IN THE SUPREME COURT OF THE UNITED STATES

ALVARO NOE MENDOZA-VALENCIA,	)	**Case No.** _____
	)	
Petitioner,	)	
	)	
v.	)	
	)	
	)	
STATE OF OREGON,	)	
	)	
Respondent.	)	

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

ALVARO NOE MENDOZA-VALENCIA
SID#12685917
Petitioner pro se
Eastern Oregon Correctional Institution
2500 Westgate
Pendleton, OR 97801

ELLEN F. ROSENBLUM
OSB#753239
Oregon Attorney General
BENJAMIN GUTMAN
OSB#160599
Solicitor General

Attorneys for Respondent

Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
503-378-4402

QUESTIONS PRESENTED

The trial court denied petitioner's multiple requests for substitution counsel based on his claim of ineffective assistance of counsel. There was a complete breakdown of the attorney-client relationship, and petitioner refused to proceed with a jury trial with the court-appointed counsel assigned to him because trial counsel did nothing to assist petitioner in his defense. The trial court conducted a perfunctory inquiry on whether trial counsel was effective and simply declared that counsel was effective. The trial court made no express findings, and then proceeded to have a jury trial without petitioner present. Petitioner received over 75 years in prison.

The questions presented are:

1. Can a state trial court deny a criminal defendant's request for substitution counsel without any reasonable inquiry into trial counsel's performance, and then proceed with a jury trial without the defendant being present?

2. In denying a pretrial motion for substitution counsel, should a trial court be required to make reasoned findings of fact on the record to ascertain effective assistance of counsel under the Sixth Amendment to the United States Constitution?

3. When the Attorney-Client Relationship completely breaks down to the point where a criminal defendant refuses to participate in the jury trial process, at what time and in what manner should the trial court take direct intervention to protect the integrity of the Sixth Amendment's guarantee of assistance of counsel?

OPINIONS BELOW

On September 6, 2019, petitioner was convicted by a jury in the Washington County Circuit Court of the State of Oregon in *State v. Alvaro Noe Mendoza-Valencia*, Case Nos. 18CR42383; 18CR71355. On May 18, 2022, the Oregon Court of Appeals affirmed petitioner's conviction and sentence without opinion. See *State v. Alvaro Noe Mendoza-Valencia*, CAA172421; A172422. On September 1, 2022, the Oregon Supreme Court denied review of petitioner's direct appeal without opinion. See *State v. Alvaro Noe Mendoza-Valencia*, S069658.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257 to review by writ of certiorari a final judgment rendered by the highest court of a state in which a decision could be had.

CONSTITUTIONAL PROVISIONS

This case involves the Effective Assistance of Counsel Clause of the Sixth Amendment to the United States Constitution, as well as the Due Process Clause of the Fourteenth Amendment under the same. These constitutional provisions provide:

> "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 defence." U.S.Const.Amend. VI

> "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." U.S.Const.Amend. XIV

PROCCEDINGS BELOW

On September 6, 2019, petitioner was charged in Washington County, Oregon, of 25-counts of enumerated sex offenses based on verbal allegations made several years prior to his arrest. Before trial, petitioner motioned the trial court for substitution counsel. The trial court denied the motion, and forced petitioner to proceed with the jury trial. Petitioner refused to proceed with a jury trial with appointed counsel. Petitioner was convicted by the jury and sentenced 75 years in prison. Petitioner's direct appeal was affirmed without opinion.

STATEMENT OF THE CASE

This is a criminal case involving sex offenses allegations. No direct or physical evidence, or admissions from the accused, were introduced at trial. Ana Maria Zarate Ramirez, petitioner's girlfriend, and petitioner were in a long-term relationship and had lived together at several places in Washington County, Oregon. Tr 279-83. Zarate Ramirez has two daughters (AN and MA) and two sons (R and L). Tr 222, 278, 617, 675-78. AN has Down syndrome. Tr 698. MA is Zarate Ramirez's youngest daughter. Tr 279, 678. MA was three years old when Zarate Ramirez and defendant first got together. Tr 280, 679. Petitioner has a daughter, MI. Tr 280-82, 614-17. MI was eight or nine years old when Zarate Ramirez and petitioner first got together. Tr 282-83, 618.

RC and MA were friends when they were nine to ten years old. Tr 240. One night, allegedly in 2010, RC planned to sleep over at MA's house. Tr 240. MA put a pornographic video on the big television, and RC told her to turn it off. Tr 240. When Zarate Ramirez told them to go to bed, petitioner allegedly called them into his room and said that they could sleep in there. Tr 240. MA told RC to tell him no and say that you do not like the smell of cigarettes. Tr 241. When RC asked MA why she should say that, MA said that petitioner would do bad things to them if they slept in his room. Tr 241. RC returned home that evening instead of staying the night. Tr 241. She told her mother and school counselor about what had happened. Tr 241. Police subsequently questioned her. Tr 242. On

