No. 21-7536

IN THE

SUPREME COURT OF THE UNITED STATES

RAMONTA FORTE — PETITIONER
(Your Name)

vs.

J. LIZARRAGA, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RAMONTA FORTE
(Your Name)

MCSP C11-219, P.O. Box 409060
(Address)

Ione, CA 95640
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT THE RIGHT TO COUNSEL AT SENTENCING IS NOT CLEARLY ESTABLISHED FEDERAL LAW?
2. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER THE RIGHT TO BE REPRESENTED BY HIS COUNSEL OF CHOICE AT TRIAL?

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:

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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 judgement of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's application for Certificate of Appealability.

OPINIONS BELOW

The following opinions and orders below are pertinent here, all of which are unpublished: [1] Opinion on direct appeal by the California Court of Appeal, Second Appeallate District, affirming Petitioner's conviction and sentence (11/4/2016) appears at Appendix A to the petition; [2] Order (7/31/2020) and Judgement (7/31/2020) by U.S. District Court for the Central District of California (Hon. Michael W. Fitzgerald), denying petition for writ of federal habeas corpus (7/31/2020), appears at Appendix B to the petition; [3]District Court Order Denying Request for Certificate of Appealability (9/22/2020), appears at Appendix C to the petition; [4] Order by Ninth Circuit Court of Appeals Denying Request for Certificate of Appealability (11/16/2021), appears at Appendix D to the petition.

JURISDICTION

The District Court denied Petitioner's request for Certificate of Appealability on November 22, 2020. The Court of Appeals for the Ninth Circuit denied Petitioner's request for Certificate of Appealability on November 16, 2021. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court held that, pursuant to 28 USC §1254(1), the United States Supreme Court has jurisdiction, on certiorari, to review a denial of a request for Certificate of Appealability by a circuit judge or panel of a Federal Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 USC § 2254. The standard for review under "AEDPA" is set forth in 28 USC § 2254(d)(1).

STANDARD OF REVIEW:
DENIAL OF CERTIFICATE OF APPEALABILITY

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.CT. 1029 (2003), this Court clarified the standards for the issuance of a Certificate of Appealability [hereafter "CAO"]:

> ...A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." 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 ... We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id. 123 S.CT. at 1034, quoting *Slack v. McDaniel*, 529 U.S. 473, at 484, 120 S.CT. 1595 (2000).

STATEMENT OF THE CASE

Petitioner was convicted by a California jury of one count of first-degree murder, accompanied by further allegations of personal weapon use; and one count of possession of a firearm by a felon. (Cal. Pen. Code §§ 187(a), 12022.53(b)(c)(d), 12021(a)(1).) Petitioner was sentenced to 25 years to life for the murder, plus consecutive 25 years to life for personal weapon use, and 2 years for the firearm by a felon to run concurrent.

PERTINENT FACTS

On July 19, 2011, Petitioner was arraigned on the felony complaint and the Office of the Public Defender (OPD) was appointed to represent him. On October 18, 2011, Petitioner waived his right to counsel and chose self-representation. On June 29, 2012, Petitioner relinquished self-representation and retained counsel William Nimmo substituted in as of record to represent Petitioner at preliminary hearing. On January 16, 2013, the date set for arraigment on the information, Petitioner appeared in court with Mr. Nimmo, who informed the court that his representation of Petitioner had ended with the conclusion of the preliminary hearing. Petitioner then informed the court he wished to proceed pro se. The court granted Petitioner's request. On that same day, the court appointed attorney Michael Morse as Petitioner's standby counsel.

On September 5, 2013, Petitioner advised the court that he would be retaining his own counsel for trial. On September 12, 2013, Petitioner appeared with retained counsel Matthew Horeczko and asked the court to allow Mr. Horeczko to substitute in as counsel of record. The trial court refused to allow the substitution after Mr. Horeczko stated that it was not possible for him to be ready for trial in 23 days. (2 Clerk's Transcripts 373, 375; Aug. Reporter's Transcripts 301-306, 309, 314-318, 320-321.)

