No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM WEBB
Petitioner

v.

STATE OF DELAWARE
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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October 24, 2024

QUESTION PRESENTED

Was petitioner's Sixth Amendment right to counsel violated when the trial court ordered petitioner to proceed *pro se* without conducting a proper *Faretta* colloquy and without determining on record that petitioner had forfeited and/or waived the right to counsel through his conduct?

PARTIES TO THE PROCEEDING

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

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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, William Webb, by and through his counsel, Megan E. Venerick-Giffin and Christopher S. Koyste, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Delaware Supreme Court filed on July 10, 2024, cited as *Webb v. State*, No. 467, 2022 (Del. July 10, 2024) and appearing at A1-7, with rehearing *en banc* denied on July 29, 2024, cited as *Webb v. State*, No. 467, 2022 (Del. July 29, 2024) and appearing at A14.

OPINION BELOW

The Supreme Court of Delaware issued an opinion on July 10, 2024 denying Mr. Webb's direct appeal, with an order on July 29, 2024 denying Mr. Webb's timely motion for rehearing *en banc*, finding that Mr. Webb forfeited his right to counsel, and the Delaware Superior Court did not err in directing Mr. Webb to proceed *pro se*.[1] The Delaware Supreme Court's July 10, 2024 opinion appears at A1-7 and is reported as *Webb v. State*, No. 467, 2022 (Del. July 10, 2024), and the Delaware Supreme Court's July 29, 2024 order denying rehearing appears at A14 and is reported as *Webb v. State*, No. 467, 2022 (Del. July 29, 2024).

[1] Despite being raised in Mr. Webb's opening brief on appeal and reply brief on appeal, the Delaware Supreme Court made no ruling on the sufficiency of the partial *Faretta* colloquy that occurred, finding that the Delaware Superior Court implicitly found that Mr. Webb had forfeited his right to counsel, thereby rendering the question of the sufficiency of the *Faretta* colloquy to be essentially moot. (A5, 70-84, 96-105).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the Supreme Court of Delaware for which petitioner seeks review was issued on July 10, 2024, with petitioner's timely motion for rehearing *en banc* denied on July 29, 2024. This petition is filed within 90 days of the Delaware Supreme Court's denial of rehearing in compliance with United States Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 6 provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense. (U.S. Const. amend. VI).

STATEMENT OF THE CASE

Petitioner William Webb (hereinafter referred to as "Mr. Webb" or "petitioner") was convicted of one count each of Stalking, Act of Intimidation, and Criminal Contempt, in addition to forty-seven counts of Breach of Conditions of Bond. (A1). Petitioner was sentenced as an habitual offender to twenty-five years of incarceration. (A5, 51). Although Mr. Webb represented himself at trial, the record lacks evidence that petitioner either forfeited or knowingly and intelligently waived his Sixth Amendment right to counsel.

Mr. Webb and the complaining witness, Patricia Burgess ("Ms. Burgess") had an on-again off-again relationship spanning multiple years, during which Ms. Burgess made claims of abusive behavior by Mr. Webb. (A53). Events that occurred on February 11, 2019 gave rise to the present criminal matter. (*Id.*). Ms. Burgess reported that on that date, Mr. Webb had grabbed her hair, forcibly taken her car keys from her person and had then driven off with her car. (A2, 53). Subsequently, Mr. Webb was arrested for Robbery and related offenses. (A2, 48). Following his arrest for the February 11, 2019 events, Mr. Webb, while incarcerated, made several calls to Ms. Burgess and sent her mail, in violation of a no-contact order which prompted the State to file additional criminal charges. (A2, 49, 53).

It is Mr. Webb's conflicts with defense attorneys who had been appointed by the Delaware Superior Court to represent him that gives rise to the current litigation. On September 6, 2019, Mr. Webb filed a *pro se* motion for self-representation. (A15-17). However, during a December 16, 2019 case review, at which point Mr. Webb was represented by Dade Werb, Esquire, the following exchange occurred:

> THE COURT: . . . back in September, you filed a request to represent yourself, and that motion was not considered at that time because it appeared that the psychiatric evaluation that was ordered had not been completed. That now has been completed, and you have been ruled competent to stand trial. And so I wanted to bring you here so that I can handle the motion that you filed in regards to representing yourself. (A19).

The court continued:

> THE COURT: So they appointed Mr. Werb to go down and talk to you to see whether or not you continue to want representation, and if that's the case, then obviously your request to represent yourself would not go forward.
>
> So I wanted you to at least have counsel in the case first, and then if you, after talking with him, decided you still wanted to represent yourself, then I need to talk to you further. (A19).

Thereafter, Mr. Webb explained to the court his grievances with defense counsel, noting "And I'm at a standpoint where -- I mean, I can represent myself, but I shouldn't have to where there's funds available for an innocent person to get representation that's effective." (A19).

The court then explained to Mr. Webb generally how the attorney-client relationship works, and advised Mr. Webb that "[t]he only issue today is whether or not you want to represent yourself, or you want Mr. Werb to represent you." (A20). The court proceeded to explain, "So my recommendation is that you let Mr. Werb represent you" while noting "you have a right to represent yourself, but I'm not hearing that that's what you want. You just weren't happy with your other lawyers, and you would like to have a lawyer represent you. Right?" (A20).

The court expressly asked Mr. Webb, "So you prefer you have an attorney. Am I correct?" and Mr. Webb responded, "Yes." (A20). The court then noted on record that "Mr. Werb is now your Counsel." (A20).

Subsequently, a *pro se* motion to disqualify counsel was filed by Mr. Webb on February 21, 2020, and on March 11, 2020, Dade Werb, Esquire filed a motion to withdraw as counsel. (A21-27).

During a July 30, 2020 hearing, the motions to disqualify counsel and to withdraw as counsel were considered by the court. Mr. Werb began, explaining:

> MR. WERB: I was appointed to this case back in November from the Conflict Counsel, as Mr. Webb had several other attorneys involved in this case. I believe it started out with Mr. Meyer of the Public Defender's Office, and then went to Mr. Chapman, and then Mr. Layton, then to myself.
>
> As Your Honor knows from my motion, I filed a motion to have myself withdrawn as counsel for Mr. Webb.
>
> There really exists no sustainable attorney/client relationship here. He refuses to follow my advice. He's complained to conflict counsel about me. He's filed Office of Disciplinary Counsel complaints against me. I've gotten at least six or seven threatening letters, a phone call back in March. He's also threatened to sue our law firm. I think he's already sued Mr. Chapman. So there's also civil suits that he's filed against prior attorneys.
>
> Your Honor, Mr. Webb was told early on that this type of behavior with an attorney will not be tolerated. I've tried to stick it out, but it's consistent abusive behavior and there's really nothing more I can do with Mr. Webb. He wants to do everything on his own. So for the reasons I set forth in the motion, and I can go into further detail, your Honor, but at this point, there's nothing more I can do for Mr. Webb and I ask that I be withdrawn from the case. (A29).

