

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JASON A. TOBEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When indisputable evidence shows a federal criminal defendant's retained counsel has abandoned him at a key pretrial hearing and is not prepared for trial, does a court abuse its discretion and deprive the defendant of his Sixth Amendment rights when, for the sole purpose of avoiding continuance of a trial, it prohibits him from discharging retained counsel?

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I. Opinions Below

The citation for the order issued by the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Rehearing *En Banc* is *United States v. Tobey*, 2021 U.S. App. LEXIS 16642 (9th Cir. June 3, 2021).

The citation for the unpublished Memorandum Disposition issued by the United States Court of Appeals for the Ninth Circuit affirming the district court order is: *United States v. Tobey*, 845 F. App'x 662, 2021 WL 1626596, 2021 U.S. App. LEXIS 12462 (9th Cir. Apr. 27, 2021).

The citation for the order of the United States District Court for the Eastern District of California affirming conviction and sentencing is *United States v. Tobey*, 2020 WL 1431590, 2020 U.S. Dist. LEXIS 51926 (E.D. Cal. Mar. 24, 2020).

The decision and judgment of the United States District Court for the Eastern District of California is unreported and is reproduced at Appendix D (App. D at 19a).

II. Basis for Jurisdiction

The Memorandum Disposition affirming the district court's order affirming the judgment was issued by the United States Court of Appeals for the Ninth Circuit on April 27, 2021. App. B at 2a-4a. The Ninth Circuit denied Mr. Tobey's Petition for Rehearing and Rehearing *En Banc* on June 3, 2021. App. A at 1a.

This Court has jurisdiction to review the judgment on a writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1).

III. Constitutional Provisions and Statutes Involved in the Case

1. Sixth Amendment to the United States Constitution:

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.

IV. Statement of the Case

On October 31, 2018, Mr. Tobey was charged with a Class B federal misdemeanor: a violation of 36 C.F.R. § 261.3(c), intimidating any Forest Service officer engaged in the performance of duties for the protection of the National Forest System. The federal court had jurisdiction over the matter pursuant to 18 United States Code § 3401(a), Federal Rule of Criminal Procedure 58(b)(3)(B), and Local Rules of Practice for the Eastern District of California, Rules 302(b)(3) and 421.

Mr. Tobey retained attorney Travis Stroud to represent him. On March 6, 2019, Mr. Tobey was arraigned. On April 25, 2019, through his attorney Travis Stroud, Mr. Tobey filed a motion to dismiss the criminal complaint. A hearing on

the motion was scheduled for May 7, 2019. Between the March 6th arraignment and the May 7th hearing, there were no court proceedings in the case.

At the May 7, 2019 hearing, which was two days before the scheduled trial, Mr. Tobey came to court but Mr. Stroud failed to appear. The May 7, 2019 hearing was also a pretrial conference in which the magistrate judge resolved discovery disputes and ruled on pretrial motions. Again, Mr. Stroud was not present to represent Mr. Tobey.

At the outset of the May 7, 2019 hearing, Mr. Tobey, who had been abandoned by his retained counsel at the key pretrial hearing, asked the court to allow him to discharge Mr. Stroud on the ground that he was not in communication with Mr. Tobey and was not prepared for the trial. Mr. Tobey told the magistrate judge that Mr. Stroud had taken on new matters, including a county-wide contract, that took up so much of his time that he had not shown up for meetings with Mr. Tobey to prepare for trial. Docket No. 28, p. 2.¹ He also pointed out that Mr. Stroud failed to show up that day for the hearing. *Id.* All of Mr. Tobey's representations were backed up by Natalie Ludwig, a lawyer in the courtroom that day who worked with Mr. Stroud but who was not counsel for Mr. Tobey. She verified to the court that Mr. Stroud had taken a contract to act as the public

¹ The transcript of the May 7, 2019 hearing was filed as Docket No. 28 in *United States v. Jason Tobey*, No. 3:18-mj-00024-DMC (E.D. Cal.).

defender for Glenn County and “he has not been available to meet with Mr. Tobey and to prepare for this case.” Docket No. 28, p. 11.

The government opposed any continuance of the trial, which was set for two days later, because a witness was already *en route* and two more would soon travel. Docket No. 28, p. 8. The trial had never been continued before.

