No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MALCOLM ROY EVANS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A TRIAL COURT MAY SUMMARILY PROHIBIT AN ACCUSED FROM TESTIFYING IN HIS OWN DEFENSE IN A CRIMINAL TRIAL MERELY FOR STATING TO THE JURY HIS BELIEF THAT HIS RIGHTS WERE BEING VIOLATED?

WHETHER A TRIAL COURT MUST INQUIRE INTO AN ACCUSED'S COMPLAINTS ABOUT CONSTITUTIONALLY INADEQUATE REPRESENTATION BY COUNSEL?

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Petitioner Malcolm Roy Evans respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, filed on November 6, 2018

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit that is the subject of this petition is reported in *United States v. Evans*, 908 F.3d 346 (8th Cir. 2018), and is reprinted in the appendix hereto, p. 1A-16A, infra. The Eighth Circuit denied a petition for rehearing en banc or panel rehearing in an order filed on December 11, 2018. (Appendix 17A).

The final judgment of the United States District Court for the District of Minnesota and rulings (Senior Judge Ann D. Montgomery) that are the subject of this Petition have not been reported. The documents deemed relevant to this Petition are reprinted in the Appendix.

JURISDICTION

Petitioner Malcolm Roy Evans was convicted in a jury trial of armed bank robbery in violation of 18 U.S.C. § 2113(a) and 2113(d), attempted carjacking and carjacking in violation 18 U.S.C. § 2119(1), and forcing a person to accompany the defendant while avoiding apprehension in violation of 18 U.S.C. § 2113(e). Mr. Evans was sentenced to 360 months imprisonment by the Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota. Sentence was imposed on May 24, 2017 and final judgment was entered on May 25, 2017. Mr. Evans timely appealed his conviction and sentence.

The United States Court of Appeals for the Eighth Circuit affirmed Mr. Evans' conviction and sentence on November 6, 2018, and denied his petition for rehearing en banc or panel rehearing on December 11, 2018. Mr. Evans now timely files this petition for writ of certiorari.

The jurisdiction of this Court to review the judgments of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment V - No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Constitution Amendment VI - In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. The Underlying Offense.

The government alleged that on December 29, 2014 the suspect entered a Wells Fargo Bank branch inside a grocery store in Moorhead, Minnesota with a sawed off shotgun and left with about $10,000 in cash. (Appendix 2A). Upon exiting the store, the suspect entered a vehicle and told the driver to drive. (App. 2A). The driver and her daughter exited the vehicle and ran away, taking the keys with her. The driver's only description of the suspect was that he was wearing a dark color coat, green scarf, dark spots on his chin.

The suspect then went to a nearby liquor store, approached a pickup truck outside the store and demanded that the driver let him inside. After getting inside, the suspected demanded that the driver go to West Acres Mall in Fargo, North Dakota. (App. 2A). When they arrived at the Mall, the suspect ordered the driver

to leave the truck and then drove the truck away on his own. (App. 2A). The truck was later found a few blocks from the Mall. (App. 2A). The driver of this vehicle only described the suspect as an African American male with short hair and freckles on his face. The government alleged that surveillance video later shows a person going in the directions of a Motel 6 (as well as other businesses), but with different clothing than the robber.

The next day police searched two Motel 6 rooms in Fargo, North Dakota which Petitioner was renting. (App. 2A). There were numerous people partying in the rooms. The police seized numerous items including $2090 in cash, a sawed-off shotgun, and clothing consistent with what the bank robber was described as wearing. (App. 2A). One of those questioned in the motel room was also a resident at the same shelter where Petitioner was staying, and was in possession of shotgun shells and $505 cash. (6/16/15 Trial Tr. 163-164, 175, 293, 6/17/15 Trial Tr. 356). None of the money seized from the hotel room was tied to the bank. (6/16/15 Trial Tr. 155). There were no recorded serial numbers, no bait bills, no dye packs, no bank bands. (6/15/15 Trial Tr. 61-62).

