IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 10-2758 WM

UNITED STATES OF AMERICA

vs.

CLIFTON TAYLOR

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLANT

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

The appellant, Clifton Taylor was indicted on April 8, 2008 in a one-count indictment charging him with bank robbery by force, violence, and intimidation of the Central Bank, 2301 Independence Avenue, Kansas City, Missouri, an FDIC insured institution, in violation of Title 18, U.S.C., Section 2113(a).

Mr. Taylor entered a plea of not guilty to the charge and was tried before a jury and found guilty on January 21, 2010. He was sentenced to 105 months of confinement to be followed by three years of supervised release.

This case involves the 6th amendment right to counsel. Appellant requests 10 minutes oral argument.

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CITATIONS OF AUTHORITY

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court below was based upon violations of the laws of the United States. This is a direct appeal of Mr. Taylor's jury trial conviction in the United States District Court for the Western District of Missouri, Case No. 09-00112-01-CR-W-ODS, tried before The Honorable Ortrie D. Smith. This appeal is authorized pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure; Title 18 United States Code and Title 28, United States Code, §1291.

Mr. Taylor filed a timely Notice of Appeal on August 6, 2010. Appellant represented himself pro se during the trial. Undersigned counsel was appointed to represent appellant in United States District Court at the sentencing proceedings pursuant to the Criminal Justice Act and is presently representing appellant before this court as CJA counsel.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. BOTH THE MAGISTRATE JUDGE AND THE DISTRICT COURT JUDGE ABUSED THEIR DISCRETION WHEN THEY REPEATEDLY FAILED TO PROVIDE A REPLCEMENT COUNSEL FOR MR. TAYLOR WHICH RESULTED IN HIS 11TH HOUR DECSION TO TRY HIS CASE PRO SE WITHOUT BENEFIT OF A CONTINUANCE, THEREBY RENDERING ANY WAIVER OF SIXTH AMENDMENT RIGHTS MEANINGLESS AND INVOLUNTARY.

Faretta v. California, 422 U.S. 806 (1975)

Johnson v. Zerbst, 304 U.S. 458 (1938)

United States v. Kind, 194 (F3d 900 (8th Cir. 1999)

STATEMENT OF THE CASE

Following his arrest on complaint, defendant was indicted on April 8, 2009 for forcible bank robbery (See doc. 12) and arraigned on April 15th (Doc. 15). He was initially represented by a public defender, Mr. Travis Poindexter, who filed a motion to continue the trial and a trial date of August 24th of 2009 was set (See order, doc 18).

Between May 20, 2009 and August 6, 2009 defendant made numerous attempts to have Mr. Poindexter replaced as counsel. On August 6, 2009, Mr. Poindexter filed a motion for mental examination of his client which was granted. Mr. Taylor was found to be competent at a hearing on October 22, 2009. More motions to replace his attorney then followed.

Mr. Poindexter filed a motion to continue the trial on November 12, 2009, which was granted and the trial date was moved to January 11, 2010 (Doc 59) followed by more motions by Mr. Taylor seeking to replace his attorney.

On December 29, 2009, a letter from defendant was filed which was dated December 23, 2009, in which Mr. Taylor requested permission to go pro se. Mr. Taylor cited his reasons as: 1) failure of his attorney to file motions; 2) poor communication with Mr. Poindexter; and, 3) fear for his own situation attributable to his attorney's failure to act (See doc. 83). Mr. Taylor concluded by stating he

refused to be represented by Mr. Poindexter because of their "irreconcilable differences" (Id.).

The pro se request resulted in a hearing on January 11, 2010 (See minute entry, doc 88). Mr. Taylor was informed by the Magistrate that he would recommend that his motion be granted but also indicated orally that he would not be given a continuance to prepare for trial (Id.).

Trial commenced on schedule on January 19, 2010 with Mr. Taylor acting as pro se counsel with Mr. Poindexter appearing as standby counsel.

Mr. Taylor was convicted on January 21, 2010 of the armed robbery. On the same day Mr. Poindexter filed a motion to withdraw as standby counsel stating he had "fulfilled the obligation of stand-by-counsel" and that because of his own testimony in the trial, there was an admitted conflict because the testimony was adverse and prejudicial (Doc. 104). The motion was granted and undersigned counsel was appointed as replacement standby counsel and then a week later on January 28, 2010, as full counsel of record to represent Mr. Taylor at sentencing and further proceedings with Mr. Taylor's full consent.

This timely appeal followed.

STATEMENT OF FACTS

Michael Carroll worked at the Central Bank of Kansas City located at 2301 Independence Avenue where he was employed at an Information Technology (IT) officer (Tr.82). The bank is FDIC insured and was insured on the day of the robbery (Tr. 118-119). After the bank was robbed, he printed a photograph (Gov Ex 96) and created a CD with footage from video cameras in the bank (Gov Ex 58) (Tr.83-85). The photograph showed an individual walking across in front of the teller line in the lobby of the bank (Tr.85).

Veronica Lopez also worked at the bank and was present the day of the robbery (Tr.86). She was working by the vault as the vault teller on March 12th (Tr.89). Ms. Lopez identified a number of photographs of the bank, inside and outside including the drive through and the entrance to the bank which were admitted without objection (Tr. 87-89). Ms. Lopez was asked about events at around 12:20 in the afternoon and remembered it to be a slow day, all the employees, were at lunch and it appeared nobody was in the lobby (Tr.91). About that time her supervisor, Lori Dorr, alerted her that a customer was waiting and she stood and motioned the individual to her window. He looked similar to the person

in the photograph, exhibit number 96 (Tr. 91-92). Ms. Lopez was asked to describe what happened:

> He slid this piece of paper with a playing card. Looked like kid's playing cards. I asked him for his ID. And he just made me a sign with his eyes, like look at it, what was giving me.
>
> * * *
> When I opened the paper I started reading. It's smile, $3,000 or I will shot (sic) somebody in 20 seconds.

