22-5244

ORIGINAL

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES M. TORRENCE
Petitioner

vs.

HAZEL PETERSON, WARDEN
Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals For The

Tenth Circuit

PETITION FOR CERTIORARI

Charles M. Torrence, #8977
Norton Correctional Facility
P.O. Box 546
Norton, Kansas 67654-0546

Pro Se

QUESTIONS PRESENTED

ONE: Whether it is of statewide, and even nationwide importance, for the United States Supreme Court to declare definitively whether a mental competency hearing harbors "significant consequences" for a criminal defendant which makes it a "critical stage" in the criminal prosecution requiring representation by counsel under the Sixth Amendment to the United States Constitution?

TWO: If the answer to ONE is yes, did the state of Kansas deny Charles M. Torrence his Sixth Amendment constitutional right to counsel at his competency hearing?

LIST OF PARTIES

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

RELATED CASES

Complaint Informations: Sedgwick County, Wichita, Kansas Case Nos. 13 CR 0942, 13 CR 1383, and 13 CR 1713.

April 28, 2017: The Kansas Court of Appeals affirmed Torrence's convictions. State v. Torrence, 394 P.3d 152; 2017 WL 1535137 (unpublished opinion). (Torrence I) **February 27, 2018,** the Kansas Supreme Court denied review.

April 2, 2018: Torrence filed a motion for post-conviction relief ("Motion") pursuant to K.S.A. 60-1507 (habeas corpus) in the District Court of Sedgwick County (Case No. 18 CV 795). **April 23, 2018,** the district court denied relief under K.S.A. 60-1507.

November 25, 2020: The Kansas Court of Appeals affirmed the district court's denial of Torrence's K.S.A. 60-1507 motion. State v. Torrence, 475 P.3d 1294; 2020 WL 6930802. (Torrence II)

December 17, 2020: Petitioner filed an Application for federal habess corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Kansas, in Case No. 20-CV-3310-JWB. **February 9, 2022,** the federal district court denied Torrence § 2254 relief. **March 4, 2022,** Torrence docketed his appeal from said denial in the United States Court of Appeals for the Tenth Circuit (case No. 22-3045).

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Constitutional and Statutory Provisions:

Rules:

Other Authorities:

Appendix:

NOTE TO THE COURT:

This Petitioner includes Appendix A and B (supra)on the authority of Supreme Court Rule 14(i)(vi), and solely as "any other material the petitioner believes essential to understand the petition" he submits for review under Supreme Court Rule 11.

QUESTIONS PRESENTED

ONE: Whether it is of statewide, and even nationwide importance, for the United States Supreme Court to declare definitively whether a mental competency hearing harbors "significant consequences" for a criminal defendant which makes it a "critical stage" in the criminal prosecution requiring representation by counsel under the Sixth Amendment to the United States Constitution?

TWO: If the answer to ONE is yes, did the state of Kansas deny Charles M. Torrence his Sixth Amendment constitutional right to counsel at his competency hearing?

OPINION BELOW

The federal district court's findings of fact, conclusions of law, and final judgment in Mr. Torrence's 28 U.S.C. § 2254 proceeding are reported in its MEMORANDUM AND ORDER, Case No. 20-3310-JWB; entered on February 9, 2022.

STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1254(1), the Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not yet been entered by the court. See United States v. Nixon, 418 U.S. 683, 692; id. at 686-87 (reviewing claims "because of the public importance of the

issues presented and the need for their prompt resolution"). Torrence hereby invokes Rule 11 of the U.S. Supreme Court for this Court to review his case pending in the Tenth Circuit, U.S. Court of Appeals, before judgment is entered in that case.

Under 28 U.S.C. § 2101(e), a petition for a writ of certiorari before judgment is timely filed "at any time before judgment" in the court of appeals. Because a notice of appeals has been filed by Mr. Torrence in this case and his case has been docketed in the court of appeals, invocation of 28 U.S.C. § 1254(1) is proper.[1] Issue of public importance; prompt resolution is needed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution assures that no person shall be subjected to criminal prosecution without the assistance of counsel:

> "In all criminal prosecutions, the accused shall enjoy the right . . . 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."

The Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

---

[1] Appeal currently pending in 10th Circuit Court of Appeals of the United States, in Case No. 22-3045.

28 U.S.C. § 1254(1) provides that cases in the court of appeals may be reviewed by this Court as follows:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree[.]

28 U.S.C. § 2101(e) provides:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

Kan. Stat. Annot. § 22-3302 provides in pertinent parts:

> (1) At any time after the defendant has been charged with a crime and before pronouncement of sentence, the defendant, the defendant's counsel or the prosecuting attorney may request a determination of the defendant's competency to stand trial. If, upon the request of either party or upon the judge's own knowledge and observation, the judge before whom the case is pending finds that there is reason to believe that the defendant is incompetent to stand trial the proceedings shall be suspended and a hearing conducted to determine the competency of the defendant.
>
> (7) The defendant shall be present personally at all proceedings under this section.

Kan. Stat. Annot. § 22-4503(a) provides:

> "A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceeding against such defendant . . .[.]"