B. Procedural History

The government obtained an Indictment against Petitioner Malcolm Roy Evans on January 22, 2015 alleging armed bank robbery in violation of 18 U.S.C. § 2113(a) and

2113(d), attempted carjacking and carjacking in violation 18 U.S.C. § 2119(1), kidnapping in violation of 18 U.S.C. § 1201(a)(1),[1] and forcing a person to accompany the defendant while avoiding apprehension in violation of 18 U.S.C. § 2113(e). (App. 73A-75A). The charges all related to the bank robbery incident on December 29, 2014 in Moorhead, Minnesota. (Id.)

A jury trial was held from June 15-18, 2015. The jury found Evans guilty on all counts. Evans filed a motion for a new trial on July 2, 2017 based on the court's preclusion of Evans from testifying, the prejudicial effect of disruptions by Evans during trial, and a surprise eyewitness identification. The district court summarily denied the motion at the sentencing hearing. On May 24, 2017, the district court imposed a sentence of 360 months imprisonment. (App. 2A). Judgement was entered on May 25, 2017.

Evans timely appealed. Issues on appeal included those raised in this Petition, the district court prohibiting Evans from testifying on his own behalf and the district court's failure to address Evans' complaints about inadequate representation by counsel. (App. 4A-6A, 7A-12A). The 8th Circuit Court of Appeals affirmed Evans' conviction and sentence in an split decision filed on November 6, 2018. (App. 1A-16A). . Judge Jane Kelly filed an opinion dissenting in part on the grounds that the district court failed to look into Mr. Evans complaints about his representation before trial, and "Without an inquiry into those complaints and a more fulsome exploration into the probative value of

[1] The kidnaping charge was dismissed upon motion of the government just before trial.

Evans's planned testimony, the record is insufficient to warrant excluding his testimony altogether. (App. 15A-16A). Evans timely filed a petition for rehearing en banc or hearing which the 8th Circuit summarily denied in an order filed on December 11, 2018. (App. 17A).

C. Objections Concerning Legal Representation.

Petitioner Evans filed numerous pro se pleadings and sent multiple correspondences to District Judge Ann Montgomery complaining of inadequate representation. Evans sent Judge Montgomery correspondence containing a sworn declaration dated March 8, 2015, and stamped "Received" by the judge's chambers on March 12. (App. 51A, 55A). The letter opened, "I'm having some serious problem with my assistant federal defender." (Id.) Evans explains he has an 8th grade education. (Id.) He explains disagreements with his attorney arising from Evans' refusal to plead guilty and not believing he is getting a speedy trial. (Id., pgs 52A-53A). Evans states that despite having received discovery on February 14, "I have not ben given not been given the opportunity to hear the verbatim recording of witness statement nor have I been permitted to review all the DVD evidence. I need to review all this critical evidence before I can even begain *[sic]* building a meaningful defense." (Id. 53A). He stated that when counsel visited, counsel only spent 15-20 minutes reviewing DVDs which comprised a small portion of the evidence, with 5 or 6 DVDs he had not reviewed. (Id. 53A-54A). Evans stated that his counsel had not taken actions that Evans had requested to

prepare his defense, and that he believed that his constitutional rights to effective assistance of counsel, due process and equal protection were being violated. (App. 54A-55A).

Judge Montgomery responded to Mr. Evans' correspondence by brief letter dated March 12, 2015, where she acknowledges receipt of Evans' correspondence. (App. 50A). Judge Montgomery states in her letter, "I will address your concerns related to your counsel only when the case comes before me for a hearing. You have a motions hearing scheduled for tomorrow before Magistrate Judge Brisbois and I am hopeful your concerns can be resolved there." (Id.) At the pretrial motions hearing before Magistrate Judge Brisbois on the morning of March 13, 2015, there was no mention of Evans' issues with his counsel. (District Court Docket, Doc. 93). The case did not come before Judge Montgomery for a hearing until the pretrial conference on June 12, 2015, one business day before trial. (App. 18A).

