No. 19-5469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

BROCK FAY FISH - Petitioner,

v.

UNITED STATES OF AMERICA - Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Brock Fay Fish
Reg. No.: 12442-059
Unit B
FCI Sandstone
PO Box 1000
Sandstone, MN 55072

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW

I. HAS THE EIGHTH CIRCUIT COURT OF APPEALS ENTERED A DECISION WHICH VIOLATES STATUTE, NAMELY SECTION 35 OF THE JUDICIARY ACT OF 1789, 1 STAT. 92 (CODIFIED IN 28 U.S.C. § 1654), THUS VIOLATING PETITIONER'S STATUTORY RIGHT OF SELF-REPRESENTATION AND INSO-DOING, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S JUDICIAL POWER TO PREVENT A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

II. DOES THE RECORD CLEARLY CONTRADICT THE LOWER COURT'S BASIS FOR DENYING PETITIONER'S APPEAL. THIS NOT ONLY REPRESENTS A CONFLICT WITH SEVERAL HOLDINGS OF THIS HONORABLE COURT, BUT ALSO THE FEDERAL RULES OF CIVIL PROCEDURE, THUS CREATING A MANIFEST INJUSTICE IF NOT CORRECTED.

III. DOES THE UNSOLICITED APPOINTMENT OF COUNSEL AND THE SUBSEQUENT AFFIRMATION OF THE DISTRICT COURT'S DENIAL OF PETITIONER'S HABEAS MOTION PREJUDICE THE PETITIONER CREATING A CONFLICT AMONG DECISIONS OF THIS HONORABLE COURT AS WELL AS CREATING A NEED FOR REVIEW BY THIS COURT TO PREVENT A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

LIST OF PARTIES

The United States of America

TABLE OF AUTHORITIES

Page(s)

U.S. SUPREME COURT

CIRCUIT COURTS

STATUTES

STATUTES

RULES OF COURT

U.S. GUIDELINES

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

BROCK FAY FISH - Petitioner,

v.

UNITED STATES OF AMERICA - Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PRAYER

The Petitioner, Brock Fay Fish, respectfully prays that a writ of certiorari be issued to review the unpublished Order and Judgement of the United States Court of Appeals for the Eighth Circuit issued April 9, 2019.

OPINION BELOW

On January 15, 2019, the United States Court of Appeals for the Eighth Circuit affirmed the lower court's denial of Mr. Fish's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner Fish filed for a rehearing en banc which was also denied on April 9, 2019. The Eighth Circuit issued its formal mandate on April 16, 2019. (see: FISH v. UNITED STATES, No. 17-3167 (CA8 2019). A copy of which is provided as Appendix.

JURISDICTIONAL STATEMENT

On January 15, 2019, the United States Court of Appeals for the Eighth Circuit entered its Order and Judgment affirming the denial of petitioner's motion pursuant to 28 U.S.C. § 2255 by the lower court. (see: U.S.A. v. FISH, No. 1:16-cv-00320 (D.Minn., 09/05/17); FISH v. UNITED STATES, No. 17-3167 (CA8 2019). A petition for rehearing en banc was denied on April 9, 2019.

Jurisdiction of this Court is invoked under Section 1254(1), Title 28 United States Code.

This case was brought as a federal criminal prosecution pursuant to Conspiracy to Distribute a Controlled Substance in violation of 21 U.S.C. § 841(a)(1). The District Court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (codified in 28 USC § 1654) which provides that in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of. . .counsel.

This case also implicates Rule 15(c) of the Federal Rules of Civil Procedure as well as several previous holdings of this Court, thus creating a manifest injustice.

STATEMENT OF THE CASE

On July 16, 2013, by way of indictment, Petitioner Brock Fish was charged with six drug related counts, among them, and subject to the instant matter, is Count One; Conspiracy To Possess With Intent To Distribute and Distribute A Controlled Substance Resulting In Serious Bodily Injury Or Death in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. (D.Ct.Doc.1) On June 25, 2014, an initial plea agreement was filed (D.Ct.Doc.285). On July 10, 2014, an Information was filed alleging conspiracy to possess with intent to distribute, which is essentially Count One of the indictment with the exception that the element for "resulting in serious bodily injury or death" was omitted. (D.Ct.305).

On advisement of counsel Fish pled guilty to Count One and, believing it was necessary to receive a decrease in his sentence under USSG § 5K2.2, admitted that his criminal conduct resulted in serious bodily injury to two people, despite the fact that this conduct had not been proven as the "but for" cause of their deaths. The plea agreement did not contain an agreed upon base offense level but did set forth the maximum sentence of life as well as the mandatory minimum sentence of 10 years. At sentencing, the government stated that the information Fish eventually provided was not only too late for consideration under § 5K2.2, but was also of no use to the government because the information had already been received from someone else.