STATEMENT OF THE CASE

A Sedgwick County Court jury in Wichita, Kansas convicted Mr. Torrence of attempted aggravated robbery, aggravated robbery (x3), robbery, and unlawful possession of a firearm. (Jury Verdict forms in Case No. 13 CR 0942). Torrence appealed.

In April 2017, the Kansas Court of Appeals affirmed the trial court's judgment. State v. Torrence, 394 P.3d 152; 2017 WL 1535137. Petition for Review to the Kansas Supreme Court was denied on February 27, 2018. In April 2018 Torrence sought post-conviction relief pursuant to K.S.A. 60-1507. The court summarily denied the petition on April 23, 2018. (Order Summarily Denying 60-1507 Habeas Corpus Petition, Case No. 18 CV 795). Torrence appealed again. The appellate court affirmed. Torrence v. State, 475 P.3d 1294; 2020 WL 6930802. Kansas Supreme Court Rule 8.03B allowed Torrence to bypass the Kansas Supreme Court to file his 28 U.S.C. § 2254 in federal district court. (Petition, Page 1, #1). The federal district court denied his § 2254 February 9, 2022. (Memorandum and Order, Page 5 #31 and #32).

Torrence filed his (timely) Notice of Appeal on March 4, 2022. (Notice of Appeal, Page 5 #36). The district court issued a Certificate of Appealability on March 8, 2022, but limited it to Torrence's claim that the State denied him his right to counsel at his mental competency hearing. (Memorandum and Order, Page 5 #41). Because Mr. Torrence was permitted to proceed "in forma pauperis" in federal district court, Fed. R. App. P. 24(a)(3) allowed Torrence to continue to proceed in forma pauperis in the Court of Appeals without further authorization. (Order, Page 2 #5). **NOTE: Documents referenced herein are contained in the Civil Docket for Case No. 20-3310-JWB, U.S. District Court.**

STATEMENT OF RELEVANT FACTS

The road to here begun when the state judge cramed Mr. Torrence's separate cases together until his competency to stand trial was resolved. (Transcript of Motion, held on June 27, 2013, pgs. 2-5). This became a problem because the court did so without having determined beforehand whether Torrence made a knowing, voluntary, and intelligent decision to waive counsel in each of the latter cases, and, at his competency hearing. (Transcripts of Initial Appearance on 13 CR 1163, 13 CR 1383, and 13 CR 1713; see also Transcript of Finding of Competency, held on August 13, 2013, pg. 2). It is always advisable to answer such an inquiry, because otherwise the record may misinform as to a defendant's station and answering the inquiry may avoid consequences that abridge his or her constitutional rights. Mr. Torrence's case hinges equally on this determination.

The State of Kansas charged Mr. Torrence in four separate complaint/informations; having allegedly committed six different crimes. (Complaint'Informations in 13 CR 0942, 13 CR 1163, 13 CR 1383, and 13 CR 1713). The first was on April 12, 2013. The second, sometimes after May 3, 2013. The third on May 27, 2013. The fourth on June 26, 2013.

On May 3, 2013, judge Warren Wilbert granted Torrence's request to represent himself. (May 3, 2013, Transcript). This waiver of counsel was confined to Case No. 13 CR 0942. (May 3, 2013, Transcript). Judge Wilbert warned Torrence of the dangers

of representing himself, questioned Torrence, and found that he knowingly and voluntarily waived his right to counsel. (May 3, 2013, Transcript). Judge Wilbert appointed Torrence standby counsel (Charles S. Osburn) and informed him that standby counsel could not be involved in the proceedings in any way; but could only answer legal questions Mr. Torrence may have. (May 13, 2013, Transcript, pg. 5).

Mr. Torrence soon afterwards filed a motion to remove standby counsel from the case. Mr. Osburn responded by filing a motion under K.S.A. 22-3302 to have Torrence's mental competency determined. Mr. Osburn noted in his motion, ". . . from my conversation with Mr. Torrence, I think that there is a good faith belief that there is concern here regarding his competency[.]" (June 27, 2013, Transcript, pg. 3 & 4). Mr. Osburn requested the court to "take Mr. Torrence off the docket for the time being and order an evaluation by ComCare in that regard." (June 27, 2013, Transcript). Mr. Torrence had, in addition to Osburn's motion, filed a pro se motion raising a mental defect defense under K.S.A. 22-3219. (June 27, 2013, Transcript). The prosecution concurred in the motions. (June 27, 2013, Transcript, pg. 4).

Judge William Woolley heard the motions on June 27, 2013. (Transcript). Judge Woolley granted all but the motion to remove standby counsel. (June 27, 2013, Transcript, pg. 4). He specified, "everything will be off the docket," "until we get this re-

solved." (June 27, 2013, Transcript, pg. 4). He ordered that Torrence be evaluated by ComCare. (June 27, 2013, Transcript).

