

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDRE CRAWFORD : CIVIL ACTION
 :
 v. :
 :
 JAMES MORGAN, ET AL. : NO. 97-3018

M E M O R A N D U M

Padova, J. August , 1998

Petitioner, Andre Crawford, a prisoner at the State Correctional Institute at Smithfield, Pennsylvania, filed a pro se Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998). In accordance with 28 U.S.C.A. § 636(b)(1)(B) (West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Jacob P. Hart for a Report and Recommendation ("Report"). Magistrate Judge Hart recommended that the Court dismiss the Petition, and Petitioner filed objections. The Court held oral argument on the objections on August 6, 1998.¹ For the following reasons, the Court will sustain Petitioner's objections, reverse the judgment of conviction and remand the case to the Court of Common Pleas of Montgomery County for a new trial.

¹ At the hearing, the Commonwealth presented the testimony of: Edmund J. Campbell, Jr., Esq., the Assistant District Attorney assigned to Petitioner's case; Daniel Glammer, Esq., the Assistant Public Defender originally appointed as Petitioner's counsel; and Richard Simon, Esq., who acted as standby counsel for Petitioner during his trial before the Honorable William J. Furber, Jr. on July 11, 1994.

I. BACKGROUND

On January 20, 1993, Petitioner was arrested by detectives from the Cheltenham Township Police Department and charged with aggravated assault and related offenses for aiming a handgun at an officer. Eight days later, Petitioner was arrested and charged with aggravated assault and related offenses for shooting one Leslie Miner.² Subsequent to the Petitioner's waiving his formal arraignment in the Court of Common Pleas of Montgomery County, Assistant Public Defender, Daniel Glammer, was appointed to represent Petitioner.

Petitioner's trial was originally scheduled for July 12, 1993. It was continued, however, by defense counsel until August 27, 1993. On that date, a hearing was held before the Honorable William A. Vogel regarding Petitioner's request for substitution of counsel. At the hearing, Judge Vogel denied Petitioner's request for new counsel and provided Petitioner with the option of either representing himself or keeping Mr. Glammer as his

² These cases were ultimately consolidated by the trial court. Petitioner challenged the validity of the consolidation in the appeal of his conviction to the Superior Court of Pennsylvania. His argument was rejected and found to be without merit by both the trial court and the Superior Court. Petitioner again raised the consolidation issue in the instant Petition. Magistrate Judge Hart evaluated Petitioner's argument in his Report and concluded that indeed the cases were consolidated properly. Petitioner did not object to that conclusion in his Objections filed with this Court. Therefore, the Court need not address this issue and hereby adopts Magistrate Judge Hart's recommendation as it pertains to consolidation.

attorney. When Petitioner maintained that he would not change his mind about his desire to dispense with Mr. Glammer's representation, Judge Vogel issued an Order which stated, "Defendant's request is granted to remove Dan Glammer as defense counsel. Matters listed for Tuesday, August 31, 1993, [are] hereby continued to Monday, October 18, at the Defendant's request." (Judge Furber Opinion of February 2, 1996 ("Furber Op.") at 13 n.11.)

On April 11, 1994, Petitioner appeared before the Honorable Paul W. Tressler. After discerning that Petitioner had not signed a written waiver of his right to counsel, Judge Tressler, "in an abundance of caution" intended to colloquy Petitioner on the record. (Continuance Transcript of April 11, 1994 ("Cont. Tr.") at 3.) No such colloquy ever took place. Eight days later, Petitioner requested a one-week continuance before the Honorable Marjorie C. Lawrence. That continuance was granted.

On July 11, 1994, Petitioner represented himself in a trial by jury, with the assistance of standby counsel, Richard Simon, Esq. He was convicted of five counts of Aggravated Assault, Aggravated Assault on a Police Officer, Possession of a Weapon with Intent to Employ Criminally, three counts of Recklessly Endangering Another Person, two counts of Violation of the Uniform Firearms Act, and Simple Assault.

