

20-6176

No. 20-1507

ORIGINAL

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON J. WEATHERS,
Petitioner,

v.

SCOTT FRAKES,
Respondent.

On Writ of Certiorari To The United States
Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

BRANDON J. WEATHERS
Pro se Petitioner
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QUESTION PRESENTED

1. Did the Court of appeals correctly apply the interest of justice standard into the Petitioner's substitution of counsel claim where the trial court made no inquiry to gather the relevant facts into the circumstances underlying the request where the Petitioner proceeded pro se?
2. Did the Petitioner knowingly and intelligently waive his right to counsel nine days after discharging appointed counsel?

TABLE OF CONTENTS

QUESTION PRESENTED	i
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTIONAL GROUNDS	1
RELEVANT CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	8
ARGUMENT	9
1. Substitution of Counsel	9
2. Waiver of Counsel	24
CONCLUSION	29

APPENDIX

Federal District Court Decision	A
Court of Appeals for the Eighth Circuit	B
Eighth Circuit Court of Appeal denial of rehearing	C
Order Denying Defendant's Amended Postconviction	D
Relevant November ^{4TH} , 2015 Transcript Pages	E
Case Index and BOE 70:16-18 Page	F

TABLE OF AUTHORITIES

Fareth v. California, 422 U.S. 806 (1975)	25, 27
Fowler v. Collins, 253 F.3d 244, 249-50 (6 TH Cir. 2001)	27
Gideon v. Wainwright, 83 S.Ct. 792 (1963)	29
Harrington v. Richter, 562 U.S. 86 (2011)	9
James v. Brigano, 470 F.3d 636 (6 TH Cir. 2006)	26
Johnson v. Zerbst, 304 U.S. 458 (1938)	29
Martel v. Clair, 565 U.S. 648 (2012)	23
Smith v. Lockhart, 923 F.2d 1314 (8 TH Cir. 1991)	11, 13, 15
Strickland v. Washington, 104 S.Ct. 2052 (1984)	9
United States v. Adezo-Gonzalez, 268 F.3d 772, 779 (9 TH Cir. 2001)	21
United States v. Cronin, 104 S.Ct. 2039 (1984)	18
United States v. DiAmore, 56 F.3d 1202 (9 TH Cir. 1995)	22
United States v. Diaz, 951 F.3d 148 (3 RD Cir. 2020)	14
United States v. Diaz-Rodriguez, 745 F.3d 586 (1 ST Cir. 2014)	10
United States v. Farah, 899 F.3d 608 (8 TH Cir. 2018)	15
United States v. Graham, 91 F.3d 213, 221 (D.C. Cir. 1996)	10
United States v. Hansen, 929 F.3d 1238 (10 TH Cir. 2019)	25, 26, 28
United States v. Jones, 795 F.3d 791 (8 TH Cir. 2015)	11
United States v. Lott, 310 F.3d 1231 (10 TH Cir. 2002)	16
United States v. Luscombe, 950 F.3d 1021 (8 TH Cir. 2020)	26, 28
United States v. Marcus, 130 S.Ct. 2159 (2010)	24, 25, 29
United States v. Mertzios, 462 F.3d 830, 838 (8 TH Cir. 2006)	25
United States v. Moore, 159 F.3d 1154 (9 TH Cir. 1998)	22

United States v. Musa, 220 F.3d 1096, 1102 (9 TH Cir. 2000)	14
United States v. Powell, 847 F.3d 760 (6 TH Cir. 2017)	10, 11
United States v. Reed, 668 F.3d 978, 986 (8 TH Cir. 2012)	26
United States v. Reyes-Bosque, 596 F.3d 1017, 1033 (9 TH Cir. 2010)	19
United States v. Rodriguez, 612 F.3d 1049 (8 TH Cir. 2010)	16, 18
United States v. Simeonov, 252 F.3d 238 (2 ND Cir. 2001)	10
United States v. Velasquez, 855 F.3d 1021 (9 TH Cir. 2017)	14, 18

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	passim
U.S. Const. Amend. XIV	passim

STATUTES

Neb. Rev. Stat. 28-319.01	2
28 U.S.C. 1254 (1)	1
28 U.S.C. 2101 (c)	1
28 U.S.C. 2254	2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon J. Weathers respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in Case No. 20-1507.

