Case No. 22-7125

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 WRIT OF CERTIORARI

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

QUESTION PRESENTED

ONE: The Constitution requires that "any waiver of the right to counsel be knowing, voluntary, and intelligent." Iowa v. Tovar, 541 U.S. 77, at 87-88 (2004). The question here is whether the Tenth Circuit correctly concluded there was no clearly established Federal law from the Supreme Court holding that the Sixth Amendment is violated when a defendant proceeds pro se with standby counsel at a critical stage; notwithstanding the Tenth Circuit's failure to address in a dispositive order defendant's concomitant federal constitutional claim that defendant had not made a competent and intelligent decision to waive the right to counsel at such stage. In other words, whether by deletion or alteration of this latter factor in the "any waiver of the right to counsel" test, such, of itself, is "contrary to" established Supreme Court precedent.

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 State v. Torrence, 394 P.3d 152; 2017 WL 1535137 (unpublished opinion).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).

December 29, 2022: The Tenth Circuit Court of Appeals affirmed the federal District Court's decision denying Mr. Torrence § 2254 relief (Case No. 22-3045.

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OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is filed under Case No. 22-3045 at the United States Court of Appeals, Tenth Circuit, 1823 Stout St., Denver, CO 80257; captioned Charles M. Torrence, Petitioner-Appellant, v. Hazel Peterson, Warden, Respondent-Appellee.

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. The opinion of the United States district court appears at Appendix B to this Petition.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided Mr. Torrence's case was December 29, 2022.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "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."

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[.]

U.S.C.S Fed. Rules App. Proc. Rule 40 -- Practice Notes

> **Writ of Certiorari.** Filing a petition for a panel rehearing is not a prerequisite to filing a petition for a writ of certiorari in the Supreme Court.

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).

The Tenth Circuit affirmed the federal district court's denial of Torrence's § 2254 petition on December 29, 2022.

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 like fashion, the record is devoid of evidence the courts satisfied themselves Mr. Torrence knowingly, voluntarily, and intelligently waived his right to counsel at the stages he now complains about.

REASONS FOR GRANTING THE WRIT

A. Even if Mr. Torrence appeared pro se with standby counsel at a "critical stage," such did not justify the Tenth Circuit's departure from the Supreme Court's longstanding requirement to have established beforehand that "any waiver" of the right to counsel was knowing, voluntary, and intelligent.

28 U.S.C. § 2254(d)

A habeas petitioner may receive relief on a claim "adjudicated on the merits" in state court whenever the last reasoned state decision either was (1) contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1); or (2) based on an unreasonable determination of the facts given the evidence presented in state court, Id. at § 2254(d)(2). A state court decision is "contrary to" clearly established federal law when it (1) applies a legal rule that contradicts prior Supreme Court precedent; or (2) reaches a different result from a Supreme Court case despite confronting indistinguishable facts. See, e.g., Williams v. Taylor, 529 U.S. 362, 405 (2000) (O'Connor, J., concurring). A state court's decision is an "unreasonable application" of clearly established federal law when it is "objectively unreasonable." Id. at 409-10. In applying section (d)(1), a federal habeas court "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 131 S. Ct. 1388, at 1398.

ARGUMENT

The Sixth Amendment secures to criminal defendants both the right to trial counsel and the right to proceed without counsel. Faretta v. California, 422 U.S. 806, 834 (1975).

From the very start, Mr. Torrence has asserted he did not knowingly, voluntarily, and intelligently waive his right to counsel for the mental competency hearing. He also asserted in his K.S.A. 60-1507 habeas appeal that he had not competently and intelligently waived his right to counsel in three of his four separate cases on or before the date of the competency hearing. The lower courts have not ruled, definitively, on either point.

The Tenth Circuit Court of Appeals ruled:

> "Mr. Torrence fails to identify any clearly established federal law to support his claim. Although he broadly asserts he was denied the assistance of counsel at his mental-competency hearing in violation of the Sixth Amendment, the Kansas Court of Appeals found that he requested to represent himself and then he appeared with standby counsel at the competency hearing. Mr. Torrence identifies no Supreme Court authority, and we have found none, holding that the Sixth Amendment is violated under such circumstances."