(Tr. 92).

After identifying the card with the writing on it, it was admitted as government exhibit 115 without objection and read to the jury verbatim (Tr. 93). Ms. Lopez felt safe behind her teller glass but was concerned about the safety of other employees sitting at open desks (Id.). She counted out about $2,700 and the robber took the money and left the bank (Tr. 94). The robber left the note on the counter (Tr. 96). Ms. Lopez then pressed the alarm button and reported the robbery to her boss (Id.). Ms. Lopez and the jury were then shown the video footage of the robbery in progress and Ms. Lopez again related the events as they were shown on the footage (Tr. 97-100). A record of a bank audit done after the robbery confirmed the shortage to be $2,700 in one-hundred-dollar-bills (Gov Ex. 116) which Ms. Lopez recognized (Tr. 103). Finally, Ms. Lopez was asked about a

hat the robber was wearing which she described as a green cold weather hat or a beanie – it was kind of green with a black line all around (Tr. 104).

During cross-examination Ms. Lopez said that defendant's face was familiar to her but she could not remember whether he was a prior customer she might have helped at some prior time (Tr. 105-106).[1] When asked by the defendant if he was the person who robbed the bank, she said "Yes" but then when asked if she had been coached, she responded "Uh-huh" (Tr. 106). During redirect she admitted she had been unable to pick Mr. Taylor from a six-person photographic lineup (Tr. 107).

Lorie Dorr, Ms. Lopez's VP supervisor and senior chief of operations, testified about events immediately following the robbery (Tr. 109-112) and how she walked out the front door where she saw the robber from the back as he was running east toward the corner (Tr. 113). In the parking lot she saw two employees returning from lunch (Id.). She told them what had occurred and they got back in the car to follow the robber (Tr. 114-115).

Virginia Spino and Michelle Visos both worked at the bank and had gone to lunch together on the day of the robbery (Tr. 132-133). As the two returned from

[1] Customer account records indicate that defendant maintained a checking account at the bank in the year 2008 (Tr. 120-121).

lunch, Ms. Spino observed someone coming out of the bank fast who looked a little suspicious (Tr. 136). He was an African-American and had on a green hat, a brown jacket and jeans (Id.). Immediately after that Lori Door came out and told her about the robbery and said it was the person she had just seen who was walking through the parking lot at that time (Tr. 136-137). In response, she and Ms. Visos got back in the car, went south, and turned left on 6th street traveling east (Tr. 136-137). She kept her eyes on the robber as he walked behind a "group home" where she lost sight of him for about one second and then he went behind a CVS pharmacy (Tr. 138). After he passed the group home she noticed he was no longer wearing the green hat (Tr. 138-139). She also observed a green pickup truck parked close to the group home and saw the person throw the green hat into the truck as he passed by (Tr. 139-140). They continued to follow him and he went through a lot and crossed on to Prospect street [which runs north to south] (Tr. 142) and went to the corner of Independence Avenue [runs east to west] where he entered a store located on the corner of the intersection (Tr. 144). Michelle Visos, who was driving, stopped the car in the middle of Independence avenue and they waited for the police while Ms. Spino continued to observe and call 911 (Tr. 145). Just as the police arrived, the individual came out of the store and he was arrested (Tr. 147). It was the same person they had followed from the bank because she

saw the blue jeans, a brown jacket, and tannish shoes that laced up and had a white sole (Tr. 148).

During cross, Ms. Spino said that the person arrested, who was Mr. Taylor, had on a black leather coat when he was arrested (Tr. 148-149). During further cross it became apparent that Ms. Spino was confused as to the color of the jacket and whether it was brown or black and at what point the person she followed had on a brown or black jacket, but she was sure about the jeans and shoes (Tr. 149-154).

The driver of the car, Ms. Michelle Visos, a bank loan officer, remembered the robbery and remembered going to lunch and returning with Ms. Spino (Tr. 154-156). Ms. Visos also described the route the person took after leaving the bank; how he was followed; the descriptions and locations of the group home and CVS pharmacy; and, the green truck (Tr. 157-164). She also recalled that when he came from behind the group home he was no longer wearing the green hat (Tr. 161). She also recalled they followed the person, he went north on Prospect, he turned the corner going east on Independence Avenue, they lost sight of him momentarily, and she surmised he entered a shop near the corner (Tr. 166-167). She too remembered that he then emerged from one of the shops just as the police arrived and they pointed him out (Tr. 167-168). Ms. Visos also identified the photo of the

shoes with white soles (Tr. 169). On cross she described the coat the person was wearing when he came out of the bank as a brown Carhart type coat and that his hat he was wearing was green (Tr. 171). During further cross it became clear she did not personally see the individual they were following enter a shop on Independence Avenue, as they clearly lost sight of him (Tr. 172-175).

Eugene Washburn testified that on the day of the robbery he worked for Hilltop Tree Service; he and Kenny Kraus, a "skinny white guy", had just finished cutting down trees behind "Sons of Columbus" located on Independence Avenue near Prospect; and, they had just finished lunch and were walking back toward the job site when he observed a black male fall down, jump up real quick, and take off running (Tr. 176-179). He was wearing a dark colored jacket and had on blue jeans (Tr. 180).