OPINIONS BELOW

The decision of the Federal District Court of Nebraska denying habeas corpus on February 13, 2020. (Petition for writ of Certiorari, Appendix A). The decision of the United States Court of Appeals for the Eighth Circuit denying certificate of appealability was filed on July 24TH, 2020. (Petition for Certiorari, Appendix B). A Petition for Rehearing was filed by the Petitioner on August 4TH, 2020. Rehearing was denied August 28TH as overlength of brief. (Petition for Certiorari, Appendix C).

STATEMENT OF JURISDICTIONAL GROUNDS

A writ of Certiorari is being sought from this Court pursuant to 28 U.S.C.A. 1254(1) and 28 U.S.C.A. 2101(c). The ninety-day filing requirement for the

Petition for Certiorari pursuant to U.S.C.A. 2101 was complied with.

The jurisdictional basis of the United States District Court of Nebraska rested upon 28 U.S.C.A. 2254. The appellate jurisdiction of the United States Court of Appeals for the Eighth Circuit rested upon Federal Rule of Appellate Procedure 22 U.S.C.A.

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment VI of the United States Constitution
Amendment XIV of the United States Constitution

STATEMENT OF THE CASE

The Petitioner was charged with two (2) counts of first-degree sexual assault of a child in violation of Neb. Rev. Stat. 28-319.01 on November 13, 2014.

Prior to trial, defense counsel received discovery on December 29TH, 2014. (Filing No. 11-12 p.11) Defense counsel provided co-counsel with discovery

on January 13, 2015. None of the discovery included any text messages or cellular data.

The Petitioner advised defense counsel about this missing evidence at a meeting in January of 2015 and informed counsel that the missing evidence would clearly show that the Petitioner never had sexual relations with the victim.

Due to defense counsel's refusals to pursue the missing text message discovery, the Petitioner filed his first motion for new counsel and a motion to compel due to counsel's inaction. The motions were addressed on June 18TH, 2015.

The Petitioner withdrew the motion for new counsel at defense counsel's assurances the discovery would be provided soon. (BOE Vol. II 6:19-17:1) The motion to compel was argued by the Petitioner and the Court granted the motion, giving the State until June 26TH, 2015 to turn over the missing evidence. (BOE Vol. I 17:8-19:24)

On October 1ST, 2015, the district court filed copies of several letters that had been sent

by the Petitioner to the Court in August and September, again raising the prosecutions unwillingness to turn over the missing discovery and defense counsel's refusal to pursue the missing evidence.

In violation of the motion to compel order, the Petitioner received some of the text messages in a hearing held October 6TH, 2015. On October 28TH, 2015, the Petitioner filed a second motion for substitute counsel. The substitution motion was addressed on November 4TH, 2015.

Prior to addressing the motion for new counsel, the district court addresses the Petitioner's motion to produce for examination. The Petitioner advised the Court that the phone he was arrested with, he never received any information from, and defense counsel has never made an attempt to get it. (BOE Vol. I 44:11-44:22)

Defense counsel falsely states, "everything that I currently have, I know Mr. Weathers has had the opportunity to review that." (BOE Vol. I 45:24-46:1)

The prosecution falsely states, "your Honor, I believe all of the phones in this case have been analyzed, and I believe all of the discovery has been turned over." (BOE Vol. I 46:11-46:13)

The Petitioner's motion for new counsel was very fact specific regarding the missing discovery:

F) Despite discovery being filed last December, and a motion to compel filed by me and granted by Judge Shelly Stratman on June 18TH, 2015, giving the State eight (8) days to do so, my attorney still has not tried to retrieve text messages and all cellular data that will prove my innocence

When the trial court addresses the motion for substitution of counsel, instead of inquiring into the factual basis of the Petitioner's motion and to resolve the conflicting statements by the Petitioner, defense counsel, the State, and the courts own previous motion to compel order from June 18TH, 2015, the Petitioner is offered a Hobson's Choice.

