No. 20-7236

IN THE

Supreme Court of the United States

ORIGINAL

VINCENT E. BOYD

Petitioner

v.

DYLON RADTKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Vincent E. Boyd
Petitioner, *pro se*
P.O. Box 19033
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QUESTIONS PRESENTED

Should courts have to clearly define, on the record, the proper role of standby counsel in the proceedings? In other words, should courts engage in a colloquy with pro se defendants and counsel in order to establish the proper role of standby counsel for the defendant and counsel, thereby, protecting defendants' Sixth Amendment right to self-representation? Further, did this issue warrant the issuance of a Certificate of Appealability?

LIST OF PARTIES

[X] 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.

RELATED CASES

- *Boyd v. Radtke,* 2020 WL6481790, U.S. Court of Appeals for the Seventh Circuit. Order entered September 30, 2020.
- *Boyd v. Eckstein,* 2019 WL5298526, U.S. District Court for the Eastern District of Wisconsin. Order entered October 18, 2019.
- *State v. Boyd,* 2017 Wisc. App. LEXIS 620, Wisconsin Court of Appeals. Opinion and Order entered August 23, 2017.
- *State v. Boyd,* Appeal No. 2014AP837, Wisconsin Court of Appeals. Opinion and Order entered February 26, 2015.
- *State v. Boyd,* Appeal No. 2013AP684, Wisconsin Court of Appeals. Opinion and Order entered November 6, 2013.

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The opinion of the United States Court of Appeals for the Seventh Circuit appears at **Appendix A** to the petition and is unpublished.

The opinion of the United States District Court for the Eastern District of Wisconsin appears at **Appendix B** to the petition and is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at **Appendix C** to the petition and is unpublished.

The second highest opinion of Wisconsin Court of Appeals appears at **Appendix D** to the petition and is unpublished.

The first opinion of the Wisconsin Court of Appeals appears at **Appendix E** to the petition and is unpublished.

JURISDICTIONAL STATEMENT

1.) On October 18, 2019, the United States District Court for the Eastern District of Wisconsin, denied Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, and denied Petitioner a Certificate of Appealability pursuant to 28 U.S.C. 2253(c)(2).

2.) On September 28, 2020, the United States Court of Appeals for the Seventh Circuit issued an order denying the Petitioner's application for a Certificate of Appealability pursuant to 28 U.S.C.2253(c)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment right to self-representation. Specifically, how both the acrimonious appointment of standby counsel and the failure of lower courts to define the role of standby counsel violates the defendant's Sixth Amendment right to self-representation.

STATEMENT OF THE CASE

The charges against Vincent Boyd stemmed from allegations that he had sexual contact with Alison B.W. sometime in 2003.

On March 26, 2012, at the Final Pretrial Conference, Boyd filed a Motion for the Appointment of New Counsel. The motion asserted that Boyd's attorney, John Wallace, was not prepared for trial and, as a result, had repeatedly pressured Boyd to plead guilty against his wishes. Boyd further asserted that Wallace had "threatened to hit [Boyd]" and had "told [Boyd] to shut up over a dozen times." (App. J:1; App. H:8). The trial court denied Boyd's motion.

During the same hearing, Boyd asked the court, "Can I just represent myself on this case then?" (App. H:11). When the trial court told Boyd that "Wallace is still going to be sitting there" even if Boyd represented himself, Wallace interjected his own approval of such an arrangement, stating, "That would be fine with me." (App. H:11). The court asked Boyd if he wanted to do his "own openings and closings," and Boyd replied unequivocally, "I would like to completely represent myself on this case." (App. H:12). The trial court allowed Boyd to represent himself without engaging in any colloquy regarding this request, and appointed Wallace as standby counsel despite the objections Boyd had just made concerning Wallace's conduct and further involvement in the case. (App. H:12-13). The court did not discuss or explain the role or limitations of standby counsel with Boyd or Wallace at that or any other time.

With less than twenty-four hours to prepare for trial, Boyd initiated an inquiry with the trial court concerning his cross-examination of the state's witnesses, asking, "Will I be allowed to question the witnesses myself?" (App. H:13). But before the court could articulate a response to Boyd's question, the prosecutor, Ms. Paider, interrupted to voice her own concerns that Boyd be reminded that he would be bound by the rules of evidence. Ms. Paider further speculated that

Boyd was questioning his prior conviction and wanted to have a trial within a trial. (App. H: 13-14). Contrary to Ms. Paider's concerns, Boyd had not filed any motions seeking to have a trial within a trial.