Mr. Evans sent correspondence to Judge Montgomery which went in the mail on March 16 and she received in her chambers received on March 19, 2015, in which he stated that he still had not seen the evidence in his case. (App. 57A-58A). Evans enclosed a copy of a letter from his public defender dated February 6, 2015 which acknowledged a voice mail from Evans requesting to review his discovery and promising to review and discuss the discovery with Evans prior to filing any pretrial motions. (59A). Evans notes that in addition to still not having seen his discovery, he was not shown the discovery as

promised before the filing of pretrial motions and therefore did not have the opportunity to participate in discussions of issues to raise. (App. 57A-58A).

Magistrate Judge Leo Brisbois sent a letter to Mr. Evans dated March 18, 2015, indicating he had received a document from Evans, did not read the document, and was returning it because Evans was required to communicate with the court through his attorney. (App. 61A). There is no record of what Evans was trying to communicate to the district court.

Mr. Evans sent numerous other *pro se* memoranda and other documents to the district court throughout March - May, 2015 complaining about inadequacy of legal representation, lack of access to discovery or evidence in his case, and interference with his legal mail and access to evidence by jail staff with complicity by his counsel. (District Court Docket, Docs. 35-38, 41-42, 46-49, 59). On March 20, 2015, Evans submitted a memorandum signed under penalty of perjury, stating that his attorney had still not provided access to most of the evidence in his case including less than half of the DVDs, less than half the recordings, and none of the photographic evidence. (App. 63A, 65A). Evans submitted another sworn memorandum on April 2 which the district court filed on April 6, 2015, documenting that he had not been able to see evidence in his case. (District Court Docket, Doc. 38).

On April 15, 2015, the district court received from Mr. Evans a pro se "Defendant's Ex Parte Memorandum to Document and Make-A-Record of Counsel's

Unprofessional Conduct & Errors and To-Point-Out Counsel's Incompetence." (DCD Doc. 41). This memorandum alleged that Evans counsel had not involved Evans in decisions regarding his defense, had not consulted with Evans so that he could provide exonerating evidence in response to allegations in the case or utilized exonerating information that Evans provided, and had not taken appropriate action warranted by the evidence such as requesting a Franks hearing. (District Court Docket, Doc. 41).

On April 22, 2015, the district court received a pro se request for a writ of mandamus from Evans to require his counsel to allow him access to evidence in his case. (District Court Docket, Doc. 42). Evans signed this document under oath on April 19, 2015, and stated that his counsel had still not provided sufficient access for Evans to review all of the evidence on CD or DVD and thereby prevented Evans from meaningfully and adequately participating in his defense. (Id.)

Mr. Evans submitted another pro se document which he framed as a "Complaint" against attorneys and staff in the Federal Public Defender's office which on May 18, 2015. (District Court Docket, Doc. 46). This submission, signed again under oath, set forth Evans' grievances about his counsel not allowing him access to most of the evidence in the case, failing to inform or involve Evans in decisions or actions taken in his case, and failing to obtain or follow up on exculpatory evidence that Evans provided to his counsel. (Id.) Many of the allegations were repeated or expounded on additional memoranda that the district court received from Evans on May 19 and 21, 2015. (Distrcit

Court Docket, Doc. 47-48).

The district court did not address any of Mr. Evans' at least twelve pro se correspondences and pleadings which he sent after the motions hearing from mid-March until June 2, 2015. On June 3, 2015, Evans sent a letter to Judge Montgomery stating, "Please acknowledge receopt of any/or all documents I've sent you, Please, thank you." (App. 69A). The district court received and docketed this letter on June 8, 2015. (Id.). Judge Montgomery sent a response letter dated June 8, 2015 stating, "I have received a number of documents from you. They are all being held in a file in my chambers. We will discuss the substance and relevance of those submissions when you are in court for your trial next week." (App. 71A).

On June 9, 2015, Evans sent a letter to Judge Montgomery stating that his counsel had just informed him on June 8 that trial was scheduled on June 15, and that he still had not been given an opportunity to see evidence in his case. (App. 72A). The district court received this letter on June 11, 2015. (Id).