The State took no position on Mr. Werb's motion to withdraw as counsel, simply noting that the State was familiar with Mr. Webb's history of conflict with prior defense counsel. (A29). The court then addressed Mr. Webb, and the following exchange occurred:

> THE COURT: Mr. Webb, Mr. Werb has filed a motion to withdraw and you have filed a motion to disqualify him. So I assume you have no objection to him getting out of the case. Is that fair?
>
> THE DEFENDANT: That's fair to say, Your Honor.
>
> THE COURT: Okay, now do you intend to represent yourself?

THE DEFENDANT: If that need be, I will. (A29).

THE COURT: Well, I think we have probably appointed all the attorneys that anyone is going to appoint for you. You've gone through at least three, maybe four different attorneys who have all had to withdraw from your representation, so it looks like you're going to have to represent yourself in regards to this matter.

So do you agree with Mr. Werb's comments that you and he are not getting along anymore? (A29).

THE DEFENDANT: We are not getting along. He refused to assert my rights to my freedom. (A29).

Thereafter, Mr. Webb raised some additional complaints with the court; however, the court stated in response:

THE COURT: Okay. So I have to ask you some questions before we can go any further and make some comments to you, so please listen carefully.

If you are representing yourself, you'll be required to comply with all of the rules and procedures that would be expected of counsel if they were representing you. So the conduct in the courtroom, the filing of papers, and the responses that would need to be filed, the same rules that would apply to Mr. Werb in his representation to you would also apply if you represent yourself.

As you know, the trial in this matter has been stayed for some period of time because of the Covid-19 pandemic.

THE DEFENDANT: No, Your Honor. These trials were scheduled before that. You can't use that as a crutch. All of these trials were scheduled before that.

THE COURT: Well, perhaps, but at the moment -- (A30)

THE DEFENDANT: That's what the Delaware Constitution, Article 1, Subsection 7 says, and the Supreme Court directed one-third, they said, within one year, 100 percent of cases shouldn't go to trial. I was arrested on February 14th, 2019. I've been held in jail since without a trial, or anything to get near a trial. You've got to hold that against the State. (A30).

A brief discussion regarding Mr. Webb's reindictment and need for an arraignment was then held. (A30). After Mr. Webb alleged that he had not been timely arraigned, the court noted:

> THE COURT: I also would have to assume, Mr. Webb, that some of the delay is associated with you threatening every lawyer that you've had so far and, therefore, we'd have to start all over again for new counsel. So if you want the process to proceed forward, obviously you're not going to have counsel anymore, so you can't make any more of those threats, so hopefully that will allow the Court to move your case forward, although I will tell you that there's hundreds of cases like yours that have been delayed because of the Court closure, so we'll have to see how the trial date proceeds. But you can't keep threatening your counsel and then causing delay in the case and then argue that your case should have gone quicker. (A30-31).

Following a discussion of the status of the docket report, the court stated:

> THE COURT: Okay. Well, Mr. Werb, I will grant your motion to withdraw as counsel. It's obvious that Mr. Webb no longer desires your representation, and because of the conduct that he has directed towards you, I think it would be inappropriate for you to continue to represent him. So that motion is granted.
>
> In regards -- I'm looking at the first docket I have, which is case 1902015015, that has the stalking, act of intimidation cases. It looks like trial was set to begin on June second with a final case review on May 11th of 2020. Obviously with the pandemic, that was unable to go forward. It reflects a series of requests by counsel to withdraw from the case because of Mr. Webb's conduct. So that appears to be an order. Case 1904001943, the last docket looks like there was a writ of habeas corpus filed by Mr. Webb and denied by Judge Primos. There is a motion to dismiss filed in June, which I received, couldn't go forward because of the pandemic. Trial again was set for June second on these cases, and because of the pandemic, did not go forward. Same is true with 1902006825. It appears that was set for trial, but, again, unable to go forward. And then there's a case, 1906000296. Again, it was set for trial on June second, 2020, but, again, was unable to go forward because of the pandemic.
>
> So I've reviewed the documents and the motion to dismiss filed by Mr. Webb. I find the motion -- (A31).
>
> THE DEFENDANT: Hold on, Your Honor.
>
> THE COURT: Yes. Go ahead.
>
> THE DEFENDANT: You haven't read the previous document. The third time it was scheduled for trial, it was scheduled in October; it was scheduled in January. (A31).

THE COURT: That probably was true, but you kept arguing with your attorneys and kept giving them a hard time.

THE DEFENDANT: My attorney refused to file the proper things, and do investigation which would prove my innocence.

THE COURT: Okay. Well, what I was about ready to do --

THE DEFENDANT: Ms. Hrivnak has suppressed the phone calls that exonerate me. So let's deal with that. Read that motion. I want my motion read on record in full.

THE COURT: Okay.

THE DEFENDANT: Or I will take you to the Supreme Court of Delaware and have you disciplined for failure for my first amendment rights.

THE COURT: Mr. Webb, you wouldn't be the first and you probably won't be the last, so if you think I have done anything improper, you're free to write them. I'm pretty confident I have done very little with your case other than deal with attorneys who you keep threatening, so if you --

THE DEFENDANT: Your Honor -- (A32).

THE COURT: Wait a minute. It's my turn to talk. When I talk, you don't. We're going to set some ground rules here. You do not control this court, sir. This is my courtroom, not yours. I will give you the right to have a trial and it will be a fair one, but you will not interrupt me; you will not be disruptive and you will not be discourteous. Okay?

And if you do that, sir, that's fine, you'll watch the trial from your prison cell. All right?

So I've ruled that the motion to dismiss the indictments for lack of speedy trial are without merit and those motions are denied. I don't believe since he was just reindicted again, he does not have a new trial date. We will give it a trial date as soon as the arraignment is completed with the first case review and a second case review.

All right. So I believe that concludes all the matters that I have before me, Mr. Werb and Ms. Hrivnak, unless you have something else?