On December 9, 2013, the jury returned verdicts convicting Petitioner. On

March 4, 2014, Deputy Public Defender Judith Greenberg appeared in the courtroom and was seated with Petitioner at counsel table. Petitioner moved to relinquish self- representation and to have the OPD represent him for his new trial motion and sentencing. The court stated:

> First, if I were to allow counsel to substitute in, counsel would require the transcripts be prepared. This would occasion a delay of months. That's the first issue I have ... The second issue I've got is that, Mr. Forte ... you have done a highly effective job representing yourself... This is not a situation where you are an unsophisticated person unfamiliar with the ways of the law ... The need for counsel to represent you is not as great ... as it would be with other folks. (19 RT 6304-6305.)

To which Petitioner responded:

> I appreciate your remark, I've been effective, I feel I'm not an attorney, and I'm just in over my head. I feel I was forced to do a trial by myself pro per, and I just feel that – I – I've taken on too much trying to try a murder case (19RT 6306.)

Petitioner then stated:

> Your Honor, I just simply feel that I would be denied my Sixth Amendment right to counsel at this very, very critical stage in the proceedings if I'm denied an attorney for the motion for new trial and as well as any sentencing or anything of that nature. When we get into that aspect, I would like to be represented by counsel. (19RT 6307:28-6308:6.)

Ultimately the court ruled:

> For the reasons that I said before, the motion to relinquish the pro per status is denied. It would occasion a delay, first, and Mr. Forte has proven himself more than capable of setting forth his legal arguments. So your motion is denied. (19RT 6320-6321.)

With the denial of his waiver of self-representation, Petitioner then requested reporter's transcripts of the trial for use in preparing the new trial motion. The court declined to provide transcripts of the entire trial, but granted Petitioner's request as to the testimonies Dr. Rothberg, J. Brooks, P. Garcia, P. Castillo, and T. Goossen. (19RT 6326-6329.) Additionally the court ordered a transcript of the Evidence Code section 402 hearing at which Dr. Krell described his gun and pig's blood experiment. (19RT 6355.)

Later that same day Petitioner protested that the denial of his request for appointment of counsel constituted a denial of his right to counsel and asked unequivocally if he was not being allowed to relinquish self-representation. (19RT 6336.)

Petitioner stated:

> Your Honor, I have to object, your Honor, because to me this issue is not resolved. ARE YOU ACTUALLY DENYING ME MY RIGHT TO COUNSEL? ARE YOU SAYING THAT YOU'RE NOT GOING TO LET ME RELINQUISH MY STATUS AT THIS POINT? (19RT 6336:7-11, emphasis added.)

The trial court responded:

> YES. Let me clarify, not denying your right to counsel. I'm honoring the choice you made repeatedly, which is to represent yourself. (19 RT 6336: 12-14, emphasis added.)

Petitioner then made the following record:

> I'M NOT DOING THIS FOR DELAY TACTICS. I'm doing this because AT EVERY POINT I FELT THAT I NEEDED AN ATTORNEY. THAT'S WHY I HIRED AN ATTORNEY AT THE PRELIM who I actually hired to do the entire trial. As Ms. Greenberg pointed out, THE MONEY DID RUN OUT. SO THEN I WAS FORCED PRO PER ... I TRIED TO HIRE MR. HORECZKO, AND THE COURT WOULD NOT ALLOW A CONTINUANCE AT THAT TIME ... I KNEW I WAS IN OVER MY HEAD. I'M A PRO PER DEFENDANT. I CAN'T TRY A MURDER CASE ... I BELIEVE I WAS FORCED TO TRIAL PRO PER. The court said that I had Mr. Morse here ... you said you would not give Mr. Morse a continuance. He had three weeks to prepare for trial. HE HAS NEVER SPOKEN TO ME. I BELIEVE EIGHT INVESTIGATORS — OR EIGHT EXPERTS ON THE CASE. HE'S NEVER SPOKEN TO ANY OF THEM. And I believe that the court was — I believe you would have given Mr. Morse a continuance, you would have had to, or HE WOULD HAVE RENDERED ME INEFFECTIVE ASSISTANCE OF COUNSEL — if he would not have asked for a continuance, he would have rendered me ineffective assistance of counsel. I'M FORCED INTO THE SAME SITUATION WHERE I FEEL I'M IN OVER MY HEAD, I FEEL THAT I CAN'T — JUST LIKE I FEEL I CAN'T DO THE TRIAL, I DID NOT HAVE ENOUGH TIME — I DON'T FEEL THAT I CAN DO IT ON MY OWN ... I want the record to be clear, I'M ASKING FOR COUNSEL, AND I'M BEING DENIED MY SIXTH AMENDMENT RIGHT ... You know the delays at this point are different than the delays before the day — before trial,

