No. _____

In The

SUPREME COURT OF THE UNITED STATES

MARCUS H,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
CONNECTICUT APPELLATE COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Was the indigent petitioner's Sixth Amendment right to have appointed counsel represent him at his criminal jury trial violated when the trial court failed to find him indigent by relying on the fact he had posted bail and his mother had paid some of his attorney's fees?

LIST OF PARTIES

The caption of the case contains the redacted name of the petitioner, Marcus H, and the prosecuting authority, the State of Connecticut.

LIST OF ALL PROCEEDINGS IN STATE, FEDERAL AND APPELLATE COURTS

State of Connecticut Superior Court Proceedings: *State v. Marcus H,* Docket No. K10L-Cr14- (redacted), *State v. Marcus H*, K10K-MV14- (redacted), M*arcus H v. Commissioner,* Docket No. TSR-CV-16-(redacted); Federal Proceedings: None; State of Connecticut Appellate Court Proceedings: *State v. Marcus H,* 190 Conn. App. 332, 210 A.3d 607, cert. denied, 332 Conn. 910, 211 A.3d 71 (2019).

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OTHER AUTHORITIES:

The Petitioner, Marcus H, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court which entered in the above-entitled proceeding on June 4, 2019 (App. p. 1a) and became final on June 26, 2019 when the Connecticut Supreme Court denied certification for further appellate review. (App. p. 22a).

OPINION BELOW

The opinion below was from the Connecticut Appellate Court. It was published and filed on June 4, 2019. The case was styled *State of Connecticut v. Marcus H, No. AC 40796.* It is published as *State v. Marcus H*, 190 Conn. App. 332, 210 A.3d 607 (2019). The entire text of this opinion is reproduced in the appendix. (App. pp. 1a-21a.) The Connecticut Supreme Court denied certification for further appellate review on June 26, 2019, 332 Conn. 910, (2019), 211 A.3d 71 (2019). (App. p. 22a).

BASIS FOR JURISDICTION

The judgment of the Connecticut Appellate Court entered on June 4, 2019. The Connecticut Supreme Court denied certification for further review on June 26, 2019. The statutory provision believed to confer jurisdiction to review judgment in this matter on a writ of certiorari is 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut Constitution Article First Section 19, Amendment IV:

Section 19 of article first of the constitution is amended to read as follows: The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate.

SUPREME COURT RULES

United States Supreme Court, Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another Untied States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES INVOLVED IN THIS CASE

Connecticut General Statutes:

Connecticut General Statutes § 14-222 Reckless Driving

Connecticut General Statutes § 14-223(b) Increasing Speed in Attempt to Escape/Elude Officer

Connecticut General Statutes § 14-227(a)(1) Operating Vehicle Under Influence of Intoxicating Liquor

Connecticut General Statutes § 14-237(a)(a)(2) Operating Vehicle with Elevated Blood-Alcohol Content

Connecticut General Statutes § 51-296 Designation of Public Defender for Indigent Defendant, Codefendant

Connecticut General Statutes § 51-297 Determination of Indigency

Connecticut General Statutes § 53a-21(a)(1) Risk of Injury to a Minor

Connecticut General Statutes § 53a-60d Assault with Motor Vehicle 2nd Degree

Connecticut General Statutes § 53a-63 Reckless Endangerment 3rd Degree

Connecticut General Statutes § 53a-167a Interfering with an Officer

Connecticut General Statutes § 54-86e Confidentiality of Identifying Information Pertaining to Victims of Certain Crimes

United States Code

28 U.S.C. § 1257 State courts; certiorari;
(a) Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

STATEMENT OF THE CASE

A. INTRODUCTION

The Petitioner, Marcus H[1], was convicted of assault in the second degree with a motor vehicle in violation of statute § 53a-60d; two counts of risk of injury to a minor, in violation of statute § 53a-21(a)(1); two counts of reckless endangerment in the third degree, in violation of statute § 53a-63; reckless driving, in violation of statute § 14-222; operating a vehicle under the influence of intoxicating liquor, in violation of statute § 14-227(a)(1); operating a vehicle with an elevated blood-alcohol content, in violation of statute § 14-237a(a)(2); interfering with an officer, in violation of statute § 53a-167a; and increasing speed in an attempt to escape or elude an officer

[1] The petitioner's last name is redacted pursuant to Connecticut Statute § 54-86e. App. p. 138a.

in violation of statute § 14-223(b).[2] The total effective sentence was "twenty-three years execution suspended after fourteen years and six months to serve of which one hundred and twenty days are mandatory to serve followed by five years of probation."[3]

The petitioner appealed his conviction to the Connecticut Appellate Court, Connecticut's intermediate appellate court, claiming, inter alia, that he was deprived of his Sixth Amendment right to counsel. The Connecticut Appellate Court affirmed. June 4, (2019). The petitioner then petitioned the Connecticut Supreme Court which denied the petition for certification on June 26, 2019.[4]

B. FACTS RELEVANT TO THIS PETITION

Following his arrest, the petitioner was initially represented by privately retained counsel Jack O'Donnell. He withdrew from the case on January 14, 2015. The petitioner owed him a substantial sum of money. (Tr. 2-19-16, p. 3, App. p. 116a.) Thereafter, Attorney John Williams was privately retained. Almost a year later, on February 18, 2016, at the start of jury selection, Attorney Williams informed the court that his client wanted to retain new counsel due to a dispute between himself and the petitioner which occurred the prior day. (Tr. 2-18-14, 1-2, 9-11, App. pp. 82a-83a, 90a-92a.) The prosecutor claimed that the petitioner was trying to delay the trial. In response, the petitioner, who was seeking a short continuance in order to retain new counsel, said:

> None of this is to waste any time. My life is on hold as this case goes on anyways. . . . *I'm unemployed.* I hardly see my children. . . This stalls my life, and I just want my proper opportunity to be heard, and if I don't -- *if the person that is my voice is not even on the same accord with me, it makes it impossible for my side to be heard.* . . . I'm not asking for a year. I'm just asking for just a short period of time. (Tr. 2/18/16e, App. p. 85a, emphasis added.)

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[2] See Connecticut Superior Court Judgment dated June 28, 2016. App. pp. 35a-37a
[3] App. p. 37a.
[4] 332 Conn. 910 (2019), App. p. A-22.)