MS. HRIVNAK: Your Honor, I do have a question. (A32).

As far as his representing himself, will there be standby counsel, or how does the Court expect us to address discovery with him being in Vaughn and the quantity of disk evidence? I know a prior case I had, they had to make special arrangements with the law library where the defendant had to make arrangements to go in and listen to that evidence. Does the Court expect to have standby counsel or will we just, I guess, contact the prison and send it down for the law library, or how --

THE COURT: I'm hesitant to appoint standby counsel since he's gone through four other lawyers.

MS. HRIVNAK: Okay.

THE COURT: And so it would seem to me that you could send the discovery to the law library with a copy to Mr. Webb indicating it has been given.

MS. HRIVNAK: Okay.

THE COURT: If you have any difficulty with the institution in that regard, you can let me know and I'll try to accommodate it.

MS. HRIVNAK: Okay. (A32).

THE COURT: Okay. Anything else?

MS. HRIVNAK: No, thank you.

THE COURT: Anything else, Counsel?

MR. WERB: No, Your Honor. Thank you very much.

THE COURT: Thank you very much. This ends the proceedings. (A32).

Following the July 30, 2020 hearing, Mr. Webb was arraigned on August 11, 2020. During the arraignment, Mr. Webb represented himself.

A case review was subsequently held on September 17, 2020 before The Honorable Francis J. Jones, who was not the specially assigned judge to the case. (A34-44). During this case review, Mr. Webb participated via video as a *pro se* defendant. (A34-35). The prosecutor began by stating:

MS. HRIVNAK: Your Honor, the last hearing that we had was addressing -- there was some pending motions to withdraw as counsel. Mr. Werb had been the latest court-appointed attorney for Mr. Webb and Judge Carpenter is specially assigned to this case.

After that hearing, Mr. Werb had been permitted to withdraw as counsel. My recollection is that the Court began the pro se colloquy with the defendant, who -- and then the defendant had interjected, and so the State's position is that that was not completely finished.

However, it is clear that he will not be appointed at State's expense any more attorneys, as he has gone through the public defender's office, as well as three attorneys in the conflicts program. (A36).

After the court noted "Ok", the prosecutor proceeded:

MS. HRIVNAK: So I think at this point, Ms. Warner and I will be sending a -- an email to Judge Carpenter's Chambers asking probably for another hearing so that we can be sure that there has been a full and complete pro se colloquy and that all of the Briscoe factors have been covered with the defendant from that perspective.

In reference to Tuesday's case review, there is a plea offer that is being extended to the defendant. The State does still owe him some discovery. He had been provided copies of certain discovery through Dade Werb and we will be sending him another packet. The packet that he was initially provided through Mr. Werb did not contain any Jencks material. He will most likely not be getting that, again, early on. And there is a significant amount of digital evidence in this case and so we're working on determining how we're going to get that to him so he can look at and listen to that material. (A37-38).

Mr. Webb then addressed the court, raising issues regarding the reindictment. (A38-40). The court then noted:

THE COURT: Here's what we're going to do: This is Judge Carpenter's case. He's specifically assigned, so he needs to -- we need to get a hearing on with Judge Carpenter so we can complete the pro se colloquy.
And we also need to get the motion that Mr. Webb has filed that he sent to Judge Jurden to Judge Carpenter -- Okay -- so that we can get something scheduled so that we can get all these matters that are presently needed to be resolved.

Does that make sense, Ms. Hrivnak? (A40).

MS. HRIVNAK: That's fine, Your Honor.

THE COURT: All right.

Mr. Webb, that's what we're going to do. I'm going to make sure that your paperwork that you sent to Judge Jurden gets to Judge Carpenter and then you'll be hearing from Judge Carpenter about setting up a hearing to address the outstanding matters. Okay?

THE DEFENDANT: All right.

THE COURT: Thank you.

MS. HRIVNAK: Thank you, Your Honor.

THE DEFENDANT: Is there -- I filed a bail motion. Is that on the record, too.

THE COURT: Ms. Callahan?

THE CLERK: When did he file it.

THE COURT: When was that filed? (A41).

THE DEFENDANT: That was filed before -- it would be filed before July 30th.

I don't understand how -- well, of course, they're tampering with my mail here so my mail don't arrive until the weekend so we can't respond. I already got two of my Supreme Court dates dismissed because they're tampering with my mail down here. They're tampering with my legal mail. Ms. Hrivnak is well aware of it.

MS. HRIVNAK: Your Honor, the docket indicates that there's a motion for reduction of bail that was filed on July 20th.

THE COURT: That's also going to have to be addressed with Judge Carpenter. All right, I will make sure that these matters are brought to his attention. Okay?

THE DEFENDANT: Yeah.

THE COURT: Thank you.

MS. HRIVNAK: Thank you, Your Honor. (A42).

THE COURT: That completes the calendar, Ms. Hrivnak.

MS. HRIVNAK: Thank you, Your Honor.

THE COURT: All right. (A42-43).

The next hearing in Mr. Webb's case was a suppression hearing held on November 5, 2021, which continued on to November 29, 2021. (A11). The docket sheet for ID No. 19020006825 from the time period between the September 17, 2020 case review and the November 5, 2021 suppression hearing show that no letter or motion was ever filed by the State with Judge Carpenter requesting that the *pro se* colloquy be completed. The docket sheets for ID No. 1904001943 and ID No. 1902015015 and ID No. 1906000296 likewise reveal the same.

Nevertheless, during the November 5, 2021 hearing, the new prosecutor assigned to the case, Ms. Milecki, stated:

> MS. MILECKI: Additionally, your Honor, I understand that Ms. Hrivnak has had the case previously and that the defendant has elected to proceed pro se, I am not sure whether a full colloquy was done. So I -- (A11).
>
> THE COURT: Oh, yes, one has. I mean, he's -- let me just say for the record, a colloquy has occurred to the extent that Mr. Webb would allow one to occur. He's been adamant about representing himself. And if my recollection is correct, he's gone through at least two prior attorneys, both of which moved to be excused primarily because of Mr. Webb's abusive conduct. So I'm pretty confident that even the Supreme Court would recognize that Mr. Webb is a difficult individual who prefers to represent himself, since he doesn't have any confidence in anybody else other than himself. (A11).

