No. _____

In The Supreme Court of the United States

Brent Lanier Lynch, Petitioner

vs.

Eddie Miles, Warden, Stillwater Correctional Facility, Minnesota, Respondent.

On Petition For Writ of Certiorari To The Eighth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

Zachary A. Longsdorf, I.D. No.: 390021
Counsel of Record
5854 Blackshire Path, Suite 3
Inver Grove Heights, MN 55076
Telephone: (651) 788-0876
Facsimile: (651) 223-5790
zach@longsdorflaw.com

QUESTIONS PRESENTED

1. In deciding whether to issue a certificate of appealability under 28 U.S.C. § 2253, may a federal court find that "reasonable jurists would not disagree" about the denial of relief on procedural grounds where other courts have resolved the same issue, on similar facts, in a manner favorable to habeas petitioner's position?

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The Eighth Circuit Judgment in *Lynch v. Miles*, No. 18-2190 denying the request for a certificate of appealability (Appendix A) is unreported. The Order of the United States District Court, *Lynch v. Miles*, 17-1917(DWF/TNL) (March 19, 2018), appears at Appendix B. The Report and Recommendation of the Magistrate Judge appears at Appendix C. Mr. Lynch had an appeal to the Minnesota Court of Appeals, *Lynch v. State*, A16-0801 (Minn.App. March 20, 2017). This opinion appears at Appendix D. Mr. Lynch petitioned the Minnesota Supreme Court for review. This was denied by an Order dated May 30, 2017, which appears at Appendix E.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on November 27, 2018. (Appendix A). Petitioner filed a Petition for Panel Rehearing on December 10, 2018. That Petition was denied by an Order dated January 9, 2019. (Appendix F). Petitioner invokes this Court's jurisdiction on the basis of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The questions presented implicate the following provisions of the United States Constitution:

AMEND. XIV, No state shall … deprive any person of life, liberty, or property without due process of law.

AMEND. V, No person shall be … deprived of life, liberty, or property without the due process of law.

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

The questions further implicate the following statutory provisions:

28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from— (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254, which is reproduced verbatim in the appendix to this section. (Appendix G).

STATEMENT OF THE CASE

Petitioner Brent Lynch seeks a writ of certiorari to the Eighth Circuit from the denial of a certificate of appealability in federal habeas corpus review. Federal court jurisdiction derives from 28 U.S.C. § 2254. The Minnesota Court of Appeals affirmed Mr. Lynch's conviction on appeal. See Appendix D.

Mr. Lynch's habeas petition was denied by the United States District Court for the District of Minnesota. Appendix B. The District Court's Order adopted the Magistrate Judge's Report and Recommendation (Appendix C) and denied a Certificate of Appealability under 28 U.S.C. § 2253 as to all claims. Mr. Lynch's timely filed Application for Certificate of Appealability was denied by the Eighth Circuit Court of Appeals on November 27, 2018. (Appendix A). A timely filed petition for rehearing was denied on January 9, 2019.

On March 3, 2012, at 6:10 a.m., a 911 call was made that Mr. Lynch's friend, CL, needed an ambulance. CL was found deceased in Mr. Lynch's residence. The neighbor who called 911 told police that Mr. Lynch stated that CL was "really drunk" and that he brought her upstairs. When he tried to throw her onto the bed, she, instead, landed on the floor, striking her head. Initially, Mr. Lynch was charged with unintentional murder for causing CL's death during the drunken toss.

On March 6, 2012, Mr. Lynch made his first appearance. 3-6-12 Transcript. It was determined that he qualified for an attorney from the Ramsey County Public Defender's Office. Id. P. 2. Attorney John Riemer was assigned to the case. Id. On April 13, 2012, Mr. Lynch retained private counsel by making full payment of $7,500.00. See Postconviction Exhibit 1 - April 5, 2012 Retainer Agreement, Docket Id. 5.

On June 4, 2012, after retaining counsel, Mr. Lynch intended to plead guilty to second-degree unintentional murder, going so far as preparing a plea petition. 6-4-12 Transcript. P. 9. However, before Mr. Lynch was able to enter that plea, the

prosecution served him with an amended complaint which added a count of second-degree intentional murder. Id. P. 4. The amended complaint had, apparently, been drafted sometime prior to the hearing though it was not served or filed prior to the hearing. Id. P. 8-9.