things of that nature. There's not much of a problem of – as far as the parties are concerned with witnesses, and, you know, it's already in the post-conviction stage ... it's not actually – as I said, the day before trial or right eve of trial, it's a totally different area right now, and I don't understand why you would make the ruling that you're making, and I STRONGLY OBJECT TO THAT RULING, MY DENIAL OF COUNSEL ... The Sixth Amendment right is not a harmless error issue when it comes to this. THIS IS THE FUNDAMENTAL RIGHT OF EVERY CITIZEN TO HAVE COUNSEL. And I am requesting – I'm requesting the Public Defender's Office because Mr. Morse has shown no interest in this case whatsoever, and I HAVE NEVER SPOKEN TO HIM. HE WAS NOT HERE DURING THE TRIAL. Miss Greenberg was here during the trial ... YOU'RE SIMPLY DENYING ME COUNSEL NOW. FOR EXAMPLE, NOT GOING TO LET ME GIVE UP MY STATUS WHICH IS – I BELIEVE IS WITH ALL DUE RESPECT AN ERRONEOUS DECISION, YOUR HONOR. (19RT 6353:2-6355:15; emphasis added.)

On March 5, 2014, Petitioner again requested counsel. On April 23, 2014, Petitioner filed his new trial motion and engaged in a colloquy with the court regarding the court's prior ruling on Petitioner's request for appointment of counsel. (19RT 6601-02.)

The court replied that Petitioner had chosen not to be represented by counsel the court would have appointed. (19RT 6602.)

Petitioner demurred and explained that the court had in a straightforward manner declined to appoint counsel for him and not declined to appoint counsel of his choice to represent him. (19RT 6602-04.) Petitioner stated:

NO, ACTUALLY, YOUR HONOR, YOU DENIED ME COUNSEL PERIOD. The record is clear. I asked you if you were going to give me counsel, and THE RECORD WAS MADE THAT YOU DENIED ME COUNSEL AT ALL. SO IT WASN'T A CHOICE BETWEEN MR. MORSE OR COUNSEL OF MY CHOICE, IT WAS ABSOLUTE DENIAL OF COUNSEL. (19RT 6602:27-6603:4: emphasis added.)

After denying Petitioner's motion for new trial, the court stated it intended to move to sentence Petitioner. At this point, Petitioner once again asserted his Due Process, Sixth, and Fourteenth Amendments right to representation by counsel. (19RT 6628.) Petitioner stated:

[A] [d]efendant has a constitutional right to counsel at the time judgment is pronounced. That's California Constitution article 1, section 15. *In response to Roberts*, 1953, 40 Cal.2d 754. I STRONGLY OBJECT TO BEING SENTENCED ... AND I'M REQUESTING COUNSEL AGAIN FOR THE PRONOUNCEMENT OF JUDGMENT, FOR SENTENCING .... I have had no time to study pronouncement of judgment or sentencing. I have no idea what the sentencing guidelines are, credits, anything of that nature. I'M IN OVER MY HEAD, as I told you, since postconviction. Since trial, THAT'S WHY I TRIED TO HIRE AN ATTORNEY AT TRIAL. I tried to hire an attorney for prelim, which I did. Tried to hire an attorney at every stage. I tried to give up my status and get an attorney for postconviction. I HAVE

> CONSISTENTLY TRIED TO GET COUNSEL. I CONSISTENTLY TRIED TO DEFEND MYSELF THE BEST WAY POSSIBLE, AND I JUST VOICE MY OBJECTION TO ANY PRONOUNCEMENT OF SENTENCING AT THIS TIME. (19RT 6629:1-18.)

The court stated that it did not deny Petitioner counsel. The court said it believed it denied Petitioner's right to select his "actual lawyer." (19RT 6630.)