On September 12, 1994, Petitioner was sentenced. On that date, Judge Furber appointed private counsel to represent Petitioner regarding his post trial motions. Those motions were denied by Judge Furber on August 15, 1995. Petitioner appealed the Judgment of Sentence to the Superior Court of Pennsylvania, Philadelphia District. In that appeal, Petitioner raised a number of issues. Only two issues are relevant to the instant determination: (1) Whether the trial court erred by denying Petitioner's request for the appointment of new counsel on August 27, 1993 and on July 11, 1994; and (2) whether the trial court erred in denying Petitioner's request for a new trial on the ground that in the absence of an on-the-record colloquy, he was denied his constitutional right to counsel when he proceeded to trial pro se.³ Judge Furber issued an opinion on February 2, 1996, in which he concluded that the Judgment of Sentence should be affirmed. The Superior Court agreed and affirmed the judgment of the trial court. A Petition for Allowance of Appeal to the Pennsylvania Supreme Court, filed August 21, 1996, was denied on February 12, 1997.

On April 28, 1997, Petitioner filed the instant Petition in this Court. On December 9, 1997, Magistrate Judge Hart recommended that the Petition be dismissed as mixed, containing

³ All of Petitioner's Objections to the Report concern these two issues.

exhausted and unexhausted claims. Subsequently, Petitioner requested that he be permitted to withdraw his unexhausted claim. On January 12, 1998, the Court granted Petitioner's request and remanded the case to Magistrate Judge Hart for further Report and Recommendation. It is this Report, in which Magistrate Judge Hart recommends the Petition be dismissed, that is presently before the Court and to which Petitioner has filed objections.

II. LEGAL STANDARD

"[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Pursuant to 28 U.S.C.A. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, a petitioner is not entitled to habeas corpus relief unless the state courts' adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d)(1) and (2).

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall

make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. § 636(b) (West 1993).

III. DISCUSSION

When on the eve of trial a defendant seeks to substitute counsel, or, in the alternative, to represent himself, a trial court must engage in the following two-part inquiry.

First, the court must decide if the reasons for the defendant's request for substitute counsel constitute good cause and are thus sufficiently substantial to justify a continuance of the trial in order to allow new counsel to be obtained. If the district court determines that the defendant is not entitled to a continuance in order to engage new counsel, the defendant is then left with a choice between continuing with his existing counsel or proceeding to trial pro se, thus bringing into play the court's second stage of inquiry. Since the decision to proceed pro se involves a waiver of the defendant's sixth amendment right to counsel, the district court then has the responsibility of ensuring that any decision by the defendant to represent himself is intelligently and competently made.

It is vital that the district court take particular pains in discharging its responsibility to conduct these inquiries concerning substitution of counsel and waiver of counsel. Perfunctory questioning is not sufficient. This is true even when the trial judge strongly suspects that the defendant's requests are disingenuous and designed solely to manipulate the judicial process and to delay the trial. Although such improper tactics by an accused cannot be allowed to succeed, at the same time, a trial cannot be permitted to go forward when a defendant does not fully

appreciate the impact of his actions on his fundamental constitutional rights.

United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982)⁴; see also United States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir. 1995) (“The first inquiry requires a district court to determine whether good cause exists for granting the requested continuance. The second requires the district court to engage in an on-the-record colloquy to ensure that a defendant who chooses to represent himself is making a knowing, intelligent and voluntary waiver of his Sixth Amendment right to counsel.”). The United States Supreme Court has cautioned “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.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations and citations omitted). The Sixth Amendment “stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.” Id. at 462 (internal quotations and citation omitted).⁵

⁴ Welty involved a direct appeal from a conviction in federal court. “The same standard for determining whether a defendant waived his right to counsel applies in federal court habeas corpus review of state court proceedings.” Piankhy v. Cuyler, 703 F.2d 728, 731 n.3 (3d Cir. 1983).

⁵ A defendant’s sixth amendment right to counsel is made applicable to the states by the fourteenth amendment. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

A. Substitution of Counsel

In considering a defendant's request for a substitution of counsel, the trial court has a "duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known." Brown v. United States, 264 F.2d 363, 369 (D.C. Cir. 1959) (Burger, J., concurring in part)). The request need be granted only if "good cause" is shown for the defendant's dissatisfaction with his attorney. Welty, 674 F.2d at 188. Good cause has been defined as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with counsel. McKee v. Harris, 649 F.2d 927, 931 (2d Cir. 1981). A disagreement over trial strategy does not constitute good cause. Goldberg, 67 F.3d at 1098.