Despite having previously counseled her client that based upon her review of the decedents' toxicology reports as well as her interpretation of this Court's decision in BURRAGE v. UNITED STATES, 134 S.Ct. 881 (2014), there was "no way" Fish could be charged with, let alone found guilty of, the deaths of the two individuals, counsel allowed Fish to enter into the plea agree-

ment which stipulated that the "methamphetamine he sold as part of this conspiracy, resulted in serious bodily injury to Douglas Peterson and Cheryl Bettis." (D.Ct.Doc.285;p.2). Counsel never made any attempt to independently investigate the full extent of decedents' mental or physiological health histories or the possible presence of other drugs in their systems at the time of their deaths.

The Presentence Investigation Report (PSR) states that decedent Peterson's death was a "suspected drug overdose" and decedent Bettis' death was by "similar causes". (PSR @ 82). An interview conducted by the Drug Enforcement Agency (DEA) with the North Dakota Forensic Medical Examiner showed that Mr. Peterson suffered from "arteriosclerotic cardiovascular disease" as well as "pulmonary emphysema" at the time of his death. The medical examiner also stated that Ms. Bettis' mental health conditions were not part of the medical records reviewed.

According to defense counsel, there was evidence that the decedents' deaths were not caused by methamphetamine and Ms. Bettis had between 10 to 12 other drugs in her system at the time of her death. Further, there was information available at the time counsel negotiated the plea agreement, that showed that Ms. Bettis was suicidal and had intentionally ingested large quantities of various drugs prior to her death. Insofar as Mr. Peterson, his toxicology reports showed that he had less than 400 parts-per-million of methamphetamine in his system at the time of his death and that he suffered from an enlarged heart and atherosclerosis. Nonetheless, defense counsel failed to raise any of these issues to the sentencing court.

More over, defense counsel never, at any time, during the plea negotiations or at sentencing, raised the argument that her client could not be held responsible for the deaths based on the findings in BURRAGE, supra,

nor did counsel advise her client that the enhancement under USSG § 2D1.1 (a)(2) did not apply to his offense of conviction.

At the Change of Plea Hearing which took place on July 10, 2014, the government acknowledged that Fish was eligible for a two-level downward departure if not for the "serious injury or death" enhancement. The government also stated that the plea agreement contained an "upward departure based on physical injury or death". Defense counsel attempted to argue against the enhancement but failed to mention BURRAGE and its impact on her client's case, or the facts revealed in the autopsy reports. During the entire hearing defense counsel displayed her lack of knowledge and experience in federal criminal sentencing matters, however, she never advised her client to refrain from entering into the plea agreement.

On December 9, 2014, the PSR was filed recommending a base offense level of 38, plus a four-level enhancement for an "organizer/leadership" role in the conspiracy. (D.Ct.Doc.449). The PSR also recommended a three-level reduction for acceptance of responsibility bring Fish's Total Adjusted Offense Level to 39, which, combined with a Criminal History Category of I, set the guidelines sentencing range at 262-327 months.

On March 27, 2015, in a plea agreement supplement (D.Ct.Doc.493) defense counsel stipulated that her client's offense level should be at 38 pursuant to USSG § 2D1.1(a)(2). On september 2, 2015, at the Sentencing Hearing, defense counsel raised the issue of the § 2D1.1(a)(2) enhancement, apparently agreeing that it applied to her client, but, again, she appeared to be confused by the enhancement's language and she failed to formally object to its application stating to the Court that she was only "commenting" on the application.

On September 6, 2016, Petitioner timely filed a habeas corpus petition

in accordance with 28 U.S.C. § 2255. (D.Ct.Doc. 574).

Fish's petition was submitted using the standard form supplied by the district court. Id. He did not, as per the instructions, submit any supporting arguments expanding on his grounds for relief. In five of his six grounds, Fish cited ineffective assistance of counsel, however, in Ground Six, Fish couched his claim in a different manner stating; "Defendant's sentence enhancement for the bodily harm/death factor was inappropriately applied. Based upon information and belief, the autopsy results/medical examinations do not conclusively show that the victims had not used other drugs which could have also lead to their death/bodily harm." Id.@ P.8(a)(citing as supporting case law, BURRAGE v. UNITED STATES, 134 S.Ct. 881 (2104).

In their opposition brief (D.Ct.Doc. 590) the government combined Grounds Four and Five Id. @ P.19,n.3, and then combined Grounds Five and Six Id. @ P.20,n.4 claiming that the voluntariness of Fish's plea and the ineffective assistance during the plea negotiations and at the Change of Plea Hearing were overlapping issues to be addressed in one argument. Id.