Subsequently, the court addressed Mr. Webb stating:

> THE COURT: Let me ask you this question before we get too far into this. When you last appeared in the courtroom, there was, I think it was in reference to perhaps Mr. Chapman or someone else moving to no longer represent you?
>
> MR. WEBB: Yeah. That was Dade Werb, that was on July, July 30th.
>
> THE COURT: Okay. Is it still your desire to represent yourself now? Or do you, have changed your thoughts about that and want somebody to represent you?

> MR. WEBB: I mean, I've had three attorneys, none of them, none of them investigated the facts or the evidence in my case.
>
> THE COURT: Well, there has been three attorneys, but they have -- the dispute has been that you had -- you and them had a disagreement to the point that they felt they could no longer represent you because you were being difficult and abusive to them -- I'm not suggesting that happened, but that's what they represented -- and they had all been excused. (A12).
>
> So at this point in time is there anyone that you contacted, or any attorney that you contacted that you would like to have represent you, or are you proceeding, still proceeding by yourself?
>
> MR. WEBB: I can proceed by myself.
>
> THE COURT: All right. (A12-13).

The parties then proceeded to issues concerning the motion to suppress.

The only hearing held following the November 29, 2021 suppression hearing prior to the start of trial was a final case review, held on April 11, 2022, at which Mr. Webb proceeded *pro se* and during which there was no discussion of Mr. Webb's representation status. (A50).

Thereafter, a jury trial was held from May 9, 2022 to May 13, 2022, with Mr. Webb acting *pro se* during the entirety of the trial. (A5, 51). Similarly, Mr. Webb represented himself during his sentencing hearing on December 13, 2022. (A5, 51).

Mr. Webb timely appealed to the Delaware Supreme Court. (A51). Based upon the aforementioned facts, Mr. Webb filed an Opening Brief, alleging that he had been deprived of his federal and state constitutional right to the effective assistance of counsel, pursuant to the Sixth Amendment to the United States Constitution and Article 1, § 7 of the Delaware Constitution, when the Delaware Superior Court directed Mr. Webb to proceed *pro se* without holding a full and complete *Faretta* colloquy. (A68-91). The Delaware Supreme Court denied Mr. Webb's claim,

finding that the Delaware Superior Court had implicitly found that Mr. Webb had forfeited his right to counsel, which does not require the completion of a *Faretta* colloquy. (A5-7). The Delaware Supreme Court acknowledged that the Superior Court "did not use the words 'forfeit' or 'forfeiture'"; nevertheless, the Delaware Supreme Court concluded that "the court's statement was the functional equivalent of a forfeiture finding". (A7).

The constitutional question at issue was preserved in the Delaware Supreme Court, as petitioner asserted that he was deprived of his Sixth Amendment right to counsel when the trial court ordered petitioner to proceed *pro se* without conducting a proper *Faretta* colloquy and without determining on record that petitioner had forfeited and/or waived the right to counsel through his conduct. (A68-91, 95-116, 118-122).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(c) provides that a writ of certiorari may be granted where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Delaware Supreme Court's multi-faceted decision decides an important question of federal law that has not been, but should be, settled by this Court, which is whether a state court of last resort can find after-the-fact that a lower court had implicitly found, without stating on record and after conducting a legally insufficient *Faretta* colloquy, that the defendant had forfeited his Sixth Amendment right to counsel. Relatedly, the Delaware Supreme Court's answer in the affirmative to this question has the naturally flowing consequence of creating conflict with this Court's decisions in *Faretta v. California* and its progeny,

which held unequivocally that a *Faretta* violation is a structural error not subject to a harmless-error analysis.

As such, petitioner's case presents this Court with an opportunity to not just remedy the constitutional deprivation experienced by Mr. Webb but to clarify whether the Sixth Amendment is violated when an appellate court concludes, in the face of a deficient *Faretta* colloquy and without a clear finding made on record by the lower court, that the lower court had implicitly decided that the defendant had forfeited his constitutional right to counsel.

I. The Delaware Supreme Court's conclusion that petitioner forfeited his right to counsel and that the trial court properly ordered petitioner to proceed *pro se* contravenes Sixth Amendment precedent of this Court created by *Faretta* and its progeny and raises the unanswered question of whether an appellate court can retroactively conclude that the lower court implicitly found forfeiture absent a clear finding on record of forfeiture.

A. The *Faretta* colloquy was deficient, and Mr. Webb did not knowingly and intelligently waive his Sixth Amendment right to counsel.

The factual record clearly shows that the Delaware Superior Court began the requisite *Faretta* colloquy with Mr. Webb but never finished it. (A30-32). The record also unequivocally shows that the State was aware of this and mentioned on record on two occasions that the *pro se Faretta* colloquy needed to be completed and/or performed. (A11, 36-38, 41).

During the September 17, 2020 case review, the State noted that it planned to send Judge Carpenter a letter requesting a hearing to finish the colloquy. (A37-38). Nowhere in the record is there any evidence that the State filed such a letter with the court. The record also shows that during this same case review, Judge Jones advised the parties that the court would notify Judge Carpenter that a hearing needed to be scheduled to finish the colloquy. (A40-41). Whether this inter-judge

notification occurred is unknown; regardless, it is clear that the hearing to finish the colloquy was neither scheduled nor held.

The factual record unequivocally shows that the only further discussion of Mr. Webb's representation occurred during the beginning of the November 5, 2021 suppression hearing, at which time the newly assigned prosecutor to the case inquired whether a *pro se* colloquy had been done with Mr. Webb. (A11). In response, Judge Carpenter stated:

> THE COURT: Oh, yes, one has. I mean, he's -- let me just say for the record, a colloquy has occurred to the extent that Mr. Webb would allow one to occur. . . . (A11).

In stating that "a colloquy has occurred to the extent that Mr. Webb would allow one to occur", Judge Carpenter necessarily acknowledged that a complete *Faretta* colloquy had not occurred. The record also shows that Judge Carpenter mischaracterized the factual record, as there is absolutely no indication in the record that Mr. Webb refused to engage in a colloquy with the court. (A30-32).

It is true that when Judge Carpenter began the *Faretta* colloquy during the July 30, 2020 hearing, Mr. Webb interrupted with a comment regarding delays in the scheduling of his trial, and from there, the record clearly shows, the parties became distracted with discussing that issue and simply never returned to continuing the *Faretta* colloquy. (A30-32). As the record evidences, the court began the colloquy by stating:

> THE COURT: Okay. So I have to ask you some questions before we can go any further and make some comments to you, so please listen carefully.
>
> If you are representing yourself, you'll be required to comply with all of the rules and procedures that would be expected of counsel if they were representing you. So the conduct in the courtroom, the filing of papers, and the responses that would need to

> be filed, the same rules that would apply to Mr. Werb in his representation to you would also apply if you represent yourself.
>
> As you know, the trial in this matter has been stayed for some period of time because of the Covid-19 pandemic. (A30).