March 3, 2010, child protective services worker Laurie Wuthrich (and a police officer), following up on RC's report of possible sexual abuse of MA, went to MA's elementary school and talked to MA. Tr 254-55. MA said that RC had come over, but that petitioner did not invite them into his bedroom. Tr 258. MA denied any touching of her private parts and was confused when asked. Tr 259-60. She said that MI had left home, and they did not know where she was. Tr 259. She said that, two months earlier, MI had said that petitioner had "touched" her. Tr 259. MA clarified that "touched" meant "hit." Tr 259. MA said that it turned out not to be true and that MI had just been mad. Tr 259. She denied telling RC that she, MA, had been "touched." Tr 260. Wuthrich and a police officer questioned MI the same day at her high school. Tr 261. MI said that she had recently run away because of an argument with her stepmother. Tr 262, 664. Her parents knew where she was. Tr 273. MI's mother lived in Mexico and had not kept MI with her. Tr 262-63. Wuthrich also contacted AN and she said that things were good, that she felt safe, and that there had not been any touching of her private parts. Tr 264. Zarate Ramirez told Wuthrich that, one time, she saw defendant lying on a bed with MI and had one hand on his cell phone and his other hand on MI's breast. Tr 265. When Wuthrich later asked MI about that, MI adamantly denied that that had happened. Tr 266. Zarate Ramirez did not tell Wuthrich about other incidents that she had witnessed because of defendant's earlier threat to kill her son. Tr 291-92. Wuthrich made a "safety plan" that petitioner should have no unsupervised contact with the children for 30 days. Tr 274, 334. Wuthrich was unable to gather any more information and "closed the case." Tr 275.

AN was 23 years old at the time of trial in 2019. Tr 220. She testified that something "bad" and "sad" happened to her and MA with petitioner, on their "potty parts" or private body parts. Tr 223-25. Petitioner touched her vagina and breasts with the "potty parts of a man" and with his hand. Tr 226-28, 232. She was 18 years old when that happened. Tr 231-32. She told the police that when they first questioned her, but they did not understand what she was saying. Tr 230. MA was 20 years old at the

time of trial. Tr 675. She testified that petitioner had raped and inappropriately touch her and AN. Tr 683-84. The touching allegedly began when she was three or four years old and petitioner had her sit in his lap. Tr 684-85. There were multiple other instances that occurred in the house and other places. Tr 686-87. He showed them pornography. Tr 689. He used dildoes and vibrators and would film them with his phone. Tr 690-93. He allegedly penetrated her vagina with his finger multiple times before she was 12 years old. Tr 694, 714. Petitioner was allegedly penetrating AN with his penis. Tr 696-98. AN was crying so MA told him to stop and do it to her instead. Tr 696-98. He ordered them to put on particular clothing and tell them to come in his room. Tr 701-02. He told MA that he would hurt her siblings or mother if she told. Tr 699. Once, in petitioner's car, petitioner had MA put her mouth on his penis, called her "puta," and told her to "keep sucking his dick." Tr 704. According to Zarate Ramirez, AN once told her she wanted to tell her something but did not want her to tell petitioner. Tr 292. AN said that petitioner took off all his clothes and pulled MA in there. Tr 292. Zarate Ramirez them asked MA if that had happened. Tr 292. MA said nothing had happened. Tr 292. Another time, AN said that petitioner had called "us" into the room. Tr 293. Zarate Ramirez told petitioner to stop touching their daughters, and petitioner said that she was crazy. Tr 293. He once grabbed a screwdriver and said that he was capable of killing any one of them. Tr 295. According to Zarate Ramirez, petitioner moved out and left their relationship unexpectedly. Tr 294, 338. He just said that he had to go. Tr 338. MI had just graduated from high school at that time. Tr 624. One day, about two to three years after petitioner left, AN told Zarate Ramirez that MA was smoking marijuana. Tr 295, 339, 772. Zarate Ramirez slapped MA and MA responded that she was trying to forget that petitioner had rape her and AN. Tr 295, 722. On September 22, 2016, Zarate Ramirez was testifying at a grand jury hearing about an unrelated matter and while there, she asked a district attorney's victim advocated what to do about MA's claim of abuse. Tr 296, 339. The advocate introduced Zarate Ramirez and MA to Detective Cheryl Banks. Tr 374. Detective Banks talked to MA in a corridor down the hall from the grand jury room. Tr 374-77.

MA said that petitioner had sexually abused her between the ages of four and 13, but she had been afraid to talk about it. Tr 378. She did not disclose the abuse in 2010 because petitioner said that he would kill her mother or kick them out and they would be homeless. Tr 382. She said that petitioner would hurt her mother and siblings. Tr 382. AN had told Zarate Ramirez about petitioner's sexual abuse three times in the past, but MA denied it each time, because she was terrified. Tr 382, 720.

On October 18, 2016, MA and AN went to Child Abuse Response and Evaluation Services (CARES) Northwest. Tr 341. MA was 17 years old then. Tr 461. MA had a normal anogenital exam but that was not unusual for a sexually active teenage. Tr 349. MA said that petitioner had touched both the inside and outside of her vagina and anus with his "front bottom part." Tr 356.

