No. 20-7063

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Pablo A. Damiani-Melendez — PETITIONER
(Your Name)

vs.

Dana Metzger, Warden, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Delaware Superior Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Pablo A. Damiani Melendez
(Your Name)

14100 McMullen Hwy., S.W.
(Address)

Cumberland, MD 21502
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Did trial Court Violate Melendez's sixth Amendment right under the united states and Delaware Constitution when it denied his Verbal request to proceed pro se?

2. Did trial Court Violate Melendez's Fifth Amendment right to Due process, when it forced him into trial with unwanted Counsel?

3. Did trial Court engage in proper and thorough Colloguy with Melendez after waiving right to Counsel?

4. Did trial Court properly address Melendez's Complaint of a Conflict with trial Counsel?

5. Was the Delaware Superior and supreme Court's denial of Melendez's request to represent himself adverse to the spirit of the sixth Amendment and to a proper application of Delaware Law?

6. Did the United States District Court err in denying Melendez's writ based Solely on tardiness, failing to review the ineffective assistance of trial Counsel and Sixth Amendment Violation When Same issues raised severe federal questions Sufficient for lateness to be waived?

7. Did the united states District Court err in denying Melendez's writ when Same infact did establish Valid Claims of Constitutional Violations that jurists of reason would find debatable?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Attorney General of the State of Delaware,
The Honorable William C. Carpenter Jr..

RELATED CASES

Damiani-Melendez V. State, 55 A.3d 357 (Del. 2012).
Damiani-Melendez, 2015 WL 9015051.
Damiani-Melendez V. State, 139 A.3d 837 (Table),
2016 WL 2928891 (Del. May 13, 2016)
D. Del. Civ. No. 1:17-cv-00126 (Judgment entered Feb. 11, 2020)
U.S. Court of Appeals for the third Circuit No. 20-1496
Judgment entered Sept. 1, 2020.
U.S. Court of Appeals for the third Circuit No. 20-1496
(Petition for rehearing) (Judgment entered Oct. 7, 2020).

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (continued)

CASES — PAGE NUMBER

TABLE OF CONTENTS

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[√] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix B/C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[√] For cases from **state courts:** Do not Posses any Decisions.

The opinion of the highest state court to review the merits appears at Appendix Do not Posses Documents to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was September 1, 2020.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 7, 2020, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts:** Do not Posses any Decisions.

The date on which the highest state court decided my case was May 13, 2016. A copy of that decision appears at Appendix Do not Posses Documents.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V : [1791]

-U.S. Bill of Rights-

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just cause.

Amendment VI : [1791]

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 defense.

STATEMENT OF THE CASE

On May 26, 2011, the Honorable Jan R. Jurden heald a hearing in response to Melendez's letter to trial Counsel instructing him to file a motion to relief himself from the case. Hearing Tr. (May 26, 2011). The following exchange occurred:

> The Court: Are you asking the Court for permission to represent yourself?
> The Defendant: No, your Honor. I am not.
> The Court: So what you want is a different public defender; is that right?
> The Defendant: Yes, your Honor. Id. at pp. 2-3

The Court then, following a discussion, denied the request to have another attorney appointed and Clarified with Melendez his desire to not represent himself. Id. at p. 3. Prior to Concluding the hearing, the Court again asked Melendez if he wished to represent himself to which he responded in the negative. Id. at p. 8.

On September 21, 2011, the Honorable Fred S. Silverman held a hearing to Consider, among other things, a motion to dismiss Counsel filed by Melendez. At the outset, the following exchange took Place:

> The Court: [Y]ou've asked to go Pro se, havent you?
> The Defendant: No, Your Honor, I have not.
> Motion to Dismiss Counsel Tr. (sept. 21, 2011) p. 3.

Melendez went on to clarify that his intention behind filing the motion was to have another attorney appointed. The Court denied that request. Id. at pp. 44-45.

