IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09-00112-01-CR-W-ODS
	)	
CLIFTON D. TAYLOR,	)	
	)	
Defendant.	)	

RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

Comes now the United States of America, by and through its undersigned attorney, Daniel M. Nelson, Executive Assistant United States Attorney, and files this motion in opposition to defendant Taylor's Motion for a New Trial. For the following reasons, the United States respectfully suggests that defendant's motion be denied.

Suggestions in Support

A. Background

Following his arrest on the indictment, Defendant Taylor requested appointed counsel, and Assistant Public Defender Travis Poindexter entered his appearance. At his detention hearing on March 18, 2009, the court ordered Taylor detained. Over the next months, the defendant proceeded to file numerous handwritten, *pro se*, motions requesting dismissal of charges, suppression of evidence, and new counsel. Magistrate Judge Robert Larsen denied the motions. On August 6, 2009, Mr. Poindexter filed a motion, pursuant to 18 U.S.C. § 4241(a) and (b), for a judicial determination of defendant's mental competency. Judge Larsen granted the motion the following day and the defendant was subsequently examined. After a written report

was issued, Judge Larsen issued a report and recommendations. On November 9, 2009, this Court entered an order finding Taylor competent to stand trial.

Through pro se motions, Defendant Taylor continued to request new counsel. On November 9, 2009, Judge Larsen held an attorney appointment hearing. Orally, Taylor again moved the court to replace Mr. Poindexter, emphatically exclaiming that he did not "want that dude to serve as my lawyer!" Judge Larsen inquired into the reasons for Taylor's request. Taylor offered several reasons, complaining first about how he wanted to suppress as "an unlawful wire tap" video footage obtained, with owner consent, from the cell phone store where he shopped soon after the robbery and soon before his arrest. He made additional complaints about Mr. Poindexter's unwillingness to file other motions that Taylor wanted, forcing Taylor to file them pro se, which he did. Government counsel proffered that there was no wire tap, that the video in question had been willingly turned over by the store's consenting owner, and that it had already been produced. Mr. Poindexter stated that he had explained that to Taylor, who apparently nonetheless wanted to suppress it on improper seizure grounds.

Taylor never objected to Mr. Poindexter's qualifications as an attorney or his ability to represent him in court. His appeared to be a complaint based on a perception that Mr. Poindexter was not conducting his defense exactly as he wished it conducted. Judge Larsen found that none of the reasons Taylor gave constituted a legal basis to replace Mr. Poindexter and he denied the motion. In apparent protest, Taylor flipped over the counsel table, injuring defense investigator Ron Neimeyer in the process. Judge Larsen ordered Taylor removed from the courtroom. After a short break, Taylor was allowed to return and the hearing was concluded without further incident.

Defendant subsequently requested by pro se motion to proceed as his own counsel. A hearing was held by U.S. Magistrate Judge Robert Larson on January 11, 2010. Judge Larsen repeatedly warned Taylor that this strategy seldom works out well for a criminal defendant. Judge Larsen explained that if Taylor hired counsel, he could hire whomever he wanted, but if he wanted replacement counsel, there had to be a legal basis before Judge Larsen would provide him with a new attorney. Taylor said that he understood, and he continued to insist that he preferred representing himself to representation by appointed counsel. The government believes that this extensive discussion and choice, subsequently reaffirmed by the defendant on several occasions, constituted a knowing and voluntary decision by Taylor to proceed pro se instead of proceeding with appointed counsel. The government immediately made an additional copy of the discovery for Mr. Taylor and he was able to take it with him that same day. Mr. Poindexter was asked to stay on as stand-by counsel, and Judge Larsen granted Taylor's request to proceed pro se. At the outset of trial, this Court again warned Taylor that proceeding pro se usually works to a defendant's detriment. Again, Taylor insisted that he wished to represent himself. Travis Poindexter sat in the courtroom for the duration of the trial, ready and willing to step in if the defendant requested assistance. Defendant Taylor never requested such assistance.

B. Trial

During his two-day trial, Defendant Taylor gave an opening statement and a closing argument, he introduced witnesses and evidence on his behalf, and he testified to explain his version of events to the jury. Considerable care was taken by the Court to ensure that the jury did not see that Taylor's legs were shackled, including disallowing the government to stand up during opening statement, examinations, and closing argument. Taylor also conducted

sometimes-lengthy cross examinations of the majority of government's witnesses. At times, he made headway, such as when he induced the victim bank teller to say that she had been "coached" during trial preparation. He also succeeded with multiple witnesses in casting a small degree of doubt on the physical integrity of the crime scene by pointing out a minor mistake in crime scene investigator's reports concerning which pocket was torn on the leather jacket they found containing the bank proceeds. Crime scene investigators mistakenly noted that the left pocket, instead of the right pocket, was torn. The defendant noticed this from the reports and successfully impeached the witnesses with their mistake. Further, he advanced a consistent argument that his former counsel and the government had collaborated against him. To advance his argument, he insisted, despite warnings from the court, in introducing a second DNA report that had been commissioned by Mr. Poindexter. While the contents of the report did not help the defendant, he introduced it to support his theory of the case. He argued that the fact that Mr. Poindexter had not obtained a buccal swab from him to submit to the second lab showed that a conspiracy existed. The government believes that this amounted to a strategic choice by the defendant, and the defendant's right to represent himself clearly protects his right to make such strategic choices. On January 21, 2010, after the jury deliberated for approximately five hours, defendant Taylor was convicted of a single count of bank robbery.

