10-5-2017

State v. Dougherty Appellant's Brief Dckt. 43583

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43583**
Plaintiff-Respondent,	)	
	)	**BENEWAH COUNTY NO. CR**
v.	)	**2014-956**
	)	
WILLIAM PATRICK DOUGHERTY, III,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

HONORABLE JOHN T. MITCHELL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

William Dougherty, III, was charged with a single count of eluding a police officer. Prior to his trial, Mr. Dougherty's counsel successfully moved to withdraw (based on a breakdown of the attorney-client relationship) and Mr. Dougherty was left unrepresented. Ultimately, he was forced to go to trial *pro se* and was found guilty as charged. He also appeared *pro se* at his sentencing.

Because the district court never gave Mr. Dougherty a *Faretta*[1] warning, or otherwise made any effort to determine whether Mr. Dougherty was knowingly, intelligently, and voluntarily waiving his right to counsel and exercising his right to represent himself, the district court violated Mr. Dougherty's Sixth Amendment rights.

Statement of the Facts and Course of Proceedings

Shortly after terminating the pursuit of a speeding motorcyclist who had evaded multiple officers multiple times, William Dougherty was stopped because he fit the vague description of the sought-after motorcyclist. (*See generally* 7/14/15 Tr., p.89, L.1 – p.140, L.15.) Although Mr. Dougherty had not been violating any traffic laws when he was stopped (7/14/15 Tr., p.134, L.20 – p.136, L.1), because officers believed he was the one who had led them on a high speed chase, he was arrested (7/14/15 Tr., p.101, Ls.5-15, p.102, L.21 – p.103, L.2, p.127, Ls.3-11, 21-

[1] *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, the Supreme Court held that under the Sixth Amendment, a criminal defendant not only has a right to the assistance of counsel, but also a right of self-representation. It also held, however, that in order for a defendant to represent himself, he must knowingly and intelligently waive the right to counsel. *Id*. at 835. To validly relinquish his right to counsel and represent himself, he "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id*. (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

23, p.129, Ls.5-15, p.139, L.2 – p.140, L.1). A few days later, the State filed a Criminal Complaint charging Mr. Dougherty with a single count of felony eluding. (R., pp.12-13.)

The predominant issue before the trial court concerned Mr. Dougherty's right to the "assistance of counsel." When Mr. Dougherty requested the "assistance of counsel"—which is something he did early and often—he was requesting "hybrid counsel" (also known as "co-counsel").[2]

At Mr. Dougherty's first appearance (on the day the complaint was filed), the presiding magistrate asked if Mr. Dougherty wanted the court to consider an application for the appointment of a public defender; in answer to that question, Mr. Dougherty started to explore what, exactly, that meant, and to state his concern that, owing to his faith, he could not accept full representation by another, but the court cut him off, directing him fill out an application if he wanted the public defender. (8/11/14 Tr., p.9, L.19 – p.10, L.14.) Moments later, Mr. Dougherty expressed his frustration with working through the criminal justice system as a layman, and said he needed an "interpreter" to navigate the legal process. (8/11/14 Tr., p.12, Ls.9-20.) The court's response was to tell him again that he could apply for a public defender. (8/11/14 Tr., p.12, Ls.21-25.) When Mr. Dougherty again stated that it was "not possible" for him to accept a public defender in the traditional sense, the court was dismissive, telling him, "Well, you're between a rock and a hard place, then." (8/11/14 Tr., p.13, Ls.1-3.) It then immediately ended the hearing, remarking, "I've had enough of Mr. Dougherty." (8/11/14 Tr., p.13, Ls.5-6.)

[2] "[H]ybrid representation consists of concurrent self-representation and representation by counsel." Colquitt, Joseph, *Hybrid Representation: Standing the Two-Sided Coin on its Edge*, 38 WAKE FOREST L. REV. 55, 74 (2003). An excellent discussion of hybrid representation, with a clear explanation of how it differs from traditional attorney representation, self-representation, and "advisory" or "standby" representation, can be found in Joseph Colquitt's article.