The court consolidated Torrence's new criminal cases (i.e., 13 CR 1163, 13 CR 1383, and 13 CR 1713) with the first one from 13 CR 0942 -- for competency evaluation purposes. (June 27th and August 13th, 2013 Transcripts). The state court records demonstrate the court did not obtain from Mr. Torrence a knowing, voluntary, and intelligent waiver of counsel in the latter cases on or before the competency hearing. (Transcripts of Initial Appearance on 13 CR 1163, 13 CR 1383, 13 CR 1713; and, August 13, 2013, Transcript of Finding of Competency).

The court assumed because Torrence opted for self-representation in 13 CR 0942 that he intended the same with the subsequent charges. Mr. Torrence asserted early on the State erred by making this assumption: (Affidavit of Charles M. Torrence in Support of K.S.A. 60-1507 Motion, pg. 7, paragraph 27(f) & (g); see also Reply Brief of Appellant, No. 18-120312-A). Primarily because the new charges differed as to the facts, the charges, and the punishment. (Cf. Complaint/Information in 13 CR 1163, 13 CR 1383, 13 CR 1713, and 13 CR 0942). Torrence noted he did not know what punishment the Kansas Sentencing Guidelines Act proscribed for his subsequent offenses. (Reply Brief of Appellant, No. 18-120312-A, pg. 8). Torrence has asserted he would have requested counsel on the new charges, if asked. (Reply Brief, No. 18-

120312-A, pg. 3).

Torrence appeared pro se at his competency hearing. (August 13, 2013, Transcript, pg. 2). The cover page of the transcript indicates an appearance by standby counsel Charles S. Osburn, but the record shows Osburn was never addressed and never spoke during the hearing. (August 13, 2013, Transcript, pg. 2). The court directed all inquiries concerning Torrence's competency to Torrence. Torrence asserted in his K.S.A. 60-1507 habeas motion that his pro se appearance at the competency hearing was not a knowing, voluntary, and intelligent decision. (Affidavit of Charles M. Torrence, Case No. 18 CV 0795, paragraph 27)(f)). Mr. Torrence did not neglect to assert that standby counsel was not present at the hearing (§ 60-1507 motion, pg. 4). Torrence argued below that "the task of challenging the mental evaluation was unlawfully left to [him] who displayed no understanding of how to subject his evaluation to meaningful adversarial testing; particularly without having been allowed at any time to review the evaluation or had it read to him." (See, e.g., 28 U.S.C. § 2254 petition, Page 6(a), #3). Torrence attested as much in his Affidavit in support of his K.S.A. 60-1507 motion, at page 7(g):

> "I did not understand how the competency procedure operated otherwise I would have objected to not having an actual competency hearing and also objected to Mr. Osburn not being present at the August 13th, 2013 proceeding and being forced to proceed pro se before my competency to stand trial had been resolved[.]"

On top of this, Torrence presented an Exhibit with his Traverse, and Memorandum in support, titled "Document #1", verifying that the agency (ComCare) the court ordered to evaluate him never did. ("Visit Cross-Reference Report). Torrence also attached therewith documentation that ComCare did not file a mental evaluation report on him with the Clerk of the Sedgwick County District Court. (Memorandum in support of Traverse, "Document #3", letter from District Court Clerk). As far back as in his Affidavit in support of his § 60-1507 motion, Torrence asserted:

> "The real controversy of identification, **my incompetency**, the reliability of the State's evidence, and my alibi (i.e., my medical records and hospital personnel verifying my facial injury, etc.), was not fully tried, because evidence integral to my theory of defense or incompetency was unlawfully or wrongfully excluded by either the court, the prosecution, law enforcement or by my lawyers. This denied me due process." (Page 8, paragraph 29).

There was no medical testimony presented at Torrence's competency hearing, and Torrence did not have the opportunity to cross-examine the alleged mental evaluator from ComCare as to his purported finding of competency. (August 13, 2013, Transcript). What is more, Judge Waller, whom presided over the competency hearing, is now deceased and therefore we have no way to determine what "report" he relied on for his finding (i.e., a written one or "word of mouth").

In this appeal no one denies that Mr. Torrence was not represented by counsel at his competency hearing. No one denies that a competency hearing is a critical stage of the criminal

proceedings. No one denies that Mr. Torrence was entitled to counsel at critical stages.

REASONS FOR GRANTING THE WRIT

Researchers estimate that well over 35,000 adults with serious mental illnesses are booked into U.S. jails on any given day. Researchers also estimate that approximately 60,000 adult competency evaluations are conducted annually in the U.S., and about 30% of the defendants referred for evaluation are found by the courts to be incompetent. (See Karen L. Hubbard et al., Competency Restoration . . ., 27 LAW & HUM. BEHAV. 127, 127 (2003)).

The Bureau of Justice Statistics reported that during one sample year, "more than half of all prisons and jails had a mental health problem, including 705,000 in state prisons, 78,800 in federal prisons, and 479,900 in local jails." (See Doris J. James & Lauren E. Glaze, "Mental Health Problems of Prison and Jail Inmates, Bureau of Just. stat. special rep. 1 (Sept. 2006)," https://www.bjs.gov/content/pub/pdf/mhppji.pdf.).

Not having definitive Supreme Court precedent holding a competency hearing is a critical stage in the criminal prosecution requiring representation by counsel contributes to the disparity in numbers between state and federal prisoners with mental problems passing on to prison from the courts.