The record reflects that the trial court properly complied with Welty by conducting an inquiry into the reasons for Petitioner's dissatisfaction with Mr. Glammer. Upon Petitioner's request for substitute counsel, the following dialogue took place between Petitioner and Judge Vogel.

ADA: My understanding is that Andre Crawford wishes to dismiss Dan Glammer from representing him. It's the Commonwealth's position that if Your Honor or any judge decides to dismiss him -- or the case should not be continued on Tuesday. We're ready to go, ready to proceed. Numerous files have been continued numerous times.

. . .

Court: Are you ready to go to trial to represent yourself or are you going to get other counsel? Mr. Glammer represents you through the public defender's office, I assume, right.

Crawford: Yes.

Court: And you can't switch around. I mean, you have Mr. Glammer and there's 25 or 30, but you can't go from A to B to C.

Crawford: I understand that, Your Honor. But see, the problem I have with Mr. Glammer and myself, we have differences in how my trial should run on the 31st. He told me yesterday that he had a problem with representing me because he feels as though one of the witnesses that I would bring to the stand would lie for me. I told him if he had problems with that, you know, I would want somebody else representing me. That's why I'm here today. If I have to represent myself, I will. I do not want him. I'll do that under protest.

Court: You'll represent yourself under protest?

Crawford: Yes. If I can't get appointed new counsel.

Court: Well, the Court is not going to appoint another attorney within the public defender's office. You're going to have to represent yourself or get private counsel, but the Court doesn't go from counsel to counsel within the P.D.'s office. And if there's a conflict, it's your decision if you want him or you don't want him.

Crawford: I don't want him.

Court: On any cases?

Crawford: None of them.

Court: Okay. On all these cases, you want to represent yourself or get private counsel, right?

Crawford: Yes -- no, not represent -- I want the Court to appoint me new counsel.

Court: I can't appoint another person in the public defender's office. There's a conflict in the office.

Crawford: I understand you're saying that.

Court: I mean, otherwise, the next one that's appointed you might not like then the next one you might not like.

Crawford: It's not that I don't like Mr. Glammer. We just recently had this disagreement --

Court: Well, you don't get along.

Crawford: -- over this case. It's not that we don't get along. It's this case that we have a problem with. We have differences that we cannot resolve with this case.

Court: All right. Then I'll grant your request and have him removed as counsel Now, are you ready to go to trial on Tuesday representing yourself or do you want a continuance?

Crawford: No, I'm not.

Court: Are you going to prepare it yourself?

Crawford: I'm going to do the best I can, Your Honor.

. . .

Court: [T]o give you the opportunity to represent yourself, we'll continue it to a date to be fixed. How much time do you need? I would say probably the middle of September. Three or four weeks?

Crawford: I have no idea, Your Honor. I'm not experienced in this thing, Your Honor.

Court: Yes, that's why you should keep your public defender. I mean, I don't understand why you fired him, but that's up to you

(Pet. To W'Draw. Atty. Tr. at 2, 5-7, 9.)

It is clear from this record that Petitioner had the opportunity to make known to the Court that he and Mr. Glammer had different ideas concerning how the trial should run. In fact, Petitioner explained the details of his disagreement with Mr. Glammer. And as Petitioner stated at oral argument, that disagreement concerned trial strategy.⁶ Thus, the record supports the conclusion that the trial court properly engaged in the first part of the Welty inquiry and that there was not "good cause" to entitle Petitioner to newly appointed counsel.

B. "Waiver" of Counsel

Once the trial court appropriately determines that a defendant is not entitled to the appointment of substitute counsel, "the court can then properly insist that the defendant choose between representation by his existing counsel and proceeding pro se. The court, however, has the responsibility of

⁶ Petitioner stated to the Court, "[W]e had an argument, argument concerning one of the witnesses and also I believe it was the strategies for what would be my -- and --." Petitioner also concurred when the Court clarified and said, "I think that's uncontested for the purposes of this case and that is that there was a dispute between you and your then attorney with respect to the calling of the witness . . . And the strategy of defense, that's uncontested." Petitioner responded, "Yes, Your Honor" (Aug. 6, 1998 Hearing Tr. at 31-32.)