C. Legal Analysis

Through his new motion, Taylor essentially claims that the court should have appointed him with an attorney he could communicate with better, and that his own assistance was ineffective. He argues that this Court had a duty to step in and force him to accept representation despite his repeated affirmations that he wished to represent himself. He cites no persuasive

authority for this claimed duty of the court to intercede or provide him with an appointed attorney conforming to his exact, particular preference. However, it is a long-established principle that a defendant who elects to represent himself in a criminal proceeding cannot thereafter complain his own assistance was ineffective. *Faretta v. California*, 404 U.S. 806, 834 n. 46 (1975). Further, this court had no duty to provide Taylor with counsel fitting Taylor's exact specifications for an ideal attorney including his communication style and willingness to file myriad motions of the defendant's design.

1. <u>The court properly denied Taylor's pre-trial motions for appointed counsel</u>

First, Judge Larsen was correct in denying Taylor's pre-trial motions for a new attorney as they did not indicate any ineffectiveness on the part of Mr. Poindexter, or any prejudice against the defendant. The Sixth Amendment entitles criminal defendants to effective assistance of counsel which means the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *United States v. Boone*, 437 F.3d 829, 839 (8th Cir. 2006). In *Boone*, the court held that the defendant showed only that he was "not happy with some of counsel's tactical choices" and had reservations about counsel's not giving the case his full "100 percent." *Id*. The court held that the defendant "has not demonstrated that he was prejudiced by any of the decisions about which he complains..." *Id*.

Through his motion, the defendant does not attack Mr. Poindexter's qualifications to serve as counsel or claim that he was prejudiced by Mr. Poindexter's choices. Rather, Taylor appears to argue that he had a personality conflict with his lawyer and the court should have appointed a new attorney on that basis. The court had no such duty. The right to effective assistance of counsel is just that; it is not an unfettered right for the defendant to have counsel

that meets his every exacting preference. Judicial review of an appointed counsel's performance is highly deferential, and there is a strong presumption that a counsel's conduct falls within a wide range of reasonable professional assistance. *Abdi v. Hatch*, 450 F.3d 334, 337 (8th Cir. 2006). Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories. *Lyons v. Luebbers*, 403 F.3d 585, 594 (8th Cir. 2005). Taylor provided no basis, either at his appointment of counsel hearing, or through this motion, that Mr. Poindexter fell short in any of these categories.

Further, the defendant engaged in strategic game-playing, seeking to subvert the system to his own advantage. For example, when Judge Larsen denied his motion for new counsel, he tipped over the table in the courtroom to show his displeasure.[1] He became loud and obstructionist with the court when Judge Larsen's decisions did not go his way. For all of these reasons, the court was within its considerable discretion in denying Taylor's motion for a new attorney.

2. <u>Defendant's knowing and voluntary choice to represent himself did not deny him his right to effective assistance</u>

When a defendant is faced with the choice of proceeding with counsel he is not entirely happy with or defending pro se, the trial judge must satisfy himself that if the defendant chooses to proceed Pro se, he does so knowingly, with a full understanding of the risks involved.

[1]Taylor also refused to provide a buccal swab to his appointed attorney for testing, and then argued at trial that because his former attorney did not obtain a buccal swab from him, that showed that his former counsel was allied with the government.

Cordoba v Harris, 473 F.Supp. 632, 637-38 (S.D.N.Y. 1979).[2] This consists primarily of the judge instructing the defendant that he has the choice between defense by a lawyer and defense pro se; that he will be given a reasonable time to make the choice; that it is advisable to have a lawyer, because of his special skill and training in the law; and that the judge believes it is in the best interests of the defendant to have a lawyer; but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. Defendant Taylor was so instructed. After denying his motion for new appointed counsel, Judge Larsen judge expressly told Taylor that he had to choose between appointed counsel and self-representation, he explained the advantages of proceeding with appointed counsel, and Taylor was made aware of the complications he would encounter in conducting his own defense. On the first day of trial, this court held a similar colloquy with the defendant. On both occasions, Taylor remained adamant and unequivocal that he wished to represent himself. Taylor was coherent in court, he had been found competent to stand trial, and he had experience with the legal system including a prior felony conviction. Under the relevant case law, Taylor's waiver was knowing and intelligent. *See United States v. Abdul-Aziz*, 486 F.3d 471, 475 (8th Cir. 2007). As such, the Constitution guaranteed his right to proceed *pro se* at his trial. *Faretta v. California*, 422 U.S. 806, 819 (1975).