Without being advised of his Sixth Amendment right to counsel, the Petitioner is offered the Hobson's choice of keeping his public defender, hire his own counsel, or proceed pro se. (BOE Vol. I 49:15-50:9) The Petitioner chose to proceed pro se.

The trial court offered no reason or explanation for denying the motion for new counsel.

The Petitioner proceeded pro se in subsequent hearings on November 10TH, November 13TH, and December 3RD, 2015. The Petitioner also proceeded pro se in his jury trial December 7TH December 11TH, 2015, and again self-represented at sentencing.

On November 13, 2015, nine days after the Petitioner discharged counsel, the trial court states, "there are other matters that needed to be addressed." The missing text messages defense counsel and the prosecution stated were turned over previously on November 4, 2015.

The State falsely stated that her expert from the police department could not access several of the Petitioner's phones

and needed the Passcodes. (BOE Vol. I 64:14-64:23).

The prosecution's statement is refuted by her own expert in trial who stated all of the phones were analyzed in November of 2014, a year prior. (BOE Vol. I 857:14-857:15), and by the subpoena to U.S. Cellular (filing no. 11-12 p.12) by Det. Darren Cunningham and Det. Christy Jaworski.

Detective Jaworski testifies to the subpoena compliance in trial by U.S. Cellular. (BOE Vol. I 911:5-911:6).

On December 3RD, 2015, another hearing was held regarding missing text messages from the Petitioner's Samsung Galaxy SIII cellphone. The State responded, "the phones we couldn't get into, we obviously don't have any information to give him."

Judge Shelly Stratman stated, "I'd have to look at the record from our last hearing--but the two (2) Samsungs you didn't give the passcode to, because you said you weren't interested

in that; isn't that accurate? (BOE Vol. I 85:24-86:4).

These statements are refuted by Det. Christy Jaworski's testimony of the subpoena compliance by U.S. Cellular in trial. (BOE Vol. V 911:5-911:6).

The State needed the passcodes to bypass the security feature to omit the exculpatory evidence from the Petitioner. The State succeeded with the Kyocera phone.

If the trial court would have inquired into the Petitioner's motion to substitute counsel to gather the relevant facts, the court would have discovered that the State was in possession of all of the, the text messages for a year.

SUMMARY OF THE ARGUMENT

The Petitioner Brandon J. Weathers argues that he is entitled to Habeas Corpus relief in the United States District Court of Nebraska on his Petition for Writ of Habeas Corpus which allege that his appellate counsel was ineffective

for failing to assign as error the trial court's failure to conduct an adequate inquiry into the Petitioner's motion for substitution of counsel.

The Petitioner contends that appellate counsel's actions violated his Sixth Amendment right to effective assistance of counsel in that counsel's performance was deficient and adversely affected the outcome of the proceeding under Strickland v. Washington, 104 S.Ct. 2052 (1984).

This Court must conclude that the State's criminal justice system has experienced the "extreme malfunction" for which federal habeas relief is the remedy. Harrington v. Richter, 562 U.S. 86 (2011)

ARGUMENT

1. Substitution of Counsel

The decision of the Eighth Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings, is in conflict with its own prior decisions, and in conflict with the decisions of the other Court of Appeals on this same important matter.

The United States Courts of Appeals are in uniformity regarding substitution of counsel motions.

where a defendant voices a seemingly substantial complaint about counsel, the court should inquire into the reasons for dissatisfaction. United States v. Simeonov, 252 F.3d 238 (2ND Cir. 2001)

when defendant requests substitution of counsel or counsel seeks to withdraw, the court must conduct an appropriate inquiry into the source of the defendant's dissatisfaction with his counsel.