"ensuring that any choice of self-representation is made knowingly and intelligently, with an awareness of the dangers and disadvantages inherent in defending oneself." Welty, 674 F.2d at 188. The record must establish that the defendant "knows what he is doing and his choice is made with eyes open." Faretta v. California, 422 U.S. 806, 835 (1975)(citing Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)). The trial judge should "advise [the defendant] 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." Welty, 674 F.2d at 185.

Eight months after Judge Vogel issued his Order granting Petitioner's request to remove Mr. Glammer as his attorney and continuing the trial so that Petitioner could prepare his defense, Petitioner appeared before Judge Tressler regarding the Commonwealth's petition for consolidation and for trial. At that hearing, Judge Tressler began by asking Petitioner if he had an attorney. When Petitioner responded in the negative, the following dialogue ensued.

Court: Do we have a waiver signed by Mr. Crawford?

ADA: There is an Order issued August 27th by Judge Vogel indicating that, on his request, Mr. Glammer was discharged from representing Mr. Crawford, and he proceeds on his own. On November 17th of '93, Mr. Crawford represented himself in a trial. I think that

that would -- that qualifies, but if Your Honor --⁷

Court: Maybe it would, but, in an abundance of caution --

ADA: Is a brief colloquy appropriate, Your Honor?

Court: Yes. Mr. Crawford, do you want to come up here? All right.

Crawford: What is this for?

Court: So you can waive your attorney.

Crawford: I didn't want to waive my attorney. I told Judge Vogel that when we had the hearing. I never wanted to represent myself. I just didn't want Mr. Glammer representing me.

Court: All right. Sit down. Is there an Order?

ADA: There is an Order. It should be dated August 27th, Your Honor.

Court: Exactly why didn't you want Mr. Glammer?

Crawford: Me and Mr. Glammer had some problems as to how we were going to handle my defense in the two cases that were supposed to come up -- well, the one case that was supposed to come up today, that we were supposed to go to trial for.

. . .

Crawford: I explained to Judge Vogel that me and him had irreconcilable differences.

⁷ The United States Court of Appeals for the Third Circuit ("Third Circuit") specifically rejected the argument that the Assistant District Attorney appears to be making here, i.e.: that because Petitioner represented himself before, he implicitly made a knowing and intelligent waiver in this case. See Welty, 674 F.2d at 191 ("[W]e could not extrapolate from [defendant's] participation or self-representation in other cases that he made a knowing and intelligent waiver of counsel in this case.").

Court: That doesn't mean much to me. A lot of Defendants have irreconcilable differences with their attorney. Stand up. Get him up. You're in a courtroom. You don't have to do that. He'll stand up. Now, what were you going to say? You're representing yourself. Let the record reflect he sat down. He's not going to speak. He doesn't want to say anything, because, obviously, I'm not going to listen to him, unless he stands up. So, therefore, he's waiving his right to --

Crawford: I ain't waiving --

Court: Yes, you are. Because if you speak in this courtroom, you stand up just like these guys do when they speak. Did you see them stand up when they spoke to me?

Crawford: Yeah. I see them.

Court: You're not going to, right? You're not going to be like everybody else; is that correct? We're going to proceed with the Rule 1100. I'll hear your consolidation motion. I find that Mr. Crawford is not willing to cooperate with the Court; is not willing to do even the simplest request of the Court, which is the courtesy of standing, which everyone who deals with the Court does. Not because of me, but because it's the Court. So therefore, we'll proceed.

Crawford: Excuse me Your Honor, before we proceed --

Court: Do you have anything you want to say?

Crawford: Yes, Your Honor.

Court: I won't recognize you until you stand up; do you understand me?

Crawford: Yes.

Court: All right. Go ahead.

(Cont. Tr. at 3-4, 7-9.)

One week later, at a hearing during which Petitioner requested a one week continuance, Judge Lawrence also spoke, albeit briefly, to the issue of Petitioner's self-representation. Judge Lawrence stated, "Stand up when you address the Court, Mr. Crawford. If you want to play lawyer, learn the rules."

(Consol. Cont. Tr. at 3.)