Karen Ramirez worked at "Discount Tobacco and Cellular" as a salesperson (Tr. 182). Ms. Ramirez testified that Mr. Taylor was in her store and apparently intended to buy a phone but it was apparent to her that he discovered he had no money as he was touching his pockets and it was apparent he was mad because he had forgotten his money (Tr. 185-186). Ms. Ramirez testified the store had security cameras and she identified an exhibit which was a video tape from that day (Tr. 186). She then viewed the video and described in "play by play" fashion

the events in her store described above and how the police then arrested the same person [the defendant] as he left the store (Tr. 187-190).

During cross-examination Mr. Taylor attempted to impeach the witness and establish that the video tape was tampered with because the tape played in court failed to show the purchase of some cigarettes, and had an incorrect date/time stamp. (Tr. 191-195). He also suggested to the witness that what he was looking for was not "a wad of money" but simply some money to pay for the cigarettes which he in fact purchased and from which he had removed one to smoke prior to his arrest (Tr. Id.).[2]

Jeff Hoffecker, a Kansas City Police Officer was dispatched to the robbery and was told that two employees were following the suspect (Tr. 195-199). He went directly to the intersection of Independence and Prospect where he was contacted by the two employees who described for him what they had observed and how they had followed the suspect and their belief he was in one of the stores (Tr. 199-201). As the officer was getting ready to formulate a plan to search for the suspect, Mr. Taylor emerged from the phone store, was pointed out as the

[2] Thad Winkelman, a field audio forensic examiner from the Regional Computer Forensic Lab in Kansas City, Missouri, explained that the store had four cameras that took photos from different angles and that he had prepared the DVD for court. He denied he had altered the tape in any way and did not agree that the video had

persons they had followed, and he was arrested (Id.). Mr. Taylor had no proceeds from the robbery on him at the time of his arrest (Tr. 212).

Timothy Griddine, another KCPD officer testified about how he did an area canvas looking for money and other evidence (Tr. 208-213). He was then directed to a truck by a Hispanic male, Juan Gomez (Tr. 218) who told him there was a jacket laying in the back of the cab that was not his (Tr. 213-214).[3] Officer Griddine identified a photo (exhibit 52) of a black leather coat that Mr. Gomez said was not his (Tr. 215). The officer then got in the cab and used his night stick to lift the jacket to prevent evidence contamination and then saw hundred dollar bills and a greenish blue "skull cap" underneath the jacket (Tr. 215-216).

During cross-examination Mr. Taylor attempted to impeach the officer by establishing crime scene contamination, that is, that there were inconsistencies as to where the money was found, whether it had been moved from one pocket to another, the position of the coat, and so on, which Mr. Taylor believed

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been tampered with as suggested; however, he had no explanation for the failure to show the cigarette purchase (Tr. 281-288).

[3] Mr. Gomez had parked his truck and was making a payment to his insurance agent. Upon returning to the truck to get some papers for the Insurance agent, he noticed the jacket. When he came back out the police were on the scene and he advised the jacket was not his (Tr. 277-281).

substantially undermined the credibility of any DNA evidence sufficiently to prevent its introduction into evidence during the trail (218-221).

Melanie Bartch, a KCPD crime scene investigator testified that she arrived at the scene, made contact with Officer Griddine, took various photographs, and took custody of the leather coat, money and two hats (Tr. 223-229). She testified the items were in the bed of the pickup when she took custody and that she put everything in a brown bag (Tr. 229). She also processed the evidence at the bank and took custody of the two cards identified as a "Subway card" and a "Luck of the Irish card", one of which had the demand note written on it (Tr. 230-233).[4] These items were then turned over to Sergeant Chris Lantz, KCPD, who later turned the items over to Special Agent J. C. Bauer of the FBI (Tr. 244-249). Agent Bauer was at the crime scene and took possession of the evidence and testified as to the chain of custody of the evidence while in FBI possession and how the evidence ultimately ended up in court and then identified and described the various items of physical evidence (Tr. 250-261).

During cross-examination of Ms. Bartch, Mr. Taylor attempted to impeach her by accusing her of tampering with the crime scene which she denied (Tr. 234-

[4] These items were subjected to fingerprint analysis without any positive results. See testimony of Julia Snyder, a Kansas City Crime Lab fingerprint examiner (Tr. 271-277).

242). Mr. Taylor asked questions about the same issues he had raised with Officer Griddine as to the position of various items; their description and location at various times during the investigation; failure to photograph everything; and, the general manner in which the evidence was handled, suggesting there were serious missteps in the process (Id.). Mr. Taylor pursued the same line of cross-examination with FBI Agent Bauer, again attempting to highlight what he believed to be inconsistencies in the testimony and how things were handled (Tr. 262-263).

Christopher Toigo, a KCPD robbery detective, testified that he interviewed Mr. Taylor after his arrest on the day of the robbery and that Mr. Taylor gave inconsistent information about how he arrived at the phone store and why he was in the area. (Tr. 288-292). The detective then asked him about the two witnesses who had followed him and, according to the detective, he stated "we all know what happened", which the detective considered an admission that he had robbed the bank (Tr. 292).

FBI Special Agent Michael Mrachek also testified he heard this exact statement by defendant (Tr. 311). The agent also testified that Mr. Taylor attempted at one point to eat his agent notes and a Styrofoam cup (Tr. 312-314). He also testified that he submitted the cup to the crime lab for DNA analysis as a know sample to compare to possible DNA that might be present on the jacket, hats,

and other items recovered at the crime scene (Tr. 326). He later obtained additional known samples from Mr. Taylor at the lab's request using a buccal swap kit (Id.).