On the following day, September 22, 2011, prior to the Commencement of Jury selection and five days prior to the start of trial, Melendez raised Concerns about an exchange earlier on this same day between Mr. Melendez and Trial Counsel which Melendez Considered a Conflict, Where Trial Counsel told Melendez that there was no trial strategy for people like him who are guilty, and that if he was Melendez he would hang himself in the holding Cell. Jury Selection Tr. (sept. 22, 2011). The following exchange occurred:

> The Court: We are picking the jury now. Do you want to represent yourself in a case in which you will Spend the rest of your life in jail if you are Convicted? Do you want to represent yourself, is that What you are telling me? You are not telling me that,

You want Somebody else, the answer to that is no. Judge Silverman has already made that decision and I'm not overruling it, even by what you are telling me this morning. So do you want to represent yourself?

The Defendant: Your Honor, if it comes down to me having to represent myself, I will represent myself.

The Court: All right.

The Defendant: If that's what it comes down to, to get him out of my case, your Honor, I will do so, If that's what it takes, and I would not - and if I do do that, your Honor, I would not want Mr. Manning to serve as my Co-Counsel, I do not want him in my case at all. If it takes for me to go pro se, your Honor, I will do that. I have tried many ways to get rid of him as I feel he's not doing what he should be doing for me, and now with this Conflict, today, your Honor, if I have to go Pro se, Your Honor, I will do so. Id. at pp. 16-17.

The Court indicated to Mr. Melendez that he was "making a huge, huge mistake" by seeking to self-represent, and that, if so, he would "be required to comply with all the rules" and that "it's going to start today, today." Id. at pp. 17-18. The Court recessed in order to speak to Judges Jurden and Silverman. Following the recess, the trial Judge indicated:

The Court: My understanding is that the issue Concerning representation has been previously discussed with both of them, first with Judge Jurden, who denied the request to excuse Mr. Manning from the case, and it occurred yesturday before Judge Silverman, and what he has represented to me was a long Colloquy and discussion about Mr. Manning's representation. It Was also represented to me that in each of those proceedings there was not a request by the defendant to represent himself, it was simply a request to remove Mr. Manning from the proceedings. It is quarter of twelve on the morning that we are to select the jury. It would be disruptive

to this process to allow a defendant on the eve of trial to make the request to represent himself, because at the moment it would appear to the Court he is not prepared to proceed forward and With the potential Consequences to him, I find that a last minute request to represent himself would be so disruptive to the process - We have more than a hundred jurors downstairs waiting, ready to be picked for the trial... Mr. Manning will remain Counsel in the matter because of the lateness of the request that's being made and the fact that it had been addressed previously by two other Superior Court Judges. Id. at pp. 19-20.

On September 28, 2011, being the Second day of trial, Mr. Melendez revisited his request to proceed pro se. Transcript of proceedings (September 28, 2011) pp. 43-48. The following exchange occurred:

The Defendant: Why Can't I go pro se your Honor?
The Court: I told you, we're not going to go that route.
The Defendant: I want to be pro se.
The Court: We are not going to have the Conversation anymore, period. Mr. Manning is representing you and that's the way it is. If Somebody in the future want to say I was wrong, and you were... We Started the trial, that issue was addressed prior to trial, it was denied prior to trial, I picked the jury, you made the request again and I made the decision not to do it. Id. at p. 48.

On October 5, 2011, Mr. Melendez once again revisited the pro se issue, asking for a reason of his denial to proceed pro se. Trial Transcript (October 5, 2011). The following exchange occurred:

The Defendant: I just basically wanted to go back a few days and for the record I wanted to basically ask a question as to why was it -- I just want to Know a reason on the record of why on Tuesday and Wednesday, September 27th and 28th, defendant was denied to proceed pro se.
The Court: Mr. Melendez, the record is what the

record is. We have gone through that. You have gone through at least three Judges Who've made that decision, two Judges before I picked up the case on the morning of trial. And on the morning of trial the Court believed it would be a disruption to allow you to proceed pro se. We were ready to pick the jury when it came to my attention when I walked on the bench and I decided to allow Mr. Manning to continue to represent you. The record is what the record is. If the Supreme Court says we did it wrong, they will tell us and we will try it again. But at the moment that's the record and there is nothing else to add. Id. at pp. 4-5.

The reason Melendez is emphasizing his repeated requests to proceed pro se and the Courts response is to highlight and contradict the trial Courts Memorandum Opinion in which the trial Court attempted to recharacterize it's position of Melendez's request to proceed pro se from being untimely and disruptive to being ambiguous and motivated more by a desire to obtain Substitute Counsel or to delay the proceedings than to represent himself. Memorandum Opinion (November 25, 2015) pp. 21-22.