Nonetheless, Boyd further requested "some latitude in questioning the victim." (App. H:15). The trial court immediately cut Boyd off without considering the testimony Boyd was seeking to introduce, and ruled, "You will get no latitude." (App. H:15). Even when Wallace, now Boyd's standby counsel, attempted to assist the court in ascertaining the nature of the evidence Boyd sought to introduce, the trial court immediately cut him off as well, reaffirming its ruling, "You will get no latitude." (App. H:15). The trial court did not engage in a balancing of competing interests or inquire into the nature of the line of questioning Boyd sought to introduce at that or any other time.

The next day, March 27, 2012, trial was scheduled to begin at 8:30 a.m. As the trial court began to go over Boyd's request to represent himself, Wallace immediately interrupted the proceedings to request a moment to speak to Boyd. (App. K:3). After a discussion held off the record between Wallace and Boyd, Wallace requested permission to speak with the prosecutor about a possible resolution. (App. K:3). The court gave Wallace five minutes in which Wallace negotiated a plea agreement with the prosecutor outside of the courtroom without Boyd being present. (App. K:3-4). At no time did the trial court ask if Boyd had requested or in any way authorized standby counsel to engage in seeking a plea agreement or in negotiating a plea agreement outside his presence, and Boyd was not given an opportunity to speak on the matter. (App. K:3-4.)

Upon returning from outside the courtroom with the prosecutor, standby counsel immediately published a plea agreement to the court. However, the terms that Wallace published

to the court included plea terms regarding a possible resolution to a pending Langlade County case, as well as terms wholly different from those Wallace put on the plea questionnaire and relayed to Boyd and his family. (App. K:4-5; App. G:2). The prosecutor quickly clarified that those were not the terms and that she has no authority over the Langlade County case, stating, "Whatever Langlade County wants to do with their case is their decision. It is plea to both counts, open sentencing." (App. K:5). Wallace had lied to Boyd and his family about the terms of the plea agreement.

Without addressing whether standby counsel could act on behalf of the now *pro se* defendant, or was even authorized to do so by Boyd, the trial court immediately entered into a plea colloquy. (App. K:5-9). During the colloquy, Boyd informed the court that he felt "a lot of pressure" and that he felt like he didn't have "any other option but to [plead no contest]." (App. K:6). Boyd further stated, "[...] since coming in yesterday, I feel pressured today" and that he didn't think he could he "could get a fair trial." (App. K:6).

Later in the plea colloquy, the court directed questions to standby counsel, asking, "[...] Mr. Wallace, are you of the opinion that Mr. Boyd is entering his pea freely, voluntarily, and intelligently?" (App. K:10). Wallace replied, "[...] Under the circumstances, he's entering a plea of no contest and it's difficult for him." (App. K:10). Despite Boyd's stated reluctance to enter the no contest plea, the trial court accepted Boyd's plea as being valid. (App. K:10).

Following the hearing, Wallace filled out the plea questionnaire, writing in the incorrect plea terms, and signing it as Boyd's attorney, even though he was only standby counsel. (App. G:2). He included the plea terms regarding the Langlade County case that the prosecutor had already said were not part of the plea agreement, as well as an agreement to "20 years" which was not published to the court by either standby counsel or the prosecutor. (App. G:2). Boyd

crossed out the portion concerning the Langlade County case and signed the plea questionnaire. (App. G:2).

On May 8, 2012, Boyd filed a *pro se* Motion to Withdraw Plea and Appoint New Counsel, arguing that, on the morning of trial, "Wallace approached Boyd and pressured him to enter a plea," and that Wallace "refused to allow Boyd to handle the proceeding himself." (App. L: 2-3). The motion further argued that the trial court's "no latitude" ruling regarding Boyd's questioning of the state's witnesses violated his constitutional rights. (App. L:3).

On June 6, 2012, Boyd filed a Supplement to Defendant's Motion to Withdraw Guilty/No Contest Plea, arguing that the trial court failed to follow legal requirements when allowing Boyd to proceed *pro se.* (App. M).