Under 28 U.S.C. § 2254(d), habeas relief shall not be granted to a state prisoner from a judgment of the State with respect to any claim adjudicated on the merits in State court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The State of Kansas denied Mr. Torrence counsel at his court-ordered mental competency hearing. It did so without determining beforehand whether Torrence made a knowing, voluntary, and intelligent decision to appear pro se at the hearing. The Supreme Court has made plain that if the accused, by whatever manner or means, is not represented by counsel, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence; particularly where the accused has not competently and intelligently waived his or her constitutional right to counsel. See Johnson v. Zerbst, 304 U.S. 458, at 467-69 (1938)

In the instant matter, the lower courts have avoided determining whether Torrence's pro se appearance at his competency hearing was a competent and intelligent decision by claiming now there is no Supreme Court precedent available to state prisoners holding a mental competency hearing is a "critical stage" at which representation by counsel is constitutionally required.

I. Significant Consequences of a Competency Hearing

Critical stages are those steps of a criminal proceeding that hold significant consequences for the accused. Bell v. Cone, 535 U.S. 685, 695-96 (2002).

The trial court found reason to believe Mr. Torrence was incompetent to stand trial and, therefore, ordered a mental evaluation by "ComCare" of Torrence followed by a competency hearing. The Kansas Supreme Court has held once a defendant has received a competency evaluation, a statutory hearing under K.S.A. 22-3302 must be held "where competency could be judicially determined." See State v. Davis, 281 Kan. 169, 130 P.3d 69 (2006); see also K.S.A. 22-3302(1). The Kansas Court of Appeals recognized that a competence hearing "has significant consequences for how a district court addresses a defendant's motion to proceed pro se." See State v. Booker, 379 P.3d 1152 , rev. denied 2017 Kan. LEXIS 603.

A competency determination has significant consequences for both the defendant and the state.

In Riggins v. Neveda, 504 U.S. 127, 139-40 (1992), the Court noted:

> "Unless a defendant is competent, the State cannot put him on trial. Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the right to summons, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. Drope v. Missouri, 420 U.S. 162, 171-72, [ ] (1975)."

Four years later, in Cooper v. Oklahoma, 517 U.S. 348, 364 (1996), the Court added:

> "The importance of these rights and decisions demonstrate than an erroneous determination of competence threatens a 'fundamental component of our criminal justice system' -- the basic fairness of the trial itself."

Mr. Torrence argues in his Briefs before the Tenth Circuit Court of Appeals that Estelle v. Smith and Medina v. California are precedent holding that a mental competency hearing is a critical stage of the criminal prosecution at which the defendant through the Sixth Amendment is entitled to representation by counsel. Estelle, 451 U.S. 454 (1981); Medina, 505 U.S. 437 (1992). In Medina, Justice Kennedy expressly recognized: "Once a competency hearing is held, however, the defendant is entitled to the assistance of counsel, e.g., Estelle v. Smith, [451 U.S. 454], and psychiatric evidence is brought to bear on the question of the defendant's mental condition[.]"

The federal district court for Kansas, and counsel for the state of Kansas, disagree, claiming they do "not provide clearly established Supreme Court precedent to support Torrence's specific claim that he has a Sixth Amendment right to counsel at a mental competency hearing." (Appellee's Brief, at pgs. 18-21). They characterize Estelle and Medina on this specific point as nothing more than dicta. But counsel acknowledges Estelle was denied his Sixth Amendment right to the assistance of counsel because he did not have counsel to help him make (1) "the significant decision

of whether to submit to the [psychiatric] examination and" **(2)** "to what end the psychiatric findings may be employed." (Appellee's Brief at 19).

Mr. Torrence had counsel to help him make "the significant decision on whether to submit to the [psychiatric] examination." (Transcript of Motion Proceeding, held June 27, 2013, pgs. 3 & 4). Torrence had neither full-time nor standby counsel at the competency hearing to present what counsel believed to be evidence of his incompetency, to lodge his objections about results of the mental evaluation report, nor to help him decide to what end the psychiatrist's findings may be employed. Standby counsel Charles S. Osburn notified Torrence after-the-fact, "Kansas law prohibits those type of examinations to be shared with the client." (See Exhibit #2 filed in support of Torrence's § 2254 motion on December 17, 2020; letter to Torrence from Mr. Osburn). In Kansas, "[a] party who raises the issue of the defendant's competency to stand trial has the burden of going forward with the evidence." State v. Stewart, 306 Kan. 237, 252, 393 P.3d 1031 (2017). It was Torrence's standby counsel who raised the issue of his incompetency. The problem was, "standby counsel does not qualify as the assistance of counsel required by the Sixth Amendment." See State v. Vann, 280 Kan. 782, 127 P.3d 307 (2006).

Under K.S.A. 22-3302 et seq. -- the mental competency determination statutes -- the psychiatric interview and competency hearing necessarily become intertwined.