Fish replied in the same fashion (D.Ct.Doc. 593) arguing that the his counsel's ineffectiveness led him to accept a flawed plea agreement and to admit to elements of a crime he did not commit. He further argued that counsel was fully aware of the rammifications of the BURRAGE decision on his case, but failed to use this knowledge to defend him. Id. @ P.17-21.He offered additional support for his claim in an amended brief (D.Ct.Doc. 603) citing this Court's decision in LEE v. UNITED STATES, 582 U.S. ____ (2017).

On September 5, 2017, the District Court for the District of North Dakota denied Fish's § 2255 motion (D.Ct.Doc. 605) and on December 29, 2017, Fish submitted his Motion for Certificate of Appealability (CA8 No. 17-3167) in which

he raised two issues for consideration; Issue I - Did the District Court err in finding that appellant made a knowing and voluntary plea when defense counsel having advance knowledge of the decision in BURRAGE v. UNITED STATES, 134 S.Ct. 881, 892 (2014) making the "death or serious bodily injury" enhancement inapplicable to her client, still allowed him to enter into the plea agreement., and, Issue II - Did the District Court err in refusing to find, let alone address appellant's argument that he was prejudiced by defense counsel's deficient performance as described in the Supreme Court's opinion in LEE v. UNITED STATES, 137 S.Ct. 1958, 198 L.Ed. 2d 476 (2017). (see: Appl. for COA;CA8 No.17-3167)(available at Appendix B-1)

On March 1, 2018, the United States Court of Appeals for the Eighth Circuit granted Fish's application for certificate of appealability (Appx. B-2) stating in its Order; "[a]pplication for certificate of appealability is granted on the claim that Fish received ineffective assistance of counsel in Case Number 1:13-cr-129 when counsel advised him to plead guilty with a stipulation to a base offense level of 38. . .". Id. The Order went on to state; "The parties also may address whether this claim was properly raised in the district court in Case Number 1:16-cv-320." Id.

On that same day, without advising Fish, the lower court appointed him counsel (Appx. B-3) who immediately, and again, without informing Fish beforehand, filed a Motion for Clarification, which the lower court granted on March 15, 2018. (Appx.B-5) In the time between counsel's unsolicited appointment and the lower court's Order, Id., Fish conducted an interview with appointed counsel via telephone from the prison and upon concluding same arrived at the decision that the attorney did not share the same goals with respect to his appeal. Specifically, counsel advised Fish that it was

his intent to file and ANDERS brief as he had determined that there were no non-frivolous issues to be decided.

Fish so advised the lower court of this situation and further informed the lower court of his desire to have their appointed counsel file a Motion to Withdraw and to allow Fish to proceed pro se. Id. @ B-4 . Five days later, Fish submitted his own Motion For Leave To Proceed Pro Se, Id. @ B-7, along with a Motion for An Enlargement of Time to Comply With The Court's Briefing Schedule. Id. @ B-8. On April 3, 2018, the Eighth Circuit Court of Appeals issued its Order allowing their appointed counsel to withdraw, but denying Fish's request to represent himself, instead, the court appointed yet another attorney to handle the appeal. Not once did the lower court conduct any type of hearing to ascertain Fish's ability to represent himself or if his desire to do so was an informed request.

On January 15, 2019, the lower court affirmed the district court's judgement stating that; "Upon careful review of the record and the parties' arguments, we conclude that Fish forfeited the certified issue by failing to include it in his section 2255 motion." (CA8;No.17-3167,01/15/19)(per curiam) The court went on to state that; "Finally, we note that Fish does not limit his arguments to the question we certified." Id. @ p.3

It should be noted that Fish submitted an Objection To Order, Id. @ B-6 stating that the lower court's recharacterization of his Issue(s) was done without his knowledge or approval by the court appointed attorney. He further stated that the recharacterization needlessly restricted his ability to fully develop his claim for relief. Id. @ p.1-2. The lower court never answered this motion. On March 4, 2019, Fish petitioned the lower court for a rehearing en banc which was denied on April 9, 2019.