On June 7, 2012, a hearing was held and the circuit court denied Boyd's motions.

On June 16, 2012, the State of Wisconsin, Winnebago County Circuit Court, sentenced Boyd to 50 years imprisonment, with 30 years consisting of initial confinement and 20 years of extended supervision on both charges, to be served concurrently. (App. F).

Boyd appealed to the Wisconsin Court of Appeals, arguing that the court, when granting Boyd's request to represent himself, failed to conduct the colloquy required by *State v. Klessig,* 211 Wis. 2d 194, 564, N.W. 716 (1997); and standby counsel acted beyond the scope of his authority, denying Boyd his right to represent himself.

The State of Wisconsin conceded that the circuit court failed to conduct the *Klessig* colloquy, and the Wisconsin Court of Appeals issued a summary order reversing and remanding for a retrospective

hearing regarding Boyd's waiver of the right to counsel. (*State v. Boyd,* No. 2013AP684-CR, Decided November 6, 2013) (App. E).

On March 27, 2014, the circuit court held an evidentiary hearing and denied Boyd's plea withdrawal requests. On appeal, Boyd argued that 1) standby counsel's conduct violated his right to self-representation; and 2) that the State had failed to establish that his waiver of the right to counsel was valid. The Wisconsin Court of Appeals affirmed the judgment of conviction in a per curiam decision on February 26, 2015. (*State v. Boyd,* No. 2014AP837-CR) (App. D). The Wisconsin Supreme Court denied Boyd's timely Petition for Review on June 12, 2015.

On March 16, 2016, Boyd filed a postconviction motion in the circuit court under Wis. Stat. § 974.06 seeking plea withdrawal. In the motion, Boyd argued that he was improperly pressured into entering the no contest pleas, in part, by the circuit court's admittedly erroneous ruling on the eve of trial that he would get "no latitude" in cross-examining the State's witnesses. The circuit court had acknowledged the erroneous ruling at the end of the March 27, 2014 Evidentiary Hearing. (App. I:76-77). The circuit court denied Boyd's motion without a hearing on May 31, 2016.

On appeal, Boyd renewed his claim that the circuit court's admittedly erroneous "no latitude" ruling had unduly pressured him into entering his no contest pleas. In a per curiam decision, the Wisconsin Court of Appeals affirmed the order denying postconviction relief, holding that the circuit court's ruling was proper. (*State v. Boyd,* 2017 Wisc. App. LEXIS 620, Decided August 23, 2017) (App. C). The Wisconsin Supreme Court denied Boyd's timely Petition for Review on December 12, 2017.

On February 22, 2018, Boyd filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Wisconsin. In the petition, Boyd raised two grounds for relief. First, he maintained that standby counsel exceeded the scope of his role, denying Boyd's right to self-representation. Specifically, Boyd alleged that standby counsel

negotiated the plea deal outside of his presence and then lied to him about the agreement that was reached; improperly signed the plea questionnaire as Boyd's attorney, including an agreement of 20 years on the document that was wholly different than the agreement standby counsel had conveyed to Boyd and published to the court; and improperly speaking on Boyd's behalf about the validity of his pleas. Boyd further alleged that standby counsel intentionally coerced him to enter the pleas.

Second, Boyd maintained that the circuit court admitted that its "no latitude" ruling on the eve of trial was made in error and would have been reversed had Boyd proceeded to trial. Boyd alleged that this ruling improperly pressured him to enter the no contest pleas, as Boyd was never told that it would have been reversed had he proceeded to trial, rendering his pleas unknowing, unintelligent, and involuntary.

On October 18, 2019, the United States District Court for the Eastern District of Wisconsin, the Honorable J.P. Stadtmueller, presiding, denied Boyd's Petition for a Writ of Habeas Corpus and denied a Certificate of Appealability. (App. B:9-10).

Boyd filed a notice of appeal from the denial his petition for a writ of habeas corpus and an application for a certificate of appealability to the United States Court of Appeals for the Seventh Circuit. On September 30, 2020, the Seventh Circuit denied Boyd's request for a certificate of appealability. (App. A).