In the interview, MA said that, beginning when she was three or four years old, petitioner would put her on his lap and touch her chest and bottom parts, kiss her on the mouth, and have her touch his "bottom part," by with she meant his penis. Tr 468. When she was in third grade, it "got worse." Tr 468-69. He would call her and AN into his room where he kept the computer, and in exchange for letting them use the computer, he would allegedly penetrate their vaginas with his finger. Tr 470. He would take her and AN to work with him and take their clothes off. Tr 471-72. He would tell them he would hurt their mother or brothers if they did not do what he said. Tr 472-73. MA described an incident in petitioner's car in which AN was screaming in pain while petitioner was having sex with her in the car. Tr 474. MA told petitioner to do it to her instead. Tr 474, 496. Whenever Zarate Ramirez asked if anything was happening, MA denied it, even after AN disclosed the abused to Zarate Ramirez on three different occasions. Tr 474-75. Petitioner stopped "doing it" to AN when AN was about 13 years old. Tr 475. MA was about ten years old then, and he kept "doing it" to her. Tr 475. He inserted a dildo "toy" in her anus and vagina. Tr 485, 488, 500.

MA had an incident of bleeding in the third grade after petitioner inserted a toy into her vagina. Tr 504-07. She went to the doctor, who said that it was menstruation, but MA did not menstrual again

until fifth grade. Tr 477-78, 503-09. He inserted the toy into AN's vagina too, and she screamed in pain. Tr 506. Petitioner would take pictures of them and record them and would put their hair in pigtails and choose clothing for them to wear. Tr 486-91, 510. He allegedly made her and AN watch pornography. Tr 486-89. He put his mouth on MA's "bottom part." Tr 498. She and AN would put their mouths on his "bottom part." Tr 498. He penetrated their front parts with his finger or with a toy. Tr 499. He had sex with her and AN, two times in the "back part" and "always in the front part." Tr 492-93. He took turns doing that with her and AN. Tr 494. That happened in the house, in his truck, and at job sites. Tr. 495.

AN was 20 years old when she went to CARES. Tr 412. Because of her Down syndrome, she appeared to operate at a third-grade level or lower. Tr 429-30, 473. AN communicates very concretely. Tr 359. AN's exam showed nonspecific findings, a prominent ridge on her anus, which could have been present from birth or could be the result of an injury. Tr 358. She has sought medical care in the past for painful bowel movements. Tr 358. While pointing to her crotch, she said that her "other stepdad" had touched her. Tr 360. In the interview, AN said, "Oh yeah," when asked whether her other stepdad had done something. Tr 417. She said that he was mean and made them cry but she could not remember what he did. Tr 417-19.

MI was 25 years old when she testified at trial. Tr 614. She testified that petitioner began sexually abusing her before they moved in with Zarate Ramirez and her children. Tr 631. Petitioner would say that he was having a nightmare and touch her breast. Tr 631-33. His sexual abuse continued after they moved in with Zarate Ramirez. Tr 633. When she was 11 or 12 years old, petitioner would put his mouth on her breast while they were in the bottom bunk and the other children were nearby. Tr 634- 35. He touched her vagina over and under her clothing, including once when he took her to get a tetanus shot. Tr. 636. He put his finger inside of her vagina. Tr 639. MI ran away when she was about 17 years old but returned after a few weeks. Tr 664. She did not go disclose any sexual abused during

the 2010 investigation because it was hard to say anything and petitioner allegedly was always threatening her and hitting her. Tr 640. He once choked her and hit her with a pan on the head. Tr 640-41. He told her that she would sent to Mexico to live with her mother if she said anything. Tr 641. After the 2010 investigation, the sexual touching stopped but the hitting continued. Tr 641.

Based on the conclusion of the October 18, 2016 CARES interview, Washington County issued a warrant for petitioner's arrest, and on September 14, 2018, the police arrested petitioner in Vancouver, Washington, and three days later he was transported back to Washington County, Oregon. On October 24, 2018, petitioner was indicted by a grand jury of 25 counts of enumerated sex offenses.

Several references of images and/or recordings were made at trial, but at no point was any such images or recordings introduced as exhibits to the jury or with any other court entity. See e.g., Tr 486-91, 510; Tr 690-93.

On January 30, 2019, petitioner mailed a letter to his counsel of record, Shannon M. Kmetic, informing her that petitioner had an imminent trial and that he has not yet received any form of discovery. See Appendix D, page 1 of 45. About three days later, Ms Kmetic came to visit petitioner in the jail and said that she "was working on his case." On March 5, 2019, petitioner sent another letter to Ms Kmetic and requested that she contact his wife as a material witness in the case. See Appendix D, page 3 of 45. About four days later, Ms Kmetic came to visit petitioner again and merely repeated that she "was working on his case." Petitioner wanted his discovery and for his lawyer to speak with his wife as a material witness. On March 12, 2019, petitioner filed a "Motion to Substitute Counsel" and requested a hearing. See Appendix D, page 5 of 45. This motion was filed by the court on March 19, 2019. On March 26, 2019, petitioner had a hearing before Judge Rebecca D. Guptill. At the hearing, the judge asked why petitioner wanted to have Ms Kmetic substituted by different counsel. Petitioner said that she was not conducting any form of investigation, would not provide him with any discovery, and would not contact his wife as a

material witness. The court then turned to Ms Kmetic for a response, and she merely replied with "I am working hard on his case." At that time, trial was approximately 120 days away. The trial court allowed petitioner's motion and appointed Ruben Medina, Jr to represent petitioner.