Petitioner reminded the court as he had earlier that the court did not deny him the appointment of specific counsel, but denied him counsel altogether, when it ruled on March 4, 2014. (19RT 6630.) Petitioner stated:

> ...well, the thing is, your Honor, I have the transcript, and the record is clear YOU COMPLETELY DENIED ME COUNSEL. YOU DID NOT GIVE ME A CHOICE TO GO WITH MR. MORSE OR WITH ANYONE ... SO I JUST WANT THE RECORD TO BE VERY CLEAR ON THAT ... YOU DENIED ME COMPLETELY OF COUNSEL. (19RT 6630:22-6631:3; emphasis added.)

Thereafter, the court proceeded to sentence Petitioner. (19RT 6632-37.)

REASONS FOR GRANTING THE PETITION

The Constitution of the United States of America guarantees certain rights to all citizens. One of the most fundamental rights guaranteed by the Constitution is the Sixth Amendment right to counsel in criminal proceedings. The public at large is adversely effected, especially anyone facing a criminal charge, when state courts are allowed to trample upon a criminal defendant's Sixth Amendment right to counsel. The integrity of the entire justice system is threatened, and the American people will lose faith in the criminal justice process, if state courts are permitted to infringe upon a criminal defendant's right to counsel.

Furthermore, as Petitioner will demonstrate below, the decision of the Ninth Circuit to deny a Certificate of Appealability on Petitioner's Denial of Counsel issues is in conflict with previous Ninth Circuit decisions. Moreover, Petitioner's issues are supported by Supreme Court precedent:

(1) The right to counsel at all critical stages of the criminal process: *See Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004); *and Gideon v. Wainwright*, 372 U.S. 335, 344 (1963);

(2) The right to counsel at sentencing: *See Townsend v. Burke*, 334 U.S. 736 (1984); *and Gardner v. Florida*, 430 U.S. 349 (1977);

(3) The right of a defendant who can afford to hire his own attorney to be represented by the attorney of his choice: *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-148 (2006).

Petitioner was denied the assistance of counsel twice during his criminal trial, which are two separate and distinct issues. The first time Petitioner was denied counsel was before the start of trial when he appeared before the court with retained counsel Matthew Horeczko and the trial court refused a substitution of counsel. The second time was during the postconviction proceedings when Petitioner attempted to relinquish his pro per status and have counsel appointed for the purposes of preparing a new trial motion and sentencing. According to decisions of both the Ninth Circuit and the Supreme Court, the trial court's denial of retained counsel of choice for trial, and the appointment of counsel for sentencing, violated Petitioner's Sixth Amendment right to the assistance of counsel.

With regard to the denial of counsel at sentencing, the District Court concluded that the right to counsel at sentencing is not clearly established federal law and therefore the claim is not cognizable on habeas corpus. (Report and Recommendation (R&R):3-5; Dkt. 34.) However, this ruling is debatable because in *Gardner v. Florida* 430 U.S. 349 the Supreme Court is unequivocal: "The sentencing is a critical stage of the proceeding at which he is entitled to the effective assistance of counsel." Id. at 358; *see also Mempa v. Rhay*, 389 U.S. 128 (1967) [Same.].

Furthermore, the Supreme Court has clearly established that the Sixth Amendment guarantees a criminal defendant the right to counsel at all critical stages of the criminal process. *See Iowa v. Tovar*, 541 U.S. 77, 80-81; see also *United States v. Cronic*, 466 U.S. 648, 659 (1984).

Additionally, in *Townsend v. Burke*, 334 U.S. 736, the Supreme Court held that the absence of counsel during sentencing deprived the defendant of due process.

Thus, in light of the above-cited authorities, it is evident that Petitioner's Denial of Counsel at Sentencing claim is governed by clearly established federal law and is therefore cognizable on federal habeas corpus.

The Ninth Circuit decision denying Petitioner a Certificate of Appealability on the grounds that Petitioner has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(C)(2), is debatable and is in conflict with previous Ninth Circuit decisions:

In *Robinson v. Ignacio*, 360 F.3d 1044 (9th Cir. 2004), the Ninth Circuit held that the denial of the right to counsel at sentencing is structural error. *See United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990) (Reversed and remanded because defendant's request for appointment of counsel at sentencing should have been granted, even though his waiver of counsel at trial was made unequivocally, voluntarily, and intelligently.)