On the contrary, Torrence cited Supreme Court law holding a prerequisite to a defendant's exercise of the right to self-representation is that the defendant knowingly and intelligently waive the right to counsel also provided by the Sixth Amendment. The Tenth Circuit held the facts in those cases are distinguishable from those in Torrence's cases. In other words, it used how they differ factually from Torrence's case to avoid the "knowing and intelligent waiver" rule which is applicable to all.

"The AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Panetti v. Quarterman, 551 U.S. 930, at 953 (2007).

The trial court forced self-representation upon Mr. Torrence at critical stages; by not having fulfilled that prerequisite.

This "prerequisite" has been a Supreme Court rule for at least 85 years. In Johnson v. Zerbst, 304 U.S. 458, at 464-65, the Court held:

> "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.
>
> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."

The Court has repeatedly emphasized that this duty to ensure that a waiver is competent and knowing falls squarely on the trial court judge. When a defendant appears without counsel, a judge has a solemn duty "to make a thorough inquiry and to take all steps necessary to insure the fullest protection of his constitutional right at every stage of the proceedings." Von Moltke v. Gillies, 332 U.S. 708, at 722. A trial judge must "investigate as long and as thoroughly as the circumstances of the case before

him demand" to discharge this duty. Id. at 723.

In keeping in step with Johnson and Von Moltke this Court held that the trial court will not discharge its duty to ensure the waiver was valid when it determined only that the defendant was competent to stand trial **without probing whether the waiver was also knowing and intelligent.** See Godinez v. Moran, 509 U.S. 389 (1993) (acknowledging a defendant "may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently'" Id. at 396). Thus, a trial court is obligated to conduct a two-part inquiry to ensure a waiver was valid. Id. at 401. First, the court must ensure the defendant is competent. Second, the waiver must be knowing and voluntary.

This right is so precious that the colloquy must be **a penetrating and comprehensive examination of all the circumstances under which such a waiver is tendered.** Von Moltke, 332 U.S. at 724.

The Kansas Supreme Court held, "if the interests of the accused, the prosecution, and the public are to be effectively protected is that **the record shall control."** State v. Higby, 210 Kan. 554, 558, 502 P.2d 740 (1972); emphasis added.

Claims presented to state court are presumed to be adjudicated on the merits, even if those claims are not expressly addressed in a dispositive order. Ritcher, 131 S. Ct. at 784-85.

The rule in Ritcher did not release the lower courts in the present case from the holding in Johnson: "While the 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.

The Supreme Court further held the principles declared in Johnson v. Zerbst are equally applicable to asserted waivers of the right to counsel in state criminal proceedings. Carnley v. Cochran, 369 U.S. 506 (1962).

The Tenth Circuit's review of Mr. Torrence's denial of counsel claim made it incumbent upon the court to settle without equivocation whether the trial court, as a matter of law, satisfied on record (in a dispositive order) the two-part inquiry set forth in Godinez: (1) competence to waive counsel, and (2) knowing and intelligent waiver. This in spite of whether Torrence had standby counsel present or not.

The lower court's Sixth Amendment inquiry, in addition to being wholly improper in step-one, also fell far short of the searching inquiry required by a proper step-two analysis. The record before the lower courts provide no evidence upon which this Court may reasonably conclude there has been any compliance with cases such as Tovar, Johnson, Von Moltke, and Godinez.

The lower courts have not expressly addressed, in a dispositive order, whether the "prerequisite" to a valid waiver by Torrence was met or how or why it was not. In effect, Kansas courts also denied Mr. Torrence an adequate forum in which to reliably adjudicate his substantial and detailed allegations of being denied his right to counsel without a knowing, voluntary, and intelligent waiver having been made. By not doing these things, they have failed to apply controlling Supreme Court law under the "contrary to" clause of the AEDPA. Williams, 529 U.S. at 405-06.