The reports of the court-appointed psychiatrists are essential, necessary, indispensable and elementary prerequisites to the ultimate determination of competency. Kansas law provides that a court's finding of incompetency will be made on the basis of, inter alia, "a hearing conducted to determine the competency of the defendant." See K.S.A. 22-3302(1). Significant consequences emanating from the results of Torrence's psychiatric interview ranged from the convening of a jury at the outset under K.S.A. 22-3302(c)(1), involuntary commitment under K.S.A. 22-3303 to a treatment facility for a period of 90 days or indefinitely, to dismissal without prejudice of the charges against him under K.S.A. 22-3305(2).

Without definitive Supreme Court precedent on the "specific" point herein under scrutiny, the restriction 28 U.S.C. 2254(1) imposes on Torrence and similarly situated individuals (i.e., no Supreme Court precedent, no § 2254 relief), endorses that the state of Kansas did not evaluate Torrence as court-ordered (see Section III, infra), that he did not competently and intelligently waive his right to counsel at each critical stage in the proceedings, did not have the guiding hand of counsel to help him make the significant decision "to what end the psychiatrist's findings [if any] may be employed," and endorses that the State tried, convicted, and allowed Torrence to proceed pro se while incompetent. The Fourteenth Amendment does not allow anyone to make or enforce a law endorsing such an abridgement.

The guidance of this Court is needed. State prisoners are without remedy under 28 U.S.C. § 2254 -- against a state's failure to adopt and adhere to adequate procedures to protect a defendant's right not to be tried and convicted while incompetent -- without definitive Supreme Court precedent holding a mental competency hearing is a critical stage in the criminal prosecution at which representation by counsel under the Sixth Amendment is required.

II. Mr. Torrence is Entitled to Habeas Relief Because He Was Denied Counsel at a Critical Stage in the Criminal Prosecution.

The Sixth Amendment entitles a defendant to the assistance of counsel at every critical stage of a criminal prosecution. Kirby v. Illinois, 406 U.S. 682, 690 (1972). Critical stages are those steps of a criminal proceeding that hold significant consequences for the accused. Bell v. Cone, 535 U.S. 685, 695-96 (2002). Thus, a defendant is entitled to counsel at any proceeding where an attorney's assistance may avoid the substantial prejudice that could otherwise result from the proceeding. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

In addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial . . ..

The Court in United States v. Wade, 388 U.S. 218, at 226-27 (1967) held, "We scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial."

Under K.S.A. 22-4503(a), "A defendant charged . . . with any felony is entitled to have the assistance of counsel at every stage of the proceeding against such defendant . . .[.]" The Supreme Court recognized that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." See Kentucky v. Stincer, 482 U.S. 730, 745 (1987). The competency statute, K.S.A. 22-3302(7), provides: "The defendant shall be present personally at all proceedings under this section." This means that Torrence's presence at his competency hearing was "critical to its outcome." These statutes "supplement the constitution and are to be regarded as rendering the constitutional guarantee effective." See, e.g., Townsend v. State, 215 Kan. 485, 487, 524 P.2d 758 (1974). They constitute a legislative definition of what is, under the circumstances named, a reasonable and proper procedure for safeguarding effective assistance of counsel at a defendant's competency hearing and protection against trying and convicting a defendant while incompetent. It was the apparent intent of the Kansas legislature, in passing/reconciling together § 22-4503(a) and § 22-3302

(7), to prevent the oppression of a citizen by subjecting him or her to trial and conviction without counsel and while incompetent.

K.S.A. 22-4503(a) and § 22-3302(7) -- where the concern was whether a competency hearing is a critical stage -- are evidence that the lower courts' consideration of Torrence's denial of his right to counsel claim resulted in a decision that was based on an unreasonable determination of the facts.

The Supreme Court has not yet considered **in primal** whether a competency hearing is a critical stage in the process for these purposes. The case of Estelle v. Smith entertained a set of facts which indicate as much. Id., 451 U.S. 454. In Medina v. California Justice Kennedy remarked in unequivocal fashion, "Once a competency hearing is held, however, the defendant is entitled to the assistance of counsel . . .[.]" Id., 505 U.S. 437, at 450. But the opposition, and federal District Court, wants more. They want that "spotted calf," i.e., "an on-point Supreme Court case for the 'specific proposition' that 'a competency hearing is a critical stage of a criminal proceeding to which the Sixth Amendment right to counsel attaches.'" (Appellee's Brief at pg. 22). Notwithstanding, this Court's holding in Panetti v. Quarterman, 551 U.S. 930, at 953, that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."

However, every federal court of appeals to take up the question has answered it affirmatively. Raymond v. Weber, 552 F.3d 680, 684 (8th Cir. 2009); United States v. Collins, 430 F.3d 1260, 1264 (10th Cir. 2005); Appel v. Horn, 250 F.3d 203, 215 (3rd Cir. 2001); United States v. Barfield, 969 F.2d 1554, 1556 (4th Cir. 1992); Sturges v. Goldsmith, 796 F.2d 1103, 1108-09 (9th Cir. 1998); United States v. Klat, 156 F.3d 1258, 1262 (D.C. Cir. 1998). Because it is a critical stage under the governing standard, an accused must be represented at competency hearing. As the D.C. Circuit has explained, "We find it contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel. Such a defendant may not proceed pro se until the question of her competency to stand trial has been resolved."