Petitioner's case is analogous to *Robinson* in that although Petitioner represented himself at trial, he unequivocally requested the appointment of counsel for sentencing. The facts are clear: On March 4, 2014, Petitioner requested the appointment of counsel for sentencing and the trial court denied that request. (19RT 6307:28-6308:6; 6321:4-9.) Then, on April 23, 2014, the trial court sentenced Petitioner without the assistance of counsel. (19RT 6632-37.)

The law on this issue is also clear: The Sixth Amendment guarantees a criminal defendant the assistance of counsel at all critical stages of the trial. The Supreme Court has held that a defendant is entitled to the assistance of counsel at sentencing. *See Townsend v. Burke*, 334 U.S. 736; *see also Gardner v. Florida*, 430 U.S. 349, at 358.

Thus, via the facts of the case and the authorities cited, Petitioner has satisfied the *Slack* test for the issuance of a COA by demonstrating that it is at least debatable "whether the petitioner states a valid claim of the denial of a constitutional right, and that jursits of reason would find it debatable whether the district court was correct in its procedural ruling." Id. 120 S.Ct. at 1601.

With regard to the Denial of Counsel of Choice issue, the district court rejects this claim on the grounds that Petitioner has not demonstrated that the trial court committed an abuse of discretion in denying him the right to be represented by counsel of his choice. (R&R 35:4-5; Dkt. 34.) However, this ruling is debatable because via an explication of the facts of the case and a citing of relevant authorities in the Petitioner's Objections To Report And Recommendation (hereafter "Objections"; 31-57; Dkt.43); Petitioner has clearly demonstrated that the court abused its discretion in denying him the right to be represented by his retained counsel of choice.

In *United States v. Gonzalez-Lopez*, 548 U.S. 140, the Supreme Court held that the erroneous denial of counsel of choice is structural error. Id. at 146-148.

The Ninth Circuit decision denying a COA on the Denial of Counsel of Choice issue because Petitioner has not made a "substantial showing of the denial of a constitutional right" 28 U.S.C. § 2253(c)(2); is at least debatable and in conflict with previous Ninth Circuit decisions.

In the Report and Recommendation the Magistrate states that the Ninth Circuit has identified three factors relevant to a trial court's exercize of discretion in this context: (1) whether the defendant already retained new counsel; (2) whether current counsel was prepared and competent to proceed forward; and (3) the timing of defendant's request to substitute counsel. *Miller v. Blackletter*, 525 F.3d 890, at 896-898 (9th Cir. 2008) (R&R 31:12-16; Dkt.34.)

Petitioner has demonstrated that all three factors identified in *Miller* weigh in his favor. As to the first factor, the Magistrate concedes this factor because, "Petitioner already had retained Horeczko at the time he sought to substitute him as counsel." (R&R 31:18-19.)

As to the second factor, in so far as Petitioner was representing himself at trial, he was current counsel and was not prepared to proceed forward. Petitioner informed the court that he was not prepared to proceed to trial and made a specific, detailed, and clear record of the reasons why he was not prepared on the following dates: September 12. 2013, (RT 302-306, 309-312, 314-318, 320-321, 323); October 2, 2013, (RT 602-602, 607, 611, 613-614); October 22, 2013, (RT 2-14); November 1, 2013, (RT B6-B7, B11-B17, B33-B34, B48-B49, B59-B60, B65, B72); and November 5, 2013, (RT 309, 314-317, 319-320, 329.) Thus, this factor falls in Petioner's favor as well because he was representing himself and not prepared and competent to proceed forward.

In the R&R, the Magistrate argues that, "The trial court found that Morse [Petitioner's standby counsel] was competent and prepared to proceed." (R&R 31:24-25; Dkt.34.) However, in the writ for habeas corpus (Memorandum of Points Authorities attached thereto pp. 97-101; Dkt. 2); and the Objections to R&R (43-51; Dkt.43), Petitioner has clearly demonstrated that the trial court denied the request for substitution without conducting an adequate inquiry into Morse's preparedness. To confute this point, the Magistrate contends that the trial court was not required to make an adequate inquiry of Morse because: "At no time was Morse ever representing Petitioner" (R&R 33:3-4; Dkt.34);

"Morse and Petitioner did not have an attorney-client relationship" (Id. 34: 1-2); "Morse never actively represented Petitioner" (Id. 34:12); and "[Morse] provided no performance on behalf of Petitioner." (Id. 34:13-14.)