United States v. Diaz-Rodriguez, 745 F.3d 586 (1ST Cir. 2014)

when an indigent defendant seeks appointment of substitute counsel, a district court is generally obligated "to engage the defendant in a colloquy concerning the cause of the defendant's dissatisfaction with his representation. United States v. Graham, 91 F.3d 213, 221 (D.C. Cir. 1996)

Once defendant brings any serious dissatisfaction with counsel to district court's attention, court has obligation to inquire into source of

nature of dissatisfaction and may grant motion to withdraw or for substitute counsel if there is a showing of good cause. United States v. Powell, 847 F.3d 760 (6TH Cir. 2017).

The Eighth Circuit's principles of substitution of counsel law echoes that of its sister Circuits.

"A trial court has an obligation, on a motion for substitution of counsel, to inquire thoroughly into situations where a defendant makes a seemingly substantial complaint about counsel." United States v. Jones, 795 F.3d 791 (8TH Cir. 2015)

In Smith v. Lockhart, 923 F.2d 1314 (8TH Cir. 1991), the Petitioner was arraigned before the court on seven counts of terroristic threats on October 16TH, 1988. The Petitioner voiced his concern over his appointed counsel citing a conflict of interest.

Namely the fact that defense counsel was a part-time municipal judge, a class action suit pending in federal court and the fact that defense counsel was representing his co-defendant.

without inquiring to gather the relevant facts, the trial judge informed Mr. Smith he could either accept appointed counsel or proceed pro se. Smith informed the judge that he wanted a lawyer, but that he would not accept appointed counsel.

On November 6TH, 1986, the court conducted a pre-trial omnibus hearing in Smith's criminal case. Smith appeared pro se. At the beginning of the hearing, Smith again told the judge he wanted a lawyer, but had irreconcilable conflicts with counsel.

Although Smith attempted to argue the merits of his stated conflict of interest, the judge REFUSED to inquire further.

The Judge refused to appoint a different attorney, and again told Smith he had to accept defense counsel or proceed pro se. The Judge then offered to appoint a legal advisor to assist Smith with his pro se defense, which Smith accepted.

Despite Smith's stated objections to defense counsel, the Judge appointed defense counsel as Smith's legal advisor.

The Eighth Circuit Court of Appeals reversed, conditionally granting habeas corpus. The Court reasoned that the omni-bus hearing was a "critical stage" necessitating assistance of counsel, and (2) the defendant showed sufficient cause for substitution of counsel and, thus, trial court violated defendant's Sixth Amendment rights by failing to appoint different counsel to assist at omni-bus hearing.

The Eighth Circuit stated that "when a defendant raises seemingly substantial complaint about counsel, judge has obligation to inquire thoroughly into factual basis of defendant's dissatisfaction, and inquiry should be on record; court must make kind of inquiry that might ease defendant's dissatisfaction, distrust, or concern." Smith v. Lockhart, 923 F.2d 1314 (8TH Cir. 1991).

In the case at bar, the Petitioner's earlier expression of discontent, namely the first motion to substitute counsel and the pro se motion to compel, should have alerted the court to the possibility that the Petitioner was not receiving the benefits of meaningful assistance of counsel under the Sixth Amendment.

Following receipt of the Petitioner's October 28TH, 2015 motion for substitution of counsel, the district court addressed the motion on November 4TH, 2015.

At this hearing, the trial court made no inquiry into the truth of the Petitioner's allegations or their impact on the case before it, namely the missing discovery Petitioner asserts would have disposed of the case.

"Typically, if a district court fails to make 'any on-the-record inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney,' it abuses its discretion." United States v. Diaz, 951 F.3d 148 (3RD Cir. 2020)

See also United States v. Musa, 220 F.3d 1096, 1102 (9TH Cir. 2000), reversed and remanded, finding the district court made no inquiry at all; United States v. Velasquez, 855 F.3d 1021 (9TH Cir. 2017), reversed and remanded, district court's lack of inquiry into defendant's concerns about counsel's representation during the plea-bargaining stage weighed in favor of finding district court abused its discretion in denying defendant's motion to substitute counsel.