Jennifer McMurray, a Kansas City Police Crime Lab DNA forensic specialist testified about chain of custody on DNA (Tr. 340-344). Her testimony was followed by Shana Hawkins, also a crime lab employee. (Tr. 345) Ms. Hawkins was asked to examine a coat, two hats and a cup from which she obtained cell samples and some hair (Tr. 346-355). Ms. Jessica Hanna, also from the same lab, is a DNA analyst (Tr. 356). Ms. Hanna testified that she was given four unknown samples from a green hat, a brown hat, a left jacket coat pocket and the collar of the jacket to examine (Tr. 361). Of the four samples, only three were usable (Tr. 362). She obtained major and minor profiles for more than one person which is not unusual when clothing is shared (Tr. 363-366). When she compared the known profile of defendant Taylor, she obtained a match with the major profiles from the unknown samples (Tr. 366-367). She testified that only one person in two quadrillion (a 2 with 15 zeros behind it) would have the same profile and this was many times the total world population of 6.6 billion (Tr. 368).

The government then rested.

Mr. Taylor opened his case and moved the admission of Defendant's exhibit 3, the separate DNA test caused to be performed by Mr. Poindexter (Tr. 370). He

next called Mr. Poindexter, his former appointed attorney, who was by this point standby counsel as a witness. He testified that he had the DNA independently tested by a private lab using known and unknown samples provided by the government (Tr. 371-379). Mr. Poindexter testified he did not obtain a new fresh sample of DNA from defendant Taylor to submit to the private lab (Id.). Mr. Taylor then accused him of being in league with the government (Id.). Mr. Taylor then testified in his own defense in narrative fashion and told the jury how he arrived at the phone store, bought cigarettes, and that his intent was to buy a phone, after which he was going to a plasma center to see some girls he knew (Tr. 382-386). Mr. Taylor was cross-examined about his clothing and some inconsistent statements but maintained his innocence (Tr. 387-397). He then rested his case.

SUMMARY OF THE ARGUMENTS

Mr. Taylor made what appears on the surface to be a voluntary decision to try his own case *pro se* with the assistance of stand-by counsel, Mr. Travis Poindexter, of the public defender's office. This decision was arrived at after much frustration and a series of events which left Mr. Taylor with the firm belief that he had no choice in the matter. His repeated requests for change of counsel because of lack of communication and conflict with Mr. Poindexter, who was

originally his appointed attorney, were all denied by the federal magistrate. Mr. Poindexter was subsequently relieved as appointed counsel shortly prior to trial and designated as standby counsel. Mr. Taylor's request for a continuance to prepare for trial pro se was then summarily denied.

At trial the district court judge informed him of the perils of defending his own case and then obtained a supposed waiver from him before starting the trial. Then midway through the trial his standby counsel and the court were apprised of what can charitably be called his foolish intent to call Mr. Poindexter as a witness to impeach that lawyer's performance. Notwithstanding this, Mr. Poindexter remained as standby counsel and the court took no action to replace him even though it was apparent there was going to be a conflict.

Mr. Poindexter did indeed testify and literally sealed defendant's fate and the government's case by revealing additional DNA evidence test results that were independently done by a private lab, the results of which were totally consistent with government DNA testing and therefore extremely prejudicial to defendant's case.

Mr. Poindexter then filed a motion after trial in which he admitted to a conflict with defendant and was allowed to withdraw as counsel by order of the very Magistrate who had repeatedly denied defendant's request for different

counsel. During the trial, when alerted to the fact that a major conflict was looming, the district court took no steps to replace standby counsel with another attorney or see if Mr. Taylor wished to reconsider his decision to be his own lawyer. Later, when Mr. Poindexter testified and it was confirmed there was a conflict, the district court still took no steps to protect Mr. Taylor's right to counsel or at a minimum replace Poindexter with new standby counsel.

ARGUMENT

I. BOTH THE MAGISTRATE JUDGE AND THE DISTRICT COURT JUDGE ABUSED THEIR DISCRETION WHEN THEY REPEATEDLY FAILED TO PROVIDE A REPLCEMENT COUNSEL FOR MR. TAYLOR WHICH RESULTED IN HIS 11TH HOUR DECSION TO TRY HIS CASE PRO SE WITHOUT BENEFIT OF A CONTINUANCE, THEREBY RENDERING ANY WAIVER OF SIXTH AMENDMENT RIGHTS MEANINGLESS AND INVOLUNTARY.

STANDARED OF REVIEW

The various separate rulings by the Magistrate and the district court in which defendant's multiple motions were denied are subject to an abuse of discretion review individually; however, to the extent these rulings ultimately resulted in an involuntary decision on the part of Mr. Taylor to proceed pro se, the standard of

review is de novo per *United States v. Kind*, 194 (F3d 900 (8th Cir. 1999); *United States v. Mentzos*, 462 F.3d 830 (8th Cir. 2006).

ADDITIONAL FACTS SPECIFIC TO THE ARGUMENT

Defendant was arrested on March 13, 2009, based on allegations in a complaint alleging bank robbery and appeared before the Honorable Robert Larsen, United States Magistrate Judge for the Western District of Missouri later that day (Doc. 1). On the same day he completed an affidavit of financial status and the public defender was appointed to represent him (See Order, doc. 7). Judge Larsen conducted a detention hearing on March 18th and defendant was held without bond pending trial (Doc. 7). He was later indicted on April 8, 2009 (See doc. 12) and arraigned on April 15th (Doc. 15). On May 12th his public defender, Mr. Travis Poindexter, filed a motion to continue the trial which was granted on May 13th and a trial date of August 24th of 2009 was set (See order, doc 18).