Attorney Williams said the petitioner had paid less than half the fee owed him and had not made payments for "many, many months." (T. 2/18/16, p. 10, App. p. 91a.) The petitioner did not want to represent himself. (T. 2/18/16, p. 8, 12-13, App. p. 93a.) He wanted an attorney he could trust and believe in. One concern he had was that Williams would not handle the case to his fullest ability because of the outstanding fee. (T. 2/18/16, p.12, App. p. 93a.) During colloquy between the court and the petitioner, the court stated, "THE COURT: All right, well I don't hear the defendant asking to represent himself pro se. The petitioner replied, "No." The trial court denied the petitioner's motion to continue the case until he could hire new counsel. (T. 2/18/16, pp. 8-9, 13-14, 16, App. pp. 84a, 90a, 94a, 95a, 97a.) At this point the petitioner inquired about the possibility of representing himself pro se. "THE DEFENDANT: If, in fact, I did go pro se, *we would just do the jury selection just me by myself on today?*" The court replied that, ". . . I didn't hear you – that you were asking for that," The petitioner replied: ". . . *if it's a situation where it's pro se or staying with Attorney Williams, then I'd rather go pro se.*" (2-18-16 Tr.. p. 16, App. p. 97a, emphasis added.)

At this juncture the trial court began to canvass the petitioner under Connecticut's procedural rule, Practice Book § 44-3.[5] One of the questions the court asked the defendant was if he understood "that, as a layperson, [he] would be at a disadvantage, because [he had not] had the training" that his now discharged private attorney had. The petitioner replied: "Yes." (2-18-16 Tr.. p. 23, App. p. 104a.) He was also asked if he understood he would "face certain dangers in representing" himself. Id. He again replied: "Yes." Id. None of the dangers of being pro se were

[5] Connecticut Practice Book § 44-3 is published at App. p. 4.4-3. The canvass occurred on February 18, 2016 and is published in appendix pp. 98a-107a. It is referred to herein as the *Faretta* canvass, the judicial inquiry based on *Faretta v. California*, 422 U.S. 806 (1975).

elucidated or explained.[6] Most of the court's canvass questions were framed using the phrase, "And you understand . . . ." and elicited largely a series of monosyllabic "Yes" responses with a smattering of, "Yes, I do" responses. (App. pp. 97a-107a.)

The trial court then ruled that the petitioner could proceed pro se and file a pro appearance. (Id., p. 26, App. p. 107a.) Attorney Williams was advised to participate as standby counsel.[7] Id. The State of Connecticut was represented by two experienced state prosecutors in this serious felony case, Assistant States Attorneys Bowman and Grayson Holmes. Attorney Bowman asked the court if the petitioner's standby counsel was "going to be doing the questioning?" (Id., p. 28, App. p. 109a.) Standby counsel then spoke up and this colloquy occurred:

> ATTY. WILLIAMS: My understanding of the role of standby counsel is I'm not allowed to speak. I just sit here, and if he wants to ask me a question, I answer it.
> THE COURT: Yes, and that's the Court's understanding, that Mr. Williams will be here. He will be available throughout. If the defendant wishes to discuss anything with Attorney Williams, I'll give him a reasonable opportunity to do that.
> ATTY. BOWMAN: Thank you. I just hadn't, in ten years, hadn't had that situation. (Id., pp. 28-29, App. pp. 109a-110a, emphasis added.)

The *Faretta* hearing transcript does not suggest that prior to being permitted to proceed pro se the petitioner knew that in Connecticut his counsel would just "sit here" and would not be "allowed to speak." Id.

Following the *Faretta* ruling, the other experienced state prosecutor who had been silent up to this point, interjected as follows:

> ATTY. HOLMES: Your Honor, and -- I apologize. Grayson

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[6] One danger is that pro se defendants end up with poorer outcomes. See, e.g., *How Gideon v. Wainwright Became Goldilocks*, 12 OHIO ST. J. CRIM. L. 307, 308, (2015) George C. Thomas, III.

[7] Connecticut Practice Book §§ 44-4 and 44-5 describe the role of standby counsel. (App. p. 142a-143a.)

> Holmes for the State. I just want to make sure that we're clear on the record that the Court has made the finding that the defendant has knowingly and voluntarily waived his right to counsel.
> THE COURT: Yes, I will make that finding at this time. (Id., at 29, App. p. 110a.)

Shortly thereafter, jury selection started with the pro se defendant's ex-attorney sitting mute at counsel table as standby counsel. The pro se defendant then engaged in voir dire. Under the Connecticut Constitution, voir dire is conducted by means of direct, individualized questioning by counsel.[8] Because the petitioner was pro se, he asked each venireperson questions. The trial record demonstrates that the first time standby counsel spoke after voir dire commenced occurred at the end of the day. At that point, three jurors had already been selected. When standby counsel spoke, it was not to assist the petitioner. The court inquired of those present, "THE COURT: . . . let me just inquire. It is quarter of. Do we have time to finish the last person?" (Id., p. 136, App. p. 112a1.) Standby counsel replied first, "I doubt it Your Honor. The most I can give you is another five minutes." Id. One of the prosecutors then said, "I wouldn't say, Your Honor." Id. The court then excused the venireperson and then the petitioner spoke.

> THE DEFENDANT: During recess, I went to speak to the Public Defender's Office, and they wouldn't give me an application. They didn't even say I'd get denied or -- they just wouldn't give me anything. (Id., at 137, App. p. 112a2.)

The court inquired if the refusal to give the petitioner an application seeking the appointment of a public defender occurred in the same courthouse that the trial was in. The petitioner said it was and the court then directed him to go to a different Public Defender's Office which was at "the other courthouse." Id. Thereafter court was adjourned.

When court opened the next morning the court requested, "the appearances for the record,

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[8] Connecticut Constitution, Article IV, amending Section 19 of Article First states in part: "The right to question each juror individually shall be inviolate."

please." (Tr. exc. 2-19-16, p. 1, App. p. 113a.)

> ATTY. BOWMAN: . . . Assistant State's Attorney Sarah Bowman.
> ATTY. HOLMES: Special Deputy Assistant State's Attorney Grayson Holmes.
> THE DEFENDANT: Marcus H for the defendant.
> ATTY. WILLIAMS: John Williams, standby.
> THE COURT: Thank you.
> ATTY. KELLY: And Sean Kelly, Judge, from the Office of the Public Defender. Id.