REASONS FOR GRANTING THE PETITION

The "prejudice" of the state court in petitioners trial infected his entire trial with errors of Constitutional dimensions (U.S. V. Frady, 456 U.S. 152, 170 (1982)), thus creating "fundamental error" (Coleman V. Thompson, 111 S.Ct. 2546, 2557 (1991); Chapman V. California, 386 U.S. 18 (1967)). A "miscarriage of justice" will occur if the claims are not heard on the merits. (Wainwright V. Sykes, 433 U.S. 72, 87-88 (1977); Murray V. Carrier, 477 U.S. 478, 495-496 (1986); and Edwards V. Carpenter, 529 U.S. 446, 451 (2000)). Melendez now prays that this Court hears his Claims on the Merits.

The united states Constitution and the Delaware Constitution both provide a right to Self-representation in a Criminal proceeding.

The united states Supreme Court's discussion in Faretta V. California, 422 U.S. 806, 819-21 (1975) is instructive.

"Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, it's denial is not amenable to "harmless error" analysis. The right is either respected or denied; it's deprivation Cannot be harmless". Buhl V. Cooksey, 233 F.3d 783, 806 (3rd cir. 2000).

In denying Melendez's Amended motion for postConviction relief, the trial Court relied upon the two-step inquiry set forth in Briscoe V. State, 606 A.2d 103 (Del. 1992), (Citing U.S. V. Welty, 674 F.2d. 185, 187 (3rd Cir. 1982)), which state:

> First, the Court Must "determine if the reasons for the defendant's request for substitute Counsel Constitute good Cause to justify a Continuance of the trial, in order to allow new Counsel to be Obtained." Second, if the Court "determines that the defendant is not entitled to a Continuance, in order to engage new Counsel, the defendant must then Choose between two Constitutional options, either Continuing with it's existing Counsel or proceeding to trial Pro se".

Having denied Melendez's renewed request for appointment of

a new Counsel and, implicitly, that he was not entitled to a Continuance of the trial by stating that Melendez's requirements with the rules is "going to start today, today", (Jury selection Tr. (sept. 22, 2011) pp. 17-18), the next step was that Melendez "must" then Choose to Continue with assigned Counsel or proceed pro se. In U.S. V. Welty, supra, 674 F.2d at 187, it was also stated that:

> Where on eve of trial, defendant seeks new Counsel, or, in alternative, opts to represent himself, district Court must engage in two lines of inquiry; first, Court must decide if reasons for defendant's request for substitute Counsel Constitute good cause and are thus Sufficiently Substantial to justify Continuance in order to allow new Counsel to be Obtained; if district Court determines that defendant is not entitled to Continuance, defendant is then left with Choice between Continuing with existing Counsel or proceeding Pro se; and second, Since decision to proceed Pro se involves Waiver of sixth Amendment right to Counsel, district Court then has responsibility of ensuring that any decision by defendant to represent himself is intelligently and Competently made. Also cited in Buhl V. Cooksey, supra, 233 F.3d at 798, and Government of Virgin islands V. James, 934 F.2d 468, 470 (3rd cir. 1991).

A defendant's request of self-representation in a Criminal trial must be made clearly and unequivocally. This requirement prevents defendants from making Casual and ineffective requests to proceed Pro se, and then attempting to upset "adverse Verdicts after trials at which they had been represented by Counsel." (U.S. ex rel. Maldonado V. Denno, 348 F.2d 12, 16 (2nd Cir. 1965)). It also keeps defendants from proceeding pro se, then Challenging any Subsequent Conviction by alleging a denial of the right to Counsel. Requiring a Clear and unequivocal assertion of the right also protects defendants from inadvertently Waiving Counsel based upon "'Occasional musings on the benefits of self-representation'" (united States V. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000) Quoting United States V. Arlt, 41 F.3d 516, 519 (9th Cir. 1994)). However, a defendant

need not "recite some talismanic formula hoping to open the eyes and ears of the Court to his request" to invoke his/her Sixth Amendment rights under Faretta. (Buhl V. Cooksey, Supra, 233 F.3d at 792; Dorman V. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986)). Such a requirement would contradict the right it was designed to protect as a defendant's Sixth Amendment right of self-representation would then be conditioned upon his/her knowledge of the precise language needed to assert it. The law simply requires an affirmative, unequivocal, request, and does not require that request to be written or in the form of a formal motion filed with the Court. (Buhl V. Cooksey, supra, 233 F.3d at 792).