SUMMARY OF THE ARGUMENT

When Boyd elected to proceed *pro se* after being denied a new attorney, not only did the court fail to create a record of the required waiver of the constitutional right to the assistance of counsel, but immediately provided standby counsel for Boyd without any explanation or discussion as to what role standby counsel would have in the trial. And who was that standby

counsel? It was the very same attorney whose representation precipitated Boyd's request for new counsel. Now, Boyd, who requested a new lawyer, was forced to unwillingly proceed *pro se* with his only source of guidance: an attorney from whom he was estranged.

To make matters even worse, the former attorney, now standby counsel, and Boyd, were left to define for themselves an appropriate role for standby counsel with absolutely no direction as to what that role should be. Not only was this case later reversed and remanded due to the trial court's failure to make a record of Boyd's initial waiver of counsel, but the trial court made absolutely no effort to establish what standby counsel's role would be in the case. This is because the constitutional guidance concerning standby counsel is severely limited.

The acrimonious environment created by this ill-defined standard resulted in the hasty and very reluctant entry of Boyd's pleas, revealing the importance of establishing more defined guidelines for both the appointment of standby counsel and the role and obligations of standby counsel in the proceedings. This is especially true, whereas here, the record shows that Wallace, after being appointed as standby counsel, continued to act as Boyd's attorney, pressuring Boyd to enter pleas against his stated wishes.

These are significant constitutional violations that warranted the reversal of Boyd's conviction at the District Court level when Boyd petitioned for a Writ of Habeas Corpus. Moreover, this case warranted a Certificate of Appealability from the Seventh Circuit Court of Appeals, as these issues are clearly debatable amongst reasonable jurists and require further guidance from the Supreme Court.

ARGUMENT

I. Boyd's Sixth Amendment right to self-representation was violated when the trial court failed to define the role of standby counsel on the record, permitting standby counsel to usurp Boyd's autonomy which resulted in an involuntary plea.

This Court has made it clear that the right to self-representation is implicit in the Sixth Amendment right to counsel: "Although not stated in the Amendment in so many words, the right to self-representation – to make one's own defense personally – is thus necessarily implied by the structure of the Amendment." *Faretta v. California,* 422 U.S. 806, 819 (1975). The right to self-representation means that a defendant may not, consistent with the Sixth Amendment, have counsel forced upon him against his wishes. "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." *Id.* at 820. This Court's jurisprudence in this area recognizes a long history in Britain and the colonies where self-representation for serious crimes was commonplace. *Id.* at 826-827.

This Court has also recognized that the actions of standby counsel may, under some circumstances, violate the right to self-representation. *McKaskle v. Wiggins,* 465 U.S. 168, 177 (1984). The Court stated that the right to self-representation "must impose some limits on the extent of standby counsel's unsolicited participation." *Id.* In general, "In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Id.*

The problem here is that *McKaskle* is the only case in which this Court has examined the legal standards applicable to standby counsels' actions. Although the opinion contains general language discussing the overarching relationship between the presence of standby counsel and the right to self-representation, the bulk of the Court's discussion focuses on standby counsels' actions *during a trial,* and thus does not provide any guidance to courts,

lawyers, or defendants for the appointment of standby counsel and the role of the designated attorney.

Here, the trial court failed to make any attempt whatsoever to clarify the role of standby counsel through an appropriate colloquy on the record with Boyd, clarifying for the record that both Wallace and Boyd understood the role standby counsel was to play in the case. In his first motion to withdraw his plea, Boyd asserted that Wallace overstepped his role as standby counsel when he 1.) approached Boyd on the morning of trial and continued to pressure him to enter a plea, despite the fact that this behavior was exactly what Boyd had complained of in his previous motion for the appointment of new counsel (See App. J: 2-3); 2.) filled out the plea questionnaire with an agreement wholly different from that published to the court, and signed it as Boyd's attorney; (See App. G:2); 3.) lied to Boyd and his mother about the terms of the plea agreement Wallace had solely negotiated (See App. L:2); and 4.) repeatedly spoke on Boyd's behalf during the proceedings rather than allowing Boyd to control his own defense. (App. L:2). In *McKaskle,* this Court disapproved of the fact that standby counsel infrequently interrupted the defendant, made unsolicited comments, and occasionally used profanity. *Id.* at 185-86. Such improper conduct would not have occurred had the trial court clarified the role of standby counsel in protection of Boyd's right to self-representation.