[2]"[T]he decision to proceed Pro se is viewed as an election of one constitutional right over another, rather than as a 'waiver' of the right to counsel." *United States v. Bubar*, 567 F.2d 192, 203 n. 18 (2d Cir.), Cert. denied, 434 U.S. 872 (1977); *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 133-34 (2d Cir. 1975), Cert. denied, 426 U.S. 937, 96 S.Ct. 2652 (1976); *United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 756 n. 8 (2d Cir. 1975). "Under either formulation however, the decision must be knowingly and intelligently made." *Id.*

Interference by the court concerning his decision would have been improper. In *Wilks v. Israel*, the court held that the trial judge was "not duty-bound to require [appointed counsel] to proceed with the defense despite [the defendant's] unequivocal rejection of his services." *Wilks v. Israel*, 478 F. Supp. 404, 409 (E.D. Wis. 1979). The court found that the indigent defendant had knowingly and voluntarily waived his right to counsel despite his request for another appointed attorney and his declaration that he could not represent himself. *Id*. On three separate occasions, the trial judge expressly told the defendant that he had to choose between appointed counsel and self-representation, the defendant was advised of the advantages appointed counsel afforded, and he was fully aware of his own incompetence to conduct the defense. *Id*. at 408-09. The court noted that the defendant was mentally competent to appreciate the consequences of his choice to reject appointed counsel's assistance and to proceed pro se, even though he had been hospitalized in mental institutions five times, he was examined by at least two psychiatrists and was certified competent to stand trial. While the defendant's courtroom behavior was erratic and occasionally violent, medical testimony indicated that this behavior was goal-directed and manipulative. *Id.* at 408.

Giving an indigent defendant a choice between accepting appointed counsel's representation and self-representation did not operate to deny such defendant's right to counsel. *Id.* at 409. "As long as the defendant unequivocally renounces his appointed counsel, with an awareness that to do so means proceeding pro se, the legality of the election and the fact of the waiver are not disturbed by the defendant's declarations that he is not qualified to represent himself, that he wants another lawyer appointed, or by his failure to present any defense." *Id*. at 409 (citing *United States v. Davis*, 604 F.2d 474 (7th Cir. 1979)*; United States ex rel. Testamark*

v. Vincent, 496 F.2d 641, 643-44 (2d Cir. 1974)). The defendant's "vague complaints" at trial about quality of his legal representation provided no basis for relief, where, in his petition for writ of habeas corpus, he had not challenged qualifications of appointed counsel, nor had he suggested that appointed counsel was not prepared to present a defense, and in fact appointed counsel was prepared to offer evidence. *Id.*

In *United States v. Davis*, 604 F.2d 474 (7th Cir. 1979), the trial court refused to appoint the attorney of the defendant's choice. Instead, the court informed the defendant that he had to choose between his court-appointed counsel and self-representation. Davis protested that he did not wish to proceed with his court-appointed attorney but that he did not want to represent himself. As in Taylor's case, the court strongly advised him to accept the assistance of his appointed counsel, but the defendant declined. *Id.* at 477. Davis declined to cross-examine any witnesses or present a defense, and the jury convicted him. The court of appeals affirmed, holding that he "had no right to have the court appoint him the attorney of his choice." *Id*. at 483. The court considered the defendant's claim that by requesting another appointed attorney and declaring that he could not represent himself, the defendant had not waived his right to counsel. Applying the waiver standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Seventh Circuit panel ruled that the defendant did knowingly and voluntarily waive his right to counsel. *Id.* at 482. The panel's reasoning applies with equal force to the case at bar.

In *United States v. Brockman*, 183 F.3d 891, 898 n. 7 (8th Cir. 1999), Brockman asserted an ineffective assistance of counsel argument, contending that his own pro se representation was not objectively reasonable and prejudiced his defense. But the court ruled that "it is well established that a defendant who exercises his right to appear pro se cannot thereafter complain

that the quality of his own defense amounted to a denial of effective assistance of counsel." *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984) (Constitution does not require judges to take over chores for pro se defendant that would normally be attended to by trained counsel as matter of course)). In *United States v. Bryant*, 766 F.2d 370 (8th Cir. 1985), the 8th Circuit similarly held that the defendant executed a knowing, voluntary, and intelligent waiver of her Sixth Amendment right to counsel and therefore was foreclosed from challenging the adequacy of dual representation at his trial.

These cases, and the case at bar, contrast with the situation presented in *United States v. Gonzalez-Lopez*, 548 US. 140 (2006), cited by the defendant, where the defendant was prevented from using a retained attorney. In fact, while there was no structural defect in Taylor's case, denying him his right to represent himself would have arguably created a structural defect under the case law cited by the defendant.

C. Conclusion

Taylor was found competent to stand trial. As in the above-cited cases, Taylor made a knowing and voluntary decision to waive counsel despite extensive colloquies advising him of the perils of that decision.

He unequivocally expressed his desire to proceed pro se. As in *Wilks* and *Davis*, Taylor made this decision "with his eyes open." It was Taylor's right to do so, and as such, this court should deny his motion for a new trial.

Respectfully,

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By /s/ *Daniel M. Nelson*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on February 8, 2010 to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

/s/ Daniel M. Nelson
Daniel M. Nelson
Executive Assistant United States Attorney