STATEMENT OF THE FACTS

The following statement of facts is taken from the Eighth Circuit opinion:

Brock Fay Fish, who is currently serving 240 months in prison for conspiring to distribute drugs, filed a motion under 28 U.S.C. § 2255 seeking to set aside his sentence. The district court denied the motion and refused to issue a certificate of appealability on any of the six issue he raised. An administrative panel of this court granted him a certificate of appealability on one issue:

> Brock Fish's application for a certificate of appealability is granted on the claim that Fish received ineffective assistance of counsel in [his criminal case] when counsel advised him to plead guilty with a stipulation to a base offense level of 38 under the United States Sentencing Guidelines, despite the possibility that USSG § 2D1.1(a)(2) was not applicable in light of BURRAGE v. UNITED STATES, [571 U.S. 204, 218-19] (2014), and the possibility that Fish would not have pleaded guilty but for the advice. **The parties also may address whether this claim was properly raised in the district court in [Fish's postconviction proceeding].**

(Emphasis added). Upon careful review of the record and the parties' arguments, we conclude that Fish forfeited the certified issue by faililng to include it in his section 2255 motion.

Four of the six grounds for relief in the motion identified specific deficiencies in counsel's performance: allowing Fish to talk to investigators without receiving anything in return; failing to tell him about a deadline for accepting a plea deal; letting him enter into an initial plea agreement without a specific sentencing recommendation; and remaining silent when the district court criticized him. A fifth relied on those four to allege "cumulative. . . ineffectiveness." Although these theories alleged ineffective assistance of counsel, none focused upon counsel's advice that he plead guilty to an offense with a stipulated offense level of 38, which is the only question we certified for

review.

The sixth ground came closer to the certified issue. It alleged that the district court should not have sentenced him under U.S.S.G. § 2D1.1(a)(2), which increases the base offense level for selling drugs if they cause "death or serious bodily injury." But the question Fish raised in the motion was whether section 2D1.1(a)(2) applied to him, not whether counsel's advice on this point fell "outside the wide range of professionally competent assistance." STRICKLAND v. WASHINGTON, 466 U.S. 668, 690 (1984). This omission is conspicuous because each of his other claims questioned counsel's performance. The district court cannot be expected to address claims no one properly raises, even when the litigant is pro se. Cf. SAUNDERS v. UNITED STATES, 235 F.3d 950, 953 (8th Cir. 2001).

Finally, we note that Fish does not limit his arguments to the question we certified. For example, the certificate of appealability contemplates a challenge to the guilty plea itself, as indicated by its reference to "the possibility that Fish would not have pleaded guilty" in the absence of counsel's advice. On appeal, however, Fish primarily seeks a new sentencing hearing, not an order setting aside his plea. Fish also attacks various other decisions made by counsel during his criminal case, rather than focusing on the single point we identified. To the extent Fish's arguments address uncertified issues, they are not properly before us.

Fish forfeited the only issue he was authorized to pursue on appeal, so we affirm the judgment of the district court. (CA8,01/15/19)(per curiam).

In a footnote the panel clarified their statement concerning the district court's responsibility to address claims improperly raised stating; "To be sure, Fish eventually connected his argument about section 2D1.1(a)(2) to his

"dissatisfaction with counsel's performance, but he did so in his reply brief, too late to properly raise a new issue before the district court." Id. @ p.3, n.2 (citations omitted).

By ignoring Fish's informed, unequivocable and timely declaration that he refused the assistance of counsel and wished to represent himself, the Eighth Circuit has violated section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (codified in 28 U.S.C. § 1654). This arbitrary and capricious practice of denying an incarcerated appellant their right of self-representation is unique to this circuit and is not applied consistently among prisoner litigants. More over, this conduct is an over reach of the lower court's authority as the aforementioned statute has never been declared unconstitutional. (see e.g.: MARBURY v. MADISON, 5 U.S. (1 Cranch) 137 (1803).

Furthermore, because the lower court appointed Fish legal representation in a habeas matter, specifically, at the appeals stage, the question becomes; Does this circumvent this Court's holding in PENNSYLVANIA v. FINLEY, 481 U.S. 551, 554 (1987) where it was decided that there is no constitutional right to counsel in collateral attacks. (see also: COLEMAN v. THOMPSON, 501 U.S. 722 (1991)(same)), and, if it does, is Fish now allowed to filed yet another habeas petition pursuant to 28 U.S.C. § 2255 claiming ineffective assistance of counsel on appeal?

The lower court's decision also seems to ignore the mandate of Rule 15(c) [Fed.R.Civ.Proc. 15(c)] addressing the relate back issue. Although this argument was never presented by counsel on appeal, Fish contends that by the government asserting the issue of ineffective assistance when it combined Grounds Four, Five and Six of Fish's § 2255 petition, it thereby opened the door, so-to-speak, for this issue to be argued in Fish's reply brief.

Last, but no less important, the Eighth Circuit's reasoning that Fish improperly raised an issue before the district court, contradicts this Court's holding in HAINES v. KERNER, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972) reh den 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed. 2d 819.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit Court of Appeals has entered a decision which violates statute, namely Section 35 of the Judiciary Act of 1789, 1 Stat. 92 (codified in 28 U.S.C. § 1654), thus violating Petitioner's statutory right of self-representation and insodoing, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's judicial power to prevent a fundamental miscarriage of justice.