The magistrate judge refused to allow Mr. Tobey to discharge Mr. Stroud because doing so would require continuing the trial. The magistrate judge acknowledged that Mr. Tobey was not engaged in “bad faith” or “gamesmanship or an effort to forestall.” Docket No. 28, p. 9. Instead, the magistrate judge simply insisted that unless there was an agreement by the government to change the trial date, the date would not be changed. Docket No. 28, p. 10. The magistrate judge pointed to Mr. Stroud’s “professional responsibility” to represent Mr. Tobey at the trial, ignoring the fact that Mr. Stroud was demonstrably shirking that responsibility by failing to appear in court that day. *Id.* The magistrate judge acknowledged Mr. Stroud was unprepared and absent from court, but treated the trial date as unmovable, stating:

At this point, defense counsel is unavailable, is unprepared. What I understand from Mr. Tobey’s earlier comments that there are concerns about the adequacy of his representation. But we’ve got trial in two days.

Docket No. 28, p. 11.

The magistrate judge faulted Mr. Stroud for not moving to withdraw sooner, stating:

Well, at this point, I don't feel like it's reasonable that he be released. I have no formal motion before the Court in that regard, and had he initiated a proper motion in order for it to be timely, he would have had to bring it well before this point.

Docket No. 28, p. 13. The magistrate judge ignored both the fact that it was Mr. Tobey who was asking for permission to fire Mr. Stroud (and not Mr. Stroud seeking permission to withdraw), and that Mr. Tobey made this request at the first hearing that occurred after he was arraigned.

At the end of the hearing, when Mr. Tobey further explained to the court Mr. Stroud's "lack of ability to perform," the magistrate judge simply responded, "[a]nd unfortunately, that's going to need to be an issue between you and your counsel." Docket No. 28, p. 16.

The one-day bench trial went forward on May 9, 2019, and Mr. Tobey was convicted.

Mr. Tobey appealed his conviction first to a district judge of the Eastern District of California and then, when that appeal was unsuccessful, to the United States Court of Appeals for the Ninth Circuit. The focus of his appeal was on the magistrate judge's refusal to allow him to fire a retained attorney who was indisputably absent from court, out-of-communication with Mr. Tobey, and unprepared for trial. While various Sixth Amendment issues were raised in

briefing and intermediate decisions, ultimately the Ninth Circuit held that the magistrate judge did not abuse his discretion in refusing to allow Mr. Tobey to fire his retained counsel because

Tobey waited until the eve of trial to request a change of counsel. The magistrate judge found that granting the motion would have substantially burdened the court and the government as at least one witness was already *en route* to California from Georgia, while others were preparing to travel for trial.

United States v. Tobey, 845 F. App'x 662 (9th Cir. 2021); App. B at 3a.

V. Reasons for Granting the Petition for a Writ of *Certiorari*

A compelling reason to grant the instant petition exists because this Court indicated in *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983), that when a defendant in a criminal case seeks to discharge retained counsel, courts must balance the defendant's right to counsel against a desire not to continue a trial. This Court has not had an opportunity to flesh out the weights these competing interests have. This case presents an excellent vehicle to provide federal district courts with clarity on this subject. The record shows that the magistrate judge found Mr. Tobey was not engaged in gamesmanship and that his retained counsel was not prepared for trial. By not showing up to court for the only post-arraignment, pre-trial hearing in the case, retained counsel was in gross dereliction of his duty to Mr. Tobey at the very moment Mr. Tobey asked if he could fire him. The magistrate judge simply announced that even in light of these facts, it would not continue a misdemeanor

trial that had never been continued before because the government already had a witness *en route*. This case then raises the question of whether a defendant's Sixth Amendment right to counsel must be given some weight when compared to the desire to keep a set trial date.

The Sixth Amendment guarantees a criminal defendant the right to the “assistance of counsel for his defense.” U.S. Const. Amend. VI. This includes a qualified right to choose counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The choice-of-counsel right is implicated when a defendant moves to dismiss retained counsel, regardless of whether he will seek appointed counsel or retain alternative counsel afterwards. *United States v. Brown*, 785 F.3d 1337, 1344 (9th Cir. 2015). *See also United States v. Jimenez-Antunez*, 820 F.3d 1267, 1271 (11th Cir. 2016) (a “defendant exercises the right to counsel of choice when he moves to dismiss retained counsel, regardless of the type of counsel he wishes to engage afterward.”).

The Sixth Amendment also incorporates a right to the effective assistance of counsel. *See, e.g., Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1964 (2017) (“The Sixth Amendment guarantees a defendant the effective assistance of counsel at ‘critical stages of a criminal proceeding . . .’”). This Court has held before that when counsel is unprepared for trial and a continuance is needed, an “unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for

delay violates the right to the assistance of counsel.” *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983) (internal quotations and citations omitted). As the Seventh Circuit held, when a defendant’s attorney is unprepared for trial and a defendant seeks to replace him or her with new counsel, even if that requires some delay of the trial, denial of the continuance because of a “myopic insistence on proceeding with a scheduled trial date in the face of a valid request for a continuance is arbitrary and unreasonable.” *United States v. Sellers*, 645 F.3d 830, 835 (7th Cir. 2011).