Consistent with his beliefs, Mr. Dougherty did not make application for appointment of a public defender initially, and he appeared *pro se* for his preliminary hearing (before the same magistrate who presided over his first appearance). (*See* 8/22/14 Tr., p.1, Ls.15-18.) At that hearing, the court dismissed Mr. Dougherty's initial concerns about a lack of access to legal materials,[3] basically telling him he should have applied for a public defender. (*See* 8/22/14 Tr., p.1, Ls.9-23.) Later, Mr. Dougherty stated his desire for "co-counsel"; again, the court indicated he should have applied for a public defender. (8/22/14 Tr., p.13, Ls.9-11.) Later still, when Mr. Dougherty complained further about a lack of access to legal materials, the prosecutor interjected, arguing the Mr. Dougherty needed the assistance of counsel. (8/22/14 Tr., p.66, Ls.8-25.) At that point, Mr. Dougherty reiterated that he could not accept the representation of the public defender because it was against his religion, but because he needed the assistance of counsel, he sought the appointment of co-counsel. (8/22/14 Tr., p.67, Ls.13-19.) The court commented, "Well, and I don't know how to deal with that," and it continued with the preliminary hearing. (8/22/14 Tr., p.67, Ls.2-24.) Finally, at the end of the preliminary hearing, the court revisited—and punted—the co-counsel issue:

> JUDGE: I'll let you comply with discovery and . . . and take those matters up. You know Mr. Dougherty, as Mr. Payne said in his argument, and as I tried to tell you at your first appearance, I don't know what it is about the religious position that you have that prevents you from making application for an attorney. Maybe Judge Gibler will decide just to appoint a lawyer to represent you, but I'm going to let Judge Gibler . . .
>
> DOUGHERTY: So in the past . . . in other . . . in other venues . . .
>
> JUDGE: I'm just going to let Judge Gibler address those issues with you, so.
>
> DOUGHERTY: . . . in other venues they've given me co-assistance of Counsel because we need some translation between me and the Court.

[3] Mr. Dougherty was obviously in custody at the time of his preliminary hearing, as he had a motion for bond reduction pending. (*See* 8/22/14 Tr., p.1, Ls.23-25.)

> JUDGE: And maybe that's what . . . how Judge Gibler will decide to deal with it, so. We'll be in recess.

(8/22/14 Tr., p.86, Ls.1-15 (ellipses in original).) Mr. Dougherty was bound over. (8/22/14 Tr., p.78, L.16 – p.79, L.19.)

Mr. Dougherty's district court arraignment was also dominated by the counsel question. The district court started by asking Mr. Dougherty if he wanted an attorney, and Mr. Dougherty responded: "I've been asking for the assistance of counsel since the beginning." (9/12/14 Tr., p.14, Ls.9-11.) When the court sought clarification, Mr. Dougherty explained the same thing he had explained to the magistrate—that he could not have someone represent him, but that he would like "the assistance of counsel," *i.e.*, someone to help him "communicate effectively" with the court.[4] (9/12/14 Tr., p.14, L.15 – p.16, L.9.) The district court then asked him to fill out the public defender application to ensure he was indigent and could be provided assistance at county expense. (*See* 9/12/14 Tr., p.16, Ls.5-20; *see also* 9/12/14 Tr., p.24, Ls.5-24.) However, Mr. Dougherty did not fully complete the application,[5] and the arraignment ended without counsel being appointed in any capacity. (*See* 9/12/14 Tr., p.16, L.19 – p.25, L.3.)

At some point, Mr. Dougherty submitted a partially-completed financial disclosure form (*see* R., pp.29-30) and a handwritten "Motion for Court Appointed Co-Counsel or Assistance of Counsel" (*see* R., p.32).[6] Although Mr. Dougherty's financial disclosure was not complete, it

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[4] Initially, it appears the district court did not understand what Mr. Dougherty was asking for since, during a period of cross-talk, it started to warn him of the dangers of self-representation. (*See* 9/12/14 Tr., p.15, L.13 – p.16, L.9.) It appears, however, that the court quickly realized Mr. Dougherty was not seeking to represent himself. (*See* 9/12/14 Tr., p.16, Ls.5-14.)

[5] Mr. Dougherty repeatedly asserted that he needed the assistance of counsel in even completing the financial disclosure form. (*See, e.g.*, 9/12/14 Tr., p.16, Ls.21-22, p.18, Ls.9-13.)

[6] Both documents were filed on September 16, 2014. (R., pp.29-30, 32.) It is not clear if the financial disclosure form was the same one discussed at the September 12, 2014 arraignment, or if Mr. Dougherty filled out and submitted a new one.

asserted he was homeless and had no income, thereby clearly establishing he was indigent. (*See* R., pp.29-20.)