At this point the court asked the public defender if the petitioner had now "applied for the Public Defender's appointment?" Id. Attorney Kelly confirmed that the petitioner was now seeking legal representation from their office and they had met "late yesterday afternoon to make application." Id.[9] They spoke and Attorney Kelly told the petitioner to be at his office "at nine o'clock in the morning in order to prepare an application so he could look at his eligibility for Public Defender services." The petitioner showed up and "brought down some information" and the Public Defender's office took the petitioner's application that morning before the trial court opened. Id. Attorney Kelly informed the court that he was "not seeking appointment in this matter." (Id., p. 2, App. p. 115a.) He began to say that the reason their office was not seeking appointment was "not so much related to financial status." Id. Attorney Kelly explained by asking the clerk of court on the record, if "at least two times previously . . . there was also private counsel retained in this matter?" Id. The clerk affirmatively replied. Attorney Kelly further explained:

> ATTY. KELLY: . . . and putting the fact that he has actually posted bonds - I recognize that it was back . . . in 2014, posted significant bonds in order to end up getting his liberty, in essence, while the cases are pending.
> In addition, he was able to enter into two arrangements with two private counsels. Kind of shows a pattern where, if there's money needed, money comes, and that's where we are right now. I know he does have a right to represent himself pro se. I know he does

[9] Presumably this was in accordance with state Practice Book §§ 37-6, 44-1 and Statute §§ 51-296, 51-297. App, pp. 13a, 132a, 133a, 140a.

> have esteemed counsel appointed as standby right now with Mr. Williams. So, in a vacuum, just looking at the application alone, *that's not enough to end* up [with] -- the basis *for my decision not to seek appointment*, Judge. (Id., pp. 2-3, App. pp. 115a-116a, emphasis added.)

With this turn of events, the public defender, as well as the parties, were looking to the trial court to make a ruling. The trial court then conducted a hearing on the petitioner's indigency status and application to be represented by the public defender. The court first turned to the pro se petitioner.

> THE COURT: All right, anything you wish to say, sir?
> THE DEFENDANT: Yes, Your Honor. I had a conversation on two occasions with Mr. Kelly, and he was very honest. However, what -- in terms of the bonds, those bonds were posted over a year and a half ago. *Since then, my financial state has changed very, very drastically.* The two private counsels that I did hire, I provided Mr. Kelly with one of the financial agreements with the original lawyer, and I owed him $4,800, I think it was. $4,400. (Id., p. 3, App. p. 116a, emphasis added.)

Attorney Kelly turned to a document and said, "Here you go. I think the balance due was still $4,390. Id. The petitioner then continued to explain his impoverished financial status.

> THE DEFENDANT: $4,390, and that's out of $5,000. I was only able to pay him $610 before we parted ways, and it wasn't -- that was very early in this case that he was dismissed, and he actually, on-record, admitted what he did wrong in that situation. And yesterday, we addressed, you know, the issue with Attorney Williams. I also, and he can attest to it, owe him a substantial amount of money. *The initial payment that was given to Attorney Williams was not from myself. It was from my mom's entire income tax return.* (Id., pp. 3-4, App. pp. 116a-117a, emphasis added.)

The petitioner, addressing the court, stated that the previous day (when the petitioner asserted he was in conflict with his privately retained attorney and wanted a continuance so his family could privately retain replacement counsel) "you [the court] said . . . if I had someone else at that moment to file an appearance, then you would, you know, accept. I didn't." (Id.) After

representing himself for a number of hours pro se the previous day, a period in which three out of six jurors were selected, the petitioner invoked his Sixth Amendment right and explained:

> Therefore, I took the initiative to go and apply for Public Defender's help as counsel, because I did state on numerous times yesterday that I did not want the legal assistance from Mr. Williams, because I felt it would be ineffective, and the Sixth Amendment gives us the right to effective counsel. (Id.)

The petitioner then specifically referred to his indigent status:

> And in my financial state, it also gives us the right to free counsel on the State's -- I guess we could say on the State's dollar or per the State's payment. And I would ask that you would consider the appointment from the Public Defender's Office, because I am, indeed, financially eligible for the services. Id.

The trial court also knew that the petitioner was unemployed. The petitioner had informed the court of this the previous day. (2-18-16 Tr. p. 4, App. p. 85a.)

The court then turned to one of the state prosecutors. The state did not take a neutral stance regarding the petitioner's invocation of his right to counsel as an indigent applicant and instead objected to the petitioner being appointed counsel at state expense. The state argued in part that, "[t]oday was the day to bring *financial information about his mother's resources and salary*, and he didn't." (2-17-16 Tr. p. 5, App. p. 118a, emphasis added.) The following colloquy occurred:

> THE DEFENDANT: In regards to the comment about being asked for my mom's financial state or paperwork to prove that, that was never asked.
> ATTY. KELLY: And I will say, Judge, he's correct in reference to that. I did not ask for his mother's income at that point. I just asked for a financial global picture. Certainly, that was not specifically specified. I do agree.

The petitioner also argued:

> I spoke to you yesterday about the fact that I was looking into other attorneys. I didn't have them present with me yesterday, but I do have the -- at least, a representative from the Public Defender's Office with me today. (Id., p. 6, App. p. 119a.)

The prosecutor additionally argued that during the previous day's jury selection, "[t]he defendant did a very competent job" and that he had standby counsel. (Id., p. 7, App. p. 120a.) The defendant replied that, "[t]he question at hand is not my competence." He went on to state:

> However, *I'm seeking another attorney.* I'm seeking help from someone else. You -- I mean, the Court appointed Mr. Williams as standby attorney. It wasn't me who, you know, put in a request for him to be standby attorney, so I would just like to have that on the record. (Id., p. 8, App. p. 121a, emphasis added.)

The court then thanked the petitioner and stated: "But let me just indicate that the Public Defender's Office has made the determination that the defendant is not eligible." Id. That in turn triggered a dialogue between the public defender Attorney Kelly and the petitioner.

> THE DEFENDANT: *You said I wasn't eligible*?
> ATTY. KELLY: What I said was I was not gonna seek appointment, given all circumstances. *I said just on what the financial affidavit that you provided alone, if taken in a vacuum, perhaps that might indicate that you are eligible.* I'll state that for the record.
>
> . . .
>
> But we're left with a scenario where you are . . . living at home. I don't have the entire household income. I know you have brought . . . your tax documents in the past. At one point, you clearly would not have been eligible, around 2014, 2015. You were able to post bonds, arrive at financial matters or agreements with bondsmen, and you were able to actually retain the services of two private lawyers. That's usually not the circumstance or recipe where appointment is sought, Judge. (Id., at 9, App. p. 122a, emphasis added.)