The Magistrate presents conflicting arguments; on the one hand it is argued that Morse was Petitioner's counsel who was "competent and prepared to proceed" (R&R 31), for the purpose of evaluating the second *Miller* factor only; yet, on the other hand, when Petitioner demonstrates that the trial court failed to conduct an adequate inquiry into his substitution request, it is argued that, "At no time was Morse ever representing Petitioner." (R&R 33.)

Thus, either Morse was not Petitioner's counsel at the time the request for substitution was made, in which case Morse's preparedness is irrelevant in the evaluation of the second *Miller* factor; or he was Petitioner's counsel, in which case the trial court was required to conduct an adequate inquiry into Morse's preparedness.

The trial court's claim that Morse was prepared, without inquiry into his preparedness to provide a record to support it, is not, within itself, sufficient to support the conclusion that Morse was prepared for trial. The record demonstrates that: Morse and Petitioner never spoke to each other; Morse never received the discovery; Morse never spoke with any of the private investigators assigned to the case; he never interviewed Petitioner, his co-defendant, or *any* witnesses; Morse never spoke with any of the eight defense experts assigned to the case; and there is no indication in the record that Morse conducted any independent investigation into the case.

The trial court could not just assume that Morse was prepared to proceed to trial. To deny counsel on an *assumption* of Morse's preparedness is unquestionably an abuse of discretion. At the very least an inquiry by the trial court into Morse's preparedness was required to establish the verasity of the court's claim.

The Ninth Circuit has consistently reversed convictions when the trial court denied a substitution of counsel without conducting an adequate inquiry into the request. *See Bradley v. Henry*, 510 F.3d 1093 (9th Cir. 2007) (Finding the trial court deprived petitioner of the right to counsel of choice by refusing to substitute retained counsel for appointed counsel because of concerns about possible financial problems or delay without con-

ducting adequate inquiry about concerns or considering alternatives); *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010) (Finding the trail court failed to make proper inquiries concerning Rivera-Corona's counsel of choice); *United States v. D'Amore*, 56 F.3d 1202, 1205 (9th Cir. 1995) (Holding that the trial court's denial of defendant's right to his counsel of choice was an abuse of discretion because the trial court conducted no inquiry into whether any "compelling purpose" existed to justify the denial); and *United States v. Musa*, 220 F.3d 1096 (9th Cir. 2000) (Holding that the trial court abused its discretion in denying defendant's request for substitution of counsel without conducting adequate inquiry.)

At no time did the trial court inquire into Morse's preparedness. In fact, the trial court made no inquiry of Morse whatsoever. Moreover, the court *never asked Mr. Horeczko how much time he needed to prepare for trial.* Time and again the Ninth Circuit has found that the trial court abused its discretion in denying a defendant's request to substitute counsel without inquiring into how much time new counsel needed to prepare for trial. *See United States v. Brown*, 785 F.3d 1337, 1349 (9th Cir. 2014) (Finding structural error for violating defendant's Sixth Amendment right to counsel of choice; noting: "The [trial] court made no effort to ascertain how long the newly appointed attorney would likely need to prepare for trial [because] ... the court never asked how long a continuance would be necessary") Id. at 1349; *see also D'Amore*, 56 F.3d at 1205; *Bradley*, 510 F.3d at 1097; *and United States v. Nguyen*, 262 F.3d 998, 1005 (9th Cir. 2001) (The denial of the motion to substitute counsel violated Nguyen's Sixth Amendment right to counsel where judge failed to inquire into how much time new counsel needed to prepare for trial.)

As to the third-factor-identified in *Miller*, Petitioner's request to substitute counsel was timely, made nearly two months before the start of trial. The district court has failed to cite any cases in which a substitution of counsel was denied so far in advance of trial because of the potential for delay.

Petitioner's motion was not made on the eve of trial. He advised the trial court on September 5, 2013, that he intended to retain counsel for trial. On September 12, 2013, Petitioner appeared with retained counsel Matthew Horeczko, which was 53 days before the trial actually begin.