The district court was obligated under the Sixth Amendment to ascertain whether the interests of justice required that the motion for substitution of counsel be granted.

The district judge failed to make any inquiry into the Petitioner's dissatisfaction by asking NOT a single question of the Petitioner or defense counsel, or of holding a separate hearing to determine the truth of the matter asserted by the Petitioner.

As in Smith v. Lockhart, the Petitioner attempted to argue the merits of his dissatisfaction with defense counsel, actually interrupting the court at not being heard.

"Given the importance of the attorney-client relationship, the court must conduct an adequate inquiry into the nature and extent of an alleged breakdown in attorney-client communication, on motion for appointment of substitute counsel." United States v. Farah, 899 F.3d 608 (8TH Cir. 2018)

The district judge, on record, refuses to address

the attorney-client relationship. (BOE Vol. I 51:3-51:21).

The Petitioner's motion to substitute counsel was very fact specific:

F. Despite discovery being filed last December, and a motion to compel filed by me and granted by Judge Shelly Stratman on June 18TH, 2015, giving the State eight (8) days to do so, my attorney still has not tried to retrieve text messages and all cellular data that will prove my innocence.

"If a defendant makes sufficiently specific, factually based allegations in support of his request for new counsel, the district court must conduct a hearing into his complaint." United States v. Lott, 310 F.3d 1231 (10TH Cir. 2002).

No hearing is granted to the Petitioner.

"In some instances, the court has the relevant facts without engaging in an intensive inquiry." United States v. Rodriguez, 612 F.3d 1049 (8TH Cir. 2010)

The trial court's own statements November 4th, 2015 shows the trial court lacked the relevant facts.

"If there are any outstanding reports or information, that that be turned over to Mr. Weathers by end of business on Friday." (BOE Vol. I 55:16-55:19)

"Again Ms. Beadle is going to find out if there's any outstanding reports or information on these phones, and that'll be turned over to you by end of business on Friday." (BOE Vol. I 58:22-58:25)

"As far as the information Ms. Beadle is required to turn over to you by Friday, it has to do with the Kyocera phone and any other outstanding-- if there's any analysis or reports or anything with regards to the phones." (BOE Vol. I 60:18-60:22)

"So far as the text messages, even if there are text messages outstanding, Ms. Beadle is going to get that to you by end of business of Friday." (BOE Vol. I 56:8-58:11)

These statements, coupled with the conflicting statements by the Petitioner and his substitution

motion, defense counsel and the subsequent hearings regarding the missing discovery shows the court lacked the relevant facts to make a ruling on the Petitioner's motion for new counsel.

Rodriguez, *supra*, is not applicable in this case.

The trial court's failure to inquire into the Petitioner's motion for substitution of counsel is compounded by the fact the Petitioner chose to proceed pro se on November 4TH, 2015 and subsequent hearings, the entire trial and sentencing.

"Trial is unfair if the accused is denied counsel at a critical stage of trial." United States v. Cronin, 104 S.Ct. 2039.

Applying the interests of justice standard to the Petitioner's motion for new counsel, case law favors finding an abuse of discretion by the trial court.

The Court of Appeals reviews a denial of a motion for substitution of counsel for abuse of discretion. United States v. Velasquez, 855 F.3d 1021 (9TH Cir. 2017).

To evaluate whether a district court abused its discretion, the Court of Appeals considers three factors: (1) the adequacy of the district court's inquiry; (2) the extent of the conflict between the defendant and counsel; and (3) the timeliness of defendant's motion. United States v. Reyes-Bosque, 596 F.3d 1017, 1033 (9TH Cir. 2010).

ADEQUACY OF INQUIRY

The Petitioner clearly and consistently raised concerns about his representation by defense counsel and his refusal to secure the missing discovery starting in April of 2015 with the first motion to compel and first motion for substitute counsel.