From the time Mr Medina was appointed to represent petitioner up until trial, there was zero pretrial investigation and little or no contact with petitioner. On April 17, 2019, petitioner sent Mr Medina a letter asking for discovery, and asked Mr Medina to interview the alleged victims in this case, their friends from school as well as various electronic media between the alleged victims and their friends, and the teachers from the schools. See Appendix D, page 10 of 45. Petitioner wanted all written reports and audio and/or video recordings. Petitioner gave Mr Medina a list of names as identified in the April 17, 2019 letter. In addition, petitioner provided Mr Medina with his desire to present an "Alibi Defense" in the same letter by asking him to procure very specific information from petitioner's employer. Petitioner also asked Mr Medina to investigate several Department of Health Services (DHS) staff members who were involved in the alleged criminal complaint. Petitioner reiterated his claim of innocence to Mr Medina. On or around April 25, 2019, Mr Medina came to see petitioner in the jail for approximately 10-15 minutes. Mr Medina said he "did not have authorization of funds" to hire an investigator to follow-up on petitioner's request. On May 9, 2019, petitioner wrote Mr Medina another letter asking for discovery. See Appendix D, page 13 of 45. Then, on or around May 15, 2019, Mr Medina came to see petitioner at the jail for about 10-15 minutes and said that Ms Kmetic "did not have all the discovery" and her investigator "was on vacation." Mr Medina then added that the "other half" of the discovery was still in the custody of the prosecution.

On June 7, 2019, petitioner filed a "Motion to Substitute Counsel" because his counsel was not providing petitioner with any discovery. See Appendix D, page 15 of 45. This motion went unanswered by the trial court. On June 12, 2019, petitioner again filed a complaint with the Oregon

State Bar stating that his attorney has not, and seemingly would not, provide him with a copy of his discovery. See Appendix D, page 16 of 45. The State Bar promptly responded and sent a response to Ruben Medina (petitioner's court-appointed counsel) and ultimately admonished counsel to provide petitioner with discovery. See Appendix D, page 19 of 45.

On July 22, 2019, petitioner filed a complaint against Judge Rebecca D. Guptill for failing to address petitioner's complaints against his lawyer. See Appendix D, page 23 of 45. This complaint was filed with the Oregon Commission on Judicial Fitness and Disability, and its response dated August 16, 2019 did not resolve the situation. The Commission responded and simply concluded that the "evidence is insufficient" to support a complaint, and therefore denied his complaint. See Appendix D, page 31 of 45.

On August 26, 2019, petitioner mailed a letter to Mr Medina again requesting discovery, and requested that counsel specifically investigate all audio/video recordings and witness statements, and provide him with transcripts thereof so petitioner could prepare a defense. See Appendix D, page 35 of 45. Mr Medina did not respond or come visit petitioner.

On August 27, 2019, petitioner's jury trial began.

The court made findings about petitioner's multiple requests for substitution counsel, and discussed the matter with the prosecutor and defense counsel. Tr 95-104. The court ruled that it would offer defendant room in which to view the trial by video but would not offer Spanish interpretation services. Tr 101-04. The court then heard other pretrial motions. Tr 104-31. A jailer, Sergeant Wortham, talked to petitioner in Spanish. Tr 131. Petitioner said that he felt he could not control himself with Medina representing him and asked to be returned to the jail. Tr 131.

The court brought petitioner into the courtroom. Tr 137. The court told petitioner that he could return to the courtroom if he followed the rules of he could watch the trial via video with interpretation services. Tr 137-39. Petitioner interjected repeatedly that he wanted a new attorney

"period." Tr 140-46. The court ordered petitioner removed from courtroom and made more findings. Tr 150-53. Petitioner told a jailer, Deputy Danner, that they would have to drag him into the court room unless he received a new attorney. Tr 153-56

The court conducted voir dire. Tr 159-68. After that, Deputy Danner reported that petitioner had not changed his mind about returning to the courtroom. Tr 171-172. Afterwards, the court brought the jury into the courtroom and gave preliminary instructions, the state gave its opening statement, and Medina "reserved" and then waived the defense's opening statement. Tr 179-209.

When trial reconvened the next day, Wednesday, August 28, 2019, Deputy Danner reported that he had informed petitioner, who was then in the courthouse in a holding cell, that he had the right to be present in the courtroom. Tr 213. Petitioner said that he wanted a new attorney, did not want to attend the trial, and that he wanted to return to the jail. Tr 213-17. The court instructed deputy Danner to inform petitioner that he could return to the courtroom if he wanted to. Tr 217.

At a break in the trial, petitioner was brought into the courtroom upon his request. Tr 303. he addressed the court:

> "THE DEFENDANT: Yes. I would like to talk. First, here's a list of witnesses that was never requested from him.*** I want to read something quickly if I may. Because I would like to preserved this for the record, but just in case (indiscernible). This is a right of legal process. The Fifth Amendment of the United States. It states that a person should not be prohibited of life, liberty, or property without due process. (Indiscernible). Due process. (Indiscernible) due process (Indiscernible). That the defendant, before being punished, he has to be given an opportunity to dispute the charges that are against him."