On May 20, 2009, Mr. Taylor filed two hand written pro se motions to dismiss in which he complained about the manner in which the government had handled certain DNA evidence and allegations that agents had not been truthful abut the status of discovery (See docs. 19 and 20). The court denied both motions the following day in a one-paragraph order noting that Mr. Taylor was represented by counsel and that the matters should be addressed through counsel (See doc. 21).

Following these two motions, on May 26th three more motions were filed pro se by defendant: a motion for discovery, pretrial release, and an additional motion to dismiss (See docs. 23 through 25). On May 29, 2009, the Magistrate entered an Order in which he held, citing authority, that there is no constitutional right to hybrid representation and again said such motions should be filed by appointed counsel, noting that even if filed by appointed counsel, such motions would not be granted. This was followed by a brief discussion of the merits of each with citations of authority (See Order, Doc. 26).

The Magistrate entered a stipulation and order on May 27th entered into between the government and defense counsel (See doc 22). In the stipulation the government indicated, among other things, that defendant was alleged have made incriminating statements to investigators. By June 22, 2009, Mr. Poindexter had filed no pretrial motions, albeit, a number of routine motions that might be filed in a criminal case were mooted by the existence and direction of the pretrial order and stipulation.

On June 22, 2009, the Magistrate was clearly alerted to the fact that Mr. Taylor and Mr. Poindexter were not communicating when Mr. Taylor filed a motion accusing Mr. Poindexter of ineffective assistance of counsel (See doc. 27). In the motion Mr. Taylor noted that Mr. Poindexter had refused to file any

motions, including a request for an evidentiary hearing, a request to see grand jury minutes, discovery and some others (Id.). While some of the proposed motions were perhaps not within the scope of Rule 12 practice or were already subject to the stipulations, Mr. Taylor did specifically take issue with the *Miranda* warnings and his statement to the authorities (Id.).

On July 15, 2009, Judge Larsen conducted a hearing, questioned defendant about his reasons for wanting a different lawyer, and then denied the request (doc. 31). The judge then issued an Order on July 16, 2010, noting that defendant's basis for requesting a new attorney was based on the refusal of Mr. Poindexter to file pretrial motions (Doc. 33). The order stated that the matters of concern to Mr. Taylor were either moot or jury questions (Id.). Although previously mentioned in the triggering letter, there was apparently no discussion about the potential motion to suppress his alleged confession (Id.). The Magistrate concluded there was no legal basis to grant a change of counsel and denied the request.

On July 23rd another letter from defendant was filed in the case (Doc. 35). In that letter Mr. Taylor expressed his frustration, noted that he was told his only option was to go pro se, and that he desperately needed a different lawyer (Id.). Mr. Poindexter's only official response of record was to file a motion on August 6, 2009 to have his client examined to determine competency (See doc 39). In the

motion Mr. Poindexter wrote:

> Although investigation to this point has uncovered no prior mental health evaluations or diagnoses, from the personal contacts and deteriorating nature of those discussions, Mr. Taylor has exhibited a number of paranoid characteristics and idealizations. Attempts to have legal and factual discussions regarding the case have given counsel reason to believe that Mr. Taylor may be suffering from a mental disease or defect which may render the defendant incapable of understanding the pending charges or assisting in his defense in the present case.

(Id.).

The examination began on August 18th and was concluded and a report submitted to the court on October 6, 2009 (See doc. 46). On the 22nd of October the Magistrate held a competency hearing (See filed transcript of hearing, doc. 48). Both government counsel and Mr. Poindexter informed the court they had no problem with the report (Doc. 48, Hr.Tr. p.2). Mr. Poindexter advised the Judge that he had attempted to discuss it with Mr. Taylor but Mr. Taylor declined to do so (Id.). Mr. Taylor then informed the court he had "irreconcilable differences" with his attorney and that he was going to sue him and he wanted a different attorney (Hr.Tr. at 3). He informed the Magistrate that Mr. Poindexter was not working on any defense and that there was a conflict of interest (Hr.Tr. p.3). Without further discussion, Judge Larsen informed Mr. Taylor that he was not going to replace Mr. Poindexter (Id.).

On October 26th the Magistrate issued a report and recommendation to the district court in which he recommended, based on the findings of the forensic psychologist's report, that the court rule that Mr. Taylor was competent to stand trial (See doc 50). The findings were adopted by Judge Smith on November 9, 2009 (Doc. 53).

On October 30th an additional letter requesting a change of counsel was docketed (See doc. 51). Mr. Taylor next appeared before Judge Larsen on November 9, 2009, with Mr. Poindexter as his attorney (doc. 55). During the 23 minute hearing the issue of counsel was again visited and at one point the defendant was removed from the courtroom over an outburst. Later he exhibited further frustration by tipping over the defense counsel table and was again removed from the courtroom. The 17 page hearing transcript is on file as docket entry number 57. When asked by the court what the problem was, Mr. Taylor explained:

> I don't like him. He's not working in my best interest. He's not arguing with the evidence. He's not saying anything about Government misconduct. He hasn't filed one motion since I've been incarcerated. He doesn't come to see me, he doesn't talk about my case. And he's like a dead-beat dad. And I don't need him on my case. And it's going to be a problem because I don't want him on my case. And I done like put down like five motions to get this dude off my case.

(Doc. 57, Hr.Tr. p. 2-3).

Following this exchange, Mr. Taylor had to be removed from the courtroom briefly because he became agitated. After some further discussion about the types of things he expected Mr. Poindexter to do, he expressed his concern that Mr. Poindexter was simply not working for him, citing the fact that he had sent him for a "psychic evaluation" (Id. at page 11). After more discussion and a statement by the court that he could either hire his own attorney or use Mr. Poindexter, the table tipping incident occurred and he was again removed from court (Id. at p. 13).