The petitioner repeated that he told Attorney Kelly that he "owed money on those bonds." Id. Addressing the court, the petitioner argued, ". . . like he said, *it's not that I'm not eligible. He's just not seeking appointment.*" (Id., at 10, App. p. 123a.) He then told the court, "*I have no money at all*," and addressing Attorney Kelly he said, "*but would you agree that financially, I am eligible for the services*?" Attorney Kelly replied: "I'd say – *the financial affidavit that you provided to me* I

said looks like alone, not – *if it was in a vacuum, you would qualify, but it is not.*" (Id., emphasis added.)

The hearing concluded.

> THE COURT: All right, so, under all the circumstances, they're not seeking to be appointed. I am not going to appoint the Public Defender's Office to represent you. We'll continue your appearance pro se with standby counsel by Attorney Williams, all right? So, thank you, Mr. Kelly. (Id.)

Thereafter the unemployed pro se petitioner continued throughout vire dire and the entire trial as a pro se defendant who was denied court-appointed counsel by the trial court because he had posted bail, his family had previously partially paid his attorney's fees and he was living at his mother's home.

Ten days later the petitioner filed with the court a financial affidavit which showed that his only asset was $161.00. The court found him to be indigent so that he could have a defense witness subpoenaed at state expense. (App. pp. 148a-149a.)

Additional facts will be referred to in the argument which follows.

REASONS FOR GRANTING THE PETITION

1. The writ of certiorari should be granted because the Connecticut court failed to "reasonably apply the rules 'squarely established' by this Court's holdings to the facts of each case." *White v. Woodall*, 134 S.Ct. 1697, 1706 (2014), quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Specifically, the pro se petitioner, who was demonstrably indigent when he applied to be appointed a public defender on the second day of jury selection but was denied court-appointed counsel because he had paid his bail and his mother had paid his attorney's fees, was forced to represent himself, pro se throughout the jury trial, in violation of his Sixth Amendment right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The writ

should be granted to correct this constitutional affront. It should also be granted to implement a comprehensive standard of indigency to prevent similar Sixth Amendment violations and to satisfy equal protection and due process among the courts of the fifty states.

A. The Connecticut Appellate Court Based Its Holding On Inaccurate Factual Premises

At the outset, it is critical to state that the Connecticut Appellate Court's holding is based on two inaccurate factual premises. It stated: "Here, there is evidence in the record to support the court's implicit finding that the defendant was not indigent and, thus, not entitled to the appointment of a public defender." 190 Conn. App. 332, 341 ___ A. ___ (2019). It then explained:

> The most probative evidence in the record that the defendant had the financial ability at the time of his request for a public defender to secure competent legal representation was that *he, in fact, had obtained a private attorney who was ready, willing, and able to continue to represent him throughout the trial.* On this fact alone, we conclude that the trial court's finding that the defendant was not indigent is not clearly erroneous, and, thus, this claim warrants no further discussion. Id., (emphasis added).

The record belies this factual finding. The petitioner owed his privately retained attorney thousands of dollars and was also in conflict with him over defense strategy. After the petitioner's motion for a trial continuance to seek new private counsel was denied, the conflicted relationship (at least from the client's perspective) was so dire that he informed the court, ". . . *if it's a situation where it's pro se or staying with Attorney Williams, then I'd rather go pro se.*" (2-18-16 Tr. p. 16, App. p. 97a, emphasis added.) Once the petitioner informed the court that he was choosing self-representation over representation by his retained counsel, the record is clear that

retained counsel was discharged by the client, notwithstanding counsel's statement that he was willing to continue representing the petitioner. At that point he had been fired.

The other factually inaccurate premise is the Appellate Court's statement that the public defender "*stated* that after reviewing the defendant's application, *the defendant was not eligible for their services* and that the Office of the Public Defender did not seek to be appointed in the case." (Id., at 338, emphasis added.) As noted in the statement of facts, the public defender never stated that the petitioner was not eligible for their services. The petitioner, per the signed application, indeed was eligible but the public defender was disinclined to seek appointment because the petitioner posted bond and his mother paid her tax return money to retain counsel for her son. (Tr. 2-19-16, p. 4, App. p. 117a.) This denial of counsel happened because the public defender not only considered the criteria required in the indigency application but went well beyond its bounds. Irrelevant factors were impermissibly relied on by the trial court when it denied the indigent petitioner's motion to be represented by the public defender's office.

The Connecticut Appellate Court cited Connecticut General Statute § 51-297(f) which states:

> Section 51-297 (f) provides in relevant part: ``As used in this chapter, `*indigent defendant' means . . . a person who is formally charged* with the commission of a crime punishable by imprisonment and *who does not have the financial ability at the time of his request for representation to secure competent legal representation* and to provide other necessary expenses of legal representation . . . ." *State v. Marcus H*, 190 Conn. App. 332, 341, ___ A.3d ___ (2019) (emphasis added).

Yet, it failed to follow the statute's mandate. It is undisputed that the petitioner did not "have the financial ability *at the time of his request*" to retain private counsel. This is vividly underscored by the indigency application he filed mid-trial. (App. p. 148a.) In this affidavit of indigency the

petitioner sought payment by the state for the service of subpoenas. The pro se petitioner once again represented that he had no income and no assets, other than $161.00 in a checking account. It is dated February 29, 2016.[10] The trial judge, Barbara B. Jongbloed, specifically found the petitioner to be "*Indigent and unable to pay*," and granted the subpoena service fee waiver requested. (App. p. 149a.) This was only ten days after the same judge denied the petitioner the services of the public defender because, in the words of Connecticut's intermediate appellate court, "there is evidence in the record to support the court's implicit finding that the defendant was not indigent." *Marcus H, supra* at 341. Between February 19, 2018 and February 29, 2018 the defendant's indigency status did not change. The evidence in the record required a finding of indigency and the court appointment of counsel so the petitioner's Sixth Amendment right to counsel would be honored.