A hearing was held on Mr. Dougherty's motion a couple days later. At that hearing, the district court recognized that Mr. Dougherty's disclosures "may not be entirely up to par," but it indicated it would appoint the public defender "to assist" Mr. Dougherty "in [his] trial" (but not "represent" him). (9/19/14 Tr., p.26, L.7 – p.27, L.25.) Unfortunately, because the district court made no effort to define the parameters of counsel's appointment, it was not entirely clear whether counsel was being appointed in a hybrid (co-counsel) capacity or an advisory capacity.

Initially, William Butler was appointed to assist Mr. Dougherty. (R., p.30.) Apparently, Mr. Butler retired a short time later and Clayton Andersen became the new public defender responsible for assisting Mr. Dougherty. (*See* 7/14/15 Tr., p.40, L.25 – p.41, L.5.)

At a pretrial conference less than two months later, it became clear that Mr. Dougherty and Mr. Andersen already had a strained relationship. Mr. Dougherty was frustrated that Mr. Andersen was hard to get a hold of and had not completed certain tasks (*see* 11/14/14 Tr., p.33, L.24 – p.35, L.8), and Mr. Andersen appeared frustrated over the lack of clarity of his role, although he confirmed that he would "be here to assist" as Mr. Dougherty represented himself (11/14/14 Tr., p.33, Ls.5-20). In response, the district court told Mr. Dougherty that he had misunderstood the public defender's role in his case: "No, no, no, no. You seem to misunderstand. You did not want an attorney appointed for you. You wanted someone to sit by and be able to advise you on procedural things. And Mr. Andersen . . . indicated he's willing to do that." (11/14/14 Tr., p.35, Ls.12-18.) Subsequently, the court informed Mr. Dougherty that he was actually representing himself, and that he could not rely on Mr. Andersen as co-counsel or hybrid counsel, only as advisory counsel. (*See, e.g.*, 11/14/14 Tr., p.36, Ls.7-9 ("You're the

one who wanted to represent yourself. So make your motions, and we'll hear them."), p.36, Ls.15-19 ("You're representing yourself. And we went through this. We're not going to replow that ground now."), p.37, Ls.5-15 ("They were appointed in the capacity you requested . . . . You asked [for] somebody to sit by and be able to advise you during the trial as to objections to make, procedurally where to go. I honored your request.").) Mr. Dougherty was clearly surprised and confused by the court's position as to the role of counsel. (*See, e.g.*, 11/14/14 Tr., p.36, L.20 – p.37, L.10 ("So—so you've appointed—okay. What is going on now? So there's counsel? There's not a counsel? You're just confusing me now. . . . So—so there was something . . . something that says that was appointed, there was somebody appointed? In what capacity were they appointed . . . Co-counsel?"), p.37, L.24 – p.38, L.14 ("I have not consented to any of this at any point in this matter. . . . [W]hen we came in here, supposedly I was represented, and now, when we're leaving, I'm supposedly not. So I need time to speak with whoever it is that I have to speak with, whoever this—the interpreter or whatever it is now. I need this defined. I need you to tell me specifically what is going on here.").) No further clarification of the role of counsel was provided by the court, and Mr. Andersen stayed on in some ill-defined advisory capacity. (*See* 11/14/14 Tr., p.38, L.2 – p.41, L.14.)

As if there had not been enough confusion over the counsel issue, private counsel suddenly substituted in as counsel for Mr. Dougherty—apparently *without Mr. Dougherty's permission*. On January 5, 2015, D. Scot Nass filed a notice of substitution of counsel indicating he would be representing Mr. Dougherty. (Aug., pp.1-2.) However, as Mr. Dougherty made abundantly clear, he had never consented to Mr. Nass representing him. (1/23/15 Tr., p.43, Ls.12-15 ("I didn't—I never—I didn't know he was getting on the case."); 3/10/15 Tr., p.12, Ls.3-8 ("We had a hearing because there was an error or—on some attorney that got onto the

case that I didn't hire, that I didn't know was going to be on the case or that—you know, once he made—there was an error in some attorney making appearance on the case."), p.19, Ls.19-21 ("Mr. Nass. Never hired him. There's no—he shouldn't have been on the record. He shouldn't have [b]een trying to act for me or whatever."); 7/14/15 Tr., p.39, Ls.15-19 ("We had a hearing to clarify the error of this individual getting on the record, that he hadn't been hired . . . and that there was an error in him being—making an appearance . . . ."); 11/6/15 Tr., p.182, Ls.18-21 ("We had a problem with your court system where some other attorney jumped on without being hired, jumped on and made themselves some of attorney of record . . . .") And, as strange as it may sound, Mr. Nass's own representations to the court support Mr. Dougherty's contention that Mr. Nass entered an appearance without Mr. Dougherty's consent. Mr. Nass explained as follows:

> About the first of the year *I was contacted by Mr. Dougherty's father requesting [a] second opinion and analysis of the factual procedural background. And in order to be able to do that, I substituted in for Mr. Andersen.* And the ROA indicates that was about January 5.
>
> I was able to review the materials from the prosecutor and [Mr. Andersen's] file as well as Mr. Dougherty's file, and I met with Mr. Dougherty. I gave him [a] legal analysis. And during that conversation, then, he indicated that I probably was not the best fit for him representing him [sic] going forward. And so, therefore, he has requested that I withdraw.

(1/23/15 Tr., p.42, L.20 – p.43, L.7 (emphasis added).)

A mere 16 days after entering an appearance on Mr. Dougherty's behalf, Mr. Nass filed a motion to withdraw, citing a breakdown in the "attorney/client relationship." (R., p.43.) At the hearing on that motion, Mr. Nass gave the above-quoted explanation of how he came to "represent" Mr. Dougherty, and asked for leave to withdraw—again based on a breakdown in the relationship. (1/23/15 Tr., p.42, L.16 – p.43, L.11.) When asked if Mr. Nass' withdrawal was his wish, Mr. Dougherty responded, "Yeah. I didn't—I never—I didn't know he was getting on

the case." (1/23/15 Tr., p.43, Ls.12-15.) After hearing no objection from the State, the court granted Mr. Nass's motion, leaving Mr. Dougherty without counsel, hybrid or otherwise. (1/23/15 Tr., p.45, Ls.13-20; R., p.50.) At no point did the district court inquire as to whether Mr. Dougherty wanted to represent himself, and at no point did it caution him against the dangers of self-representation. (*See generally* 1/23/15 Tr., p.42, L.16 – p.45, L.20.) In fact, when Mr. Dougherty brought up the question of counsel going forward, the court was unwilling to address that issue, repeatedly telling Mr. Dougherty there were no issues remaining before the court and even threatening to have him jailed as he continued to try to discuss his concern. (*See* 1/23/15 Tr., p.45, L.21 – p.49, L.6.) The only thing the court would tell Mr. Dougherty was, "Obviously you had the ability to hire counsel; so that's up to you to go . . . to hire your own attorney." (1/23/15 Tr., p.48, Ls.2-5.) Of course, that was not true. As Mr. Dougherty explained, "That was somebody else trying to donate me counsel . . . ." (1/23/15 Tr., p.48, Ls.7-8.) And this explanation was supported by that of Mr. Nass, who just minutes earlier had told the court he had been engaged by Mr. Dougherty's father. (1/23/15 Tr., p.42, Ls.20-22.) Indeed, there is absolutely no evidence in the record to suggest Mr. Dougherty personally retained Mr. Nass, or that he ever had the financial ability to do so.

Approximately six weeks later, Mr. Dougherty appeared *pro se* for his originally-scheduled trial date. Early in that proceeding, Mr. Dougherty recapped for the court the recent problems concerning counsel issue,[7] and again requested the assistance of counsel. (3/10/15 Tr., p.11, L.22 – p.24, L.13.) He asserted, "I still need counsel. I still want, you know—you, I

[7] Whereas Judge Gibler had presided over the prior district court proceedings, the March trial was set before Judge Luster. Judge Luster was clearly aware of what was reflected in the court file (*see* 3/10/15 Tr., p.13, Ls.9-24), but obviously would not have known precisely what was said at the various hearings (*see, e.g.*, 3/10/15 Tr., p.17, L.2 – p.19, L.5).

still require counsel." (3/10/15 Tr., p.12, L.25 – p.13, L.1; *see also* 3/10/15 Tr., p.21, L.21 – p.22, L.4 (clarifying that he still did not seek to represented by counsel, but rather sought an opportunity to consult with counsel).) The district court denied Mr. Dougherty's request though, ruling that it was made too late, as it would delay the trial. (3/10/15 Tr., p.22, L.11 – p.23, L.3.) Ultimately though, the trial was continued anyway, as Judge Luster wound up being disqualified. (3/10/15 Tr., p.26, L.6 – p.31, L.19.)