It was at this point Mr. Webb interrupted to state: "No, Your Honor. These trials were scheduled before that. You can't use that as a crutch. All of these trials were scheduled before that." (A30). From there, the court responded to Mr. Webb's concerns regarding trial delays and then simply moved on to other topics. (A30-32). The prosecutor even returned to the self-representation issue by inquiring whether the court was going to appoint standby counsel for Mr. Webb; yet the court still plainly failed to resume the colloquy. (A32).

Lastly, the record reveals that after the newly assigned prosecutor inquired during the November 5, 2021 as to whether a colloquy had been performed, the court simply inquired of Mr. Webb: "Is it still your desire to represent yourself now? Or do you, have changed your thoughts about that and want somebody to represent you? . . . . So at this point in time is there anyone that you contacted, or any attorney that you contacted that you would like to have represent you, or are you proceeding, still proceeding by yourself?" (A12). Mr. Webb responded: "I can proceed by myself." (A12-13).

Federal case law is well-settled that what occurred is simply not good enough to constitute a knowing and intelligent waiver of a defendant's Sixth Amendment right to counsel. *Faretta* requires that the court hold a proper colloquy with the defendant and make clear factual and legal conclusions on the record that the defendant is knowingly, intelligently and voluntarily waiving his Sixth Amendment right to counsel, which, quite obviously, did not occur in this case.

It is beyond dispute that "[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process."[2] A defendant's Sixth Amendment right to represent himself is made applicable to the States through the due process clause of the Fourteenth Amendment.[3]

It is also well settled that a defendant has the constitutional right to proceed without counsel at all critical stages when he voluntarily, knowingly and intelligently elects to do so."[4] Although the right to represent oneself has existed since colonial times, it was not until 1975 that this Court, in the landmark case of *Faretta v. California*, declared the right to self-representation to be a Constitutional right.[5] In *Faretta*, this Court gave notice to all those involved in the criminal justice system including federal and state judges, that a defendant has the right under the Sixth and Fourteenth Amendments of the United States Constitution to represent himself at trial.[6] This Court held that once a defendant clearly and unequivocally asserts his right to proceed *pro se*, the trial court must proceed with a hearing to determine if the defendant knowingly, voluntarily, and intelligently waived his right to counsel.[7] Accordingly, "[t]he Sixth Amendment right of self-representation differs from other constitutional rights because it can not be exercised without the concomitant waiver of another fundamental right that is also guaranteed under the Sixth Amendment; the right to counsel."[8] Waiver of the right to counsel "depends in each case upon the particular facts and

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[2] *Iowa v. Tovar*, 541 U. S. 77, 80-81 (2004).

[3] *Faretta v. California*, 422 U. S. 806, 819 (1975). Similarly, Article I, § 7 of the Delaware Constitution provides that a criminal defendant "has the right to be heard by himself and his counsel." (Del. Const. art. I, § 7).

[4] *Faretta*, 422 U. S. at 835; *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

[5] *Faretta*, 422 U.S. at 826-832.

[6] *Id*. at 807.

[7] *Id*. at 807.

[8] *Buhl v. Cooksey*, 233 F.3d 783, 289 (3d Cir. 2000).

circumstances surrounding that case, including the background, experience, and conduct of the accused."[9] The trial judge must "make a thorough inquiry and . . . take all steps necessary to insure the fullest protection of this constitutional right."[10]

In *United States v. Welty*, the Third Circuit Court of Appeals adopted guidelines for the waiver of counsel inquiry demanded by this Court.[11] As the Third Circuit explained in *Welty*, "[i]n order to ensure that a defendant truly appreciates the "dangers and disadvantages of self-representation," . . . the court "should advise him in unequivocal terms both of the technical problems he may encounter in acting as his own attorney and of the risks he takes if his defense efforts are unsuccessful", "should tell the defendant, for example, that he will have to conduct his defense in accordance with the [ ] Rules of Evidence and Criminal Procedure, rules with which he may not be familiar", should advise "that the defendant may be hampered in presenting his best defense by his lack of knowledge of the law", and should advise "that the effectiveness of his defense may well be diminished by his dual role as attorney and accused."[12]

The Third Circuit Court of Appeals further explained that "to be valid (a defendant's) waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."[13] Significantly, the Third Circuit noted that "the mere 'fact that an accused may tell

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[9] *Edwards*, 451 U.S. at 482 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *United States v. Salemo*, 61 F.3d 214, 218 (3d Cir. 1995)(superceded by *United States v. Turner*, 677 F.3d 570 (3d Cir. 2012)).

[10] *Salmemo,* 61 F.3d at 219 (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948)).

[11] 674 F.2d 185 (3d Cir. 1982).

[12] *Id.* at 188 (internal citations omitted).

[13] *Id.* at 188-189 (internal citations omitted).

(the court) that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility'", explaining that "'[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances,' and only after bringing home to the defendant the perils he faces in dispensing with legal representation."[14] The Third Circuit further held that "[a]fter undertaking such an inquiry, '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.'"[15]

In *Briscoe v. State*,[16] the Delaware Supreme Court adopted the Third Circuit's guidelines as set forth in *Welty*, establishing *Welty* as controlling precedent for the state of Delaware. Specifically, the Delaware Supreme Court noted that the Third Circuit enunciated the following guidelines for the trial court to use in determining whether a defendant's waiver of his Sixth Amendment right to counsel is knowingly and intelligently made:

> (1) that the defendant will have to conduct his defense in accordance with the rules of evidence and criminal procedure, rules with which he may not be familiar;
>
> (2) that the defendant may be hampered in presenting his best defense by his lack of knowledge of the law;
>
> (3) that the effectiveness of his defense may well be diminished by his dual role as attorney and accused.
>
> (4) the nature of the charges,
>
> (5) the statutory offenses included within them,

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[14] *Id.* at 189 (internal citations omitted).
[15] *Id.* (quoting *Johnson*, 304 U.S. at 465).
[16] 606 A.2d 103 (Del. 1992).