Trial courts have little, if any, guidance when exercising their discretion in determining who will be appointed as standby counsel and what standby counsel's duties will be. Courts across the country have typically employed three models for standby counsel: 1) "idle" standby counsel; 2) "at the ready" standby counsel; and 3) hybrid representation. *See* Megan H. Morgan, *Standby Me: Self-Representation and Standby Counsel in a Capital Case,* 16

Cap. Def. J. 367, 377-79 (2004)(explaining the three general models of standby counsel used by U.S. courts); *see also* John H. Pearson, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial,* 72 Cal. L Rev. 697, 713 (1984)(recognizing three models of standby counsel). Under the "idle" standby counsel model, standby counsel maintains a passive role, assuming trial obligations only when the defendant no longer wishes to proceed *pro se* or when the trial court will no longer allow the defendant to represent himself. Morgan, *supra,* at 377-78. In the "at the ready" model, standby counsel prepares for the case each day under the assumption that it is the last day the defendant will represent himself. With this model, standby counsel is a resource for the defendant, available to answer questions and help the defendant navigate procedural barriers, but only stepping in once the defendant ends self-representation. *Id.* at 379. Finally, under the hybrid representation model, the *pro se* defendant and standby counsel actively and concurrently participate in all aspects of the trial. *Id.* at 378-79.

Here, neither Boyd nor standby counsel received any guidance from the circuit court regarding what role standby counsel should play. In fact, in addressing the issue, the extent of the court's discussion on the matter consisted of the following:

> **THE DEFENDANT:** I would like to completely represent myself on this case.
>
> **THE COURT:** Okay, and Mr. Wallace will be at your side for standby counsel.

(App. H:12).

Further, when the State's Attorney, Ms. Paider, asked the court if it was "going to do any sort of finding on the record," the court simply stated:

> **THE COURT:** I will find, based upon my experiences with him, that he is competent to represent himself. He seems to know all the games to try to play, so I guess he can represent himself.

(App. H:14).

The trial court never even attempted to clarify standby counsel's role for Boyd or Wallace despite the fact that Wallace should not have been Boyd's standby counsel in the first place. Boyd's allegations against Wallace were serious, yet Wallace remained involved in this case. As a result, standby counsel was permitted to take actions on the eve of trial, the morning of trial, and in the plea bargaining process that were in direct conflict with Boyd's clear request to represent himself without Wallace's involvement in the matters. Standby counsel was permitted to continue pressuring Boyd to enter a plea even after Boyd had complained of the attorney doing just that; lie to both Boyd and his mother about the actual terms of the plea agreement, including falsifying the plea questionnaire; and speak instead of Boyd on important matters. Simply put, standby counsel was permitted to manipulate Boyd into entering a plea that was clearly unknowing, unintelligent, and involuntary. These actions clearly contradict this Court's holding in *McKaskle* that a *pro se* defendant must be able to retain actual and perceived control of his or her defense. *Id.* at 178.

It is precisely for this reason that the trial court was obligated to explain on the record the scope and role of standby counsel in this case. Such a discussion on the record is necessary to ensure that counsel and, more importantly, the defendant have knowledge and understanding of standby counsel's role in a particular defendant's case. A discussion on the record is necessary to ensure a defendant's *Faretta* right to self-representation is protected and to avoid the very ambiguity and problematic actions that brought this case before this Court.

Moreover, colloquies on the record are generally required by both this Court and several State Supreme Courts in order to protect a defendant who is waiving a right. For example, colloquies are required when a defendant enters a plea of guilty or no contest, waiving the

right to trial, *see Boykin v. Alabama,* 395 U.S. 238 (1969), or when a defendant waives his right to counsel and chooses to represent himself, *see Faretta,* 422 U.S. 806; *Klessig,* 211 Wis. 2d 194. The West Virginia Supreme Court has found that such a process is necessary to protect a defendant's right to self-representation. *See State v. Powers,* 211 W.Va. 116, 563 S.E.2d 781 (2001)(adopting process requiring trial courts to advise both counsel and the defendant, on the record, of the specific duties of standby counsel when appointed).

In all of these instances, the purpose of preserving such discussions on the record is to ensure that a defendant understands his right, understands that he is waiving this right, and understands the likely consequences of this choice. Such concerns are at play here, where Boyd waived his right to counsel, but then the interference of standby counsel undermined Boyd's corresponding right to represent himself.