In the present case, Mr. Tobey informed the trial court that his retained counsel was unprepared for trial. Mr. Tobey’s assertion was supported by another lawyer in the courtroom who confirmed for the judge that retained counsel had taken on a major new contract and “he has not been available to meet with Mr. Tobey and to prepare for this case.” Docket No. 28, p. 11. The magistrate judge agreed with Mr. Tobey that his lawyer was not prepared for the trial. *Id.*

Just as importantly, at the May 7, 2019 hearing, retained counsel, Mr. Stroud, was actively engaged in ineffective assistance of counsel: he was not present at the hearing on the motion to dismiss the complaint and pretrial conference. This Court has recognized that a defendant is deprived of his constitutional right to counsel when counsel is either “totally absent, or prevented from assisting the accused during a critical stage of the proceeding.” *United States v. Cronin*, 466 U.S. 648, 659 n. 25 (1984). Mr. Stroud was “totally absent” from

the hearing on the motion to dismiss the complaint/ pretrial conference, a critical stage of the proceeding. *Kitchen v. United States*, 227 F.3d 1014, 1018 (7th Cir. 2000). (“The Supreme Court has established that a defendant’s right to counsel attaches at or after the time that judicial proceedings have been initiated against him . . . and once a defendant's right to counsel attaches, the right continues to apply at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.”).

Rather than treating Mr. Stroud’s malfeasance in failing to appear at the hearing as a factor that supported Mr. Tobey’s right to fire him, the magistrate judge focused on policing Mr. Stroud without regard for Mr. Tobey’s Sixth Amendment right to counsel. The magistrate judge acknowledged Mr. Stroud was unprepared to try the case, but it insisted that he try the case in two days as a “matter of professional responsibility.” Docket No. 28, RT p. 10. When Ms. Ludwig discussed Mr. Stroud’s lack of preparation for trial, the court said, “[w]ell, at this point, I don't feel like it’s reasonable that he be released” because he had not filed a timely motion to withdraw. Docket No. 28, p. 13. This was problematic in two ways. Mr. Stroud’s failure to file a timely motion to withdraw from a case he had no time to work on was a symptom of his general failure to act as effective counsel for Mr. Tobey, not a valid reason to leave Mr. Tobey without effective counsel. In addition, the magistrate judge focused on professional obligations Mr.

Stroud *should have* met, not on the fact that Mr. Stroud was falling far short of fulfilling those duties in Mr. Tobey's case. The magistrate judge neglected Mr. Tobey's Sixth Amendment right to an attorney who was actually working on the case.

The Ninth Circuit panel honed in on the fact that Mr. Tobey did not ask to discharge counsel until two days before the trial. This overlooks the fact that Mr. Tobey had only been arraigned two months earlier, and there had been no court hearings between the arraignment and the May 7, 2019 hearing in which Mr. Tobey asked to fire Mr. Stroud. Because Mr. Tobey was not *pro se*, he did not have a right to file documents in the case on his own. Mr. Tobey asked the magistrate judge for permission to fire retained counsel at the first opportunity in which he was present before the judge.

This Court should grant this petition for a writ of *certiorari* and use this case as an opportunity to set some parameters lower federal courts must use when a criminal defendant seeks to discharge retained counsel before trial, and such discharge would entail a continuance of the trial date. Where, as here, all agree that the defendant is not engaged in gamesmanship, this Court should emphasize that keeping a trial date cannot automatically trump the defendant's Sixth Amendment rights to choice of counsel and effective assistance of counsel. Instead, this Court should clarify, the defendant's Sixth Amendment rights must be

considered and given some weight in the balancing process. Furthermore, when a defense attorney blatantly fails to fulfill his or her professional obligations in a criminal case, the judge's desire to enforce professional conduct rules cannot stand in the place of protecting the defendant's Sixth Amendment right to counsel; a defense lawyer's failure to fulfill the basic obligations of counsel should be a basis for removing that lawyer from the case, not thwarting the defendant's effort to obtain new counsel. Finally, when a defendant brings the court's attention to his counsel's inability or unwillingness to perform the basic functions of a criminal defense attorney, the court cannot simply brush it off as a matter between the defendant and his or her lawyer; the court must inquire into the matter with an understanding that ultimately it is the federal court that upholds a criminal defendant's Sixth Amendment right to counsel.

This Court should hold that here, where all agreed retained counsel was unprepared for trial, and where retained counsel was actively engaged in ineffective assistance of counsel at the moment Mr. Tobey sought permission to discharge him, Mr. Tobey's Sixth Amendment right to trial outweighed the court's interest in keeping the original trial date.

VI. Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*.

Dated: October 26, 2021

Respectfully submitted,

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