Tr 303-04. He said, "And, as I stated yesterday, I cannot do my trial with that (indiscernible)." Tr 305. Petitioner explained that the witnesses on the list were different that the ones that he had mentioned before court. He had, however, mentioned four of them to the defense investigator, who said that they would check, and then petitioner did not hear back. Tr 304-05 ("Because he was going to check it, and that was it."). The court apparently misunderstood petitioner as saying that petitioner did not mention the witnesses to his defense investigator:

> "THE COURT: Okay. Why does he have to ask you, as opposed to you tell him? It's your defense. Why do you not bring up things that help your defense?
>
> "THE DEFENDANT: Because they are asking about witnesses and people that know me.
>
> "THE COURT: Okay. But you just said the investigator didn't ask about those witnesses, so I'm asking you why didn't you volunteer their names. Are you trying to make it difficult for the people who are working on your defense?
>
> "THE DEFENDANT: So we are at the same spot. I brought this. I cannot work with him on the trial, and that's why I have said that I (indiscernible)."

Tr 306-07. The court received the list of names that petitioner submitted as Exhibit 201. Tr 307. Petitioner reiterated, "I'm not going to go to trial with him." Tr 307. Medina said that he had not seen any of the names on the list before. Tr 307. The trial court considered continuing the trial until the next week but decided not to so after questioning Medina and the prosecutor about the potential relevance of those witnesses. Tr 308-11.

The court reminded petitioner that the he had the right to be present, and petitioner again asked for a new attorney. Tr 309-11. Petitioner said, "As the Sixth Amendment states, I should have had an attorney that is actually helping me out." Tr 311. The court responded:

> "THE COURT: [Defendant], you are entitled to court-appointed counsel. You are entitled to competent counsel. You are not entitled to the counsel of your choice. You are not entitled to have personality issues with an attorney and then ask the Court to give you a new attorney. You are not entitled to have an attorney that believes in you. You're not entitled to have an attorney that sees eye to eye with you."

Tr 311-12. The court then told petitioner that he had the right to testify at the trial, reiterated that it would not give petitioner a new attorney, and invited petitioner to nevertheless attend the trial. Tr 313. Petitioner again said that the was not "refusing" to attend the trial "but I cannot go to trial with him." Tr 315. Petitioner repeatedly asked to be removed, an upon the court's order, he was escorted out of the courtroom. Tr 315-21. the court made findings about petitioner's conduct. Tr 321-23. The jury then returned to the courtroom, and trial testimony resumed. Tr 323-24.

The court periodically had a deputy ask petitioner whether he wanted to return to court, and

petitioner continued to refuse to attend the trial so long as Medina was representing him. Tr 403-04, 538-39, 608-11. After the state rested its case, the court had petitioner brought into the courtroom without the jury. Tr 745. The court "invited[d]" petitioner to attend the trial and discussed with him whether he want to testify. Petitioner told the court that he did not want to testify so long as Medina represented him:

> "THE DEFENDANT: Yes. But I am not prepared to testify. [As I have] said before, Your Honor, you are violating my right because I have the right to be supported by an attorney that supports me—defended by an attorney that supports me."

Tr 745-46. Petitioner continued to demand a new attorney, Tr 746-52, and again asserted that he would not go to trial with Medina:

> "THE DEFENDANT: (Defendant talking over interpreter causing audio difficulty) He told me that on the 4th before (indiscernible). I can't go to trial -
>
> "THE COURT: You are welcome to leave then.
>
> "THE DEFENDANT: I will leave because I cannot continue with this man.
>
> "THE COURT: I understand.
>
> "THE DEFENDANT: (Indiscernible) go to trial with that-- that gentleman.
>
> "THE COURT: All right. For the record, as I was talking to [defendant], he jumped to his feet. He angrily started shaking his hand to the best that he could. They are restrained. The deputies immediately jumped to his side, being concerned because he became very aggressive and denouncing it. Again, he is stating the same things that he has said at each opportunity. But I did want to make sure that I afforded him the opportunity, that he understood the opportunity to testify. He made it very clear that he will not testify under these circumstances. He has made it clear that he has been thinking about this, that we brought, you know, the entire issue of defense to his attention. I do find that he is knowingly, he is voluntarily, he's intelligently—means he's thought about it-- made a decision not to testify given the circumstances.
>
> "He continues to demand that I go into deeper inquiry with [defendant]; however, I have inquired of [defendant] with regard to the discovery that was delivered. [Defendant] has waffled back and forth, first admitting that he got some discovery, but then claiming no discovery, but then, at times, claiming he had some. [defendant] very clearly has told this Court that he has delivered the discovery, though it has been redacted, as is ordered by prior court order in such cases, so their names and things have been redacted out. That is not the same thing as not receiving discovery. And [defendant] continues to sort of play a guessing

> game with this attorney about surprising with witnesses and then taking Mr. Medina to task for not actually having a clear strategy to involve witnesses that he has no idea of, nor is he prepared to call them. Even such, I have put Mr. Medina, to his best ability, to seek out and address these folks to the extent that he be able. So that's where it stands. It's not surprising, where we're at, that [defendant] has elected not to testify. I will honor that because he's asked me."

Tr 752-55.