Later that same day, Mr. Lynch's retained counsel provided a new retainer agreement and demanded payment of an additional $20,000.00. Counsel agreed that the already paid amount of $7,500.00 would be credited toward the $27,500.00 fee and that the remainder of the fee was due no later than September 1, 2012. See Postconviction Exhibit 2 - Amended Retainer Agreement, Docket Id. 5. Thereafter, counsel demanded that Mr. Lynch pay $10,000.00 of the fee before the due date. When Mr. Lynch was unable to make the demanded payment, counsel threatened to withdraw from the case. Mr. Lynch next appeared in court with his retained counsel on August 6, 2012 for a status conference. One of the issues addressed at that hearing was the prosecution's request that Mr. Lynch be ordered to provide a writing sample for handwriting analysis. See Postconviction Exhibit 3 - 8-6-12 Transcript. P. 4. The motion for handwriting analysis was made because the prosecution was provided an undated, unsigned, and un-mailed draft of a letter was turned over to the prosecution by a Ramsey County Public Defender and the prosecution intended to use the letter as evidence against Mr. Lynch at trial. See Postconviction Exhibit 4 - Disputed Draft, Docket Id. 5. The Court ordered that Mr. Lynch provide a handwriting sample for analysis. 8-6-12 Tr. P. 5.

The disputed draft was allegedly obtained by Petitioner's cellmate, Jason Lee Zimmerman, in the Ramsey County Jail on an unspecified date in April, 2012. Postconviction Exhibit 5 - State's Memorandum of Law in Support of Admission of Jail Letter, Docket Id. 5. No specific date was provided other than "one week in April 2012." The cellmate allegedly said, but never testified under oath, that Mr. Lynch had instructed him to send the disputed draft to Mr. Lynch's brother, Aaryn Lynch. Id - Exhibit 5. The cellmate then provided the disputed draft to his attorney, Christopher Zipko. Mr. Zipko was representing the cellmate through the Ramsey County Public Defender's Office. See Postconviction Exhibit 6 – MNCIS Printout, Docket Id. 5. Mr. Zipko turned the disputed draft over to the prosecution. Exhibit 5 - Memo in Support of Admission P. 2.

During the August 6, 2012 hearing, Mr. Lynch's retained counsel informed the Court that if the disputed draft was admitted at trial, he believed that he would not be able to continue to represent Mr. Lynch. Counsel specifically stated:

> Your honor, one issue. This goes back to the reason why the State is asking for a handwriting expert. There is a letter that is purportedly from Mr. Lynch that was never mailed. It was either taken from his papers in the jail or somebody intercepted it. Somehow it found its way to us, and it indicated various things **that if this letter is admitted into evidence or the substance is testified to, I believe I could not continue to be Mr. Lynch's counsel. I think I would be diminished in the eyes of the jury. I think he and I would have a conflict as well.** So I think that I would like to offer the court is I would like to do some research on whether maybe both sides should do some research on whether this letter would be admitted or not admitted and, if admitted, could it be sanitized to the extent that I could still remain Mr. Lynch's lawyer because I think that's the best for everyone concerned versus starting over.

8-6-12 Transcript. P. 7-8 (emphasis added). Unlike Mr. Lynch's retained counsel, who felt the conflict would be that he would be diminished in the eyes of the jury, the prosecution never alleged that the draft would cause a potential conflict of interest for Mr. Wolf, stating: "Your honor, I think that's probably a wise approach. You know it is possible that the letter could be sanitized and the reference to Mr. Wolf or Mr. Lynch's lawyer can be taken out. We could probably do a simultaneous brief to the court or a memo to the court." Id. P. 8.

The Court agreed and directed simultaneous submissions regarding the admissibility and authenticity of the draft. Id. P. 9. The Court directed that the submissions contain the following information:

> Please address all contingencies that you think could arise with the letter. I know, **Mr. Wolf, you're going to tell me why you think it should not be admitted, Mr. Vlieger [the prosecution] is going to tell me why he thinks it should be admitted, then permutations of if it can be sanitized and if there is any unfair prejudice to Mr. Lynch**.

Id. P. 9 (emphasis added). The court then closed that portion of the discussion stating, "Alright. Very good. All right. Well, I will wait until I see the arguments that you present in your memos." Id. P. 11. Finally, in addressing how to handle the disputed draft, the Court then stated: "Well, yeah, I think that we should probably get another hearing date, I think that's well advised, before September 4th. Does that make sense, to deal with this preliminary issue of the letter?" Id. P. 14. When the parties agreed, the hearing regarding the preliminary issues of the disputed draft was set to take place on August 15, 2012, with the Court stating: "All

right. We'll see you the 15th then at - - You know what, let's make it ten because I have other pretrials." Id. P. 14.

Four (4) days after the August 6, 2012 hearing, the prosecution filed a memorandum setting forth its position on the disputed draft. Postconviction Exhibit 5 - State's Memorandum in Support of Admission of Jail Letter, Docket Id. 5. In addressing the potential for a conflict of interest, the prosecution stated that "[i]f needed, the State will agree not to call Mr. Wolf as a witness should his testimony otherwise be admissible as impeachment evidence." Id. at 11. It also went on to state:

> At this point, the State does not volunteer to redact portions of the letter relating to defendant's counsel, as there is no direct reference to Mr. Wolf, only the defendant's lawyer. However, the State does concede that a reasonable jury could assume that the references are to Mr. Wolf. If the court requires redaction of the letter predicate to its admissibility, the State will do so. As noted above, there are three references to defendant's lawyer in the letter. All such references can be removed without materially altering the substance of the letter.