B. By Any Analysis The Petitioner Was Indigent.

This case does not involve an applicant who is found ineligible for appointment of counsel because her income was above a threshold despite being a member of the so-called "working poor." Such applicants may have full-time low paying jobs but who, based on state indigency income or asset requirements may be deemed to be ineligible for the appointment of a public defender. A person deemed to have adequate assets in one state may be deemed to have more than sufficient assets in another.[11] The lack of a definition or uniform standard is the cause. In

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[10] App. p. 148a. In the trial court's post-verdict ruling on the petitioner's motion for articulation, the fact the court found him indigent one day after the state's witnesses started to testify was not mentioned. The trial court's ruling is at App. p. 29a. The articulation motion is at App. p. 23a.

[11] One scholar observes: "Understanding how determinations of eligibility are made is important because these decisions play the most significant role in ensuring the right to counsel for defendants who cannot afford to hire their own attorneys. Thus, the implications for establishing a balanced and standardized approach to eligibility determination are significant. *In the absence of relatively objective and uniform standards, eligibility determinations are made more*

the case at bar, the unemployed and impoverished petitioner qualified under *Gideon v. Wainwright* even though a family member paid some of his debts related to his defense. Indigent defendants' Sixth Amendment rights are being violated every time a court denies an indigent defendant in the petitioner's shoes appointed counsel in felony prosecutions.

C. Established Sixth Amendment Precedent of *Gideon v. Wainwright*, 372 U.S. 353 (1963), Prohibits Such Denials of Counsel.

Justice Hugo Black in his dissenting opinion in *Betts v. Brady*, 316 U.S. 455 at 447 (1942) stated that "denial to the poor of the request for counsel in proceedings based on charges of serious crimes has long been regarded as shocking to the universal sense of justice throughout this country." When he wrote the court's unanimous opinion in *Gideon v. Wainwright*, 372 U.S. 353 (1963) which reversed *Betts v. Brady*, he stated that the right to counsel in serious criminal prosecutions is "fundamental and essential to fair trials" but [t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Id., at 344.

Justice Arthur J. Goldberg in his concurring opinion in *Hardy v. United States*, 375 U.S. 277 at 289, n. 7 (1964) observed:

> Indigence "must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means." An accused must be deemed indigent when "at any stage of the proceedings [his] lack of means... substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right." Indigence must be defined with reference to the particular right asserted. Thus, *the fact that defendant may be able to muster*

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subjectively, increasing the risk of inequality in the appointment of situated defendants being treated unequally with respect to their Sixth Amendment rights. Further, without the ability to obtain counsel on their own, defendants may be forced to represent themselves. Wynne, Susan L., *Indigency Statutes, Vol. 5.2 Tenn. Journal of Race, Gender & Social Justice* 166 at 169 (2016) (emphasis added.)

> *enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.* [12]

This dicta from the concurring opinion in *Hardy* is admittedly not binding precedent. When one compares the uniformity of how indigency is determined in federal prosecutions with the lack of uniformity in state prosecutions, it becomes apparent that there is a constitutional problem. It can partially be explained as the "failure to implement *Gideon*."[13]

Professor Paul Marcus has cogently explained:

> The difficulty here is that the United States Supreme Court through its many 6th Amendment decisions has never chosen to define the term *indigency*; it has never explained the reach of its decisions. The states hardly have adopted uniform rules. In some states, the defendant will have to show that she is truly destitute, without any funds at all. Other states have statutes which are far more defendant friendly. Some state courts take a broad view in judicial decisions and conclude that "it is not necessary... to establish total destitution. Other statutes give essentially no direction at all, speaking in terms of the accused "demonstrating [his/her] financial inability to obtain legal counsel," or being "financially unable to secure legal representation."
> *Unfortunately, we are left with similarly situated individuals being treated quite dissimilarly throughout the nation. That can hardly be the result contemplated by Justice Black and his colleagues almost 50 years ago.*[14]

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[12] The quote within the quote is from Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, Report on Poverty and the Administration of Federal Criminal Justice 8 (1963).

[13] "[C]reating an affirmative constitutional right requires a mandate to ensure that it is adequately funded. The central problem in implementing Gideon has been that the Court created an affirmative right and then left it to the political process to fund. Unlike negative liberties, which generally involve enforcing prohibitions, and affirmative right inherently requires attention to how it will be financed. Moreover, *it was left largely to state governments to fund, and without any enforcement mechanism to ensure that funding was adequate*."
E. Chimerensky, *Lessons from Gideon*, 122 Yale, L.J. 2676, 2692 (2013).

[14] Marcus, Paul, *Why the United States Supreme Court Got Some [But Not a Lot] of the Sixth Amendment Right to Counsel Analysis Right* (2009). St. Thomas Law Review, Vol. 21, No. 2, p. 142, 2009; William & Mary Law School Research Paper No. 09-91.

In the instant case, the petitioner's mother paid part of his attorney's fees and part of the bail bondsman's fee but the petitioner, even relying on family financial assistance, was in debt to both. On the first day of jury selection, his attorney was owed almost $5,000.[15]

In other words, the petitioner's family voluntarily did what they could to pay his debts but even with their help, the petitioner was unable to pay what he owed his lawyer prior to the commencement of trial. It is bitterly ironic that the same trial judge, relying on the same indigency information ten days later then found the petitioner indigent so that the State of Connecticut would pay his subpoena service costs as he tried to represent himself. The petitioner's status as an indigent is incontrovertible. If Justice Goldberg's comment in his concurring opinion in Hardy, supra, had been uniformly applied as law in the 52 years following *Hardy,* there would be no question that the petitioner suffered the consequences of a blatant constitutional violation. Here, the petitioner was not merely unemployed and assetless, he was in substantial debt. *Gideon's* promise failed him.

D. The Petitioner Was Denied Equal Protection And Due Process of Law.

This Court has held that the Fourteenth Amendment guarantees "meaningful access to justice" in criminal cases. *Ake v. Oklahoma*, 470 U.S. 68, 77, (1985). All criminal defendants are entitled to "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). *"[J]ustice" cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."* *Ake*, 470 U.S. at 76 (emphasis added.) As a result of

[15] (Tr. 2-19-16, p. 3, App. p. 116a.)

his indigence, the petitioner was denied "meaningful access to justice," at his trial, one in which he was facing over 40 years of imprisonment.[16]

Connecticut's operative statutes, C.G.S. § 51-296 and 51-297, are silent regarding the impact of a family member posting bail. (App. pp. 132a, 133a.) From May, 2002 until October, 2018, Oklahoma's statute 22 O.S. § 1355A "Indigent Request for Representation (D)" was not silent. It was adverse to indigent defendants. "D. If the defendant is admitted to bail and . . . another person on behalf of the defendant posts a bond other than by personal recognizance, *this fact shall constitute a rebuttable presumption that the defendant is not indigent.*" (App. p. 144a, emphasis added.)