Petitioner did not attend the remainder of the trial. The court brought petitioner into the courtroom to inform him of the verdicts. Tr 835-36. In Case No. 18CR42383 (A172421), petitioner was found guilty by unanimous verdict of Counts 1-7, 9-12, and 16-17. The jury hung on Count 8, and the court dismissed that count on the state's motion. The court dismissed Count 13- 15 on the state's motion. In Case No. 18CR71355 (A172422), petitioner was found guilty by unanimous verdict of Counts 1-5. The court dismissed Counts 6-8 on the state's motion.

On September 6, 2019, during the conclusion of his *jury trial*, petitioner filed a "Motion to Compel Attorney and Prosecutor to Turn Over Discovery Pursuant to ORS135.815." See Appendix D, page 38 of 45. In this motion, petitioner cited his due process rights under the Fourteenth Amendment to the United States Constitution and this Court's holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

On September 6, 2019, the jury convicted petitioner of Counts 1 through 5.

Petitioner attended the sentencing hearing. Tr 839. In Case No. 18CR42383, on each of Counts 1, 4, 6, and 9-12, the trial court sentenced petitioner to 300 months of imprisonment and "99 years" of post-prison supervision (PPS). On each of Counts 2, 5, 16, and 17, the court sentenced petitioner to 75 months of imprisonment and ten years of PPS less time served. On Count 3, the court sentenced petitioner 70 months of imprisonment and three years of PPS. The court ordered the sentences on Counts 1, 2, 16, and 17 to be served consecutively.

In Case No. 18CR71355, on Count 1, the court imposed a sentence of 300 months of imprisonment under ORS 137.690 and 20 years of PPS less time served. On each of Counts 2-5, the

sentenced defendant to 75 months of imprisonment and ten years of PPS less time served.

The court held a resentencing hearing on November 13, 2019. In an amended judgment in Case No. 18CR42383, the court changed the sentence on Count 6 and imposed 300 months of imprisonment under ORS 137.690 and three years of PPS.

In an amended judgment in Case No. 18CR71355, on Count 1, the court imposed a sentenced of 130 months of imprisonment under ORS 137.700 and the sentencing guidelines, to be served consecutively, and 20 years of PPS less time served. On each of Counts 2-5, the sentenced defendant to 75 months of imprisonment and ten years of PPS less time served. The court ordered the sentence on Counts 3 and 5 to be served consecutively.

Defendant appealed. On appeal, defendant raised three claims of error: that the trial court erred by denying defendant's request for a court-appointed attorney other than Ruben Medina to represent him at trial; that the trial court erred in admitting one of the complainant's hearsay statements under OEC 803(18)(a)(b); and that the trial court erred by instructing the jury that it could return nonunanimous verdicts even though the verdicts were unanimous. The Court of the Appeals affirmed without opinion.

REASONS FOR GRANTING THE WRIT

This is a strictly testimonial case where the accusations made against the petitioner were made many years *after* the alleged incidents took place. There was zero physical evidence introduced at trial or eyewitness testimony (apart from the statements made by the alleged victims). Because this case was entirely testimonial, petitioner desperately needed a trial lawyer who would investigate and cross examine the witnesses effectively at trial. Accordingly, when petitioner did not receive this with his first court-appointed counsel, Ms Kmetic, he moved the trial court for substitution counsel. Then, with his second court-appointed counsel, Mr Medina, no efforts were

made to investigate witnesses or cross examine the witnesses. Again, petitioner objected and motioned the trial court for substitution counsel. The trial court held a perfunctory hearing but did not make any express findings or issue directives to Mr Medina, and ultimately denied petitioner's motion for substitution counsel.

Because this case is inherently testimonial, devoid of any direct physical evidence, and since accusations were made many *years* after the alleged incidents took place, it is a slippery conclusion to assume that those accusations equate guilt and somehow absolve counsel of his duty to be an effective trial lawyer. Here, petitioner maintained his innocence and demanded a jury trial to challenge the truth of the accusations. His counsel sat on his hands and did nothing to challenge the accusations that were made so many years *after* the alleged incidents took place. In the State of Oregon, there is a social and judicial culture that promotes the unconditional acceptance of accusations in sex offense cases—even when those accusations come many years later. And to be sure, petitioner, here, does not intend to undermine the acceptance of accusers in criminal cases (no matter how old said accusations are), but this adds to the dire need of effective trial lawyers—especially when there is such a chronic shortage of public defenders in the State of Oregon (see infra). If a criminal defendant is to stand trial based on verbal accusations, those bare accusations cannot be automatically assumed true and correct. Otherwise, a trial lawyer is little more than a perfunctory appointment for the accused. If a trial lawyer is to be "effective" under the Sixth Amendment, and a criminal defendant maintains his innocence and challenges the accusations, then counsel must challenge the accusations for reliability. The right to confront witnesses commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Here is the crux of the matter: there is no direct holding from this Court that instructs lower courts on how to resolve pretrial motions for substitution counsel. At best, there is persuasive

authority that governs post-verdict analyses which severely disadvantages a criminal defendant. After a jury verdict, all burdens and standards of review shift in the favor of the prosecution. Moreover, the Oregon appellate courts maintain the unfair practice of "affirming without opinion" on direct appeal, which is assumed correct on any collateral appeal thereafter (especially in a federal habeas corpus proceeding under 28 U.S.C. § 2254). Accordingly, because of the absence of Supreme Court guidance, a trial court, as such is the case here, can hold a perfunctory hearing, make zero affirmative findings and arbitrarily declare that trial counsel is doing a "great job," and all review thereafter is presumed correct.