The Supreme Court took it a step further in Godinez v. Moran, 509 U.S. 389, 400-02, by holding that a determination that he or she is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.

That the assistance of counsel is absolutely essential to the functioning of a fair trial is by now well understood. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (The accused in a criminal case requires the guiding hand of counsel at every step of the proceedings against him.)

So is the principle that actual denial of counsel at a critical stage of trial is a per se Sixth Amendment violation, without the necessity for any further inquiry into prejudice or other harm to the defendant. See United States v. Cronic, 466 U.S. 648, at 659 & n. 25 (1984). Cronic establishes that "an actual or constructive denial of the assistance of counsel altogether" constitutes Sixth Amendment error.

The Cronic standard, of course, applies only rarely. But this is the rare case that squarely implicates Cronic. At the most critical stage of Torrence's criminal prosecution -- the stage that would determine whether he is incompetent to stand trial -- the state of Kansas denied him counsel. In Medina v. California, 505 U.S. 437, at 450, the court emphasized, "The rule announced in Pate [v. Robinson, 383 U.S. 375] was driven by our concern that it is impossible to say whether a defendant whose competence is in doubt has made a knowing and intelligent waiver of his right to a competency hearing." In that same vein, once Torrence's competence was in doubt, it became impossible to say whether his walk to and pro se appearance at his hearing was knowing and intelligent.

Torrence, at the state and federal level, cited to Johnson v. Zerbst, 304 U.S. 458 (1938), for the proposition that the State lost jurisdiction to proceed in his case at the point it denied him his right to counsel at his competency hearing. It provides:

> "If the accused, **however**, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his or her liberty."

Id., 304 U.S. at 467-69; emphasis added.

The key word in the quote is "however." Webster's II New College Dictionary defines the word "however" as **"1. By whatever manner or means."** The word "however," therefore, includes Mr. Torrence whom, early on in his case, opted for self-representation. Johnson shows the principal concern in Torrence's case must be whether he competently and intelligently waived his right to counsel on or before the date of his competency hearing. The Supreme Court in Carnley v. Cochran, 369 U.S. 506, at 515-16 held the principles in Johnson are equally applicable to asserted waivers of the right to counsel in state criminal proceedings. The court must look to the circumstances of each individual case when determining whether the waiver of counsel was knowing and intelligent. Johnson, 304 U.S. at 464.

The opposition hopes to avoid answering why the record in Torrence's case does not demonstrate a knowing, voluntary, and intelligent decision to waive counsel by him in Case Nos. 13 CR 1163, 13 CR 1383, 13 CR 1713, nor at the "Finding of Competency" hearing held on August 13, 2013. They do so by claiming there is no Supreme Court precedent designating a competency hearing a critical stage warranting Sixth Amendment protection via effective assistance of counsel.

(Memorandum and Order, Page 5 #31; Appellee's Brief, pg. 23; Case No. 22-3045, U.S. Court of Appeals for the Tenth Circuit).

K.S.A. 22-4503(a) and K.S.A. 22-3302 channel the Sixth Amendment right to counsel to Mr. Torrence. § 22-4503(a) includes a competency hearing within the "specific proposition" that "a competency hearing is a critical stage of a criminal proceeding to which the Sixth Amendment right to counsel attaches." The statute achieves this with its language "A defendant charged . . . with any felony is entitled to have the assistance of counsel at every stage of the proceeding against such defendant . . .[.]" "The Sixth Amendment withholds from [state and] federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." Johnson v. Zerbst, 304 U.S. at 463.

The addition, deletion, or alteration of a factor in a test established by the Supreme Court constitutes a failure to apply controlling Supreme Court law under the "contrary to" clause of AEDPA. Williams v. Taylor, 529 U.S. 362, at 405-06 (2000). Mr. Torrence's waiver of counsel at the competency hearing and whether it was a competent and intelligent decision are joined at the hip. The deletion or alteration of the latter is certainly "contrary to" Johnson v. Zerbst, 304 U.S. 458.

The Court in Johnson added, "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." Id., 304 U.S. at 465. Judge Woolley's finding that he had reason to believe Torrence was incompetent foreclosed obtaining from Mr. Torrence, on that evaluation commencement date, a competent and intelligent waiver of his right to counsel in Case No. 13 CR 1713 (for certain) and for the competency hearing. (Transcript of Motion, pgs. 3 & 4, held on June 27, 2013).

The opposition would have this Court believe that the valid waiver obtained from Torrence in 13 CR 0942 was all encompassing. That it enveloped the subsequent offenses, as well; i.e., in 13 CR 1163, 13 CR 1383, 13 CR 1713, and his pro se appearance at the "Finding of Competency" hearing held on August 13, 2013. The waiver in 13 CR 0942 on May 3, 2013, was "offense specific." (See May 3, 2013 "Transcript of Motion and Approval to Proceed Pro Se). Those waivers occurring after the competency hearing do not operate retrospectively. At any place in Torrence's file where the record contains no more than his acknowledgement of and desire to waive his right to counsel, such a waiver is not valid without thorough inquiry into whether Torrence comprehend the nature of the charges and proceedings, the range of punishments (jointly or severally), and all facts necessary to a broad under-

standing of the case. See Von Moltke v. Gillies, 332 U.S. 708, 722 (1948); and, State v. McCormick, 37 Kan. App. 2d 828, 839, 159 P.3d 194 (2007).