Id. at 11-12.

No submission regarding the admissibility and use of the disputed draft was made on Mr. Lynch's behalf. Instead, on August 13, 2012, two (2) days prior to the hearing to determine the admissibility and use of the disputed draft, Mr. Lynch's attorney filed a notice of withdrawal. See Postconviction Exhibit 7 - Notice of withdrawal, Docket Id. 5. Mr. Lynch became aware of this notice of withdrawal the morning of the court appearance and went into the hearing believing that it was a hearing to determine if the disputed draft was admissible and to determine what

could be done to eliminate any potential conflict and prejudice to him if it was admissible.

On August 15, 2012, rather than address this issue, the Court addressed only retained counsel's notice of withdrawal. Retained counsel was present in court, but appeared represented by his own counsel, Arthur Martinez, who noted his appearance on the record stating: "Your honor, for the record, Arthur Martinez on behalf of Mr. Wolf who is sitting in the courtroom." 8-15-12 Transcript. P. 2. Mr. Lynch was unrepresented at that hearing and stood at a podium in the courtroom on his own while Mr. Martinez and the prosecutor stood at the other podium. Throughout the hearing, Mr. Wolf remained seated in the gallery portion of the courtroom.

The Court opening the hearing by stating:

> All right, and Mr. Lynch is present this morning. I have a motion in front of me. It's a motion to withdraw as counsel, notice of withdrawal. A conflict has arisen between, Mr. Lynch and Mr. Wolf. And pursuant to the rules of professional responsibility and seeking advice of retained counsel, Mr. Wolf believes he has an ethical duty to withdraw from the case. He's asking the Court to appoint legal counsel from the Ramsey County Public Defender's Office to represent Mr. Lynch at this time as soon as possible and also to protect his legal interests.

Id. P. 2. When allowed to speak, Mr. Lynch expressed confusion and showed a lack of understanding of the motion, stating:

> I don't really understand what's going on, why my attorney is withdrawing when I retained him legally. I don't understand what this is – why this is happening. No one really explained to me why. From my understanding, the contract we wrote up, he is legally my attorney which I retained.

Id. P. 3. Without any inquiry or any determination of whether the disputed draft was admissible, which was the basis for the purported conflict, the Court discharged Mr. Lynch's counsel, stating:

> All right. Well he sees a conflict in that representation that could impair your case, and he wants to make sure that your legal interests are protected. All right. So I will grant his motion and discharge him from the case. What I am going to do is send you back over the Law Enforcement Center which is the Ramsey County Jail, and you will meet with the Public Defender's Office and they'll interview you, see if you qualify for their services. And if you do, they will take up your representation.

Id. P. 3-4.

Following this, Mr. Lynch continued to protest the discharge of his counsel, stating, "I had placed a retainer fee of $7,500, which I feel like should be refunded." Id. P. 4. Mr. Lynch then inquired of the Court,

> The hearing that we had last week was to discuss an issue with some sort of letter that you guys had received. I just want to know with this hearing, was this hearing to do with that issue also or was this just – just for my attorney to withdraw. I mean --.

Id. The Court responded:

> We're not going to deal with the letter today. Last we met, we-the State asked for a handwriting sample from you, all right, to see if your handwriting matched the handwriting in the letter. I did grant that motion and ordered you to give a handwriting sample to the State, okay. That's all that I have dealt with regarding to your letter. At another hearing date, I will take up whether the letter that you wrote allegedly is admissible at trial, okay.

Id. P. 6-7. Mr. Lynch then stated "I put a lot of time into this attorney, put a lot of money into this attorney," before the hearing was concluded. Id. P. 6-7.

Mr. Lynch was sent to the LEC to apply for a Ramsey County Public Defender. With only a little over a month to go before trial, on August 15, 2012, Mr. Lynch was again appointed a Ramsey County Public Defender. 8-15-12 Tr. P. 2. Connie Iverson from that office was assigned to his case the following day. On September 7, 2012, the prosecution sent to Mr. Lynch, through counsel, copies of the summons it sent to grand jurors as a means of showing its intent to seek an indictment. Postconviction Exhibit 9 - September 7, 2012 Email with Attachments, Docket Id. 5.

After Ms. Iverson took over Mr. Lynch's case, on September 10, 2012, Mr. Lynch attempted to plead guilty to unintentional second-degree murder in exchange for a sentence of 330 months. 9-10-12 Tr. P. 2. In the process of doing so, Mr. Lynch told the Court that while he did intentionally push CL and later throw her onto the bed, he did not intend to kill her. 9-10-12 Tr. P. 23-38. Mr. Lynch specifically stated, "I intentionally pushed her. I didn't intentionally kill her. I did not want to kill her. It was completely unintentional." 9-10-12 Tr. P. 39. The Court rejected the plea, stating it did not find a sufficient factual basis for the plea. 9-10-12 Tr. P. 40-42.