Guidance is particularly needed because there is an extreme shortage of public defenders in the State of Oregon, as recognized by the Oregon Supreme Court, and petitioner sought substitution counsel well-before proceeding with a jury trial because his counsel of record was not effectively assisting him, and the trial court did not evaluate the motion or inquire into counsel's deficiencies but merely concluded (somewhat impulsively) that counsel was "Doing a great job." Petitioner then became so outraged by the lack of assistance from counsel, and the unprofessionalism by the trial court, that he was cautioned that trial would proceed with or without him present in the courtroom. A jury trial was held without petitioner present. This is not a case where petitioner was seeking specific counsel, but merely substitution counsel with *any other lawyer*.

The Sixth Amendment right to counsel "is the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 688, 104 S.Ct. 2052 (1984)(quoting *McMann v. Richardson,* 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039 (1984).

A. No Current Supreme Court Precedent Exists that Governs "Substitution Counsel."

Nearly all claims of ineffective assistance of counsel are premised on post-verdict analyses under the *Strickland* standard. The case at bar is distinguishable in the sense that petitioner made ample complaints about his lawyer's performance *before* trial, and moved the trial court for substitution counsel. This is not a hindsight complaint where a convicted defendant (1) must show that counsel's performance was deficient, and (2) must show that the deficient performance prejudiced the defense. See e.g., *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). Rather, this is a case where there was a complete breakdown of the attorney-client relationship and a complete dismissal of all efforts to proceed with a lawful defense of a criminal case *before trial*. There exists a dire need for Supreme Court guidance on what form of inquiry a trial court should make when a pretrial motion is made for substitution counsel based on ineffective assistance.

There is some guidance among the Federal appellate courts that establishes a post-verdict standard of review regarding denied motions for substitution of counsel, but each of those standards pertain solely to whether the trial court abused its discretion. This post-verdict analysis does nothing to help a criminal defendant secure his or her right to effective assistance of trial counsel. If a criminal defendant makes repeated complaints about his court-appointed counsel *before* trial, there is no constitutional rule established by this Court that squarely addresses how the lower courts are to remedy the situation.

Among the federal appellate courts, the practice is that when reviewing a district court's denial of a request for substitution of counsel, the court "considers not only the adequacy of the [district] court's inquiry but also factors such as the timeliness of the motion for substitution and the nature of the conflict between lawyer and client." See e.g., *United States v. Myers*, 294 F.3d 203, 207 (1st Cir. 2002); *United States v. Simeonov*, 252 F.3d 238, 241 (2d Cir. 2001)(same); *United*

States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir. 1995)(same); *United States v. Mullen*, 32 F.3d 891 (4th Cir. 1994)(same); *United States v. Jones*, 733 F.3d 574, 587 (5th Cir. 2013); *United States v. Mack*, 258 F.3d 548 (6th Cir. 2001); *United States v. Volpentesta*, 727 F.3d 666, 672–73 (7th Cir. 2013); *United States v. Swinney*, 970 F.2d 494, 499 (8th Cir. 1992); *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001); *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002); *United States v. Calderon*, 127 F.3d 1314, 1343 (11th Cir. 1997).

One factor that the federal appellate courts consider in reviewing a denied motion for substitution counsel is "whether the attorney-client conflict is so great that it resulted in a total lack of communication or otherwise prevented an adequate defense." See *Simeonov*, supra, 252 F.3d at 241 (2d Cir. 2001)(citing *United States v. Gallop,* 838 F.2d 105, 108 (4th Cir.1988)); *United States v. Allen,* 789 F.2d 90, 92 (1st Cir.1986); *United States v. Whaley,* 788 F.2d 581, 583 (9th Cir.1986)). The Tenth Circuit appends an additional factor by examining the extent to which the defendant "substantially and unreasonably contributed" to the underlying conflict with his attorney. See *United States v. Lott,* 310 F.3d 1231, 1250-51 (10th Cir.2002).

In the State of Oregon, the rule on substation counsel starts with the underlying premise that, "The right to substitute counsel is not absolute." *State v. Heaps,* 87 Or App 489, 493, 742 P.2d 1188 (1987). The trial court has discretion regarding substitution counsel. *Id.* A defendant has a right to replace court-appointed counsel with another only when he has a "legitimate complaint concerning the one already appointed for him." *State v. Langley*, 314 Or 247, 257, 839 P.2d 692 (1992), *adhered to on reconsideration*, 318 Or 28, 861 P.2d 1012 (1993). A trial court faced with a motion to substitute indigent counsel should engage in an inquiry into "the legitimacy of any complaint about appointed counsel." *State v. Olson*, 298 Or App 469, 472, 447 P.3d 57 (2019)(quoting *State v. Smith*, 339 Or 515, 526, 123 P.3d 261 (2005)). If the defendant's motion to substitute counsel is denied, the Oregon

Supreme Court has set the standard that "a trial court ruling on a motion to substitute counsel will be reviewed for abuse of the trial court's discretion." *Smith*, 339 Or. at 523.

