fees.

Third, in contrast to the defendant in *Suriano*, who was charged with a simple misdemeanor and was sentenced to just 10 days in jail and a $100 fine, Mr. Vreeland faced life in prison at the time he was denied counsel. Because of the combined impact of Colorado's harsh sex offender and habitual criminal sentencing laws, to which Mr. Vreeland was subject based on prior convictions for non-violent theft crimes, he was in fact sentenced to over three hundred years in prison. Only a capital case presents higher stakes.[3]

Finally, at all times relevant to the issue, Mr. Vreeland retained his own attorneys. This Court has imposed limits on the right to counsel of choice in cases in which a defendant requires appointed counsel, but provides greater protection to defendants who do not so require. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006). Indeed, after Mr. Vreeland's case was denied review by the Colorado Supreme Court, it held in a subsequent case that defendants may discharge retained counsel without good cause, and that in such a case, a court is *required* to advise the defendant, *before granting a request to withdraw*, whether it will allow a continuance of the trial. *Ronquillo v. People*, 404 P.3d 264, 270-271 (Colo. 2017). The *Ronquillo* court also held that in such cases, the trial court must give the defendant the option of keeping current counsel if no continuance will be granted. *Id.* For this additional reason, the lack of warning or choice given Mr. Vreeland in this case merits review.

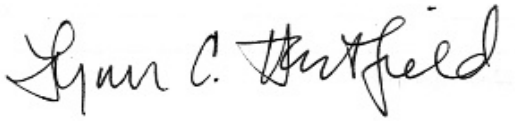
[3] *Carruthers*, however, is a capital case.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, Petitioner Delmart E.J.M. Vreeland, II respectfully requests that this Court grant his petition for writ of certiorari.

DATED this 19th day of February, 2019

Respectfully submitted,



LYNN C. HARTFIELD
Counsel of Record
CJA Attorney for Petitioner
Law Office of Lynn C. Hartfield, LLC
387 Corona St., Suite 617
Denver, Colorado 80218
lynn@lhartfieldlaw.com