On September 12, 2012, the prosecution filed notice of intent to present the case to a grand jury. Postconviction Exhibit 10 - September 12, 2012 email, Docket Id. 5. It also communicated to Mr. Lynch its final offer: an *Alford* plea to second-degree intentional murder with a sentence of 386 months or a straight plea to second-degree intentional murder with sentencing up to the court, which could

include requests for upward or downward departures. On September 13, 2012, Mr. Lynch provided to the prosecution a plea petition to plead guilty to second-degree intentional murder. Postconviction Exhibit 11 - September 13, 2013 email, Docket Id. 5. That same day, the prosecution sent a letter to the Court urging it to accept Mr. Lynch's *Alford* plea. Postconviction Exhibit 12 - September 13, 2012 Letter, Docket Id. 5. On September 14, 2012, the Court accepted Mr. Lynch's *Alford* plea.

Subsequent to this plea, in a letter to the Court, dated October 21, 2012, Mr. Lynch made a pro se motion to withdraw his plea. Postconviction Exhibit 13 - October 21, 2012 Motion to Withdraw Guilty Plea, Docket Id. 5. In his motion, Mr. Lynch argued that he had been pressured into taking a plea without fully understanding the consequences of doing so, and without having seen the final autopsy report. He also argued that after he tried to enter a plea to the unintentional murder count, which was unsuccessful, he was told that he would be facing life in prison if he did not accept what was presented to him as a final plea offer.

At a hearing on November 1, 2012, the Court denied Mr. Lynch's motion to withdraw his guilty plea, holding that the record failed to support Mr. Lynch's grounds for withdrawing his plea. 11-11-12 Tr. P. 23-34. The Court went on to sentence Mr. Lynch to 386 months and ordered that he pay restitution

Mr. Lynch then appealed the denial of his motion to withdraw his guilty plea. In his counseled brief, Mr. Lynch argued that the district court had erred in denying his motion to withdraw his plea and that it had erred in ordering payment of

restitution that was not a part of his agreement. In his pro se supplemental brief, Mr. Lynch argued that he should have been allowed to enter a guilty plea to the original complaint, which charged only unintentional murder, that the district court applied the incorrect legal standard in analyzing his retained counsel's motion to withdraw, and that he received the ineffective assistance of counsel. The Minnesota Court of Appeals affirmed his conviction in an unpublished opinion dated November 25, 2013.

On December 20, 2013, Mr. Lynch petitioned the Minnesota Supreme Court for further review, asking for review of the denial of his plea withdrawal, the order that he pay restitution, his claim that he was denied the benefit of his plea bargain, and arguing that he was denied the right to counsel and received ineffective assistance of counsel. The Minnesota Supreme Court denied the petition for further review on January 29, 2014. Mr. Lynch then petitioned the United States Supreme Court for a writ of certiorari. In his petition he argued that he was denied his right to the assistance of counsel when his choice of counsel was allowed to withdraw during a hearing in which he was not represented by substitute counsel and that he was denied this right to the counsel of his choice when counsel was discharged based on an alleged, but not substantiated, conflict of interest. This petition was denied on October 6, 2014. Appeal of that denial remained pending until the Minnesota Supreme Court denied review on May 31, 2017.

Mr. Lynch then filed for habeas relief on June 6, 2017, making claims of ineffective assistance of appellate counsel for failure to raise claims related to the

discharge of his retained counsel based on a purported but never substantiated conflict of interest and for failure to raise a conflict of interest claim, he also raised separate claims of denial of his right to counsel at a critical stage of a criminal proceeding when his retained counsel was discharged at a hearing on August 15, 2012 where Mr. Lynch was not represented by counsel, erroneous denial of his right to counsel of choice based on a purported but never substantiated conflict of interest, and denial of his right to conflict free counsel when he was appointed counsel with an actual conflict of interest after his retained counsel was erroneously discharged.

Magistrate Judge Leung issued a Report and Recommendation recommending that Mr. Lynch's be dismissed with prejudice, determining that his ineffective assistance of counsel claim was not exhausted and that his other claims were not exhausted and were procedurally barred. Mr. Lynch objected to the Report and Recommendation, arguing that his ineffective assistance of counsel claim had been raised at all levels of the state courts and that he could show cause and prejudice in the form of ineffective assistance of appellate counsel as a basis to overcome any procedural default of his underlying claims. By an Order dated January 19, 2018, the District affirmed the Report and Recommended and issued an Order dismissing Mr. Lynch's petition and denying him a Certificate of Appealability.