It is worth noting that in *McKaskle,* this Court did not simply rely on *Faretta's* recognition that standby counsel may be appropriate in some circumstances. *See McKaskle,* 465 U.S. at 178-79. Instead, the Court expressly examined standby counsel's precise role in the case and balanced the defendant's right to self-representation against societal and institutional interests in ensuring fair adversarial proceedings. *Id.* at 183-84. The *McKaskle* analysis thereby demonstrates that it is consistent with *Faretta* for a court to consider the competing interests in determining the proper scope of standby counsel's role.

On the morning of trial, while it appeared as though the trial court actually intended to speak with Boyd about his decision to represent himself, standby counsel's persistence in manipulating Boyd into a plea was so extreme that standby counsel actually interrupted the trial court's in order to further pursue a plea agreement.

THE COURT: ...Before we start, Mr. Boyd, I just want to go over with you once

again your request to represent yourself in this matter.

MR. WALLACE: One moment, Your Honor.

THE COURT: Go ahead.

(Discussion held off the record between Mr. Wallace and the defendant.)

MR. WALLACE: If I could have five minutes, Your Honor, to speak with the district attorney and discuss maybe a resolution, I would be willing to do so.

THE COURT: Take five minutes.

(App. I:3).

The trial court never returned to its attempted inquiry with Boyd.

Had the trial court provided the appropriate standby counsel instruction, standby counsel would not have been able to infringe upon Boyd's autonomy and ultimately his right of self-representation. Instead, Boyd and counsel, and the trial court, would have known that standby counsel's role in this case was to act solely as an advisor, there to help Boyd navigate the criminal system *if and when Boyd explicitly asked for such guidance.*

The American Bar Association has stated in its standards for standby counsel that such standby counsel "should not actively participate in the conduct of the defense *unless requested* by the accused or insofar as directed to do so by the court." ABA Standards for Criminal Justice 4-3.9 (b)(emphasis added). Here, standby counsel overstepped those bounds multiple times and in multiple ways. This usurpation was further exacerbated by the fact that standby counsel had previously acted as Boyd's trial counsel. Because standby counsel had previously been defense counsel, and because neither the court nor standby counsel ever clarified for Boyd what the scope of standby counsel's assistance would be, Boyd was unable to act with full autonomy in his representation.

Because standby counsel usurped Boyd's authority in the plea negotiation process and the decision of whether to go to trial, the trial court, the district court, and the Seventh Circuit

Court of Appeals, should have each, in their own turn, found that Boyd's plea was not entered knowingly, voluntarily, and intelligently, and reversed his conviction.

Given all of these factors, the district court's decision and the Seventh Circuit Court of Appeals' order denying Boyd a certificate of appealability were not a reasoned application of law to a logical interpretation of the facts of record. When a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel,* 529 U.S. 473, 481, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). A prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra,* at 484, 120 S.Ct. 1595. Applying these principles to Boyd's petition in the district court and his application to the Seventh Circuit Court of Appeals, it is clear that a COA should have issued. Both lower court decisions were erroneous and should have been reversed pursuant to this Court's holding in *McKaskle,* as well as the need for constitutional guidance from this Court on the appointment and role of standby counsel.

As a result of the contradictory descriptions of the responsibilities of standby counsel found in state and federal case law, and the lack thereof in United States Supreme Court case law, the role that standby counsel plays at a *pro se* defendant's trial currently depends on where the trial takes place, what judge presides over the trial, and the disposition of that judge on that particular day. Even with the best research, *pro se* defendants in future cases

have no way of knowing what can be expected of standby counsel. This disparity creates a general state of uncertainty amongst *pro se* defendants nationwide.

Boyd's case presents the United States Supreme Court with the perfect opportunity to address the disparity and uncertainty of the proper role of standby counsel. A thorough definition of standby counsel's role and an on the record colloquy would enable *pro se* defendants, attorneys appointed to act as standby counsel, and trial judges to better understand what is expected of standby counsel, thereby increasing judicial consistency across the United States.

II. The District Court and the Seventh Circuit Court of Appeals should have issued a COA because the requirements of § 2253 were satisfied.

Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge. As a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack,* 529 U.S. at 484, 120 S.Ct. 1595 (quoting *Barefoot v Estelle,* 463 U.S. 880, 893, 103 S.Ct. 3383 (1983)).