In any event, the court in *Miller* specifically noted that late timing does not always preclude relief. Id. 525 F.3d at 899; *United States v. Lillie*, 989 F.2d 1054, 1055 (9th Cir. 1992) (Defendant cannot be denied his choice of retained counsel just because the request came late, or the court thinks current counsel is doing an adequate job.)

Additionally, the Ninth Circuit has held that the timing of a motion for substitution of counsel cannot be the basis for its denial without a record demonstrating a "compelling purpose" for the denial. *See D'Amore*, 56 F.3d 1202 (Holding that last-minute requests to substitute counsel could be denied only if a "compelling purpose" existed for such denial.) *See also Rivera-Corona*, 619 F.3d at 979 (Requests to substitute counsel could be denied only if the denial is "compelled by 'purposes inherent in the fair, efficient and orderly administration of justice.'"), quoting *United States v. Ensing*, 491 F.3d 1109, at 1115 (9th Cir. 2007), citing *Gonzalez-Lopez*, 548 U.S. at 147-148.

In Petitioner's case, at no point does the record indicate that the granting of the motion would pose any impediment to the "fair, efficient and orderly administration of justice." *Brown*, 785 F.3d at 1350. Thus, Petitioner finds support in the court's decision in *Brown*; in which the Court held that the denial of defendant's Sixth Amendment right to counsel of choice was violated because the district court did not find the denial of defendant's motion was compelled by the fair, efficient and orderly administration of justice. Id. at 1350.

Notably, Petitioner's case is analogous to *Brown*, in which the Court reasoned:

> The [trial] court's willingness to continue the case belies the suggestion that it denied the motion to avoid delay ... And, in fact, the trial *was* continued, by a month, after the hearing, and so took place some 6½ weeks after the motion to substitute was filed.

785 F.3d at 1349, (emphasis in original.) Petitioner's case was also continued, and took place some 7½ weeks after the motion for substitution was made, which also belies any suggestion that the motion was denied to avoid delay

Accordingly, Petitioner has demonstrated that all three factors identified in *Miller* weigh in his favor. Consequently, Petitioner has established that it is at least debatable whether the district court's ruling, that the trial court did not abuse its discretion in denying the substitution of counsel, was correct.

Petitioner further contends that the waiver of his right to counsel was "not voluntary in the constitional sense," because he was presented with the constitutionally offensive "Hobson's Choice" of proceeding to trial with unprepared counsel or no counsel at all. *See Crandell v. Bunnell*, 144 F.3d 1213, 1215, 1217 (9th Cir. 1998) (Functional denial of counsel that resulted when judge forced accused to choose between incompetent lawyer or appear pro se was per se prejudicial.); *Pazden v. Maurer*, 424 F.3d 303, 319 (3d Cir. 2005) ("If a choice presented to a petitioner is constitutionally offensive, then the choice cannot be voluntary.")

The record reflects that all preparation for trial was shouldered by Petitioner, his investigators, and defense experts. The record is completely devoid of any examples of Morse's preparation. The fact of the circumstances put Morse in a position where he could not competently proceed to represent Petitioner at trial without more time to adequately prepare.

Under these circumstances, Petitioner's waiver of the right to counsel was involuntary. The trial court denied Petitioner's motion to substitute Mr. Horeczko for himself in pro per, which left him with the ultimatum of accepting representation my Morse or representing himself. *See Berry v. Lockhart*, 873 F.2d 1168 (8th Cir. 1989) (Habeas petition granted on the ground that the defendant did not knowingly and voluntarily waive his right to counsel when his motion for substituted counsel was denied and he was forced with the option of proceeding with unwanted counsel or pro se.)

The trial court was well aware that Petitioner had no desire to be represented by Morse. Petitioner advised the court that was not communicating with Morse, which indicated that he did not believe Morse had prepared for trial. (RT 317) *See Crandell*, 144 F.3d at 1215: "We have previously held that where [a] defendant is appointed a [lawyer] 'with whom he was dissatisfied, with whom he would not cooperate, and with whom he would

not in any manner whatsoever, communicate,' the defendant's constitutional rights are violated." Id. at 1215, quoting *Brown v. Craven,* 424 F.2d 1166, at 1170 (9th Cir. 1970).