Based on the above dialogue between Petitioner and Judge Tressler, both Judge Furber, who presided at Petitioner's trial, and the Superior Court, concluded that Petitioner's actions, specifically his decision not to comply with Judge Tressler's direction to stand up, constituted a knowing and intentional choice to waive representation by counsel. In Judge Furber's February 2, 1996 Opinion, he concluded:

Instantly, the record demonstrates that the defendant effectively waived his right to counsel. He was warned that he would not be entitled to new or different court appointed counsel. He was admonished by Judge Vogel and his Public Defender that he was making a grave mistake in dismissing counsel. He was granted the opportunity on at least two occasions to reconsider his decision but he indicated that he would do no such thing. Ultimately, when the Court attempted to colloquy him for the purpose of determining that he fully understood the significance of proceeding Pro Se, he thwarted this attempt with contemptuous behavior.

(Furber Op. at 15-16.) The Superior Court of Pennsylvania issued a Memorandum affirming the judgment of the Court of Common Pleas of Montgomery County on July 17, 1996. In that Memorandum, the Superior Court concluded:

[A]ppellant has not alleged that he was prejudiced in any way by the fact that he proceeded to trial pro se with the assistance of standby counsel, and, he has not alleged that his decision to proceed pro se (with the assistance of standby counsel) was not made intelligently, knowingly, or voluntarily.^[8] He is simply alleging a technical violation (i.e., that he was not colloquied), but his own behavior prevented a formal colloquy.

(July 17, 1996 Mem. at 7.) The Commonwealth agreed with these conclusions in its Supplemental Answer to the Petition for Writ of Habeas Corpus, arguing that the courts of Pennsylvania properly determined that Petitioner had waived his right to counsel by his conduct. (Comm.'s Supp. Ans. To Pet. For Writ of Hab. Corp. at 3.)

In United States v. Goldberg, 67 F.3d 1092 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit ("Third Circuit") provides the paradigm for evaluating cases in which the government contends that although the defendant did not verbally waive his right to counsel, his actions were sufficiently abusive

⁸ As to the issue of prejudice, the Third Circuit has specifically rejected a "harmless error" analysis in the context of a waiver of counsel claim, since the right to counsel is "among 'those constitutional rights [which are] so basic to a fair trial that their infraction can never be treated as harmless error.'" McMahon v. Fulcomer, 821 F.2d 934, 946 n.12 (3d Cir. 1987) (internal citations and quotations omitted).

In addition, contrary to the assertion of the Superior Court, in Petitioner's, then Appellant's, brief in support of his appeal, he argues, "[A]t no time . . . was the defendant given a colloquy on the record to determine whether he knowingly and understandingly made the decision to represent himself and also to determine the validity of his waiver of the Constitutional right to representation by counsel." (App. to Superior Ct., Br. for Appellant at 17-18.)

so as to result in a "waiver." See Goldberg, 67 F.3d at 1099. In Goldberg, the government conceded that the trial court had not engaged in the sort of inquiry required by Welty. However, the government argued that "there are certain factual scenarios in which literally actions speak louder than words, and deliberate abusive conduct can result in a waiver of the right to counsel." Goldberg, 67 F.3d at 1099 (internal quotations and citations omitted). Before turning to the merits of the government's argument, the Third Circuit examined at length the distinctions among the concepts of "forfeiture," "waiver" and "waiver by conduct." Those distinctions are instructive here.

A waiver is an intentional and voluntary relinquishment of a known right. The most commonly understood method of waiving a constitutional right is by an affirmative, verbal request. The Supreme Court has made clear that a waiver of the right to counsel must be knowing, voluntary and intelligent. The High Court has emphasized the importance of an affirmative, on-the-record waiver, noting that it indulges every reasonable presumption against waiver of fundamental constitutional rights.

. . . .

At the other end of the spectrum is the concept of forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.

. . . .

Finally, there is the hybrid situation ("waiver by conduct") that combines elements of waiver and forfeiture. Once 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.

. . . .

Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding pro se.

Goldberg, 67 F.3d at 1099-1101 (internal citations and quotations omitted).

It is undisputed that this is not a case of pure "waiver" of counsel. Petitioner never made an affirmative verbal request to waive his right to counsel. He never signed a written waiver. In fact, as the Commonwealth points out, Petitioner maintained throughout all of the proceedings that he was not waiving his right to counsel and that he was deserving of newly appointed counsel.