REASONS FOR GRANTING THIS PETITION

I. The Eighth Circuit applied a heightened standard in denying a COA on Mr. Lynch's claims.

Mr. Lynch was required to secure a certificate of appealability as a prerequisite to his appeal of the District Court's dismissal of his habeas petition. See 28 U.S.C. § 2253(c)(1)(B). Under AEDPA, an application for a COA must demonstrate "a substantial showing of the denial of a constitutional right." Id. at (b)(2). A COA must issue if either: (1) "jurists of reason could disagree with the district court's resolution of his constitutional claims" or (2) "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. Where the petition has been denied for some procedural issue and the district court did not reach the merits in the petition, the COA should issue if the petitioner shows a valid claim of denial of constitutional rights and that jurists of reason would find it debatable whether the district court was correct in its procedural decision. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). A petitioner need not show "that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court has stated that, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

In reviewing the facts and circumstances of Mr. Lynch's case, the lower courts "pa[id] lipservice to the principles guiding issuance of a COA," *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), any actually held Mr. Lynch to a far more onerous standard. Specifically, the panel "sidestep[ped the threshold COA] process by first

deciding the merits of [Mr. Lynch's] appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," thereby "in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. at 336-37.

As this Court stressed in *Miller-El*, the threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Miller-El*, 537 U.S. at 337. Yet that is precisely what occurred in this matter. At the end of this flawed analysis of the merits of Mr. Lynch's claims, the district court conclusory denied a certificate of appealability. (Appendix B at P. 4); cf. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (noting the court of appeals failed to apply the proper AEDPA standard when it "conducted a de novo review" and then "declared, without further explanation," that the state court's contrary conclusion was unreasonable).

The lower courts impermissibly sidestepped the COA inquiry in this manner by denying relief because it viewed the merits of the claims that were just decided and substituted that for the correct analysis. The failure to apply the proper COA standard in this case is not an isolated error among the lower courts. This Court has twice corrected the Fifth Circuit's unduly restrictive approach to granting COAs. See *Tennard*, 542 U.S. at 283; *Miller-El*, 537 U.S. at 327. And recently, three Justices of this Court noted the "troubling" pattern of failing to apply the threshold COA standard required by this Court's precedent. *Jordan*, 135 S. Ct. at 2652 n.2

(2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari).

Because Mr. Lynch, as explained below, has shown that reasonable jurists have reached different outcomes in cases with similar facts, it is clear the lower courts failed to faithfully apply the correct COA standard and, in doing so, have denied Mr. Lynch a chance to have the merits of his claims addressed on appeal.

A. Mr. Lynch was denied his right to counsel of choice.

The right of a defendant who does not require appointed counsel to choose who will represent him is firmly established. See e.g. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Powell v. Alabama*, 287 U.S. 45, 53 (1932). The right to choice of counsel has been recognized as the root meaning of the Sixth Amendment right to the assistance of counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006). The right has been treated as so important that a violation is placed in the limited category of structural errors which results in automatic reversal of the conviction without the need to show prejudice. *Id.* The right to counsel itself is believed by many to be the most important right a defendant has because "it affects his ability to assert any other rights he may have." Walter V. Schaefer, *Federalism and State Constitutional Criminal Procedure*, 70 HARV. L. REV. 1, 8 1956).

The right to counsel of choice serves a number of important functions beyond merely ensuring an objectively fair trial by protecting all of the defendant's other rights. Among these, it serves to allow the defendant to present the defense he

wishes to mount. *United States v. Laura*, 607 F.2d 52, 56 (3rd Cir. 1979). The right to counsel of choice also serves to grant the defendant effective control over the defense as a means of respecting his individual dignity and free will. *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1975). Defending oneself against criminal prosecution is a traumatic and personal endeavor and since it is the defendant who will suffer the consequences if the defense fails, he should be allowed to choose his defense counsel.

The right to appointed counsel and the right to counsel of choice are not fungible rights. *See State v. Patterson*, 812 N.W.2d 106, 111 (Minn. 2012); quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 140 (2006) ("[T]he Sixth Amendment right to counsel of choice[ ] .... commands[ ] ... that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best. Further, the right stands on its own and does not "derive[ ] from the Sixth Amendment's purpose of ensuring a fair trial."). The right to appointed counsel stems of Fourteenth Amendment right to due process. *Gideon v. Wainwright*, 372 U.S. 335 (1965). That Mr. Lynch could still have appointed counsel does not mean that his right to counsel of choice was not violated and does not void that violation if it occurred.

When a defendant raises a claim that he was erroneously denied the right to counsel of choice, the rule governing the claim is *United States v. Gonzalez-Lopez*. *See Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008). The argument that a defendant's right to counsel of choice could not be violated as long as he ended up with different

counsel who performed effectively was specifically considered and rejected in *United States v. Gonzalez-Lopez*. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144-48 (2006). Therefore, by focusing on the fact that Mr. Lynch ended up with appointed counsel, and then concluding that his right to counsel was not violated, the Minnesota Court of Appeals applied the wrong law to Mr. Lynch's claim and reached a conclusion that is contrary to, or an unreasonable application of clearly established federal law by conflating the right to counsel with the right to counsel of choice.