In this case, Melendez, who twice previously was denied his request for a new Counsel, stated:

> If that's what it comes down to, to get him out of my case, your Honor, I will do so, if that's what it takes, and... if I do do that, your Honor, I would not want Mr. Manning to serve as my Co-Counsel, I do not want him in my case at all. If it takes for me to go pro se, your Honor, I will do that. I have tried many ways to get rid of him as I feel he's not doing what he should be doing for me, and now with this conflict, today, your Honor, If I have to go pro se, your Honor, I will do so. (Jury selection Tr. (sept. 22, 2011) pp. 16-17).

Melendez' expressed intent to the trial Judge in the affirmative form of "I will" proceed pro se four times was a clear and unequivocal statement of his desire, especially when viewed in the Context of his previous attempts to have assigned Counsel relieved of his representation. Furthermore, it was viewed so by the Court as it Considered this plea as a request to proceed pro se when it later denied the same. Melendez, also, on two separate occasions, following his initial request, once again raised his request to proceed pro se. (Transcript of proceedings (sept. 28, 2011) pp. 43-48; and Trial transcript (Oct. 5, 2011) pp. 4-11)).

The right for a Criminal defendant to proceed pro se is

not absolute. When a trial Judge Considers a motion to proceed pro se, he or she must take certain steps. Before accepting or rejecting a defendant's motion to proceed pro se, the trial Judge must determine (1) "whether the appellant's decision to represent himself was intelligently and Competently made" and (2) "whether he was aware of the dangers of self-representation". (Government of Virgin islands V. James, Supra, 934 F.2d at 471). "If defendant still elects to proceed pro se after district Court has fulfilled it's responsibilities to ensure that decision to proceed pro se was made Voluntarily, Knowingly, and with an understanding of the ramifications and Consequences, Court must permit defendant to do so". (U.S. V. Peppers, 302 F.3d 120, 133 (3d Cir. 2002).

Melendez four times stated his decision to proceed pro se. The trial Court was then required, under Peppers, to engage in:

> a thorough inquiry, on the record, to assure itself that the defendant fully apprehends the nature of the Charges against him, the perils of self-representation, and the requirements that will be placed upon him. This calls for specific forewarning of the risks that foregoing Counsel's trained representation entails. Id. at 133.

Melendez Contends that the trial Judge never engaged in a thorough inquiry prior to denying Melendez's application and refused to entertain Melendez's Conflict Complaint. However, assuming arguendo, that the previously quoted brief Colloquy with Melendez is sufficiently thorough, Peppers notes that "[O]nce the trial Court has fulfilled those responsibilities, however, if the defendant still elects to proceed pro se, the trial Court "must" permitt him to do so." Id. at 133.

Finally, the right to proceed pro se must be made in a timely fashion, but the "timing of a defendants request to represent himself is only one factor that a Court must Consider in ruling upon such request." (Buhl V. Cooksey, Supra, 233 F.3d at 795). Indeed, the trial Judge Cited the "lateness of the request" as a factor in his denial. The trial Court made no finding of purpose to delay. Rather, in ruling that Melendez's motion was untimely, the Court relied Solely on the effect of delay. The Court reasoned that Melendez would have needed