At the pretrial conference on June 12, 2015, there was a brief mention of Evans' communications to the district court towards the end of the hearing. (App. 19A-21A). The prosecutor actually raised the issue, noting that there were documents filed under seal but a copy of one letter was served on his office, in which Evans stated that he had not heard about the trial date and had not reviewed evidence in the case. (App. 19A:15-21). The prosecutor suggested making a record of whether Evans was happy or if he was

asking for a continuance. (App. 19A:22-25).

Judge Montgomery noted that she had "received a number of communications from Mr. Evans" and stated, "You are ready to proceed to trial on Monday, I take it though." (App. 20A:1-2, 10-11). Mr. Evans responded, "I've been wanting to do a speedy trial, but those issues are still those issues. I have still, in my opinion, not seen all of the evidence in my case." (Id. lines:13-16). Evans stated that he had not seen pictures and video from a Motel 6 which had been referenced earlier in the hearing, and "It's a lot of stuff that I have not seen and heard in my case." (Id. Lines 17-22). Judge Montgomery responded to Evans by confirming that his letters had been filed, and requested that he be able to view the government's exhibit book after the hearing. (App. 21A:14-17). The prosecutor sought and obtained the judge's permission to remain in the courtroom as Evans reviewed the exhibit book. (Id. lines 21-24).

The district court made no inquiry or attempt to determine all of the evidence relevant to the case that Evans had not been able to see, and whether that evidence was necessary for Evans to be adequately informed about his case or meaningfully participate in his defense. The district court made no inquiry or attempt to determine whether Evans had an opportunity for sufficient communication with his counsel to adequately participate in his defense. The district court made no inquiry or attempt to determine whether Evans continued to believe that his counsel was not performing work that was necessary for his defense, or address those issues. The district court made no attempt to

inquire into Evans' extensive and repeated claims that he was not receiving effective assistance of counsel. The district court made no attempt to determine whether Evans had sufficient information about his case, sufficient communication with his counsel or a sufficient relationship with his counsel so that the district court could proceed to trial without violating Evans' constitutional rights.

Prior to the beginning of trial on June 15, 2015, Evans' counsel informed the district court that the jail staff did not return Evans' legal paperwork with him after the court hearing on June 12, and he was therefore unable to review his materials to prepare for trial. (App. 29A). Mr. Evans than personally addressed the district court, "I just want to restate for the record like I told you Friday, I have not seen all of the evidence in my case and so I just wanted to put that on record, because that's a violation of my due process rights." (Id. lines 4:5-8). He explained there were numerous CDs or DVDs he had not seen, and reiterated that he had been without legal materials he needed to prepare for trial. (App. 29A-30A). Judge Montgomery requested that the Marshal make sure Evans' materials were available, stated she had "done the best I can under the circumstances to make sure that you have access to that material, and proceeded to trial. (App. 30A-31A). Judge Montgomery did not make any further efforts to determine whether Evans' had an opportunity to review evidence critical to his case or had constitutionally adequate communications with his counsel.

D. Preclusion of Petitioner's Testimony.

Mr. Evans took the stand to testify in his own defense. (App. 33A). At the outset of his testimony, Evans stated that he was being "railroaded" by his attorney and defense investigator, that they had not shown him evidence in his case, that he had written to the court about the problem, and this was a violation of his rights. (App. 34A-35A; 8th Circuit Opinion, App. 8A-9A). Judge Montgomery excused the jury in the middle of Evans' speech, and had Evans escorted back to counsel table. (Id.)

Evans' counsel moved for a mistrial based on the incident. (App. 37A-40A). Judge Montgomery asked Evans if he returned to the witness stand, whether he would "respond to questions or answers" or "continue to tell the jury your complaints about the criminal justice process and the people involved." (App. 41A:7-12). Evans responded, "I could do both, Your Honor, to be honest. I don't think that I would be able to present my side without actually doing both." (Id. lines 13-15). Judge Montgomery asked again if "you would allow Mr. Becker to ask you questions and just respond to those questions without going beyond that so that I can rule on objections and those sorts of things." (Id. lines 17-20). Evans responded, "No, ma'am, I would not be able to present my testimony in that fashion." (Id. lines 22-23).