Because Mr. Lynch has identified a specific constitutional right, with a specific case decided by this Court, and has raised serious questions about whether he was denied that right, a Certificate of Appealability should have issued. The fact that none did is evidence that the Eighth Circuit Court of Appeals has continued to apply a heightened standard to this analysis that precludes review of claims that should be allowed to proceed on appeal.

B. Mr. Lynch was denied the right to counsel at a critical stage.

The U.S. Constitution guarantees every defendant the right to an attorney at every critical stage of his criminal proceedings. U.S. CONST. amend. VI. A critical stage in a criminal proceeding is one in which the defendant's rights can be sacrificed or lost. *United States v. Wade*, 388 U.S. 218, 225 (1967). The critical inquiry in determining whether a stage is critical is whether "counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226. Mr. Lynch contends that the state court decision in this case is contrary to clearly established

federal law, because the August 15th hearing has all the hallmarks of a critical stage and should have been treated as such.

Particularly since the United States Supreme Court decision in *Gideon v. Wainwright*, that Court has determined that a number of portions of the criminal trial proceedings are critical stages. See e.g. *Hamilton v. Alabama*, 368 U.S. 52 (1961)(defendant entitled to counsel at arraignment); *Massiah v. United States*, 377 U.S. 201 (1964)(defendants entitled to counsel during interrogation after indictment); *Escobedo v. Illinois*, 378 U.S. 478 (1964)(defendant entitled to counsel during interrogation even if not indicted); *United States v. Wade*, 388 U.S. 218 (1967)(defendant entitled to counsel during pretrial lineup); *Coleman v. Alabama*, 399 U.S. 1 (1970)(defendant entitled to counsel during pretrial hearing during which probable cause was determined and bail set); *Mempa v. Rhay*, 389 U.S. 128 (1967)(defendant entitled to counsel at probation revocation hearing and at sentencing); *Powell v. Texas*, 492 U.S. 680 (1989)(defendant entitled to counsel during examination to determine future dangerousness); *Pennsylvania v. Finley*, 481 U.S. 551 (1987)(defendant entitled to counsel on first appeal of right); *Argersinger v. Hamlin*, 407 U.S. 25 (1972)(defendant entitled to counsel in misdemeanor prosecution if imprisonment is possible if convicted); *Missouri v. Frye*, 132 S.Ct. 1399 (2012)(plea bargaining is crucial stage).

The analysis for determining whether a stage is a critical stage focuses on whether the lack of an attorney at the hearing will negatively impact the defendant's ability to defend himself. See e.g. *United States v. Gouveia*, 467 U.S.

180, 189 (1984)(stating that a critical stage is one where the results might well settle the accused's fate and reduce the trial to a mere formality). Counsel is necessary in a critical stage because in a critical stage, the accused is "confronted, just as at trial, by the procedural system, or by his expert adversary, or both." *Id.* at 189 (quoting *United States v. Ash*, 413 U.S. 300, 310 (1973). That assistance is needed to aid the accused in meeting is adversary. *United States v. Ash*, 413 U.S. 300, 313 (1973).

The August 15th hearing has all the hallmarks of a critical stage during which a defendant must be entitled to have counsel present and advocating on his behalf. This is the case because of what is at stake for a defendant in a case where he is denied his choice of counsel and because the hearing clearly took place after the initiation of formal criminal proceedings. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

The case of *Bradley v. Henry*, from the Ninth Circuit Court of Appeals is instructive on Plaintiff's critical stage claim. In that case, Bradley was initially represented by attorneys Hutchinson and Montgomery. *Bradley v. Henry*, 413 F.3d 961, 962 (9th Cir. 2005). After the initiation of proceedings, the district court disqualified Montgomery due a conflict of interest. *Id.* Thereafter, attorney Miller joined Hutchinson in representing Bradley. *Id.* Approximately three (3) months later, Hutchinson and Miller were replaced by attorney Sacks, who was joined, approximately three (3) months later, by attorney Thistlewaite. *Id.* Then about 11

months later, Sacks and Thistlewaite were replaced by Steigerwalt, who was joined by Dunlevy about four (4) months after that. *Id.* at 962-64.