a Continuance to prepare for trial, and that the resulting delay would have prejudiced the state. In the instant matter, Melendez's request to proceed pro se, was raised prior to the jury having been sworn, or even selected. Jury selection was held on september 22nd with the trial scheduled to begin on September 27th. This Court has found that request's to proceed pro se made on the "eve of trial" valid. (see Government of the Virgin Islands V. James, supra, 934 F.2d at 468)(request to dismiss lawyer and proceed pro se made before jury selection on the day of trial valid); see also (Government of the Virgin Islands V. Charles, 72 F.3d 401 (3d cir.1995))(request made the day before trial began); Williams V. Bartlett, 44 F.3d 95, 99 (2d Cir.1994) (right is unqualified if the request is made before start of trial); Chapman V. United States, 553 F.2d 886, 894 (5th Cir. 1977)(Motion timely if made before jury impaneled); United States V. Lorick, 753 F.2d 1295, 1298 (4th cir.)(request must be asserted before trial, Cert. denied, 471 U.S. 1107, 105 S.Ct. 2342, 85 L.Ed. 2d 857 (1985); Fritz V. Spalding, 682 F.2d 782, 784 (9th Cir. 1982)(request made before jury impanelment is timely); Horton V. Dugger, 895 F.2d 714, 717 (11th Cir. 1990)(request untimely because meaningful trial proceedings had taken place since a jury had been selected); See also Pitts V. Redman, 776 F. Supp. 907, 920-921 (D. Del. 1991)(Roth, J.)(request on third day of trial not made "before meaningful trial proceedings had begun" and therefore untimely), aff'd. 970 F.2d 899 (3d cir.), Cert. denied, 506 U.S. 1003, 113 S.Ct. 611, 121 L.Ed. 2d 545 (1992).

Furthermore, the record is lengthy and is devoid of any mention that Melendez's request to proceed pro se was ambiguous or for the purpose to delay trial, and of any mention that Melendez would need more time in which to prepare his defense if permitted to proceed pro se. The trial Judge merely Concluded "at the moment it would appear to the Court he is not prepared to proceed forward" without establishing a record for these Conclusions or engaging in an inquiry as to Melendez's preparedness.

Finally, the Trial Court, in not Considering or entertaining Melendez's Conflict with trial Counsel, denying him to self-represent and denying his Amended motion for postconviction, did so in Violation of Melendez's Constitutional rights.

United States ex rel. Carey V. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946, 90 S.Ct. 964, 25 L.Ed. 2d 127 (1970); McKee V. Harris, 649 F.2d at 931; U.S. V. Calabro, 467 F.2d 973, 986

(2d Cir. 1972), Cert. denied, 410 U.S. 926, 93 S.Ct. 1358, 35 L.Ed. 2d 587, 93 S.Ct. 1357, 93 S.Ct. 1386, 93 S.Ct. 1403 (1973), are all cases that mention that in order to warrant a substitution of Counsel during trial, the defendant must show good Cause, such as a Conflict of interest, a Complete breakdown in Communication, or an irreconcilable Conflict with his attorney. Melendez showed the trial Court good Cause when he informed the trial Court, that trial Counsel told him that there was no trial strategy for people like him who are guilty, and that if he was Melendez he would hang himself in the holding cell. (Jury Selection Tr. (Sept. 22, 2011). When the trial Court questioned trial Counsel Concerning Same, trial Counsel simply stated that heated words were exchanged and that he only attempted to inform Melendez that trial was not in his best interest, however, never denying anything. Jury Selection Tr. (Sept. 22, 2011).

In this Case, the trial Court did not follow the directive included in the Case law Chosen to support it's decision. The Court, having advised Melendez of the perils of self-representation and the severity of the Charges against him, and that it "starts today" simply disregarded Melendez's pleas that he "Will" represent himself. In doing So, the denial of Melendez's request to represent himself was adverse to the spirit of the Sixth Amendment and to a proper application of Delaware Law. The trial Court, And the Delaware Supreme Court have decided an important Federal question in a way that Conflicts with relevant decisions of this Court and of the United States Court of appeals. Finally, trial Court Violated Melendez's Fifth Amendment Due process right when it forced him into trial with unwanted Counsel after a Complete breakdown in Communication and an irreconcilable Conflict.

Melendez further Contends that even though he understands that the filling of his Federal Habeas Corpus was or may have been filed untimely, the united States District Court for the District of Delaware erred in not Considering the Constitutional Violations alleged, regardless of the tardiness of the motion. In doing So, a miscarriage of Justice has occured and will Continue to occur if the Constitutional Claims are not heard on the merits.

The United States Court of Appeals for the Third circuit, in not Considering the Constitutional Violations and not hearing Same on the merits has also err'ed, Causing a further miscarriage of justice.

Melendez prays that this Court Consider the above Constitutional Violations and rule based on the merits of this Case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Pablo A. D[illegible]

Date: November 23, 2020