Judge Montgomery denied the motion for a mistrial and further ruled that she would not allow Mr. Evans to testify. (App. 42A-43A). Evans personally objected to the judge's ruling, explaining how he had written to the judge many times explaining his

issues with the process, including his attorney not investigating necessary issues, his being denied access to evidence, failure to address discrepancies in the evidence at the motions hearing or at trial. (App. 43A-45A). Evans reiterated that he had limited education and intellectual ability, as he had stated in his writings, and therefore would have difficulty articulated his issues in legal language. (App. 43A). Judge Montgomery cut off Evans before he could continue his explanation as to why he believed the denial of his due process was relevant to his testimony, specifically stating, "So I'm going to cut you off at this point." (App. 45A).

Evans again tried to address the denial of his due process rights, but the judge again cut him off, reiterated that he would not be allowed to testify, and ruled that for the remainder of the trial, Evans would sit at a table other than counsel table next to two deputy Marshals who would remove him from the courtroom if he became obstreperous or stood or moved. (App. 46A). The district court did not make any attempt to ascertain why Evans believed his testimony about poor representation was relevant to the case, or provide any guidance as to what subjects of testimony would be permissible and inquire whether those subjects would be acceptable to Evans.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an important opportunity for the Court to address the critical right of an accused to testify in his or her own defense, and the necessity for a trial court adequately inquire into an accused's substantial complaints about the adequacy of legal,

representation. These issues go to the heart of the constitutional guarantees of due process in a criminal trial and to the effective assistance of counsel.

I. A TRIAL COURT MUST NOT SUMMARILY PROHIBIT AN ACCUSED FROM TESTIFYING IN HIS OWN DEFENSE IN A CRIMINAL TRIAL MERELY IN THE ABSENCE OF A COMPELLING NECESSITY.

This Court has made clear that "it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." Rock v. Arkansas, 483 U.S. 44, 49, 107 S.Ct. 2704 (1987). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" Id. 483 U.S. at 51 (quoting Faretta v. California, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). "The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony...." Id. (citing In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499 (1948), and Ferguson v. Georgia, 365 U.S. 570, 602, 81 S.Ct. 756 (1961) (Clark, J., concurring) (noting that the Fourteenth Amendment secures the "right of a criminal defendant to choose between silence and testifying in his own behalf").

The right to testify is "also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his

favor'...." Rock, 483 U.S. At 52. "Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense' . . . is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself." Id. (quoting United States v. Valenzuela–Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440 (1982)). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In Harris v. New York, 401 U.S. 222, [225], 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the Court stated: 'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.' " Rock, 483 U.S. at 52–53.

The instant case presents an opportunity for the Court to define the parameters or standards must be met before an accused can forfeit his or her fundamental constitutional right to testify. The 8th Circuit majority held that the district court acted properly in barring Mr. Evans from testifying because he did not testify to any subject matter that was relevant during the brief time before the district court cut off his testimony, the complaints that he continued to express to the court were not relevant, and his refusal to agree to follow the court's rules was sufficient to forfeit his right to testify. (App. 10A-12A). The dissenting opinion concluded, "Without an inquiry into those complaints and a more fulsome exploration into the probative value of Evans's planned testimony, the record is insufficient to warrant excluding his testimony altogether." (App. 16A). The

dissent articulates a more appropriate standard for the drastic move of barring a defendant's testimony which this Court should consider.

The Ninth Circuit has applied a more stringent standard for barring an accused's testimony, holding that a district court violated the accused's constitutional rights by not allowing him to testify at a pretrial competency hearing based on far more disruptive behavior than in the instant case where the judge failed to warn the accused that his disruptive behavior would lead to the loss of his right to testify. United States v. Gillenwater, 717 F.3d 1070, 1080-83 (9th Cir. 2013) In Gillenwater, the accused interrupted his attorney while his attorney was addressing the court, called his attorney a criminal, continued to interrupt after the judge told him to stop, used expletives, and questioned the judge's legitimacy. Id. 1075. The marshals escorted the accused out of the courtroom, and the judge then issued her ruling even though the defense attorney informed her that his client wanted to testify. Id.