In Williams, Justice O'Connor explained that the Virginia Supreme Court's decision there was "contrary to" Strickland v. Washington because the Virginia court added a standard from Lockhart v. Fretwell to the "prejudice-prong" on ineffective counsel analysis not found in Strickland. Id. 529 U.S. at 413-14.

In comparison, the lower courts hereon deleted or altered a factor in the "any waiver of the right to counsel" test -- **i.e., the "knowing and intelligent waiver" component** -- to justify their conclusion that there is no Supreme Court precedent holding that the Sixth Amendment is violated when a defendant proceeds pro se with standby counsel at a critical stage. And manifested, thereby, a faulty presumption that any time a defendant appears pro se with standby counsel that such need not have been preceded by a knowing, voluntary, and intelligent decision to waive counsel. Discounting that the Supreme Court has not drawn that distinction in the "waiver" of a defendant's federal constitutional right to counsel.

Johnson v. Zerbst makes clear:

> "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 467-68; emphasis added.

The violation of step-two -- the "knowing and intelligent waiver" component -- cannot be cured by a legitimately conducted trial or anything else for that matter, as the violation is invariably structural in nature. See State v. Jones, 290 Kan. 373, 385, 228 P.3d 394 (2010).

A clear message must be sent to every state in this country that if a state court were to reject a defendant's claim he or she had been denied the Sixth Amendment right to counsel at a critical stage in the criminal prosecution -- **based soley on the ground defendant appeared pro se there with standby counsel** -- that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to clearly established Supreme Court precedent.

The Tenth Circuit's deletion or alteration of the "knowing and intelligent waiver" factor, in determining Mr. Torrence's case, "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); Williams, 529 U.S. at 405.

I. The Right to Counsel

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. See Coleman v. Alabama, 399 U.S. 1, 9 (1970).

Justice Kennedy in Medina v. California, held: "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[.]"). Id., 505 U.S. 437, 450 (1992).

Kansas statute, K.S.A. 22-4503(a), entitled Mr. Torrence to the assistance of counsel at "every" stage of the proceeding against such defendant. The Kansas Supreme Court has held that statutes "supplement the constitution and are to be regarded as rendering the constitutional guarantee effective." See, e.g., Townsend v. State, 215 Kan. 485, at 487, 524 P.2d 758 (1974).

Our state appellate court cautions, "Given the limited role that a standby attorney plays, . . . the assistance of standby

counsel, no matter how useful to the court or the defendant, cannot qualify as the assistance of counsel required by the Sixth Amendment." State v. Warren, 2015 Kan. Unpub. LEXIS 645, 2015 WL 4879034 (citing McKasle v. Wiggins, 465 U.S. 168, 177-78 (1984).

II. Kansas, as well as Supreme Court law, demonstrate Mr. Torrence did not knowingly, voluntarily, and intelligently waive his right to counsel in each case nor at the competency hearing on or before the date of the competency hearing.

The opposition would have this Court believe that the valid waiver obtained from Mr. Torrence in Case No. 13 CR 0942 was all encompassing. That it enveloped the subsequent offenses, as well, (i.e. 13 CR 1163, 13 CR 1383, and 13 CR 1713), and covered 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"). The waiver by Torrence of the right to counsel in the latter cases did not occur until the following year. The waivers occurring after the competency hearing do not operate retrospectively.

The need for a knowing and intelligent waiver is required to exercise the right to self-representation. Iowa v. Tovar, 541 U.S. 77, at 87-88 (2004); State v. Sharkey, 299 Kan. 87, 322 P.3d 325 (2014). But, are the courts in agreement on this and on the methods by which this factor is to be arrived at?

Kansas courts have developed a three-step framework to determine whether the waiver of counsel was knowing and intelligent. First, the district court must advise the defendant of the right to counsel, either retained or appointed, depending on the waiver. Second, the defendant must understand the consequences of the waiver. Third, the defendant must grasp the nature of the charges and proceedings, the range of punishment, and the facts necessary for a complete comprehension of the case. State v. Buckland, 245 Kan. 132, 138, 777 P.2d 745 (1989); State v. Miller, 44 Kan. App. 2d 438, 441, 237 P.3d 1254 (2010). Cf. Von Moltke v. Gillies, 322 U.S. 708, 722 (1948).