Approximately four months later, on the day of his re-scheduled trial, Mr. Dougherty filed a written motion seeking a continuance based, in part, on the denial of his right to counsel. (R., pp.68-70.) That same day, Mr. Dougherty again appeared *pro se* for his trial.[8] At the outset of the proceeding, the district court orally denied Mr. Dougherty's motion for a continuance. (7/14/15 Tr., p.33, L.13 – p.35, L.4.) In relevant part, the court ruled that there was no Sixth Amendment violation because Mr. Dougherty had "hired his own attorney, who withdrew subsequently. . . . And Mr. Dougherty has had ample time up to this point to hire another attorney and apparently has chosen not to do so." (7/14/15 Tr., p.33, L.24 – p.34, L.9.) Thereafter, Mr. Dougherty made a lengthy record of the counsel issue (7/14/15 Tr., p.39, L.8 – p.43, L.2), during which he repeatedly reiterated his request for the assistance of counsel (*see, e.g.*, 7/14/15 Tr., p.41, Ls.14-17 ("I've been asking. I'm still asking for assistance of counsel, and I don't see how things can go—things can proceed without the assistance of counsel."), p.42, Ls.14-19 ("[F]or the record I'm asking now and previously and in the future for assistance of counsel."), p.43, Ls.14-16 ("Your Honor, I don't see how I'm going to be able to participate in

[8] At the re-set trial date, Judge Gibler again presided.

this without assistance of counsel.")). The district court was unmoved, telling Mr. Dougherty his request was made too late. (*See* 7/14/15 Tr., p.42, Ls.8-19.)[9]

At various points during the ensuing trial, Mr. Dougherty lodged his objections to the trial taking place without his having been provided with the assistance of counsel. (*See, e.g.*, 7/14/15 Tr., p.64, Ls.9-15, p.75, L.23 – p.78, L.16, p.143, L.13 – p.147, L.2, p.153, L.6 – p.154, L.13, p.166, L.24 – p.169, L.12.) Generally though, Mr. Dougherty refused to participate in the trial. (*See generally* 7/14/15 Tr., p.46, L.20 – p.171, L.11.) As a consequence, the State's evidence (summarized above) went virtually unchallenged. Ultimately, the jury came back with a guilty verdict. (7/14/15 Tr., p.170, L.18 – p.171, L.5; R., p.77.)

Fourteen days after his trial, Mr. Dougherty filed what was, in substance, a motion for a new trial, based on the violation of his Sixth Amendment rights. (*See* R., pp.81-123.) That motion argued, *inter alia*, that, because he had not knowingly, intelligently, and voluntarily chosen to represent himself, he should never have been left to fend for himself at trial. (*See* R., pp.95-103.)

At a subsequent hearing, Mr. Dougherty's motion for a new trial was tangentially discussed, although its merits were not argued. In the process of arguing at length about whether Mr. Dougherty would receive the "assistance of counsel" going forward in the post-trial proceedings,[10] the district court repeatedly hinted that it was going to grant his motion for a new

[9] All of these discussions were held in the presence of the jury panel.

[10] After Mr. Dougherty once more reiterated his request for hybrid counsel ("second chair" counsel), the court indicated it would appoint counsel, and it would be up to the appointed attorney to define the parameters of the representation. (11/6/15 Tr., p.194, L.9 – p.198, L.9; *see also* R., p.181 (order appointing counsel, Stacia Hagerty).) This arrangement was terminated by the court a few weeks later though. Ms. Hagerty had filed a motion seeking clarification from the court as to what her role was to be going forward. (*See* R., pp.182, 184-87.) When that motion came up for hearing, a bizarre exchange took place between Mr. Dougherty and the court, during which Mr. Dougherty continued to request "the assistance of counsel," *i.e.*, hybrid

trial. (*See, e.g.*, 11/6/15 Tr., p.188, Ls.23-25 ("I'm offering you counsel and that counsel can argue a motion for a new trial. And I will probably grant you a motion for a new trial."), p.193, L.20 – p.194, L.4 ("I'm trying to get him an attorney, I'm trying to get him a way to get a new trial if that's what he wants. But he's not cooperating . . . ."); *see also* 12/11/15 Tr., p.205, Ls.14-17 (the court, at a subsequent hearing, summarizing its statements at the prior hearing as follows: "I think you saw that I was doing everything I could to try and get him an attorney to help him and even stated that, if—I certainly want to hear input from the State, but that I'd be inclined, if he wanted an attorney to represent him and if he qualified, then we could—in all likelihood I'd grant him a new trial").)