In holding that the defendant had to first be warned that he would not be allowed to testify if he continued to be disruptive, Gillenwater applied Supreme Court case law interpreting the constitutional right to be present at trial which held that a defendant could only forfeit that right if, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Id. 1082 (quoting Illinois v. Allen, 397 U.S. 337,

343, 90 S.Ct. 1057 (1970)). It is only reasonable to apply the same standards for the critical right of testifying as the right to be present at trial. The standards for exclusion from trial under Allen are high. The defendant in Allen, while representing himself, questioned a juror at great length, the argued with the judge "in a most abusive and disrespectful manner," continued to talk after the judge asked appointed counsel to take over, told the judge he was "going to be a corpse," tore his attorney's file and threw the papers on the floor, and after the judge warned him of removal, continued to argue and speak abusively to the judge. Allen, 397 U.S. 339-340. The judge allowed the defendant back into the courtroom several more times where he continued to be abusive and was removed, and then finally gave assurances of proper conduct and was allowed to be present for the remainder of trial. Id. 340-341. Allen applied the following standard: "we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Id. at 343.

Mr. Evans did not engage in a level of disruption comparable to the defendants in Gillenwater and Allen. He did not yell, did not call anyone names, did not threaten anyone, was not abusive or disrespectful, and did not interrupt the judge or keep speaking when told to stop. Although the 8th Circuit cited Gillenwater and Allen in its opinion,

(App. 11A, 12A) it nevertheless applied a lower and less defined standard for barring an accused's testimony. Rather than engage in behavior that disrupted the court process, Mr. Evans merely attempted to testify as to a subject that the district court deemed irrelevant and maintained his right to testify about that subject matter when further questioned by the district court. The 8th Circuit clearly applied a lower standard than established in Allen where there is was no indication that Evans "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Allen, 397 U.S. at 343.

The 8th Circuit majority opinion cited other cases addressing grounds for barring a defendant from the courtroom which also applied a higher standard. One of those cases was United States v. Ives, 504 F.2d 935, 941–42 (9th Cir.1974), vacated, 421 U.S. 944, 95 S.Ct. 1671 (1975), reinstated in relevant part, 547 F.2d 1100 (9th Cir.1976)). In Ives, the defendant's continuously disruptive behavior caused a mistrial, and during the second trial he interrupted voir dire with his own statement, interrupted his defense counsel's opening statement with an obscenity, struck his counsel in the face during a recess, and was then given a chance to testify but refused to sit in the witness chair and refused to take the oath - both of which the judge allowed but then repeatedly refused to answer the judge's questions about where he wanted to sit to testify. Id., 504 F.2d at 942-44. The judge later gave Ives another chance to testify but Ives again refused to take the witness stand, sat "at the defense table with his feet on an adjoining chair, began pursuing the

same argument about where he was to sit to testify." Id. at 944. The judge in Ives gave that defendant far more leeway, accommodation, and opportunity to testify than Judge Montgomery's quick and intolerant response to Mr. Evans who had not been disruptive, properly took the oath and the witness stand, and was prepared to testify to issues in the case.

In another case that the 8th Circuit majority opinion cited, United States v. Nunez, 877 F.2d 1475, 1476-77 (10th Cir. 1989), the defendant interrupted a witness' testimony calling her a liar on the first day, spoke in a loud voice and gestured with his hands while a witness was testifying the second day and removed from the courtroom, and then on the fourth day moments after promising to behave, the defendant interrupted the judge and was removed from court for the remainder of trial. The defendant in Nunez responded to be being removed by saying he did not want to be part of a "burlesque" or "charade" and "here tehreafter did not indicated any desire to return or testify." Id. at 1478. Although the appeal in Nunez identified the constitutional issues as the Sixth Amendment rights to confront witnesses and to testify in his own behalf, there was no indication that Nunez planned to testify if allowed back into the courtroom. Id. at 1477. Mr. Evans' conduct did not come close to meeting the level of disruption in Nunez as he did not engage in any actions prior to his attempted testimony that disrupted the court proceedings or interfered in any way with the presentation of the case. He merely sought to provide testimony that he believed was important.