Publishing, definitively, Supreme Court precedent holding a mental competency hearing is a critical stage in the criminal prosecution at which representation by counsel under the Sixth Amendment is required, affirms that the lower court's decisions hereon were contrary to, or an unreasonable application of Supreme Court precedent; or, as well, constituted an unreasonable determination of the facts in light of the trial record. As such, Mr. Torrence application for habeas relief should have been granted.

III. Another Feature Establishing the Illegitimacy of Torrence's Conviction and Sentence

The conviction of a legally incompetent defendant violates due process. See Pate v. Robinson, 383 U.S. 375, Syl. 1(a) (1966). A conviction in a case where the defendant has not enjoyed that fundamental right is void. His imprisonment also violates the Thirteenth Amendment which forbids involuntary servitude, except as "punishment for crime," since no punishment can be valied unless after a valid trial or a valid plea of guilty.

Because the Writ of Habeas Corpus is intended to safeguard individual freedom against arbitrary and lawless State action, it must be administered with the initiative and flexibility essental to insure the miscarriage of justice within its reach are surfaced and corrected. Harris v. Nelson, 394 U.S. 286 (1969).

Judge Woolley's June 27, 2013, Order to perform mental evaluation on Mr. Torrence created a presumption of his incompetency to stand trial, until officially rebuted. See State v. Davis, 281 Kan. 169, 177-78, 130 P.3d 69 (2006). Early on Torrence documented suspensions he had:

> "And from the start I have said that this -- that this is all a -- a fabrication and that the police is just using -- concocting stuff," (Transcript of Sentencing, held on June 10, 2015, pg. 22, lines 10-12).
>
> * * *
>
> "I believe the 'man' performing the interview on me was a police or assistant district attorney rather than a mental health professional, awaiting an opportunity for me to let my guard down about my case in a way to then incriminate myself." (Affidavit of Charles M. Torrence, Case No. 18 CV 0795, paragraph 24).
>
> * * *
>
> "The real controversy of identification, my incompetency, the reliability of the State's evidence, and my alibi (i.e., my medical records and hospital personnel verifying my facial injury, etc.), was not fully tried, because evidence integral to my theory of defense or incompetency was unlawfully or wrongfully excluded by either the court, the prosecution, law enforcement or by my lawyers. This denied me due process." (Affidavit of Charles M. Torrence, Case No. 18 CV 0795, paragraph 29).

Mr. Torrence presented post-conviction evidence to federal district court that demonstrated ComCare mental evaluators, in fact, did not evaluate Torrence as the court ordered it to. Post-conviction evidence can often be relevant to establishing substantive incompetency. See 28 U.S.C. § 2254(e)(1).

The mental competency determination process commenced on June 27, 2013, and ended August 13, 2013. The jail visitation records verify no ComCare personnel visited Torrence at the jail

between those dates. ("Visit Cross-Reference Report"; see "Evidence in Support of Petitioner's Traverse" titled "Document #1"). The Clerk of Sedgwick County District Court verified ComCare did not file with the court the evaluation it supposedly performed on Mr. Torrence. (Memorandum in Support of Traverse, titled "Document #3"). All this explains why the State presented no medical testimony, nor the report, at Torrence's competency hearing. (August 13, 2013 "Finding of Competency" transcript). Because ComCare did not evaluate Torrence as court ordered, the presumption is the state of Kansas convicted and sentenced him during a period of incompetency.

IV. Torrence has not Procedurally Defaulted his Claim that he was Denied his Right to the Assistance of Counsel at his Mental Competency Hearing.

The State denied Mr. Torrence his right to counsel at the hearing to determine his competency to stand trial. It did so without establishing beforehand whether Torrence's pro se appearance at the hearing was knowing, voluntary, and intelligent. (Finding of Competency transcript, pg. 2, held on August 13, 2013).

Torrence reiterates that § 22-4503(a)'s language encompasses a competency hearing by providing "A defendant charged . . . with any felony is entitled to have the assistance of counsel at every stage of the proceeding against such defendant . . .[.]"

True, Torrence did not lodge an objection about this during his criminal case (i.e., posttrial motions) nor on direct appeal. The Kansas Supreme Court held, "It is the task of the district judge to insure that a defendant's Sixth Amendment right to counsel is honored." See State v. Vann, 280 Kan. 782, 789, 127 P.3d 307 (2006).

In determining whether a state procedural bar rule is adequate and independent ground to bar federal review of a constitutional claim, a federal habeas court must apply the state's rule in effect at the time of the purported procedural default. See Barnett v. Hargett, 174 F.3d 1128, 1134 (10th Cir. 1999).