During an in-camera hearing at which Bradley was not present, the prosecuting attorney made allegations that Bradley's father was attempting to interfere with the case to cause a continuance. *Bradley v. Henry*, 413 F.3d 961, 962-63 (9th Cir. 2005). During that same hearing Dunlevy and Steigerwalt requested to be relieved as counsel due to conflicts of interest, including nonpayment. *Id.* Also present at the same hearing were two other attorneys, Andrian and Gallenson, who had been invited by the judge, who, it seemed, was aware that Dunlevy and Steigerwalt would request to be discharged. *Id.* The contents of the in-camera hearing were sealed by the district court judge, who then went on the record in the court room and accepted the motion of Dunlevy and Steigerwalt to be discharged. *Id.* During that hearing, the Court refused to hear from attorney Hutchinson, who had been re-retained to represent Bradley, who opposed the request of Dunlevy and Steigerwalt to withdraw. *Id.* The court then appointed Andrian and Gallenson to represented Bradley. *Id.*

Thereafter, Bradley moved the court to substitute attorney Jordan for Andrian and Gallenson due to a conflict between Andrian and Bradley. *Id.* The court also declined Jordan's suggestion that he be appointed associate counsel with Andrian. *Id.* at 964. Bradley went to trial with Andrian and Gallenson representing her and was found guilty. *Id.*

Bradley appealed to the state courts, arguing her initial counsel (Montgomery) had been improperly disqualified, that she was denied her right to counsel and to be present at a critical stage when at the in-camera hearing where Dunlevy and Steigerwalt moved to withdraw, and that she had been denied her right to counsel of choice when Jordan was not appointed to represent her. *Id.* The California state courts affirmed the convictions, holding that dismissal of Montgomery was proper, that even if it was error not to allow Bradley to be present at the in camera hearing, she was not prejudiced because she could not pay Dunlevy and Steigerwalt, that refusal to allow Hutchinson to be heard on Bradley's behalf regarding the withdrawal of Dunlevy and Steigerwalt was error, but it was harmless, and that it was reasonable to deny the motion to appoint Jordan or have him appear as co-counsel due to the delay it would cause in going to trial. *Id.*

In her habeas proceedings, Bradley argued that she was denied her right to due process, a fair trial, and her choice of counsel in violation of her Fifth, Sixth, and Fourteenth Amendment rights related to the in-camera conference and refusal to appoint Jordan. *Id.* The federal district court held that the in-camera conference was a critical stage, but that Bradley's presence would not have changed anything, so was not entitled to relief. *Id.*

On appeal, the Ninth Circuit Court of Appeals reversed, holding that the in-camera hearing where retained counsel's motion to withdraw and the appointment of substitute counsel was discussed was a critical stage at which Bradley was entitled to be present and represented and that the lack of her presence and ability

to be heard on the issue was structural error. *Id.* at 967-68. In reaching the conclusion that an in camera hearing where it was decided that retained counsel would be discharged and new counsel appointed was a critical stage, the Ninth Circuit Court cited to United States Supreme Court precedent in *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Rushen v. Spain*, 464 U.S. 114 (1983); *United States v. Gagnon*, 470 U.S. 522 (1985); and *Snyder v. Massachusetts*, 291 U.S. 97 (1934), as supporting the proposition that it was a critical stage. *Id.* at 965-67. That Court went on to note that a violation of this nature requires automatic reversal, citing to *Flanagain v. United States*, 465 U.S. 259, 268 (1984). *Id.*

In this case, it is undisputed, and the state has conceded, that Mr. Lynch was unrepresented by counsel at the August 15th hearing that resulted in his chosen and paid counsel being discharged. (See Respondent's Court of Appeals Brief P. 8, filed September 15, 2016). While the caption lists that Mr. Lynch was represented by Arthur Martinez at that hearing, this was not the case. Mr. Martinez clearly identified himself as representing Mr. Lynch's retained counsel. In that hearing, Mr. Lynch expressed lack of understanding of what was occurring and why the attorney he had hired and paid was withdrawing from his case during a hearing that Mr. Lynch expected would only deal with the admissibility of the disputed draft.

The authenticity and admissibility of the disputed draft was the driving factor in whether or not a conflict of interest existed. Specifically, counsel stated, "if this letter is admitted or the substance is testified to, I believe that I could not

continue to be Mr. Lynch's counsel. I think I would be diminished in the eyes of the jury. I think he and I would have a conflict." (8-15-12 T. 7-8). It is clear that the conflict at issue is predicated on the admissibility of the disputed draft. Despite this being the express purpose of the August 15 hearing, the determination never took place and the existence of a conflict of interest that resulted in the discharge of Mr. Lynch's choice of counsel was never verified. Because the August 15 hearing was set up for a contested hearing to determine the authenticity and admissibility of the letter that was the basis for there even being a conflict, that hearing was a critical stage to Mr. Lynch and that fact that reasonable jurists have reached that conclusion on similar facts in the case of *Bradley v. Henry*, 413 F.3d 961, 962-63 (9th Cir. 2005) is evidence that the Eighth Circuit Court of Appeals has continued to apply a heightened standard to this analysis.

C. Mr. Lynch was appointed counsel with a conflict of interest.

The Sixth Amendment right to counsel encompasses a "correlative right to representation that is free of conflict s of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). "This right 'is not limited to cases involving joint representation of co-defendants * * * but extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person'." *State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998) (quoting *United States v. Soto Hernandez*, 849 F.2d 1325, 1328 (10th Cir. 1988). Typically, a defendant claiming ineffective assistance must show a reasonable probability that but for counsel's unprofessional errors, the

results of the proceedings would have been different. *Strickland*, 466 U.S. at 691-96.