In November, 2018, the statute was superceded and this subsection now reads: "D. If the defendant is admitted to bail and . . . another person on behalf of the defendant posts a bond other than by personal recognizance, *the court may consider such fact in determining the eligibility* of the defendant for appointment of the System; provided, *however, such consideration shall not be the sole factor in the determination of eligibility.*" (22 O.S. § 1355A, OCIS 2019, Indigent Defense Act, App. pp. 146a-147a, emphasis added.) Eliminating the presumption of non-indigency is an improvement.[17] The petitioner argues that when a family member posts bail for an accused loved one who is poor it should not be considered or used as a means to deprive the indigent accused of being appointed a public defender.

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[16] One glaring example occurred while he was trying to cross-examine a witness and the jury saw his leg shackles. See the petitioner's brief to the Appellate Court (pp. 25-35, App. pp. 69a-79a.) If he had been represented by counsel it is very doubtful this event would have happened.

[17] In commenting on Oklahoma's indigent defense procedures in 2006, law professor Rodney Uphoff noted, "...most Oklahoma defendants who are not in custody are denied counsel paid for by the State of Oklahoma." Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem*?, 2006 Wis. Law Rev. 739, 751 (2006).

Oklahoma's approach is not an outlier. The fifty states take disparate approaches in their indigency requirements for the appointment of counsel. One scholar observes:

> Some states do not use defendant's ability to post bond as a factor in determining defendants' indigency as a matter of state policy. *States omitting bond posting as a factor include Alabama, Connecticut, Iowa, Kansas, Minnesota and Utah. Many of these states consider a defendant indigent if he cannot afford to hire private counsel himself,* while Iowa uses the federal poverty guidelines to determine indigency. *However, there is evidence that even in these states some courts use bond posting as a factor in determining indigency.* Allison Kuhns, *If You Cannot Afford An Attorney, Will One Be Appointed For You? How (Some) States Force Criminal Defendants To Choose Between Posting Bond And Getting A Court-Appointed Attorney*, 97 Iowa C. Rev. 1787 at 1804 (emphasis added).

The author notes that despite its statute, Connecticut was one of the states where "some of the courts use bond posting as a factor in determining indigency." (Id., see n.136.) In short, if a loved one posts bail for an indigent accused, whether the accused is appointed a public defender or not should not hinge on what state they are in.[18]

In *Bearden v. Georgia*, 461 U.S. 660, 665 (1983), this Court described the Equal Protection inquiry as being "whether the State has invidiously denied one class of defendants a

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[18] A concrete example of the vast divergence opens the journal article, "*The Invisible Pillar of Gideon*" by Adam M. Gershowitz. "In 1996, the State of South Carolina charged Larry McVay with common-law robbery. McVay, who was employed part-time and took home less than $160 per week after taxes, claimed that after paying his basic living expenses he had no money left with which to hire an attorney. A South Carolina court disagreed and denied McVay's request for appointed counsel. 'Seven years later, Scott Peterson was arrested for the murder of his wife and unborn child in California. Although Peterson owned a home, drove an expensive SUV, and was carrying $10,000 in cash when he was captured, he claimed to be indigent. The State of California agreed and appointed counsel for him. The rationale underlying the Supreme Court's landmark decision in *Gideon v. Wainwright* was that in order for every defendant to stand equal before the law, the poor man charged with a crime must be provided with a lawyer to assist him. Yet despite *Gideon's* pronouncement, the seemingly middle-class Peterson was appointed counsel, while the nearly penniless McVay was left to fend for himself." 80 *Ind. Law Journal* 571 at 571 (2005).

substantial benefit available to another class of defendants." Oversimplified, this reflects a rich vs. poor dichotomy. In *Entsminger v. Iowa,* 386 U.S. 748 at 752 (1967) this Court held that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale." It has been advanced that "the injury suffered by the poor is not only the deprivation of resources vis-à-vis a wealthier class, but a *deprivation, which by definition, denies them access to a fair adversarial proceeding*." Sudeall Lucas, Lauren, "*Reclaiming Equality to Reframe Indigent Defense Reform*, 97 Minn. L.Rev. 1197 at 1240-44 (2013) (emphasis added.) Unfair deprivation of counsel "make[s] the constitutional premise of a fair trial a worthless thing." *Griffin v. Illinois*, 351 U.S. 12 at 17 (1956).

In the instant matter, the state public defender may have informed the court that his office was "not seeking appointment" based on an unwritten state policy. (App. p. 116a.) As noted, the facts that the petitioner posted bail and his mother paid some of his attorneys fees were irrelevant relative to the state statute. Nor were they called for in the indigency application. Even though the court had this information at the appointment hearing, an arbitrary line was drawn by the court which forced the petitioner to try the case to verdict unrepresented. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), this Court declared Virginia's poll tax to be unconstitutional. "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." Id., at 668. Using the facts the petitioner's mother helped pay his bail and attorneys fees similarly introduced a "capricious or irrelevant factor" which the court relied on to deprive him of a fundamental right. Such line drawings based on wealth or its lack "are traditionally disfavored." Id. What happened in the case at bar was an "invidious" discrimination . . . that runs afoul of the Equal Protection Clause." Id., (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942.)

There is a "fundamental constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 828 (1977). Thus, as Justice Ruth Bader Ginsburg noted in *M.L.B. v. S.L.J.*, 519 U.S. 102 at 120 (1996):

> We observe first that the Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer,* reflect both equal protection and due process concerns. See *Ross v. Moffitt,* 417 U.S., at 608-609, 94 S.Ct., at 2442-2443. As we said in *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2068-2069, 76 L.Ed.2d 221 (1983), in the Court's *Griffin* -line cases, '[d]ue process and equal protection principles converge.' *The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs.* See *Griffin,* 351 U.S., at 23, 76 S.Ct., at 592-593 (Frankfurter, J., concurring in judgment) (cited *supra,* at 110-111). *The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action.* See *Ross,* 417 U.S., at 609. (Emphasis added.)