Mr. Poindexter filed a motion to continue the trial on November 12, 2009, which was granted that day and the trial date was moved to January 11, 2010 (Docs. 58 and 59). On December 3, 2009, a letter again requesting change of counsel was docketed which also raised a question as to the veracity and reliability of certain video evidence and demanded production of such evidence, citing *Brady v. Maryland*, 373 U.S. 83 (1963). The motion was denied the same day in a brief one paragraph Order which indicated the issues had been previously addressed and denied (See docs 61 and 62). Another letter from defendant was again docketed on December 17th in which he once again requested change of counsel and again made his concerns about the video evidence known (See doc. 64). This motion requested the issuance of a Rule 17c subpoena to the police department to obtain all video evidence (Id.).

The following day, December the 18th, Mr. Poindexter filed proposed witness and exhibit lists and a motion in limine (Doc 67) to preclude introduction of evidence about the note and cup eating incident and the mention of outstanding warrants. The exhibit list consisted of two maps and the witness list endorsed defendant and all witnesses listed by the government. Yet another lengthy letter from defendant was also docketed on the 18th repeating his many concerns, his request for a new attorney, and his belief that he was not going to receive a fair trial (See doc. 68). Not surprisingly, the motion was denied that day relying on the same rationale citied in prior orders – that the merits of all motions and his complaints about his attorney had been previously discussed (Doc. 69).

On December 29, 2009, a letter from defendant was filed which was dated December 23, 2009, in which Mr. Taylor requested permission to go pro se. Mr. Taylor cited his reasons as: 1) failure of his attorney to file motions; 2) poor communication with Mr. Poindexter; and, 3) fear for his own situation attributable to his attorney's failure to act (See doc. 83). Mr. Taylor concluded by stating he refused to be represented by Mr. Poindexter because of their "irreconcilable differences" (Id.).

On December 30th Mr. Poindexter filed another motion in limine to preclude use of a stun belt during trial (Doc. 78). On January 5, 2010, defense counsel filed

proposed jury instructions (Doc. 82). The pro se request resulted in a hearing on January 11, 2010 with everyone present (See minute entry, doc 88). Mr. Taylor was informed by the Magistrate that he would recommend that his motion be granted but also indicated orally that he would not be given a continuance to prepare for trial (Id.).

The government counsel objected to the continuance in writing citing among other reasons his planned trip to a securities fraud conference in Utah in February and his and an FBI agent's vacation plans, noting he was ready for trial (Doc, 91). The prosecutor indicated he was also going to provide the defendant with additional discovery about another recent robbery of the same bank. He argued that the defendant, while he may not have had copies of the previously disclosed discovery, must be aware of it and must have had access to it (Tr. Id.).

Judge Larsen formalized his denial in an Order which concluded:

> Defendant provided no reasons to establish that failure to grant a continuance will likely make a continuation of the proceeding impossible or result in a miscarriage of justice. Defendant stated that he wants materials which appear to be irrelevant to this case. His attorney has gone over the discovery materials with the defendant, and the government indicated to me after the hearing that copies of all discovery will be provided to the defendant today before he leaves the courthouse to return to CCA. Defendant did not indicate during the hearing that he needed additional time to review the discovery or for any reason other than his request for irrelevant material.

> This case is not unusual or complex, it appears to be a straight-forward bank robbery case. There is nothing in the record suggesting any novel questions of fact or law, and defendant did not indicate during the hearing that there were any novel questions of fact or law.
>
> There was no delay in returning the indictment.
>
> The defendant is representing himself, and nothing has been stated that persuades me that this case cannot be prepared for trial by January 19, 2010, or that it would be unfair to insist that the case proceed to trial on January 19, 2010.
>
> For these reasons, I find that the ends of justice served by continuing this case do not outweigh the interest of the public and the defendant in a speedy trial.

(Id. Order, doc. 90).

Trial commenced on schedule on January 19, 2010, with Mr. Taylor acting as pro se counsel with Mr. Poindexter appearing as standby counsel. Prior to starting the actual case, the court informed Mr. Taylor of pitfalls that a pro se individual might face in trying to try his own case and how lack of formal training would probably work to his disadvantage, particularly since he was facing highly skilled and trained team of government lawyers (Tr. 2-5). When asked to respond as to whether he was still intent on representing himself, Mr. Taylor answered: "yeah. Any little bit I can do is more than he did for me."

After several bank employees had testified and Officer Hoffecker had provided details of the arrest, proceedings were had out of the presence of the jury (Tr. 204). The government advised the court that Mr. Taylor had requested to see some videos they had agreed to play for him and that he intended to call Mr. Poindexter as a witness in his case (Tr. 204-205). Mr. Taylor stated it was not his intent to ask Mr. Poindexter to summarize his investigation – he wanted to ask him about DNA testing he had requested (Tr. 205-207).

> You know, they have obtained DNA and I want him to compare his DNA with that of the government's. When he was my attorney he retained his own DNA expert so I would like them to know.
>
> * * *
>
> Mr. Taylor would like for the summary of the DNA examination done by the expert retained by the Public Defender's Office to be admitted in evidence.
>
> * * *
>
> THE COURT: Well, let me repeat what I said at the side bar, Mr. Taylor. I don't see how that evidence is at all helpful to you. But if you wish to offer it and the government has no objection to it then I'll admit it.

Mr. Poindexter was of course aware that defendant disliked him, did not trust him, had repeatedly tried to have him replaced, and intended to point out to the jury that Mr. Poindexter had used government known and unknown samples of

DNA to submit to the lab instead of obtaining a fresh known sample directly from Mr. Taylor for submission to the private lab. The idea behind this was to show that Mr. Poindexter was in league with the government (See Poindexter testimony, Tr. 371-379). Notwithstanding this, Mr. Poindexter did not seek to be relieved as standby counsel and the court of course took no further action.