Consequently, Petitioner's invocation to his right to represent himself was involuntary because, "The choice between unprepared counsel and self-representation is no choice at all." *James v. Brigano,* 470 F.3d 636, at 644 (6th Cir. 2006) (A waiver is involuntary if the defendant is offered the "Hobson's Choice" of proceeding to trial with unprepared counsel or no counsel at all.)

An involuntary waiver of the right to counsel violates the Constitution and federal law as set forth in *Johnson, Tovar, Faretta,* and *Edwards.* It is axiomatic that the Constitution requires that the "waiver of the right to counsel must be knowing, voluntary, and intelligent." *See Iowa v. Tovar,* 541 U.S. at 88; *Johnson v. Zerbst,* 304 U.S. 458, at 464 (1938); *Faretta v. California,* 422 U.S. 806, at 835 (1975); *Edwards v. Arizona,* 451 U.S. 477, at 482 (1981).

In making the determination of whether the waiver of the right to counsel was knowing, voluntary, and intelligent, a trial court "must thoroughly investigate the circumstances under which the waiver is made." *See James,* 470 F.3d at 644; *Faretta,* 422 U.S. at 835; *Edwards,* 451 U.S. at 482 (Waiver of the right to counsel "depends in each case 'upon the particular facts and circumstances surrounding the case...'", quoting *Johnson,* 304 U.S. at 464.)

In *Von Molke v. Gillies,* 332 U.S. 708 (1948), the Supreme Court instructs that the trial court must make a "penetrating and comprehensive examination of all the circumstances under which such a plea is rendered." Id. at 724.

The circumstances under which Petitioner waived his right to counsel reveal that the waiver was involuntary. After denying Petitioner's motion for substitution, the trial court left him with the option to represent himself or accept representation from Morse. Faced with this choice, Petitioner literally advised the trial court that he felt as if he was being compelled to represent himself by stating: "I FEEL I'M BEING FORCED TO TRIAL." (RT 323.) Petitioner continually advised the court that he believed

he was coerced into representing himself at trial: "I WANT TO OBJECT TO BEING FORCED TO TRIAL." (RT 902:17-18; emphasis added); "THE COURT HAS FORCED ME INTO TRIAL." (RT 912:5-6; emphasis added); "I FEEL I WAS FORCED TO DO THE TRIAL BY MYSELF PRO PER." (RT 6306:16-17); and "I BELIEVE I WAS FORCED TO TRIAL PRO PER." (RT 6353:12; emphasis added.)

Therefore, the district court's conclusion that Petitioner voluntarily waived his right to counsel is contrary to *Johnson* in that the trial court was negligent in its responsibility to protect Petitioner's Sixth Amendment right to counsel. *See Johnson,* 304 U.S. at 456 ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court ... This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused...") Id. at 456.

In order to comply with this duty, the trial court must "make a thorough inquiry and ... take all steps necessary to insure the fullest protection of this constitutional right." *Von Molke,* 322 U.S. at 722.

In Petitioner's case, the trial court was negligent in its duty to protect his Sixth Amendment right to counsel when it failed to conduct a thorough inquiry into Petitioner's waiver of the right to counsel. It also failed to make a penetrating and comprehensive examination of the circumstances; for had it done so, it could not but have realized that Petitioner vehemently believed he was being forced to represent himself against his will; which constitutes an involuntary waiver of the right to counsel.

Coincidentally, an involuntary waiver is equally a defective waiver. *See Cordova v. Baca,* 346 F.3d 924, 926 (9th Cir. 2003) ("We do not need a Supreme Court case to tell us the consequences of a defective waiver; a defective waiver waives nothing and thus is of no consequence."); *see also Johnson,* 304 U.S. at 468.

Like *Cordova,* Petitioner, "was entitled to counsel, yet was tried without one." 346 F.3d at 926. Accordingly, "he is entitled to an automatic reversal of the conviction ... [because, this] is the kind of defect in the trial process the Supreme Court has told us time and again cannot be unscrambled." Id. at 930.

Lastly, *Johnson* intructs any reviewing court to, "indulge every reasonable presumption against waiver of fundamental Constitutional rights and ... we do not presume acquiesence in the loss of fundamental rights." 304 U.S. at 464.

Hence, Petitioner has satisfied the *Slack* test for obtaining a COA on this issue "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." 529 U.S. at 484.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ramont Foster

Date: February 6, 2022