When the State failed to comply with the motion to compel order, the Petitioner sent a letter to defense counsel and the court in July of 2015 regarding the State's non-compliance.

The Petitioner sent more letters in August and September regarding defense counsel's failure to pursue the missing evidence. In a hearing held October 6TH, 2015, the Petitioner again complained of the missing discovery with

no help from defense counsel.

When the trial court addresses the Petitioner's motion to substitute counsel, the trial court did not ask a single question of the Petitioner or defense counsel to gather the relevant facts into the Petitioner's claim.

The Petitioner was offered the Hobson's Choice of proceeding to trial with unprepared counsel or proceed pro se.

The trial court offered no explanation for denying substitution of counsel.

The first factor weighs in the Petitioner's favor that the district court abused its discretion.

EXTENT OF THE CONFLICT

The second factor the court failed to consider was the extent of the conflict between defense counsel and the Petitioner.

The court must ask whether "there was a serious breach of trust and a significant breakdown in communication

that substantially interfered with the attorney-client relationship." United States v. Adelzo-Gonzalez, 268 F.3d 772, 779 (9TH Cir 2001)

Here the record reflects the Petitioner alerted the trial court to his dissatisfaction with appointed counsel on numerous occasions by letter and in court before the second motion for new counsel.

Furthermore, the nature of Petitioner's complaint, defense counsel's unwillingness and refusals to obtain favorable evidence on the Petitioner's behalf, suggests the strongest type in breakdown in communication that would prohibit adequate representation.

As the record clearly establishes, the Petitioner complained about counsel's representation the entire time and faced with the possibility of having to keep counsel, the Petitioner advised the court he wasn't going to talk to him if he came to see him. (BOE Vol. I 52:6-52:10)

The record overwhelmingly shows evidence of a 'significant breakdown' in the attorney-client relationship had occurred and this conflict prevented the Petitioner from mounting an adequate defense.

The extent of the conflict factor weighs in favor of finding an abuse of discretion.

TIMELINESS OF MOTION

The third factor the court failed to evaluate is the timeliness of the Petitioner's motion to substitute counsel. This factor must always be evaluated in the context of the litigation in question, so no precise amount of advance notice is required to render a request timely.

See United States v. Moore, 159 F.3d 1154, (holding that attempts to substitute counsel one month before trial and then again two (2) weeks before trial were timely even when they would have required continuance).

See also United States v. D'Amore, 516 F.3d 1202 (holding that an attempt to contact the court ten days before a hearing and a motion one day before the hearing were timely).

In the present case, the Petitioner filed his first motion for new counsel five months after discovery revealed no text messages were turned over to the

defense and defense counsel had not pursued the evidence in question. The motion was only withdrawn at defense counsel's assurances the evidence would be provided soon.

The Petitioner's second motion for new counsel occurred over a month prior to trial after the Petitioner realized the State was refusing to turn over exculpatory discovery and defense counsel refused to pursue the missing evidence.

The third factor favors holding that the district court abused its discretion.

Even if the Petitioner's motion for new counsel could be considered untimely - a reason no court relied on in its ruling on the motion to substitute counsel - the court's failure to conduct an adequate inquiry and the extent of the conflict outweighs any untimeliness in the balance of factors.

Altogether, these factors weigh in favor of finding an abuse of discretion. "Courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer." Martel v. Clair, 565 U.S. 648, 664, 132 S.Ct. 1276, 182 L.Ed. 135 (2012)

In denying postconviction relief on this claim, the district court ignores the claim altogether. (Petition for Writ of Certiorari, Appendix D)

The Eighth Circuit Court of Appeals either failed to apply the correct interest of justice standard, or did so in an implausible, illogical, or unreasonable manner.

II. Waiver of Counsel

Plain error can be found in the Petitioner's waiver of his right to counsel. The Petitioner asks this Court to review the Petitioner's waiver of counsel for plain error.

An appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that: (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial

proceedings. United States v. Marcus, 130 S.Ct. 2159 (2010).

The Petitioner argues that his waiver of counsel was involuntary because the district court refused to grant substitution of counsel. "A defendant's right to counsel includes the right to conduct his own defense." Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed. 562 (1975).

"But the court must 'assure itself that the waiver of the right to appointed counsel is knowing and voluntary.'" United States v. Mentzos, 462 F.3d 830, 838 (8TH Cir. 2006), cert. denied, 549 U.S. 1359, 127 S.Ct. 2079, 167 L.Ed. 2d 799 (2007).

The Tenth Circuit Court of Appeals stated: "A knowing and intelligent waiver of the right to counsel can be made only with the defendant's apprehension of the nature of the charges, the statutory offenses included 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. United States

V. Hansen, 929 F.3d 1238 (10TH Cir. 2019)

In United States v. Luscombe, 950 F.3d 1021 (8TH Cir. 2020), the Eighth Circuit held that the defendant knowingly and voluntarily relinquished his right to counsel "after being repeatedly warned of the dangers and disadvantages of doing so." United States v. Reed, 668 F.3d 978, 986 (8TH Cir. 2012)

The magistrate judge held a Faretta hearing, where she carefully inquired about Luscombe's knowledge of the charges, the rules of evidence and procedure, and his right to be represented by an attorney.

In the case at bar, the Petitioner was not attempting to delay the trial unreasonably and was not engaging in dilatory tactics.

Instead, he was dealing with appointed counsel that was unprepared for trial and a trial court judge intent on going to trial regardless of appointed counsel's preparedness. See James v. Brigano, 470 F.3d 636 (6TH Cir. 2006)

When the trial court addressed the motion for

substitution of counsel, the court immediately offered the Petitioner a Hobson's Choice, keep the public defender, hire your own counsel or proceed pro se, without any inquiry to gather the relevant facts. (BoE Vol. I 49:15-50:9).

As such, the Petitioner's waiver was not made knowingly and intelligently, with "eyes wide open"; the choice between unprepared counsel and self-representation is no choice at all. Fowler v. Collins, 253 F.3d 244, 249-50 (6TH Cir. 2001) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975)).

The record before this Court for a Petition for Writ of Certiorari cannot be more clear, the Petitioner moved for substitution of counsel on November 4TH, 2015.

The trial court made no inquiry into that motion nor obtained a valid waiver of counsel before the Petitioner proceeded pro se.

What should be more troubling to this Court, is the fact that the district court, in denying the Petitioner's motion for postconviction relief on April 19, 2018, stated "the defendant voluntarily waived his right to counsel, as the record supports defendant

waived this right knowing the consequences of the decision.
(Petition for Certiorari, Appendix D).

The trial court directs us to BOE 70:16-18. This hearing occurred nine (9) days later after the Petitioner discharged counsel. (Petition for Certiorari, Appendix F)

The trial court simply asked, "Okay. All right. Now, are-- Mr. Weathers, are you still wanting to proceed self-represented?" The Petitioner stated "Yes".

Whether it is the November 4TH, 2015, motion to substitute counsel hearing or the November 13TH, 2015, where the trial court stated the Petitioner actually waived his right to counsel, no constitutional waiver of the right to counsel took place.

The trial court never advised the Petitioner of the statutory offenses, range of allowable punishments thereunder, the Petitioner's apprehension of the nature of the charges, the rules of evidence and procedure, and of his right to be represented by an attorney.

United States v. Luscombe, 950 F.3d 1021 (8TH Cir. 2020);

United States v. Hansen, 929 F.3d 1238 (10TH Cir. 2019).

The Petitioner's waiver of counsel was not knowing, voluntary or intelligently made.

The Petitioner has satisfied the four prongs of the plain error standards in United States v. Marcus, 130 S.Ct. 2159 (2010)

The Petitioner's convictions were obtained in violation of Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461 (1938) and Gideon v. Wainwright, 372 U.S. 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted

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