On July 31, 2015, the Kansas Supreme Court implemented the following rule in State v. Ford, 302 Kan. 455, 467 (2015):

> "Future movants seeking to reverse a conviction because of an alleged violation of K.S.A. 22-3302 [mental competency determination procedure] must utilize the procedures in K.S.A. 60-1507 or be subject to summary dismissal."

At the state level, "[a] party may seek and obtain the benefit of a change in the law during the pendency of a direct appeal." See State v. Williams, 311 Kan. 88, 95-96, 456 P.3d 540 (2020). A conviction is not considered final until the judgment of conviction has been rendered, the availability of an appeal has been exhausted, and the time for any rehearing or final review has passed." State v. Osbey, 238 Kan. 280, 283, 710 P.2d 676 (1985).

In the present case, the jury convicted Torrence on January 29-30, 2015. (Jury Verdicts, Counts 1-6). Sentencing occurred on June 10, 2015. Torrence filed his Notice of Appeal on June

16, 2015. Docketed his appeal October 26, 2015. The direct appeal became final on February 27, 2018, or thereabouts. (Mandate, Appellate Court No. 15-114546-A (consolidated cases)). Torrence's conviction was not final until final judgment on both the conviction and the sentence had been entered on direct appeal. Because a final judgment had not been entered on July 31, 2015, Torrence's conviction was not yet final when Ford was decided. As such, Torrence is entitled to the benefit of the court's holding in Ford (supra). Torrence presented his complaint about the K.S.A. 22-3302 violation in his case in a K.S.A. 60-1507 motion as ordered.

The State used the Ford rule to lull Mr. Torrence into not lodging his complaint about being denied counsel at his competency hearing until his K.S.A. 60-1507 application. Torrence asserts he would have raised his denial of counsel claim on direct appeal had it not been for the Kansas Supreme Court holding "the Ford rule" out as sole means to better develop the factual underpinning of such a claim. Even Kansas highest court recognizes "a party may not lull another into forbearing [to raise a claim] during the limitation period and then asserting a limitations bar after an action has been filed." Miller v. Foulston, 246 Kan. 450, 468-69, 790 P.2d 404 (1990). A state's procedural rule does not bar federal review if petitioner actually complied with the rule. Lee v. Kemma, 534 U.S. 362, 366 (2002).

In Johnson v. Zerbst, 304 U.S. 458, the Court held that unless a waiver of counsel is shown to have been a competent and intelligent decision, "the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him or his life or his liberty." Id., 304 U.S. at 468. "Subject matter jurisdiction may be raised at any time, and a party does not waive jurisdictional defects by not objecting to the procedure in district court." Trotter v. State, 288 Kan. 112, 126, 200 P.3d 1236 (2009). Procedural bar was not an option in Torrence's case.

In addition, Torrence raised a substantive competency claim below and presented post-conviction evidence that the court-ordered mental competency evaluation to determine his competency to stand trial never occurred. (Evidence in Support of Torrence's Traverse, titled "Document #1," i.e., "Visit Cross-Reference Report"). Torrence from his § 60-1507 application onward raised a threshold doubt about his competency at the time of trial by clear and unrebuted convincing evidence. (See also Affidavit by Charles M. Torrence, in support of K.S.A. 60-1507 motion, paragraphs 19, 24, 25, 26, 27, and 29). "A substantive competency claim is not subject to procedural bar." Barnett v. Hargett, 174 F.3d at 1133. Torrence's allegations, and evidence in support, warranted a full evidentiary hearing. Barnett, supra.

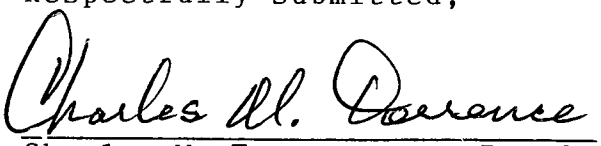
At both the state and federal court level the courts delved into the merits of Torrence's denial of counsel claim. In ruling on Torrence's K.S.A. 60-1507 post-conviction motion, the state district court determined Torrence was competent to stand trial and that "[n]o irregularities, legally or factually, occurred at either hearing." ("Order Summarily Denying 60-1507 Habeas Corpus Petition, filed April 23, 2018, in Case No. 18 CV 795, at pgs. 5 & 6). Where, as here, a state court actually decides an issue on the merits, state procedural bars will not preclude federal habeas review. Ylst v. Nunnemaker, 501 U.S. 797, 801-03 (1991).

Besides, because Torrence was improperly denied counsel "such denial constitutes cause sufficient to overcome procedural bar." Cf. Shayestah v. City of S. Salt Lake, 217 F.3d 1281 (10th Cir. 2000). Where there has been a complete denial of the constitutional right to counsel, as here, prejudice is presumed. See United States v. Cronic, 466 U.S. 648, at 658-59 (1984).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari before judgment in Torrence's case before the United States Tenth Circuit Court of Appeals in aid of its jurisdiction to review the final judgment of the federal District Court for Kansas.

Respectfully submitted,



Charles M. Torrence, Pro Se
Inmate No. 8977
Norton Correctional Facility
P.O. Box 546
Norton, Kansas 67654-0546