Mr. Taylor was convicted on January 21, 2010 of the armed robbery. On the same day Mr. Poindexter filed a motion to withdraw as standby counsel stating he had "fulfilled the obligation of stand-by-counsel" and that because of his testimony in the trial, there was an admitted conflict because of his adverse testimony (Doc. 104). The motion was granted and undersigned counsel was appointed as replacement standby counsel and then a week later on January 28, 2010, as full counsel of record to represent Mr. Taylor at sentencing and further proceedings, all with Mr. Taylor's full consent.

ARGUMENT

Appellant is not making a direct challenge to his conviction on grounds of ineffective assistance of counsel and understands that any such claim, if made at all, is normally confined to post-conviction proceedings, particularly when the record may be incomplete before the district court and has not been addressed by that court. *United States v. Morelos*, 544 F.3d 916 (8th Cir. 2008); *United States v.*

Logan, 49 F.3d 352, 361 (8th Cir. 1995).

In the federal courts, the right to counsel rests on the specific language of the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." That right has been held to include a right to assigned counsel, not just to representation by defendant's retained counsel. In *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Supreme Court stated that the Sixth Amendment bars a valid conviction and sentence if the accused is not represented by counsel and has not competently and intelligently waived his right. The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In *Carnley v. Cochran*, 369 U.S. 506 (1962) the court held that presuming waiver of counsel from a silent record is impermissible. Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a "knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances." *Brady v. United States*, 397 U.S. 742, 748 (1970); *Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

Title 28, United States Code, Section 1654 provides that defendants in federal cases may appear pro se. In *Faretta v. California*, 422 U.S. 806 (1975) the court held that a defendant in a state criminal trial has an independent

constitutional right of self-representation and that he may proceed to defend himself without counsel when he "voluntarily and intelligently" elects to do so. *Faretta* notes that this has been the rule in federal court going back to the Judiciary Act of 1789 and cites cases supporting the rule.

The sensitive nature of the right to counsel is clear from the holding in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) where the court held that the erroneous deprivation of a criminal defendant's choice of retained counsel entitles him to reversal of his conviction regardless of how effective substitute counsel may have been. However, when counsel is merely appointed, his replacement is a matter of discretion:

> A motion to substitute court appointed counsel is committed to the district court's sound discretion. *Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995). To prevail on the request, a criminal defendant must demonstrate "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *United States v. Long Crow*, 37 F.3d 1319, 1324 (8th Cir. 1994) (quotations omitted), cert. denied, 115 S.Ct. 1167 (1995). "Last-minute requests to substitute defense counsel are not favored." *United States v. Klein*, 13 F.3d 1182, 1185 (8th Cir.), cert. denied, 114 S.Ct. 2722 (1994).

United States v. Webster, 84 F.3d 1056 (8th Cir. 1996). In *U.S. v. Long Crow*, *supra*, the court stated that "[j]ustifiable dissatisfaction sufficient to merit

substitution of counsel includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant."

This was clearly the situation throughout the time Mr. Poindexter was counsel. It is not enough to conclude that certain of Mr. Taylor's motions may have lacked merit – in his mind they all had merit. That Mr. Poindexter filed no substantive pretrial motions, including one to suppress Mr. Taylor's "confession" which probably was meritorious, speaks to the utter lack of communication between the two. Moreover, Mr. Taylor repeatedly informed the Magistrate that he could not reach Mr. Poindexter; they had irreconcilable differences and could not work together. And of course the situation was no doubt further exacerbated when Mr. Poindexter sent Mr. Taylor away for a mental emanation which, based on the record, seems to have instilled further distrust in Mr. Poindexter.

And of the course the culmination of these differences and conflicts was the announcement early in the trial that Mr. Taylor intended to call the attorney as a witness and attack him for failure to submit a new and fresh independently obtained DNA sample to the private lab and then accuse him of being in concert with the government attorneys. Under the totality of the circumstances, the magistrate and the district court both abused their discretion in not granting a change of counsel.

United States v. Kind, 194 F.3d 900 (8th Cir. 1999) discusses the issue of "knowing, intelligent, and voluntary" wavier of counsel in order to go forward pro se:

> . . . We affirm the grant of a defendant's motion to represent himself at trial "if the record shows either that the court adequately warned him or that, under all the circumstances, he knew and understood the dangers and disadvantages of self representation." *United States v. Patterson*, 140 F.3d 767, 774-75 (8th Cir.), cert. denied, 119 S.Ct. 245 (1998). We review the determination that a valid waiver occurred de novo. See *United States v. Veltman*, 9 F.3d 718, 721 (8th Cir. 1993), cert. denied, 511 U.S. 1044 (1994). When the district court has not specifically warned the defendant of the dangers and disadvantages of self-representation before granting the motion, "we must review the entire record to determine if the defendant had the required knowledge from other sources." *United States v. Yagow*, 953 F.2d 427, 431 (8th Cir.), cert. denied, 506 U.S. 833 (1992).

The basic facts and issues in *Kind* parallel those in Mr. Taylor's case; however the rulings were quite different. Mr. Kind's first attorney filed a number of pretrial motions and then moved to withdraw, citing a conflict with Kind and urged the appointment of a named substitute counsel. Unlink Mr. Taylor's case, the motion was granted. On the eve of trial the substituted attorney filed a motion to permit Kind to represent himself. The motion was granted and the substitute attorney was designated standby counsel. Again, unlike Mr. Taylor's case, standby counsel actively assisted Kind with tactics and procedure and participated in

various sidebar discussions.