The Commonwealth also concedes that Petitioner's conduct was not sufficiently dilatory to constitute a forfeiture of his right to counsel.⁹ The only conduct at issue in this case is Petitioner's decision to sit, rather than to stand, as instructed by the Court. As the Commonwealth represented at the hearing, to

⁹ At oral argument, the Commonwealth was asked by the Court, "You agree that the conduct in this case would not result in a forfeiture, don't you?" The Commonwealth responded, "Yes . . . certainly, Your Honor." (Aug. 6, 1998 Hearing Tr. at 43.)

constitute "extremely dilatory" behavior, Petitioner would have had to "punch [his] lawyer" or "hir[e] somebody to kill him, something like that." (Aug. 6, 1998 Hearing Tr. at 42.) This statement is consistent with those cases that have found a "forfeiture" of a constitutional right. See United States v. McLeod, 53 F.3d 322 (11th Cir. 1995) (engaging in abusive conduct toward attorney); Illinois v. Allen, 397 U.S. 337 (1970) (threatening the judge and refusing to use appropriate language).¹⁰

Therefore, this case turns on whether the record supports the conclusion that there was a valid "waiver" of counsel by conduct. According to Goldberg, in order to have a valid "waiver by conduct," there must be (1) some measure of disruptive conduct and (2) a warning by the trial court to the defendant regarding the "consequences of his conduct, including the risks of proceeding pro se." Goldberg, 67 F.3d at 1101.¹¹ Without an

¹⁰ See also United States v. Jennings, 855 F.Supp. 1427, 1443 (M.D.Pa. 1994) (striking a blow at attorney); United States v. Fazzini, 871 F.2d 635 (7th Cir. 1989) (failing to cooperate with numerous successive attorneys).

¹¹ This set of warnings is often referred to in this context as a "colloquy." However, the "colloquy" need not take a question and answer form, as it does in circumstances in which a defendant requests to waive a constitutional right. If a defendant who has been given the choice of keeping his appointed attorney or representing himself chooses to proceed pro se, but refuses to acknowledge waiving his right to an attorney, the trial judge may satisfy his obligation of ensuring a knowing and intelligent waiver by advising the defendant "in unequivocal terms both of the technical problems he may encounter in acting

affirmative step by the trial court to ensure that Petitioner "truly appreciates the dangers and disadvantages of self-representation," there cannot be a valid waiver by conduct. Id. at 1102-1103 (citing Welty, 674 F.2d at 188).

In order for the trial court to satisfy its obligation of "ensuring that any decision by the defendant to represent himself is intelligently and competently made," Welty, 674 F.2d at 187,

[t]he district court judge should tell the defendant, for example, that he will have to conduct his defense in accordance with the Federal Rules of Evidence and Criminal Procedure, rules with which he may not be familiar; that the defendant may be hampered in presenting his best defense by his lack of knowledge of the law; and that the effectiveness of his defense may well be diminished by his dual role as attorney and accused.

Id. at 188. "[T]o 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

as his own attorney and of the risks he takes if his defense efforts are unsuccessful." Welty, 674 F.2d at 188. When a defendant is uncooperative, the "colloquy" may take the form of an exposition by the trial judge of the risks of self-representation so long as the warnings are sufficiently complete to satisfy the trial judge that the defendant has been apprised of "the dangers and disadvantages inherent in defending oneself." Id. Certainly, the refusal of a defendant to agree that he is waiving his right to counsel does not relieve the trial judge of his responsibility to ensure that the defendant is warned of the perils of self-representation. Unless an explanation of the consequences is given, the trial judge can never be sure that the defendant has made a knowing and intelligent choice to dismiss his attorney and proceed pro se.

mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 188-189 (citing Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (plurality opinion)).

Despite the Commonwealth's argument to the contrary, the record in this case reflects a total absence of any affirmative step by the trial court to warn Petitioner of the perils of proceeding pro se. The trial court did not explain to Petitioner that he would have to conduct his defense in accordance with the rules of criminal procedure. Petitioner was not warned that he could be at a disadvantage because of his lack of knowledge of the law, or that his dual role as attorney and accused might mitigate the effectiveness of his defense. The trial court did not explain the nature of the charges nor the "range of possible defenses to the charges and circumstances in mitigation thereof." Von Moltke, 332 U.S. at 724. In fact, as the Commonwealth concedes, and as the record reveals, the only statements that the trial court made to Petitioner regarding the implications of his choice to proceed pro se, were: (1) Judge Vogel's advice to Petitioner that he was making a "serious mistake" in dispensing with Mr. Glammer's representation; and (2) Judge Lawrence's admonition to Petitioner that if he wants to "play lawyer, [he should] learn the rules." (Pet. To W'Draw. Atty. Tr. At 2, 5-7,