In *M.L.B.*, supra, it was held that the state of Mississippi could "not deny M.L.B. because of her poverty, appellate review of the sufficiency of the evidence on which the trial court based its parental termination decree." Id., 102. Mississippi had denied her motion to appeal *in forma pauperis*.

In the instant case there is a similar convergence of due process and equal protection principles. When, as occurred here, a fundamental constitutional right is violated based on an inability to pay, the connection between the Due Process Clause and the Equal Protection Clause is profound. In *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584 at 2603 (2015), Justice Kennedy eloquently described the profundity.

> Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the

> identification and definition of the right. See *M. L. B.*, 519 U.S., at 120-121, . . . *This interrelation of the two principles furthers our understanding of what freedom is and must become.* (Emphasis added.)

E. The Petitioner Never Waived His Sixth Amendment Right To Appointed Counsel.

Shortly after court opened on February 18, 2016 the petitioner's privately retained counsel informed the court that his client "wishes to move to substitute another attorney not yet selected." (2-18-16 Tr. p. 1, App p. 82a.) The petitioner informed the court there was a breakdown in the attorney-client relationship. (Id. p.6, App. p. 87a.) A discussion ensued and the court asked the petitioner if he was "asking to represent yourself?" (Id. p.8, App. p. 89a.). The petitioner replied, "I actually - - *no, I want another attorney.*" Id., (emphasis added.) The counsel replied; "*well if you don't want to represent yourself, then that's fine.*" Id. The petitioner's attorney denied being in conflict with his client and claimed that although the petitioner had "not honored his commitment to me financially, nor has his mother," he was willing to continue representing him. (Id. p.11, App. p 92a .) The petitioner vigorously disputed the lack of a conflict and thereafter the prosecutor said she was "confused" regarding "if [the petitioner] decides to not allow Attorney Williams to represent him." Id., For the second time, the court inquired of the petitioner:

"The Court: Well I *had understood Mr. H to indicate that he did not want to represent himself pro se. Correct, sir*?" (Id p. 13, App. p 94a.) Again, the petitioner replied, "*I do not.*" Id., (emphasis added.)

At this juncture the prosecutor posed a question which elicited the following:

> ATTY BOWMAN: . . . I guess the question . . . is if we go forward with him pro se, or if Attorney Williams stays with him until he

> finds someone else if he wishes to do that, but going forward today, regardless.
> *THE COURT: All right, well, I don't hear the defendant asking to represent himself pro se.*
> *THE DEFENDANT: No.* (Id., emphasis added.)

The court interpreted the petitioner's request to be a request for a short continuance in order "to obtain new, private counsel." Id. The defendant did not disagree but did say, "[i]n a reasonable amount of time." Id. The court then denied the request. Id. Shortly thereafter, the petitioner asked the court this: THE DEFENDANT: If, in fact, I did go pro se, *we would just do the jury selection just me by myself on today?*" Id., at 16, App. p. 97a (emphasis added.)The court then replied: "THE COURT: Well, . . . *but I didn't hear you – that you were asking for that.*" Id. (emphasis added.) The defendant replied: "*I don't want to be stuck in a situation, where, again I feel uncomfortable, and...if it's a situation where its pro se or staying with Attorney Williams, then I'd rather just go pro se.*" Id. (emphasis added.)

The court asked him if he understood his request for time to hire a new lawyer had been denied and he said he did. Id. At this point he was asked if he was now requesting to proceed pro se and only then did the petitioner say, "yes." Id.

The state prosecutor expressed her concern over the petitioner's repeated previous denials of wanting to be pro se and then changing his position when the choice was binary pro se or stay represented by his privately retained counsel whom he was discharging.

> ATTY. BOWMAN: My concern is that now, . . . Mr. H. is setting himself up for a habeas issue in that he's first said he's not comfortable representing himself and, once the continuance request was denied, now he is, . . . going to go . . . for, . . . ineffective assistance of counsel and that he didn't have adequate representation . . . . I would ask that he not be allowed at this point to represent himself. (Id., at 17, App. p. 98a.)

The court asked him a series of questions based on Connecticut's procedural rule applying to

choosing to represent oneself pro se and *Faretta v. California,* 422 U.S. 806 (1975) and allowed him to proceed pro se. (2-18-16 Tr. pp. 18-26, App. pp. 99a-107a.) At this time, the prosecutor prompted the court to make a finding that the defendant "knowingly and voluntarily waived his right to counsel." Id., p. 29, App. p. 110a.)

The next morning, the petitioner invoked his Sixth Amendment right to counsel by applying for the public defender. He once again made the court aware that he did not want to represent himself.

> [THE DEFENDANT]: Yesterday, I explained to you how concerned I was going forward with Mr. Williams, . . . as my counsel. . . . You said you understood where I was coming from . . . and that if I had someone else at that moment to file an appearance, then you would . . . accept. I didn't. Therefore, I took the initiative to go and apply for Public Defender's help as counsel, because I did state on numerous times yesterday that I did not want the legal assistance from Mr. Williams, because I felt it would be ineffective, and the Sixth Amendment gives us the right to effective counsel. (Tr. 2/19/16, at 4, App. p. 117a.)

There is a strong presumption against waiver of a fundamental constitutional right. *Brewer v Williams*, 430 U.S. 387, 404 (1977). Any purported waiver must be scrupulously examined by the court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Indeed, the *Johnson* court held that the trial court should indulge in every reasonable presumption against waiver of fundamental constitutional rights. Id., at 464.

In the case at bar the petitioner had legal counsel for over a year prior to February 18, 2016. On that morning, when he discharged his privately retained attorney, he repeatedly stated he did not want to proceed pro se. When faced with the Hobson's choice of not discharging his privately retained counsel of record or proceeding pro se and he reluctantly said "yes," to proceeding pro se, he appeared to be thinking, as he told the court, "*just me by myself on today*?"

(Tr. 2-18-16, p. 16, App. p. 96a) (emphasis added). And after just a few hours of selecting jurors pro se, he unequivocally involved his right to apply for counsel. Indulging every reasonable presumption against waiver leads to the conclusion the waiver was not voluntary, even though many of the required questions were asked and answered.