In the federal courts, the right of self-representation has been protected by statute since the beginning of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 72, 93, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that **in all courts** of the United States, the parties may plead and manage their own causes personally or by the assistance of . . . counsel. FARETTA v. CALIFORNIA, 422 U.S. 806, 812-13 (1975) (emphasis added) (internal quotation marks omitted). The right of self-representation is currently codified in 28 U.S.C. § 1654, which states; "In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel as, by rules of such courts, respectively are permitted to manage and conduct causes therein." 28 U.S.C. § 1654.

While there is an abundance of cases addressing one's constitutional right to self-representation, they all deal with the Sixth Amendment's right to assistance of counsel and the waiver thereof, (see e.g.: FARETTA v. CALIFORNIA, 422 U.S. 806 (1975); MARTINEZ v. COURT OF APP. OF CALIF., 528 U.S.

152 (2000); MCKASKLE v. WIGGINS, 465 U.S. 168 (1984)), in criminal matter. However, when it comes to a civil case, as is the situation here, the relevant case law is minimal.

Nonetheless, a reasonable amount of simple logic should allow one to conclude that the importance of freedom of choice, especially in an individual's legal affairs, is no-less diminished by the lack of constitutional discourse. The differences between criminal and civil proceedings and the distinct constitutional grounds for the right to counsel in civil and criminal cases, do not change the fact that a litigant's knowing, intelligent, and, most importantly, voluntary waiver requires notice. (see: In re Gault, 387 U.S. 1, 41 (1967). In the instant matter Petitioner not only was denied his statutory right of self-representation, his timely, informed and unequivocable motion for leave to proceed pro se was denied by the lower court without even so much as an inquiry as to his competence, knowledge of the rules of court or a determination whether his choice was knowing and intelligent. Instead, he was forced to accept a court appointed attorney, not once, but twice, after having requested the first counsel be released, and upon review of the record the failure of Petitioner's appeal is directly the fault of the attorney. (see: Appx.B-9).

In MARTINEZ v. COURT OF APPEALS OF CALIFORNIA, 528 U.S. 152 (2000) this Court addressed the issue of the right of self-representation on appeal. Writing for the Court, the Honorable Justice Stevens stated; "The scant historical evidence pertaining to the issue of self-representation on appeal is even less helpful. The Court in FARETTA relied upon the description of the right in § 35 of the Judiciary Act of 1789, 1 Stat. 92, which states that 'the parties may plead and manage their own causes personally or by the assistance of such counsel . . .' 422 U.S. at 812. It is arguable

that this language encompasses appeals as well as trials. Assuming it does apply to appellate proceedings, however, the statutory right is expressly limited by the phrase 'as by the rules of the said courts'. 1 Stat. 92. Appellate courts have maintained the discretion to allow litigants to manage their own causes - and some such litigants have done so effectively. That opportunity, however, has been consistently subject to each court's own rules on appeal." MARTINEZ, 528 U.S. 158-59 (footnotes omitted).

Reviewing the Local Rules of Court for the Eight Circuit shows that there is no such language addressing a litigant's right of self-representation. There is nothing in the rules instructing the Court on what measures to take when a litigant makes a timely request to proceed on his own. Thus, because the local rules are silent the mandate of the law as set forth in 28 U.S.C. § 1654 must be followed.

Following this Court's line of logic in MARTINEZ, supra, and looking to FARETTA for guidance when a litigant requests permission to represent themself, that decision influenced the Eighth Circuit in UNITED STATES v. EDELMANN, 458 F.3d 791, 808 (8th Cir. 2006), where the Court stated; "The right of self-representation, however, is not absolute. Once the defendant makes a clear and unequivocal request to represent himself, a court may nonetheless deny the request in certain circumstances, such as when the request is untimely, the defendant engages in serious and obstructionist misconduct, and when the defendant is unable to produce a valid waiver of right to counsel." Id. (quoting: FARETTA, supra at 834,n.46)(quotation marks omitted in original).

The record admits no doubt that Fish's March 20, 2018, Motion For Leave To Proceed Pro Se (Appx.B-7) constituted a "clear[], and unequivocal[],

declar[ation] that he wanted to represent himself and did not want counsel." (see: FARETTA, supra at 835). Fish had, up to that date, represented his own interests in every aspect of his habeas corpus matter and never once had he called into question his competence or understanding of the law or the Rules of Court. This fact alone is not, of course, conclusive, however, the manner and content of its manifestation is illuminative of Fish's purpose to insist on his right of self-representation.