(6) the range of allowable punishments thereunder,

(7) possible defenses to the charges and circumstances in mitigation thereof, and

(8) all other facts essential to a broad understanding of the whole matter.[17]

The Delaware Supreme Court held that only after undertaking this inquiry should the trial court determine whether there is a proper waiver and make this determination on the record.[18]

In adopting the federal guidelines established by the Third Circuit Court of Appeals, the Delaware Supreme Court, in *Briscoe*, found that "the procedural prerequisites to an effective waiver of the Sixth Amendment right to counsel, as mandated by the federal courts, were not followed" and therefore, "the judgment of the Superior Court must be reversed."[19] The trial court had engaged in a limited colloquy with defendant Briscoe, noting:

> THE COURT: . . .You may cross-examine the witnesses yourself, if you wish to; but they have to be on the pertinent issues of testimony presented. Do you understand that, Mr. Briscoe?
>
> THE DEFENDANT: Not really, your Honor, but since [my appointed counsel] is here, I think since he's going to be a friend of the Court, then maybe he can guide me through this, your Honor.
>
> THE COURT: All right. Thank you.[20]

A subsequent colloquy occurred with Briscoe mid-trial at the request of standby counsel, as follows:

> THE COURT: Do you understand you are bound by the same rules as if [your attorney] was giving the closing statement for you? You may not express anything

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[17] *Id.* at 108.
[18] *Id.*
[19] *Id.* at 104-105.
[20] *Id.* at 105.

that you personally believe in, but only what the evidence shows; do you understand that?

THE DEFENDANT: I'll try my best, your Honor.

THE COURT: Okay. And if you make a wrong statement about the law, I must correct the jury on that point; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right.[21]

Not only did the Delaware Supreme Court conclude that the trial court failed to engage in the requisite inquiry with the defendant,[22] but the trial court's use of standby counsel did not "cure" the ineffective waiver.[23]

It is obvious from the lower court record that just like Briscoe, in which the Delaware Supreme Court set forth guidelines to applying this Court's holding in *Faretta*, while Mr. Webb wanted to be represented by counsel,[24] he had difficulty engaging in a productive attorney-client relationship with the defense counsel assigned to him. Likewise, it is clear that Mr. Webb, like all criminal defendants, was and is not entitled to cycle through unlimited defense counsel until he finds one with whom he is happy. As such, it may be that the result of a proper *Faretta* colloquy would have resulted in Mr. Webb being granted the right to proceed *pro se*. Nevertheless, it is immaterial what *may* have happened, as what *must* happen, did not. Simply put, Mr. Webb was never apprised of the "dangers and disadvantages of self-representation"[25] and no inquiry ever took place to ensure

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[21] *Briscoe*, 606 A.2d at 106.
[22] *Id.* at 105-106, 108-109.
[23] *Id.* at 109-111.
[24] A12-13, 19-20, 29, 31.
[25] *Faretta*, 422 U.S. at 835.

he was "knowingly and intelligently forgo[ing] [the] relinquished benefits" "associated with the right to counsel."[26]

A review of the colloquies in which the trial court engaged with Briscoe, which the Delaware Supreme Court found to be an ineffective waiver of Briscoe's Sixth Amendment right to counsel based upon this Court's holding in *Faretta*, reveals that despite the extremely limited and insufficient colloquies in which the court engaged Briscoe, it was at least more than Mr. Webb received in this case. If the limited colloquies considered by the Delaware Supreme Court in *Briscoe* constitute an ineffective waiver of the defendant's Sixth Amendment right to counsel, there can be no argument that the even more limited colloquy in which the trial court engaged Mr. Webb would be and could be found by the Delaware Supreme Court to be an effective waiver of Mr. Webb's Sixth Amendment right to counsel.

It should also be noted that the State of Delaware has tried to argue in other cases, such as *Boyer v. State*,[27] that an insufficient colloquy can be excused where the defendant has made it clear that he wishes to conduct his defense his own way, indirectly suggesting the application of a harmless error analysis. However, the Delaware Supreme Court has rejected such a proposition as inconsistent with the requirements of this Court's holding in *Faretta*, finding in *Boyer*:

> This argument seems to suggest that a defendant's passion, fervent desire or insistence that he represent himself somehow substitutes for a knowing, intelligent and voluntary relinquishment of the right to counsel or somehow cures an ineffective waiver of counsel. We recognize that a judge may face a defendant who adamantly states that he is aware of his right to counsel and wishes to waive that right; however, those statements do not alleviate the judge's responsibility to conduct a comprehensive evidentiary hearing to explore and explain the defendant's options.[28]

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[26] *Id.*
[27] *Boyer v. State*, 2009 Del. LEXIS 598 (Del. 2009).
[28] *Id.* at 5-6.

Relatedly, the Delaware Supreme Court held in *Smith v. State*:

> The fact that an accused may tell the trial court that he is aware of his right to counsel, and desires to waive that right, does not eliminate the trial court's responsibility to conduct a 'searching inquiry.' It is undisputed that conducting a 'searching inquiry' into waiver of counsel poses 'a difficult task' for the trial court, particularly when the defendant appears 'experienced in the litigation process and [when] friction has arisen between the defendant and his then-counsel.' A trial judge routinely conducts such inquiries in considering guilty pleas, however, and is expected to make no less of an inquiry before permitting a defendant to proceed pro se.[29]

Thus, under the Delaware Supreme Court's own precedent in the application of the holdings of *Faretta* and its progeny, it is immaterial that Mr. Webb wanted to conduct his defense his own way or that he had difficult relationships with his prior appointed counsel. The controlling precedent of the Third Circuit Court of Appeals and the Delaware Supreme Court is unambiguous that prior to allowing a defendant to proceed *pro se*, the trial court must first engage in a proper and full colloquy with the defendant addressing the *Briscoe/Welty* factors sufficient to determine, with the finding made on record, that the defendant is knowingly, intelligently and voluntarily waiving his Sixth Amendment right to counsel. Without a doubt, this did not occur in Mr. Webb's case and under the clear and controlling precedent of this Court, the Third Circuit Court of Appeals, and the Delaware Supreme Court, Mr. Webb did not knowingly and intelligently waive his Sixth Amendment right to counsel, requiring that his convictions be reversed and the case remanded for a new trial.[30] In light of this, it is apparent that despite refusing to rule on the issue, under no circumstances could the Delaware Supreme Court have found the *Faretta* colloquy that occurred in

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[29] *Smith v. State*, 996 A.2d 786, 791 (Del. 2010).