The petitioner was informed by the court that if he "couldn't afford an attorney, [he] would have a right to an attorney appointed to represent [him]." (Tr, 2-18-16, p. 24, App. p. 105a.) And then the trial court said, "[h]owever, *in this case you've retained Attorney Williams. You understand that correct?*" The petitioner replied, "*yes.*" Id. While it was true that the petitioner had months earlier retained this attorney, at the time of the court's question the attorney was discharged and obviously no longer representing the petitioner. The question was asked during the *Faretta* canvass. The court never asked the petitioner if he was waiving his right to appointed counsel. The fact the petitioner replied affirmatively to having retained Attorney Williams reflects a lack of understanding or confusion on the petitioner's part because at that juncture the attorney was discharged, in part due to the petitioner's indigency and inability to pay owed attorney's fees. The court's comment was highly misleading because it implied the petitioner was not eligible to apply for and be appointed a public defender. The trial court informed the petitioner there were "dangers" to pro se representation but never explained what any of them were.[19]

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[19] THE COURT: All right, and you feel that -- or do you understand that, as a layperson, you would be at a significant disadvantage, because you haven't had the training, for example, that Attorney Williams has had --
THE DEFENDANT: Yes.
THE COURT: -- and you understand that then you would be at a disadvantage and face certain dangers in representing yourself.
THE DEFENDANT: Yes. (2-18-16, Tr. p. 23, App. p. 104a.)

All of these various circumstances, to wit, the petitioner's repeated refusals to proceeding pro se, the fact he had no legal training or experience, the fact he had not been pro se at any point previously, his confusing answer about Attorney Williams' status, not being warned of any of the dangers of self-representation and being misled by the court's implication that he did not have the right to an appointed attorney because, in the court's words, ". . . in this case, you've retained Attorney Williams," – all of these establish that the *Faretta* canvass was constitutionally defective.[20]

Two decisions of this Court support finding the waiver was invalid. *Von Moltke v. Gillies*, 332 U.S. 708 (1948) and *Iowa v. Tovar*, 541 U.S. 77 (2004).

The *Von Moltke* Court specified the parameters of the trial court's role in establishing a valid waiver.

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. *The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.* To be

[20] The trial court's implication that the petitioner was forced to stay with his retained attorney and could not apply for appointed counsel is similar to what transpired in *United States v. Brown*, 785 F.3d 1337 (9th Cir. 2015). In *Brown,* as occurred here, the defendant's attorney informed the court that the client wanted him replaced. Brown referred to "money is an issue" and his dissatisfaction with "his lawyer's handling of the case." Id., at 1342. Brown sought to have his retained attorney replaced with court-appointed counsel. The trial court denied Brown's request. He was convicted and appealed. Relying on *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006), the Ninth Circuit Court of Appeals stated that, "the Sixth Amendment right to counsel of choice means that a defendant has a right to *fire* his retained . . . lawyer for any reason or [for] no reason." Id., at 1344 (emphasis in the original.) Because Brown "met the financial requirements for an appointed attorney" just as the petitioner did here, the court stated, "*he was entitled to one – such as the federal public defender waiting in the courtroom.* Id., at 1350 (emphasis added.). The court held: "Accordingly, because Brown's motion to substitute counsel should have been granted, Brown was denied his right to counsel of choice and we must vacate his convictions." Id.

> valid, *such waiver must be made with an apprehension of* the nature of the charges, the statutory offenses within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, *and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances . . .*" *Id.* at 723-24 (emphasis added.)

In *Tovar*, supra, this Court noted, "[w]arnings of the pitfalls of proceeding to trial without counsel . . . must be 'rigorous[ly]' conveyed." *Tovar*, 541 U.S. at 89 (second alteration in original) (quoting *Patterson v. Illinois*, 487 U.S. 285 at 298 (1988). It should also be noted that in *Carnley v. Cochran*, 396 U.S. 506, 516 (1962), the Court eschewed any attempt to establish waiver of the right to counsel from a silent record:

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

Finally, the petitioner highlights the fact that when he invoked his right to be represented by the public defender, the trial court did not inform him that a few hours earlier he had waived his Sixth Amendment right to counsel and it was too late. Quite the contrary, the court conducted a merits hearing and erroneously denied the petitioner's request for counsel. The petitioner's purported waiver of his Sixth Amendment right to counsel was invalid and therefore there was no waiver.

F. The Standard Of Review Is Automatic Reversal Based On Structural Error.

When a criminal defendant is denied his Sixth Amendment right to counsel, harm is presumed because it "casts such doubt on the fairness of the trial process that it can never be considered harmless error." *Penson v. Ohio*, 488 U.S. 75 at 88 (1988). This is structural error.

The denial of a defendant's Sixth Amendment right to counsel of choice is also structural error. *United States v. Gonzelez-Lopez*, 548 U.S. 140, 147-48 (2006).

CONCLUSION

On November 1, 1963, the Attorney General of the United States, Robert F. Kennedy, gave a speech regarding this Court's unanimous opinion in *Gideon v. Wainwright*. The decision had only issued earlier that year and yet our nation's highest ranking law enforcement officer recognized its extraordinary importance.

> If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the Court had not taken the trouble to look for merit in that one crude petition ... the vast machinery of American law would have gone on functioning undisturbed. But Gideon did write that letter, the Court did look into his case ... and the whole course of American legal history has been changed.[21]

Fifty years later, Attorney General Eric Holder also gave a speech about this landmark decision. He was addressing the ABA's House of Delegates. General Holder said, "America's indigent defense systems continue to exist in a state of crisis and the promise of *Gideon* is not being met."[22] One contributing factor is lack of adequate funding but, as occurred in the instant case, in some states, completely impoverished criminal defendants are denied appointed counsel because a family member posted bail or advanced fees. The petitioner suggests it is time for this Court to set some uniform standards of indigency in the interests of fairness, equal protection and due

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[21] Attorney General Robert F. Kennedy, Speech Before the New England Conference on the Defense of Indigent Persons Accused of Crime, November 1, 1963, *The Legacy of Gideon v. Wainwright*, U.S. DEP'T OF JUSTICE (Feb. 3, 2016), http://www.justice.gov/atj/fifty-years-later-legacy-gideon-v-wainwright.

[22] Attorney General Eric Holder, Remarks delivered at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.

process.

The indigent petitioner's Sixth Amendment right to be represented by appointed counsel was violated. The waiver of his right to counsel was not voluntarily and knowingly made. For all of these reasons the petitioner prays that this Court grant this petition.

Respectfully Submitted,

Marcus H, Petitioner

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