Before allowing Kind to represent himself, the Court provided Kind with advice and admonitions nearly identical to that provided to Mr. Taylor by Judge Smith which this court described as " . . . less instructional than might be necessary in other cases." The court found it was adequate however because both attorneys had taken an active role in the case up to that point, filed numerous motions, and the self-representation motion had been prepared by counsel and the motion represented that the issue had been discussed with Kind. The latter of course did not occur in Mr. Taylor's case – it was just the opposite -- no written motion was filed and he and his standby counsel were not on speaking terms and Mr. Taylor believed he had no alternative other than to act pro se because of the repeated denials of his request for change of counsel, his distrust of Mr. Poindexter, and his belief that "any little bit I can do is more than he did for me" referring to his own ability vis a vis that of Mr. Poindexter.

Also, in direct contrast to Mr. Taylor's case where his request for a continuance on the eve of trial, was denied, the Judge in the *Kind* case asked him if he needed more time to be prepared and then granted him a continuance. Mr. Taylor's journey through the judicial system was no so smooth and he of course was denied a continuance.

Other factors that point to whether a waiver is intelligent and knowing include the defendants demonstrated legal ability. Thus, in *U.S. v. Crawford*, 487 F.3d 1101 (8th Cir. 2007), the court examined various pleadings filed by the defendant and noted his motions were accompanied by supporting memoranda and it was clear the defendant was "literate, competent, and understanding and his decision was one of fee will and voluntary. In apply this test, counsel invites the court to review the many motions filed by Mr. Taylor previously referred to above – they are readable and one is able to discern the problem express and the relief sought, but they are seriously otherwise wanting based on the *Crawford* criteria.

United States v. Mentzos, 462 F.3d 830 (8th Cir. 2006) is also a significant holding. Mentzos had a public defender and requested substitute counsel. The PD office then assigned another attorney in the office, Mr. Scott, to his case. That attorney moved to have Mentzo evaluated. More motions for new counsel followed. Scott, the 2nd PD attorney filed a motion to withdraw which was denied. More motions for new counsel followed. Scott again moved to withdraw. The motion was granted because the court found "that despite the "competent and professional" representation Mentzos had received from Tilsen and Scott, "the differences between the Defendant and Scott are intractable, and a reconciliation between them seems remote." This was precisely the situation as it existed

between Mr. Poindexter and defendant Taylor by the time trial was ready to start.

Mr. Mentzos was given a third lawyer and eventually became dissatisfied with that lawyer and ultimately commenced trial as his own attorney with lawyer number three as standby counsel. He then argued on appeal his waiver of counsel was coerced and involuntary. In ruling against him, this court made the following observations:

> Mentzos had several years of education beyond high school, was articulate, and had a sense of how to put on a defense. See *Patterson*, 140 F.3d at 775 (internal quotations omitted); *United States v. Day*, 998 F.2d 622, 626-27 (8th Cir.1993). He participated in the court's voir dire of the jury, exercised his peremptory challenges, and raised objections during the trial, indicating that he was "able to grasp the nature of the charges against him and that he had the intellectual capacity required to understand the consequences of his decision." *Patterson*, 140 F.3d at 775. Mentzos consulted with court appointed standby counsel during trial, thus demonstrating that he was aware of his right to counsel. See id. When Mentzos eventually requested assistance, he was immediately provided with counsel. Although he later may have regretted his choice, stating he had "made a mistake," (T. Tr. IV at 9), Mentzos unquestionably knew the dangers of self-representation and stubbornly chose to refuse appointed counsel.

Mr. Taylor's education and skill level was substantially less and his performance at trial can only be described as disastrous given his decision to call Mr. Poindexter as a witness and his decision to then introduce corroborating DNA evidence against himself all the while trying to convince the jury his lawyer was a

government stooge. All of this would have course been likely solved by simply appointing someone else to represent him early in the case when it was apparent he and Mr. Poindexter suffered "intractable differences."

CONCLUSIONS

The United States Magistrate Judge and the United States District Court Judge both abused their discretion in failure to provide Mr. Taylor with at least one change of counsel. As in *Mentzos*, at the very least the public defender's office with its large staff could have been instructed to assign another member of the staff to the case. The failure to grant the many requests for substitute counsel resulted in an unwise and clearly involuntary decision by Mr. Taylor to try his own case with disastrous results. Mr. Taylor should be granted a new trial, placed back to square one and afforded the opportunity to explore all his options with a new attorney in who has confidence. While this Court will likely describe the evidence as overwhelming, the issue is not so much whether Mr. Taylor would be again convicted in a new trial – it is a more a question of whether there are options available to him that might result in a more favorable overall disposition. This alone is sufficient reason to grant him a new trial.

Respectfully submitted,

/s/

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Certificate of Service and Brief Compliance

I hereby certify that an electronic copy of this brief has been submitted via the ECF electronic filing system for review and approval on October 26, 2010 through the PACER ECF filing system. I further certify that two hard copies of the brief will be served on opposing counsel, postage prepaid, within 5 days of the notification that the brief has been approved and accepted by the Court and that an original and nine copies will also be forwarded to the clerk of Court within the same time period. Opposing counsel who will be duly served via ECF and by hard copy are:

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I hereby further certify that this brief contains 9.245 words, in 14 point font, that the brief was prepared using Microsoft Word 2003 and thereafter converted to Adobe PDF in native PDF word searchable format using Acrobat version 8.0.

/s/

John R. Osgood

ADDENDUM

Judgment of conviction attached as exhibit A