[30] *See, e.g., Briscoe*, 606 A.2d at 104 ("The record reflects that the procedural prerequisites to an effective waiver of the Sixth Amendment right to counsel, as mandated by the federal courts, were not followed. Accordingly, the judgment of the Superior Court must be reversed.") (internal citations omitted).

this case to be constitutionally sufficient, and as such, a finding of forfeiture was the only avenue by which Mr. Webb's convictions need not be overturned on appeal.

B. The Delaware Supreme Court erred in finding that the lower court implicitly ruled Mr. Webb had forfeited his right to counsel, as the record shows that the Superior Court treated the matter as a standard *Faretta* colloquy situation, and because the Delaware Supreme Court had no legal support for reaching an after-the-fact retroactively applicable finding of forfeiture in the absence of such a ruling stated on record in the lower court.

Relying on Third Circuit Court of Appeals case law, the Delaware Supreme Court has adopted the principles of forfeiture and waiver by conduct. In *State v. Bultron*,[31] affirmed by the Delaware Supreme Court Court in *Bultron v. State*,[32] the Delaware Superior Court relied on Third Circuit Court of Appeals case law to hold that defendants cannot engage in abusive behavior to create "good cause" for substitute counsel, as such behavior may constitute forfeiture or "waiver by conduct".[33] As the Superior Court explained:

> 'Waiver by conduct' occurs when defendant has been warned that he will lose his attorney if he engages in further misconduct, and defendant ignores the warning. 'Any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel.' Goldberg and its progeny have developed waiver by conduct. Those cases have bearing on this case's facts. In United States v. Thomas, the Third Circuit articulated the consequences of continued

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[31] 2005 Del. Super. LEXIS *6 (Jan. 21, 2005).

[32] 897 A.2d 758 (Del. 2006).

[33] *Bultron*, 2005 Del. Super. LEXIS 6, *14-16 (citing *Fischetti v. Johnson,* 384 F. 3d 140, 146 (3d Cir. 2004)); *United States v. Thomas*, 357 F.3d 357, 362-63 (3d Cir. 2004); *United States v. Leggett,* 162 F.3d 237, 249 (3d Cir. 1998); *United States v. Goldberg*, 67 F.3d 1092, 1100-01 (3d Cir. 1995) (holding that "[o]nce a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel . . . In many situations there will be defendants who engage in dilatory conduct but who vehemently object to being forced to proceed pro se. These defendants cannot truly be said to be 'waiving' their Sixth Amendment rights because although they are voluntarily engaging in misconduct knowing what they stand to lose, they are not affirmatively requesting to proceed pro se. Thus, instead of 'waiver by conduct,' this situation more appropriately might be termed 'forfeiture with knowledge.'") (citations omitted).

> misconduct following the court's warning. Thomas explained, 'The purpose of a *Faretta/Welty* colloquy is to provide the defendant with notice that continued misconduct may result in the waiver of one's right to counsel; thus, we focus on whether [defendant] was warned of the possible consequences, not whether the warning immediately preceded the [trial court's] order that the defendant must proceed pro se.'
>
> 'Forfeiture' does not require that defendant knowingly and intentionally relinquish his right to counsel; rather, it results when defendant 'engages in extremely serious misconduct,' such as physically assaulting his appointed counsel. No warning is necessary to trigger forfeiture.[34]

On appeal in *Bultron*, the Delaware Supreme Court considered the issue as one of first impression and affirmed, finding that "[a] defendant may (1) expressly waive his right to counsel with an affirmative statement, (2) waive his right to court-appointed counsel by his conduct after a warning that continued abuse will result in the consequence of losing court-appointed counsel, or (3) forfeit his right because of extremely serious misconduct, such as physical abuse without the need for a prior warning."[35] As the Delaware Supreme Court further explained:

> Regarding waiver and waiver by conduct, before a trial court may determine that a defendant has waived his right to counsel and must proceed pro se, the trial judge must first give certain warnings for any waiver to be valid. As the Third Circuit has held, 'to the extent that the defendant's actions are examined under the doctrine of 'waiver,' there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives Faretta warnings.' 'A'waiver by conduct' requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se .'[36]

In Mr. Webb's case, it is clear that the Delaware Supreme Court could not find that Mr. Webb waived his Sixth Amendment right to counsel through conduct. The record reveals not one instance of the trial court expressly advising Mr. Webb that if he continued with his arguably

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[34] *Id.* at 17-19.

[35] *Bultron*, 897 A.2d at 760, 763.

[36] *Id.* at 764.

difficult behavior when interacting with defense counsel that he risked "waiver by conduct" of his right to counsel and would therefore have no choice but to proceed *pro se*.[37] Moreover, even if the lower court had warned Mr. Webb, the Delaware Supreme Court could not find waiver by conduct without a proper *Faretta* colloquy.[38] As explained in detail above, a proper *Faretta* colloquy did not occur in this case. Thus, under Third Circuit Court of Appeal case law as adopted by the Delaware Supreme Court, the factual and legal record is clear that Mr. Webb did not waive his right to court appointed counsel by his conduct.[39]

Nevertheless, the Delaware Supreme Court found that Mr. Webb had forfeited his right to court-appointed counsel. (A6-7). Such a finding is astonishing, because the record is clear that the trial court never made a finding on record that Mr. Webb had forfeited his right to counsel. (A11-13, 29-32). At one point, the court stated, "Well, I think we have probably appointed all the attorneys that anyone is going to appoint for you. You've gone through at least three, maybe four different attorneys who have all had to withdraw from your representation, so it looks like you're going to have to represent yourself in regards to this matter." (A29). Such a statement is far short of the trial court stating that Mr. Webb had forfeited his right to counsel through extremely egregious misconduct.

Despite this, the Delaware Supreme Court found that the lower court made an implicit ruling of forfeiture, concluding that the Superior's Court's statements were the "functional equivalent" of a forfeiture finding. (A7). Yet, the lower court engaged in a *Faretta* colloquy with Mr. Webb, albeit a deficient one, which the lower court would have had no reason to do had the court reached a

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[37] *Id.*
[38] *Id.*
[39] *Id* at 763-764.(citing *Thomas*, 357 F.3d at 363; *Goldberg*, 67 F.3d at 1100).

finding of forfeiture. (A30). During the July 30, 2020 hearing in which the court declined to appoint any more attorneys for Mr. Webb, the court stated:

> THE COURT: Okay. So I have to ask you some questions before we can go any further and make some comments to you, so please listen carefully.
>
> If you are representing yourself, you'll be required to comply with all of the rules and procedures that would be expected of counsel if they were representing you. So the conduct in the courtroom, the filing of papers, and the responses that would need to be filed, the same rules that would apply to Mr. Werb in his representation to you would also apply if you represent yourself. . . . (A30).