In his motion, supra, Fish lists eight (8) separate reasons in support of his belief that he could better represent his interests on appeal that the appointed attorneys. Likewise, the evidence from the district court's record offered more proof to the appellate court that Fish was up to the task and was making an informed decision. So, there is no possibility here that Fish had been misled or coerced, however, the lower court refused to take any steps to make its own determination.

The Writ of Habeas Corpus "is the **only** effective means of preserving" an individual's rights. MCCLEASKEY v. ZANT, 499 U.S. 467, 478 (1991) (quoting: WAINWRIGHT v. SYKES, 433 U.S. 72, 79 (1977)). Fish was incarcerated for a crime for which the evidence proved he did not commit, namely, "serious bodily injury or death" (USSG § 2D1.1(a)(2)), and he had proof that not only supported his claim, but also showed that his defense counsel knew of the existence of the proof but did not offer it up at his sentencing, nor did she argue the holdings in BURRAGE v. UNITED STATES, 134 S.Ct. 881 (2014) in defense of these findings.

Fish was adamant that he would not be subject to the failings of another court appointed attorney on his appeal. He knew how to communicate his beliefs in the form of a legal brief and he knew, especially once he was

granted a certificate of appealability by the Eighth Circuit, that he had the attention of a court that could grant him the relief that he legally and constitutionally deserved. Thus, he should have been given the opportunity to exercise his statutory right of self-representation. Despite all this, the Eighth Circuit forced counsel upon him. "[T]he Constitution does not force a lawyer upon a defendant. ADAMS v. UNITED STATES ex rel. MCCANN, 317 U.S. 269, 279 (1941). To thrust counsel upon the accused, against his considered wishes . . . violates the logic of the [Sixth] Amendment. In such cases, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. Id. (quoting: FARETTA, supra at 820) (footnote omitted).

For these reasons the Writ must be granted.

II. The record clearly contradicts the lower court's basis for denying Petitioner's appeal. This not only represents a conflict with several holdings of this Honorable Court, but also the Federal Rules of Civil Procedure, thus creating a manifest injustice if not corrected.

In dismissing Petitioner's section 2255 appeal, the Eighth Circuit based its decision on the erroneous conclusion that Petitioner failed to properly include the certified issue in his original section 2255 motion, thus forfeiting same. However, the district court's record irrefutably shows that it was the government, in their opposing argument (Appx. A-2) to first introduce the ineffective assistance issue as cause for Petitioner's claim that the enhancement under USSG : 2D1.1(a)(2) had been improperly applied. More over, the question as to whether the issue was properly raised in Petitioner's 2255 motion was not raised by the district court nor by the government. It was the creation of the appellate court at the time it granted COA.

In their motion opposing Fish's § 2255 motion (Appx.A-2) the government blends Grounds Four, Five and Six in order to address Fish's claims. In Ground Four the government explains by was of a footnote that Fish's claim of ineffective assistance cause him to "not make fully knowing and voluntary plea.[3]" (Appx.A-2;p.19). They state in footnote 3; "In Ground Five, Fish contends, in part, that he was coerced into signing the plea agreement, an issue related to a knowing and voluntary plea. Since there is overlap in Grounds Four and Five on this issue, the United States will address the voluntariness of the plea in Ground Five analysis below." Id.@p.19;n3 It is at this point that Fish's claim of ineffective assistance is put into play by the government.

In Ground Five, the government writes; "In Ground Five, Fish contends that his attorney was ineffective because he was coerced into signing the plea agreement (the plea was not voluntary) and the the sentencing range was not calculated correctly.[4]".(Appx.A-2;p.20) Footnote 4 states; "In Ground Six, Fish also contends that the guideline range was not calculated correctly. Since there is overlap in Grounds Five and Six on this issue, the United States will address the issue in Ground Six analysis below." Id.@p.20;n4. Here, the ineffective assistance issue continues to be the focal point of the government's argument.

Finally, in Ground Six, the government contends that the § 2D1.1(a)(2) enhancement was properly applied based on the fact that Fish acknowledged the applicability in the plea agreement, at the Change of Plea hearing, and in the PSR. They never differentiate this issue from the ineffective issue in Grounds Four or Five despite the statements in footnotes 3 and 4 to the contrary. (Appx.A-2;Pp.22-23)

Therefore, your Petitioner contends that in replying to the government's opposition brief, he was only following the line of argument layed out by the government as he interpreted it. Fish argued, in response to the allegation that he made a knowing and voluntary plea that; "The voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." HILL v. LOCKHART, 474 U.S. 52, 56 (1985)(quotation marks and citations omitted). (Appx.A-3;p.18) He also relied on this Court's findings in MABRY v. JOHNSON, 467 U.S. 504, 509 (1984) ("A plea of guilt entered by one fully aware of the direct consequences, including the actual value of any commitments made by the court, the prosecutor, or his own counsel, must stand unless induced by. . .misrepresentation (including unfulfilled or unfulfillable promises). . ." Id. (emphasis omitted;internal quotation marks and citations in orginal omitted). And in furthering his argument that his plea was not knowing and voluntary, Fish stated that because his attorney made misrepresentations to him in order to convince him to accept the plea agreement, he should be granted his § 2255 motion, citing as an example, BURRAGE v. UNITED STATES, supra. (Appx.3;p.19).