The COA determination under § 2253 (c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *Miller-El v. Cockrell,* 537 U.S. 322, 336-37 (2003). This standard is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack,* 529 U.S. at 484, 120 S.Ct. 1595.

Here, both the District Court and the Seventh Circuit Court of Appeals application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1), to Boyd's *McKaskle* claim was wrong or, in the alternative, easily debatable amongst jurists of reason.

A. Boyd's standby counsel claim warranted the issuance of a COA.

Boyd argued in the District Court that the manner of appointing Wallace as standby counsel, as well as standby counsels' actions violated his Sixth Amendment right to self-representation. Boyd argued that Wallace, as standby counsel, continued to repeatedly pressure Boyd to enter a plea against his wishes, despite Boyd's repeated protestations of innocence and his desire to go to trial, and this, after Boyd had already filed a motion for the appointment of new counsel complaining of this very behavior from Wallace. Boyd also argued that Wallace engaged in plea negotiations outside of Boyd's presence without Boyd's express or implied consent, and that Wallace further lied to Boyd about the terms of the plea agreement and signed the plea questionnaire as Boyd's attorney. (App.N:10).

In analyzing this claim, the District Court merely copied and pasted the Wisconsin Court of Appeals analysis of Wallace's appointment as standby counsel, scope of involvement, and participation in the plea negotiation process, and adopted that discussion as its own. (App. B:6-7). The District Court wrote, "Having concluded that Wallace's presence as standby counsel was constitutional and appropriately defined, the Wisconsin Court of Appeals assessed whether Wallace's conduct during the plea hearing violated Boyd's right to self-representation" (App. B:6). However, a simple review of the Wisconsin Court of Appeals decision clearly reveals that the role of standby counsel was *not* "defined" in any way, shape, or form by that Court. Nor does the District Court say what that role was supposedly defined to be. Both the Wisconsin Court of Appeals and the District Court blatantly lied in their

decision regarding this issue. Neither Court defined, let alone discussed, the proper role of standby counsel. (App. B:6-7; App. D:6-7).

The problem is that Boyd specifically tried to inquire with the circuit court about what he would and wouldn't be permitted to do as a pro se defendant, but those questions were not answered due to the acrimonious environment created by the circuit court. The Wisconsin Court of Appeals discussion of this issue is completely incorrect and, thus, so is the District Court's acceptance of that discussion. For example, Boyd asked whether he would be able to question the witnesses himself. (App. H:13). But before the circuit court could answer Boyd's question, Ms. Paider, interrupted to ask that Boyd be reminded that he would be bound by the rules of evidence. The circuit court obliged Ms. Paider's request but did not return to Boyd's question. (App. H:13-14). Yet the Wisconsin Court of Appeals falsely stated that Boyd's questions were asked and answered:

> "...the record demonstrates that Boyd did ask for and receive guidance about the scope of what he would do and what Wallace would do."

(App. D:7). As shown above, Boyd's questions clearly were *not* answered.

Later on, Boyd requested some latitude in questioning one of the State's witnesses. However, the court, itself, refused to allow Boyd to explain the nature of his request for latitude, and simply ruled, "You will get no latitude." (App. H:15). Standby counsel interrupted the court, saying, "He's requesting some latitude in questioning..." But the court cut him off, as well, and reaffirmed it's no latitude ruling. (App. H:15). Here again, Boyd's request for guidance was clearly cut short. The Seventh Circuit Court of Appeals has consistently held that a witness's motivation in testifying is always relevant, and "parties should be granted reasonable latitude in cross-examining target witnesses." *United States v Manske,* 186 F.3d 770, 777 (7the Cir. 1999); *United States v. Thompson,* 359 F.3d 470, 479

(7th Cir. 2004). While Boyd's request was clearly on point with this standard, the circuit court's no latitude ruling was inconsistent with the governing case law. Most notably, however, is the fact that the circuit court later admitted to this error, as will be demonstrated below.