9; Consol. Cont. Tr. at 3.)¹² Clearly, these two statements do not constitute the type of warnings contemplated by Welty. Although Petitioner's previous experience with the litigation process may have made him an "experienced litigant," the trial court cannot simply presume "that he realized and had knowledge of all the implications and possible pitfalls of self-representation." Welty, 674 F.2d at 191. Even a defendant's statement that he is aware of his constitutional right to counsel and that he wants to waive that right does not relieve the judge of the responsibility to ensure that waiver is knowledgeable. Id. at 189.

The record before the Court simply does not support a conclusion that Petitioner truly understood the consequences of dismissing Mr. Glammer and electing to represent himself. It is a record devoid of any evidence that Petitioner was advised of

¹² Mr. Campbell, the Assistant District Attorney assigned to Petitioner's case, provided testimony that he advised Petitioner of the statutory maximum sentences attached to the crimes with which he was charged. The record also reveals that Daniel Glammer, Esq., the Assistant Public Defender originally assigned to Petitioner's case, told Petitioner that he was making a "grave mistake" in proceeding pro se. (Pet. To W'Draw. Atty. Tr. at 10.) However, no amount of instruction, warnings, or advice from the attorneys obviates the need for the Court to ensure that a defendant "knows what he is doing and his choice is made with eyes open." Faretta, 422 U.S. at 835 (citation omitted); Welty, 674 F.2d at 188 ("The court . . . has the responsibility of ensuring that any choice of self-representation is made knowingly and intelligently . . ."). Furthermore, even with the addition of these representations, Petitioner was not warned adequately of the consequences of representing himself.

the dangers and disadvantages of self-representation. Thus, the Court need not decide whether Petitioner's conduct was dilatory enough to constitute a waiver by conduct.¹³ The Commonwealth's claim that Petitioner "waived" his right to counsel by conduct is precluded by the Court's finding that Petitioner was not warned about the risks of proceeding pro se. Goldberg, 67 F.3d at 1102. There can be no valid waiver of the Sixth Amendment right to counsel unless the defendant receives adequate warnings. Id. at 1100.

The Superior Court concluded that the lack of a colloquy regarding Petitioner's decision to proceed pro se was merely a "technical violation," because Petitioner's "own behavior

¹³ Although the issue need not be decided, the Court notes that while Petitioner's conduct may have been sanctionable, it was not conduct that acted as a barrier to the trial court issuing the requisite warnings. The record simply does not support Judge Furber's conclusion that the decision not to stand up "thwarted" Judge Tressler's attempt to colloquy Petitioner regarding the perils of proceeding pro se. Despite the testimony of ADA Campbell that the hearing was cut short because of Petitioner's conduct and "the Court's reluctance to permit [him] to continue because of [his] conduct," (Aug. 6, 1998 Hearing Tr. at 25), in fact, the record shows that just after Judge Tressler admonished Petitioner that he would not recognize him unless he were standing, the dialogue between Judge Tressler and Petitioner resumed. At that point, either Petitioner was standing or Judge Tressler had modified his rules. Whichever interpretation is correct, it is perfectly clear from the record that for the remainder of the hearing, which, as Petitioner suggested, was terminated prematurely because he had not been notified that the Rule 1100 motion would be argued that day, Judge Tressler engaged in active conversation with Petitioner. Certainly, during this time, the opportunity existed for Judge Tressler to warn Petitioner of the disadvantages of proceeding pro se.

prevented a formal colloquy." (July 17, 1996 Mem. at 7.)

However, because Petitioner's behavior clearly was not "extremely dilatory" so as to constitute a forfeiture of Petitioner's right to counsel, the need for a "colloquy" was paramount. Without it, Petitioner could not, and did not, waive his right to counsel by conduct. Thus, the state courts' adjudication of Petitioner's claim resulted in a decision that is contrary to clearly established federal law. As such, it may not stand as a barrier to the granting of the writ.

An appropriate Order follows.

JOHN R. PADOVA, J.