The Court should review the 8th Circuit decision in this case because it sets a dangerously low standard for denying an accused his or her right to testify, and materially differs from the standards applied in other circuits and by this Court in comparable situations.

II. A TRIAL COURT MUST INQUIRE INTO AN ACCUSED'S COMPLAINTS ABOUT CONSTITUTIONALLY INADEQUATE REPRESENTATION BY COUNSEL.

In a case where a defendant raises complaints during the course of trial court proceedings about representation by counsel that, if true, would constitute a denial of the 6th Amendment Right to effective assistance of counsel or the 5th or 14th Amendment Rights to Due Process, the trial court must be required to conduct a sufficient inquiry to ensure that the defendant's constitutional rights are not violated. The district court failed in its obligation to ensure that Mr. Evans had effective assistance of counsel when it ignored his written complaints about inadequate counsel and requests for the district court's intervention for three months, and then only addressed the issue in the most cursory fashion. "[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent that defendant even though he is without funds."

Prior cases established that "when a defendant raises a seemingly substantial complaint about counsel, the judge has an obligation to inquire thoroughly" into the

alleged problem." Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991); United States v. Rodriguez, 612 F.3d 1049, 1053 (8th Cir. 2010); United States v. Jones, 662 F.3d 1018, 1025-26 (8th Cir. 2011). In the context of requests for substitution of counsel based on inadequacy of representation,

> [A]ll Circuits agree, courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer. See, e.g. United States v. Iles, 906 F.2d 1122, 1130 (C.A.6 1990) ("It is hornbook law that '[w]hen an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for defendant's dissatisfaction ...' " (quoting 2 W. LaFave & J. Israel, Criminal Procedure § 11.4, p. 36 (1984))). Moreover, an on-the-record inquiry into the defendant's allegations "permit[s] meaningful appellate review" of a trial court's exercise of discretion. United States v. Taylor, 487 U.S. 326, 336–337, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988).

Martel v. Clair, 565 U.S. 648, 664, 132 S. Ct. 1276, 1288 (2012). See also United States v. Gonzalez, 113 F.3d 1026, 1028 (9th Cir. 1997)("Before the district court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a 'sufficient basis for reaching an informed decision.'" [United States v.] D'Amore, 56 F.3d [1202,] at 1205 (9th Cir. 1995)(quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir.1986))").

The 8th Circuit opinion in the instant case determined that because Mr. Evans did not explicitly request new counsel, it was not error in treating Evans's letters as complaints about his lack of access to the evidence rather than as motions for the appointment of new counsel." (App. 5A-6A). This decision fails to recognize any

obligation on the part of a trial court to address a defendant's substantial complaints about counsel in the absence of a specific request for new counsel. Such a holding fails to meet a trial court's obligation to protect a defendant's right to effective assistance of counsel and the due process rights dependent on effective counsel. Specifically in this case, there was never any meaningful inquiry into whether Evans was ever able to sufficiently review the material evidence in his case before trial, or whether his counsel met his obligation to adequately investigate the case. The lower courts abdicated their duty to protect Mr. Evans constitutional rights necessary for a fair trial or to even be able to make an informed decision about whether to proceed to trial or plead guilty.

The Court should accept review of this case in order to consider and establish the obligation of a trial court to meaningfully inquire into a defendant's substantial complaints about his counsel's representation, regardless of whether the defendant explicitly requests a new attorney. Review is necessary to ensure that the rights to adequate counsel and a fair trial are protected when a defendant makes specific substantial complaints that implicate the denial of those rights.

CONCLUSION

Petitioner Malcolm Roy Evans respectfully prays that a writ of certiorari issue.

Respectfully submitted,

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