However, if an ineffective assistance claim is based on a conflict of interest, different standards apply. "The burden of a defendant claiming ineffective assistance due to a conflict of interest depends on whether and to what extent the alleged conflict was brought to the trial court's attention." *Cooper v. State*, 565 N.W.2d 27, 32 (Minn.App. 1997)(citing *United States v. Fish* 34 F.3d 488, 492 (7th Cir. 1994). If an objection was made to the representation or if the district court knew or should have known of the potential conflict, but did not inquire, reversal without inquiry into prejudice resulting from the alleged conflict is the proper remedy. *State v. Paige*, 765 N.W.2d 134, 140-41 (Minn.App. 2009)(citing *Holloway v. Arkansas*, 435 U.S. 475, 484, 488-89 (1978); *See also Unites States v. Young*, 315 F.3d 911, 915 n. 5 (8th Cir. 2003)(citing *Mickens v. Taylor*, 545 U.S. 162 ___, 122 S.Ct. 1237, 1241-42 (2002)(stating that in cases of multiple or serial representation, if objection was made, defendant need only prove an actual conflict of interest and reversal follows automatically, while, if no objection was made, defendant must show actual conflict that affected adequacy of representation). If no objection was made and the court did not have reason to suspect the conflict, the defendant must show counsel actively represented conflicting interests and the conflict adversely impacted the representation. *State v. Paige*, 765 N.W.2d at 140.

The prosecution's position was that Mr. Lynch's cellmate obtained the disputed draft and provided it to his attorney, who provided it. In the

memorandum of law the prosecution submitted in support of its position the letter was admissible, it made the following statement: "Before telling the State about the letter, Zimmerman revealed it to his attorney, Christopher Zipko. Zipko contacted the State and turned over the letter." P. 2. State's Memorandum in Support of Admission of Jail Letter, dated August 10, 2012, Page 2. Docket Id. 121.

There can be no reasonable argument that the district court in this matter did not have sufficient notice that it should have made an inquiry into the potential conflict of interest related to the disputed draft. The duty to inquire exists if the court has a reason to know a particular conflict exists. *Mickens v. Taylor*, 545 U.S. 162, 168-69 (2002). The disputed draft was a serious enough piece of the case against Mr. Lynch that at the August 6, 2012 hearing an order was issued requiring Mr. Lynch to give a writing sample. In addition, a hearing date of August 15, 2012 was set for the purposes of helping the Court to determine if the letter was admissible, and if it was, for what purposes and under what conditions it was admissible, and what impact it might have on Mr. Lynch's representation going forward. Further, at the August 6, 2012 hearing, the district court was put on notice of Mr. Lynch's retained counsel's belief a potential conflict of interest existed if the disputed draft was admitted. All of this should have put the district court on notice it needed to inquire about conflicts of not just Mr. Lynch's retained counsel, but of the Ramsey County Public Defender's Office it was anticipated would be assigned to represent him. The MNCIS records Mr. Lynch provided to the postconviction court showed that the cellmate's attorney was provided through the

Ramsey County Public Defender's Office. See Postconviction Exhibit 6 – MNCIS Printout, Docket Id. 5. If the attorney for his cellmate was also a Ramsey County Public Defender, Mr. Lynch was appointed counsel with an actual conflict of interest that should result in reversal.

The admissibility of the disputed draft was one of the primary points of contention in Mr. Lynch's case. It has always been Mr. Lynch's contention that he did not write the disputed draft. In order to adequately represent Mr. Lynch's interest, his counsel would have needed to obtain all information known by attorneys in the office regarding how the disputed draft came into their possession. This would necessarily have required the use of confidential communications from one client to protect another's interest. Additionally, because of the manner in which the disputed draft came into the state's possession, in order to lay foundation for the letter, the prosecution would likely need to call Mr. Zimmerman's counsel to testify. This would result in one attorney cross-examining an attorney from the same office. Either scenario on its own represents an impermissible conflict of interest.

Because Mr. Lynch has presented facts making a strong showing of denial of his right to conflict free counsel, a COA should have issued. The fact that one did not is evidence that the Eighth Circuit Court of Appeals has continued to apply a heightened standard to this analysis

CONCLUSION

For the reasons stated above, Mr. Lynch respectfully requests that this Court grant this petition for cert. and allow him to have the merits of his claims addressed.

Respectfully submitted.

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Longsdorf Law Firm, P.L.C.

s/ Zachary A. Longsdorf

Zachary A. Longsdorf (ID #0390021)
Counsel of Record for Petitioner
5854 Blackshire Path, Suite 3
Inver Grove Heights, MN 55076
Telephone: (651) 788-0876
Fax: (651) 223-5790
zach@longsdorfLaw.com