If there is blame to be laid for raising a procedurally barred issue out of time, then it has to be the government not Fish, and this contention was never raised by the district court in fact, in its Order denying the § 2255, the court wrote, citing the Change of Plea hearing transcripts and the PSR, that; "The Court has already determined that Fish's guilty plea was knowing and voluntary. Fish's argument that the Government did not prove the drugs he sold injured anyone is clearly contradicted by his own repeated admissions to the contrary." (Appx.A-4;p.15).

Habeas corpus cases are governed by the Federal Rules of Civil Procedure. (see: MAYLE v. FELIX, 545 U.S. 644, 655 (2005)(holding that; Habeas corpus Rule 11 permits application of the Federal Rules of Civil Procedure in habeas corpus cases "to the extent that [the civil rules] are not inconsistent with any statutory provisions of the [habeas] rules.") Id.@ 654-55; (see also: Rule 81(a)(2) (the civil rules "are applicable to proceedings for . . . habeas corpus") Fed.R.Civ.Proc. 81(a)(2))).

The Eighth Circuit has ignored the mandate of Rule 15(c)(1) of Federal Rules of Procedure, also known as the "Relate Back" rule. As applied to habeas motions, Rule 15(c)(1) instructs a court that; "[i]f the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurence set out - or attempted to be set out - in the original pleading, such amendment will be treated as relating back to the original pleading. (Fed.R. Civ.Proc. 15(c)(1)).

Ineffective assistance was the conduct which supported Fish's claims, and this conduct occurred during the plea negotiations, as well as the plea hearing stage, and at the sentencing. The government clearly sets this out in their brief. Fish argued in his original motion, which only asks for the Ground(s) and a brief explanation without any citation or legal arguments, that the enhancement under USSG § 2D1.1(a)(2) was improperly applied. Then, in his brief in reply to the government's argument for dismissal, he followed the line of arguement the government introduced by enlarging or explaning further how his claim that the enhancement was a mistake by showing that decisions made by this Court supported his theory that ineffective assistance and misrepresentations made by counsel are causes for an unknowing and involuntary plea.

The lower court's theory that since Fish had cited ineffective assistance as the grounds for his other five claims, the absence of same in Ground Six, necessarily made his argument on reply procedurally defaulted. ("But the question Fish raised in the motion was whether section 2D1.1(a)(2) applied to him, not whether counsel's advice on this point fell 'outside the wide range of professionally competent assistance.") (CA8;No.17-3167;01/15/19;p.3) (citing: STRICKLAND v. WASHINGTON, 466 U.S. 668, 690 (1984)).

This conclusion is violative of Fish's right to due process which requires that a guilty plea to be valid, be made voluntarily, intelligently and knowingly. This in and of itself is enough to raise a claim of ineffective assistance of counsel, especially given the lenient standard under which a court is to review pro se filings. (see: HAINES v. KERNER, supra). This is the argument raised by the government in its opposition to Fish's § 2255 motion and it is the grounds for his reply in support of his motion. Though Fish did not cite STRICKLAND or an analogous case in his initial motion, (which is discouraged by the instructions on the motion's form), he did argue that his guilty plea was uninformed and therefore involuntary because his counsel made misrepresentations as to the applicability of the enhancement and her plan to argue the BURRAGE decision (BURRAGE v. UNITED STATES, supra.), as well as her failure to sufficiently investigate the medical examiner's reports which revealed exculpatory information.

For the reasons stated above, the Writ must be granted.

III. The unsolicited appointment of counsel and the subsequent affirmation of the district court's denial of Petitioner's habeas motion has prejudiced Petitioner creating a conflict among decisions of this Honorable Court as well as creating a need for review by this Court to prevent a fundamental miscarriage of justice.