The court unquestionably began a standard *Faretta* colloquy with Mr. Webb, which the court would not have done if it had decided that Mr. Webb had forfeited his right to counsel.

The record also shows that the prosecutor viewed this as a *Faretta* or intentional waiver situation and not a case of forfeiture. During the September 17, 2020 case review held before a different judge, the prosecutor stated:

> MS. HRIVNAK: Your Honor, the last hearing that we had was addressing -- there was some pending motions to withdraw as counsel. Mr. Werb had been the latest court-appointed attorney for Mr. Webb and Judge Carpenter is specially assigned to this case.
>
> After that hearing, Mr. Werb had been permitted to withdraw as counsel. My recollection is that the Court *began the pro se colloquy with the defendant,* who -- and then the defendant had interjected, and so the State's position is that that was not completely finished.
>
> However, it is clear that he will not be appointed at State's expense any more attorneys, as he has gone through the public defender's office, as well as three attorneys in the conflicts program. (A36 *emphasis added*).

After the court noted "Ok", the prosecutor proceeded:

> MS. HRIVNAK: So I think at this point, Ms. Warner and I will be sending a -- an email to Judge Carpenter's Chambers asking probably for another hearing *so that we can be sure that there has been a full and complete pro se colloquy and that all of the*

> *Briscoe factors have been covered* with the defendant from that perspective. (A37 *emphasis added*).

Of note, the prosecutor who attended the prior hearing at which the court directed Mr. Webb to proceed *pro se*, specifically stated that the court "began the pro se colloquy" with Mr. Webb, but because Mr. Webb interjected, it had not been finished at that time. (A36). Of equal significance, the prosecutor stated that the parties should have another hearing to ensure "that there has been a full and complete pro se colloquy and that all of the Briscoe factors have been covered with the defendant". (A37). The record cannot be more clear that the prosecutor knew that a *Faretta* colloquy was needed, that a *Faretta* colloquy had been started but not finished, and that another hearing needed to be held to complete the *Faretta* colloquy and ensure that all of the *Briscoe/Welty* factors had been addressed with Mr. Webb so that he may knowingly and intelligently waive his right to counsel and proceed *pro se*.

Significantly, during the next hearing which was a November 5, 2021 suppression hearing, a different prosecutor who was newly assigned to the case, stated "I understand . . . that the defendant has *elected* to proceed pro se, I am not sure whether a full colloquy was done. . . .". (A11 *emphasis added*). This again indicates that the State's understanding of the issue was that this was a *Faretta* type situation in which the defendant chose to proceed *pro se* and therefore a colloquy needed to be performed and clear findings made on record.

Notably, the court responded with:

> THE COURT: Oh, yes, one has. I mean, he's -- let me just say for the record, a colloquy has occurred to the extent that Mr. Webb would allow one to occur. He's been adamant about representing himself. And if my recollection is correct, he's gone through at least two prior attorneys, both of which moved to be excused primarily because of Mr. Webb's abusive conduct. So I'm pretty confident that even the Supreme Court would recognize that Mr. Webb is a difficult individual who

> prefers to represent himself, since he doesn't have any confidence in anybody else other than himself. (A11).

Again, this demonstrates that the court recognized this as a situation which required a *Faretta* colloquy and believed one had been done "to the extent that Mr. Webb would allow one to occur". (A11). Importantly, the court also mentioned nothing about Mr. Webb forfeiting his right to counsel, instead stating: "Mr. Webb is a difficult individual *who prefers to represent himself*, since he doesn't have any confidence in anybody else other than himself." (A11 *emphasis added*). The court's response to the prosecutor's inquiry regarding whether the *pro se* colloquy had been completed wholly refutes the assumption that the court had already determined that Mr. Webb had forfeited his right to counsel.

In light of the aforementioned, it is clear that the record is wholly absent of any finding from the court that Mr. Webb had forfeited and/or waived his right to counsel through his conduct. Yet in spite of this clear factual record, and without relying on any federal precedent for support, the Delaware Supreme Court reached the extraordinary conclusion that it was permitted to make a retroactive and implicit finding of forfeiture on appeal when the record clearly shows that the court below made no such finding. Such a decision, for which there is no legal or factual basis to apply such an extraordinary circumstance retroactively,[40] circumvents this Court's clear holding that a *Faretta* violation is a structural error which is not subject to a harmless error analysis. Essentially, a harmless error analysis is exactly what the Delaware Supreme Court applied, concluding that since there was evidence of midconduct by Mr. Webb allegedly sufficient to warrant a finding of forfeiture

[40] *C.f. Kostyshyn v. State*, 51 A.3d 416, 418 (Del. 2012) (upholding the trial court's finding, on record, that the defendant had engaged in sufficiently egregious activity as to forfeit his right to counsel).

by the trial court, then it is irrelevant that the *Faretta* colloquy was deficient, as the trial court could have found forfeiture anyway. Yet this is not the standard to which courts are held.

Moreover, this Court has been clear "that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights."[41] As this Court has asserted, "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."[42] By making a retroactive and implicit finding of forfeiture on appeal, in the absence of a lower court record clearly evidencing that the trial court found forfeiture, the Delaware Supreme Court has done exactly what this Court has warned against–making a presumption, particularly one contrary to the factual record, that results in the loss of a defendant's fundamental rights.

The trial court, prosecutor and Mr. Webb all treated this as an intentional waiver of the Sixth Amendment right to counsel situation; yet in the face of an grossly deficient *Faretta* colloquy, the Delaware Supreme Court made the assumption that the trial court had actually found forfeiture—the only situation not requiring *Faretta* warnings—despite the trial court never even suggesting forfeiture. In light of this, it is clear that Mr. Webb did not waive his Sixth Amendment right to counsel, either intentionally or through his conduct, after receiving proper *Faretta* warnings nor did he forfeit his Sixth Amendment right to counsel through his behavior. As such, any finding other than a reversal of Mr. Webb's convictions with a remand for a new trial not only contravenes clear

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[41] *Johnson*, 304 U.S. at 464 (internal quotation marks and footnote omitted).
[42] *Id.* at 465.

precedent of this Court through an apparent loophole created by the Delaware Supreme Court but results in a glaring miscarriage of justice for the petitioner.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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