Here again, the District Court simply copied and pasted the Wisconsin Court of Appeals decision, and adopted that decision as its own. The Wisconsin Court of Appeals and the District Court reasoned that the circuit court judge was "simply impressing upon Boyd the need to follow the rules of evidence while representing himself." (App. B:8). While the District Court stated that there had been no unreasonable determination of the facts, neither the Wisconsin Court of Appeals or the District Court ever considered Boyd's claim showing the circuit court's own admission of its error at the March 2014 Evidentiary Hearing:

> **THE COURT:** I just remember that the day before, when he wanted to represent himself and he wanted the court to give him more latitude and I told him I wouldn't the day before and---*I did some research on that, and he was exactly right.* So he obviously researched it because *the case law says exactly what he said, for latitude. So the next day,* when he comes in, *I was going to say you have more latitude* while we're doing the trial, *but then he wanted to take a plea.*

(App. I:76).

Neither the Wisconsin Court of Appeals nor the District Court even attempted to explain how this clear admission of error from the circuit court could possibly square with their completely contradictory interpretation of the ruling. If the circuit court was "simply impressing upon Boyd the need to follow the rules of evidence while representing himself," as the District Court claimed, then why would the circuit court admit that, after researching Boyd's request for latitude, that Boyd was in fact right and that the ruling would be reversed had Boyd proceeded to trial? The circuit court's own acknowledgment of its erroneous ruling

clearly contradicts what both appellate courts claimed to be the case. Neither the Wisconsin Court of Appeals nor the District Court even acknowledged the statement made by the circuit court in either of their decisions. Incorporating it would be difficult. (See App. B; App. D).

The District Court, in its decision, wrote, "The transcript is by no means exemplary of an ideal exchange, but it does reflect that Boyd would be allowed to cross-examine the victim witness and to defend himself within the bounds of the law." (App. B:9). Here again, this conclusion by the District Court directly contradicts the circuit court's own statements at the evidentiary hearing, as well as the record, itself, as shown above. How could Boyd cross-examine the victim witness within the bounds of the law when the circuit court openly acknowledged, on the record, that the "no latitude" ruling was inconsistent with the governing case law? Further, Boyd was never told that the circuit court would have reversed that ruling had he proceeded to trial. (App. I:76-77). Neither the court nor standby counsel ever informed Boyd of this critical factor. *Id.* Thus, the District Court's decision on this matter simply cannot be reconciled with the abundant precedent establishing that defendants are entitled to reasonable latitude in cross-examining witnesses in certain areas, nor with the record clearly contradicting its' own decision on the matter. Here, the ordinary rules of evidence had to bow to Boyd's Sixth Amendment rights. *Davis v. Alaska,* 415 U.S. 308, 319 (1974); *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986); *Olden v. Kentucky,* 488 U.S. 227, 232 (1988); *Michigan v. Lucas,* 500 U.S. 145 (1991). What was standby counsel's obligation to Boyd when the confusion surrounding this ruling was taking place? It is clear that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El,* 537, U.S. 322, 336 (2003)(internal citations omitted). Thus, the

Seventh Circuit Court of Appeals should have issued a certificate of appealability in this case.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition because there is a great need for constitutional guidance from this court when it comes to the appointment of standby counsel. This need is even greater when, as in this case, the attorney who is appointed as standby counsel is the very same attorney whom the defendant has become estranged from. Currently there is no guidance from this court directing lower courts to engage the defendant or counsel in any type of inquiry regarding the role that standby counsel will play in any given case. This absence of case law from this Court leaves future defendants and attorneys to figure it out for themselves. The use of standby counsel is not an uncommon practice when a defendant elects to proceed pro se. In fact, the appointment of standby counsel seems to be the preferred practice. Thus, this Court should grant this petition to provide guidance to the lower courts on how to appoint standby counsel and how to define for defendants and counsel the role that standby counsel can or will provide in the case.

CONCLUSION

Boyd's plea was not entered knowingly, voluntarily, and intelligently due to the acrimonious environment that was created by the lack of constitutional guidance from this Court regarding the appointment and role of standby counsel. Because the Seventh Circuit Court of Appeals erred in denying Boyd a COA, reasonable jurists could clearly debate the issues presented, and these issues need further development from this Court, this petition for certiorari should be granted.

Respectfully submitted on this 9th day of February, 2021.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in SCR 33.2 and 34 for a brief and appendix produced with a proportional serif font. The length of the brief is 6,269 words.

Vincent E. Boyd
Petitioner, *pro se*

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with SCR 34 and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the lower court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the lower court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Vincent E. Boyd

Table of Appendices