The Writ of Habeas Corpus "is the only effective means of preserving" an individual's rights. MCCLEASKEY v. ZANT, 499 U.S. 467, 478 (1991) (quoting: WAINWRIGHT v. SYKES, 433 U.S. 72, 79 (1977)). Fish maintains that the Eighth Circuit's unsolicited appointment of counsel is not only a violation of his statutory right as set forth in 28 U.S.C. § 1654, it is an arbitrary and capricious act that has resulted in the failure of his habeas appeal due to appointed counsel's errors causing prejudice. That prejudice is in the form of Fish now having no other way of obtaining relief for the constitutional errors committed by his defense attorney during the criminal phase of this matter.

With respect to an accused who has been convicted in a [] criminal trial and who argues that it was attorney error which led to the dismissal of his appeal from a denial of habeas corpus relief, the accused is barred from bringing these claims in a subsequent federal habeas corpus proceeding, where the accused does not argue that federal review is necessary to prevent a fundamental miscarriage of justice, because the accused had no federal constitutional right to counsel to pursue his habeas corpus appeal, given that (1) there is generally no federal constitutional right to counsel to pursue a discretionary appeal; (2) consequently, a federal habeas corpus petitioner cannot claim ineffective assistance of counsel, under the Federal Constitution's Sixth Amendment, with respect to such proceedings; (3) in situations where

the state has no responsibility to insure that a federal habeas corpus petitioner was represented by competent counsel, it is the petitioner who must bear (a) the burden of a failure to follow [] procedural rules, and (b) the risk in federal habeas corpus for all attorney errors made in the course of representation; and (4) even though the claims in the case at hand include allegations of ineffective assistance of counsel during the accused's trial, and at sentencing, - and even though federal law, at the time of accused's trial, provided that ineffective assistance of counsel claims relating to conduct during trial could only be brought in federal habeas corpus proceedings - (a) the federal habeas court addressed the accused's claims, thus providing the accused with one "appeal" of those claims, (b) the attorney effectiveness which is at issue, for purposes of the instant claim during the subsequent appeal from the habeas court's judgment, (c) therefore, there is not need to consider whether an accused has a federal constitutional right to counsel in those cases in which federal collateral review is the first place that the accused can present a challenge to the accused's conviction, and (d) under the due process and equal protection clauses of the Federal Constitution's Fifth and Fourteenth Amendments, an accused does not have a right to counsel beyond a first appeal pursuing discretionary or collateral review. (see: COLEMAN v. THOMPSON, 501 U.S. 722 (1991); (see also: ROSS v. MOFFITT, 417 U.S. 600 (1974) (holding that an accused's right to counsel on appeal, which right was guaranteed by various provisions of the Federal Constitution, did not extend to discretionary appeals or petitioner for certiorari.); PENNSYLVANIA v. FINLEY, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel of discre-

tionary appeals.").

How can the above-cited decisions be reconciled with the facts that; (a) Petitioner has a statutory right to represent himself in **all** courts of the United States, (section 35, Judiciary Act of 1789, 1 Stat. 73, 92); (b) the Local Rules of the Eighth Circuit Court of Appeals is silent with respect to an individual's right to personal appearance or by counsel, (see: 28 U.S.C. § 1654); (c) Fish made a timely, unequivocal and informed notification to the lower court of his desire to continue his habeas matter pro se, (see e.g.: JOHNSON v. ZERBST, 304 U.S. 458, 464 (1938)(where the Court defined effective waiver of counsel as "an intentional relinquishment or abandonment of a known right or privilege"), CARNLEY v. COCHRAN, 369 U.S. 506, 513 (1962)(accused must "intelligently and understandingly waive the assistance of counsel"); (d) the lower court failed to make any type of inquiry or take any steps to insure that Fish was aware of the pitfalls of his decision to waive professional assistance; (e) the action by the lower court is arbitrary and capricious as supported by the fact that over the last several years there have been other cases before the court that were allowed to proceed pro se, (see: Appx.C); (f) if left unchanged, Fish will suffer a fundamental miscarriage of justice because his statutory right to select counsel of his choice or to proceed without counsel altogether has been ignored by the lower court and now his one and only opportunity for relief from a violation of his Sixth Amendment right to effective assistance of counsel has been squandered.

For these reasons, the supervisory powers of this Court are needed and therefore this Writ must be granted.

CONCLUSION

It is respectfully requested that this Court clarify the statutory rights of self-representation an individual has in habeas corpus appeals when the local rules of that particular circuit are silent. The Court is also respectfully requested to grant certiorari and vacate the Order and Judgment of the Eighth Circuit with directions to remand Petitioner's case to the district court vacating his sentence and set the matter for further proceedings in keeping with this Court's findings.

Respectfully submitted,

Dated: 2 July, 2019

Brock F. Fish, pro se
Reg. No. 12442-059
Unit B
Federal Correctional Institution
Sandstone
PO Box 1000
Sandstone, MN 55072