With such heavy emphasis on discretion, and the dangers of hindsight presumptions on appeal, the extent to which a criminal defendant can exercise his Sixth Amendment right to the effective assistance of counsel—when that assistance proves to be ineffective *before* trial—depends upon little more than the trial court's personal inclinations. Accordingly, after the constitutionally-required appointment of counsel is made, questions of effectiveness *before trial* are resolved via "judicial discretion." No rule exists to define what a trial judge must do to remedy a criminal defendant's complaint against his or her lawyer, and there is certainly no pretrial remedy that helps a defendant protect his own Sixth Amendment right to effective assistance of counsel. A trial court with an overburdened docket, a judge with partisan ideology, or a chronically understaffed public defender's office (discussed infra), are variables that can completely disenfranchise a criminal defendant of his or her Sixth Amendment right to the effective assistance of counsel. If this Court was to declare a rule that instructs trial courts to hold a hearing on a pretrial motion for substitution counsel, ascertain the nature of the defendant's complaint, and either instruct counsel to carry out the defendant's request *or* provide a reason why he or she will not, then criminal defendants will at least have a tool to safeguard their own civil rights. The practice in Oregon is that a criminal defendant complains about his lawyer's lack of effort, the trial judge holds a perfunctory hearing and arbitrarily declares that the lawyer is "doing a great job" and denies the motion, and the appellate courts thereafter "affirm without opinion." The result from this practice is rendering the Sixth Amendment right to the *effective assistance* of counsel to be pointless and an item of judicial discretion, and it only creates an express lane to the penitentiary. Nothing safeguards a criminal defendant's *pretrial* ability to ensure that his or her counsel is effective.

B. Chronic Shortage of Public Defenders in the State of Oregon.

In *Jackson v. Franke*, 369 Or 422, n. 1, 507 P.3d 222 (2022), the Oregon Supreme Court recently noted that "Oregon is said to be 1,296 public defenders short of what it needs to adequately vindicate the constitutional right to counsel. American Bar Association Standing Committee on Legal Aid and Indigent Defense, *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards* 5 (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf (accessed Mar. 28, 2022). It is estimated that, for the existing 592 public defenders to provide effective assistance of counsel with current caseloads, each of them would need to spend 26.6 hours per working day on case-specific public defense work. *Id.*" Accordingly, when there is a chronic shortage of public defenders, the very possibility of ineffective assistance due to an overburdened workload begs clarification on the question of what process is due under Amendments Six and Fourteen to the United States Constitution when a pretrial motion is made asking for non-specific substitution counsel.

C. Proposed Rule of Law

In the State of Oregon during post-conviction relief, when a criminal defendant's court-appointed counsel is not being helpful, the Oregon Supreme Court has provided guidance to litigants in *Church v. Gladden*, 244 Or. 308, 417 P.2d 993 (1966). The court held:

> "If petitioner's attorney in the first post-conviction proceeding failed to follow any legitimate request, petitioner could not sit idly by and later complain. He must inform the court at first opportunity of his attorney's failure and ask to have him replaced, or ask to have him instructed by the court to carry out petitioner's request."

Id. 244 Or., at 311-312.

This Court has held that there is no right to counsel in state collateral proceedings. *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). When state law provides

a right to counsel, then any remedial process concerning attorney effectiveness is governed by state law with due process protections under the Fourteenth Amendment to the United States Constitution.

This tool to safeguard basic civil rights in a collateral proceeding does not exist in a pretrial proceeding; that is, a criminal defendant is in a far worse position at or during trial than he is years into a prison sentence on collateral review. Before trial, a complaint against counsel is resolved via judicial discretion with zero option of having counsel instructed by the trial court to do anything. After conviction, and after direct appeal, there is at least a rule that requires the court to hold a hearing and the possibility of having counsel *instructed by the court* to carry out the defendant's requests. Clearly, a criminal defendant has much greater need of effective counsel before trial than after.

In the case at bar, petitioner wanted very specific discovery, had a list of witnesses that he wanted counsel to interview and have testify at trial, and he wanted counsel to ask very specific questions of the alleged victims. Counsel refused all of it. When petitioner complained, the trial court arbitrarily decreed that counsel was "doing a great job." With a rule similar to what is available under *Church* in a collateral proceeding, petitioner would have at least had recourse to ask the court to instruct counsel to do what he requested.

The adoption of a pretrial rule similar to *Church* would not impose an unreasonable burden on lawyers. If a criminal defendant asks to have the trial court instruct counsel to do something illegal, unethical, or improper, all lawyers have recourse to object according to local bar rules which prohibit them from doing so, which have been in place for many decades if not centuries.

What the new rule would do, however, is provide a criminal defendant with the means to utilize his Sixth Amendment right to effective assistance of trial counsel by asking the trial court to have counsel "instructed by the court to carry out [defendant's] request." *Church*, supra, at 312.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 16 day of November, 2022.

Respectfully submitted,

Alvaro Noe Mendoza-Valencia
Petitioner pro se
Eastern Oregon Correctional Institution
SID#12685917
2500 Westgate
Pendleton, OR 97801