In addition to those three steps, as noted, the district court must also inform the defendant of the dangers and disadvantages of self-representation. State v. Jones, 290 Kan. 373, 376, 228 P.3d 394 (2010). Cf. Faretta, 422 U.S. at 835.

While Mr. Torrence was apprised of some information about self-representation in 13 CR 0942, no court notified him of the necessary information for waiver in 13 CR 1163, 13 CR 1383, and 13 CR 1713 before or during any step in the process to determine his mental competency to stand trial. It is conceded that Mr. Torrence was aware of his right to counsel and that he waived his rights after being informed by the court of all his rights pertaining to 13 CR 0942 (an attempted aggravated robbery). But the record fails to show that Torrence had the capacity to understand

the repercussions of the waiver or that he had any knowledge of the charges, the punishment, or the facts involving 13 CR 1163, 13 CR 1383, and 13 CR 1713 (robbery, aggravated robbery, and criminal possession of a firearm, under the Kansas Sentencing Guidelines ACT ["KSGA]) -- at the time of the original waiver in 13 CR 0942 or during the mental competency process -- the point in time of analysis that matters.

Under the second step of the waiver analysis, the State must point to somewhere in the record indicating that Torrence possessed the capacity to understand the consequences of his waiver at the time that mattered. See Miller, 44 Kan. App. 2d at 441; cf. Johnson v. Zerbst, 304 U.S. at 465. The state district court failed to determine on record whether Torrence desired to be represented by counsel in the new cases or whether proceeding pro se in them was his intention on or before the date of the competency hearing. Perhaps Torrence understood what was going on in 13 CR 0942, but the record does not reveal he understood the significance of or need for waiver of his fundamental rights in the other three cases before entering the process to determine his competency to stand trial.

Moving on to the third step of the waiver analysis, the trial court needed to ensure that Torrence realized the meaning of the charges, penalties, and the facts at the time the latter felony offenses were thrusted upon him going into the mental competency determination process. In this case, the state

district court made no inquiry into the charges, penalties, or facts of the case in 13 CR 1163, 13 CR 1383, and 13 CR 1713 on or before the date of the mental competency hearing. The record doesn't demonstrate Torrence had any prior experience or knowledge with the Kansas sentencing guidelines act entering into the competency determination process, nor about how it classified or related to the facts or penalties of all crimes charged against him. This lack of inquiry leads to structural error, especially since the waiver in the latter cases did not occur until months after the process to determine competency was finalized. The formal waiver of counsel in the latter cases did not occur until February 2014.

As this Court knows, all cases are different and thus the dangers and disadvantages are not the same from case to case. And this Court should not presume that the one appropriate admonition in 13 CR 0942 (first case), with respect to waiver of his assistance of counsel, relieves the trial court of its duty to protect Mr. Torrence's Sixth Amendment rights in his latter cases.

December 30, 2022 a Court of Appeals panel ruled -- for the first time -- "a competency hearing is a critical stage of a criminal proceeding." State v. Allen, 2022 Kan. App. LEXIS 47. It also held because there had not yet been an adequate determination of whether Allen had knowingly and intelligently waived his right to counsel it was error to allow him to represent himself at his competency hearing.

The same must hold true for Mr. Torrence. Because there had not yet been an adequate determination of whether Torrence had knowingly and intelligently waived his right to counsel in 13 CR 1163, 13 CR 1383, 13 CR 1713, and for the competency hearing, it was error to allow Torrence to represent himself at such critical stages.

In deciding the reasonableness of the State's decision, this Court must consider the state court's method as well as its result.

CONCLUSION

The Kansas courts and the Tenth Circuit eviscerated the "knowing and intelligent waiver" requirement for self-representation, stretching back 85 years to Johnson v. Zerbst, in denying relief.

The judgment of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

Charles M. Torrence

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