No hearing was ever held on Mr. Dougherty's motion for a new trial. Rather, after the hearing at which the district court became extremely frustrated with Mr. Dougherty's requests for the "assistance of counsel," the court backtracked on its prior statements suggesting it was willing to grant a new trial, and it entered a written order denying his motion. (R., pp.194-200.) Nowhere in that order, however, did the district court address Mr. Dougherty's contention that after Mr. Nass was allowed to withdraw, he was left *pro se* without ever having knowingly, intelligently, and voluntarily waived his right to counsel. (*See* R., pp.194-200.)

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counsel, and the district court vacillated back and forth between offering a binary choice of Mr. Dougherty being represented or not represented, and offering the "assistance of counsel," as Mr. Dougherty requested. (*See* 12/11/15 Tr., p.209, L.18 – p.213, L.17.) (It appears that despite Mr. Dougherty's incessant requests for hybrid counsel, *i.e.*, "co-counsel," "second chair" counsel, and "the assistance of counsel," the district court still may not have understood what Mr. Dougherty sought, or at least what to do with that request.) At the end of that discussion, the district court became exasperated, repeatedly threatening to jail Mr. Dougherty, and relieving Ms. Hagerty with little explanation. (12/11/15 Tr., p.212, L.19 – p.213, L.15.)

Thereafter, Mr. Dougherty appeared for his sentencing hearing *pro se*.[11] He received a withheld judgment and a two-year period of probation. (2/19/16 Tr., p.247, Ls.9-14; R., pp.204-17.) Subsequently, he was found to have violated his probation and the district court imposed a sentence of five years, with two years fixed, but it also retained jurisdiction.[12] (6/8/16 Tr., p.90, Ls.8-18; R., pp.284-88.) Following a successful rider, the district court suspended Mr. Dougherty's sentence and returned him to probation, this time for a term of five years.[13] (12/21/16 Tr., p.11, Ls.3-10.)

In the meantime, Mr. Dougherty had filed a notice of appeal that was timely from the order withholding judgment. (R., pp.224-26.) On appeal, Mr. Dougherty contends the district court erred in forcing him to go to trial and sentencing *pro se*, without him having been given a *Faretta* warning or otherwise knowingly, intelligently, and voluntarily choosing to represent himself. He further contends that the district court erred in denying his motion for a new trial, which had been based, in part, on the same argument.

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[11] At the sentencing hearing, Mr. Dougherty continued to demand the assistance of counsel. (*See, e.g.*, 2/19/16 Tr., p.217, L.14 – p.218, L.4, p.219, L.19 – p.220, L.25.)

[12] During the probation violation proceedings, Mr. Dougherty continued to demand the assistance of counsel. (*See, e.g.*, 5/25/16 Tr., p.8, Ls.166-73; R., pp.253, 254.) In response, a public defender was appointed. (R., p.269.) It appears that that attorney, Jonathan Hull, saw himself as hybrid counsel, as he drafted motions that were signed by Mr. Dougherty. (*See, e.g.*, R., pp.270-71, 272-73, 274-75.) This interpretation *seems* to have been consistent with the court's understanding. (*See* 6/8/16 Tr., p.6, L.23 – p.7, L.7 ("I am requiring Mr. Hull to remain throughout the proceedings here this morning, and you can use him however you wish. It is up to you to decide whether he fully represents you in these proceedings. It's up to him whether you ask him for assistance through these proceedings. You can decide not to utilize him at all, not to talk to him at all, in which case he will still remain here in the courtroom beside you as standby counsel in case you change your mind.").) At the evidentiary hearing, Mr. Hull acted in a true hybrid capacity. (*Compare, e.g.*, 6/8/16 Tr., p.39, L.10 – p.53, L.16 (Mr. Dougherty cross-examining a State's witness himself), *with* 6/8/16 Tr., p.76, L.5 – p.77, L.7 (Mr. Dougherty relying on Mr. Hull to make a closing argument).)

[13] Mr. Dougherty had the assistance of Mr. Hull during the rider review hearing, and Mr. Hull did most of the talking. (*See generally* 12/21/16 Tr., p.3, L.1 – p.16, L.19.)

ISSUE

Did the district court violate Mr. Dougherty's Sixth Amendment right to counsel when it allowed his counsel to withdraw, leaving Mr. Dougherty unrepresented for trial and sentencing, without first administering a *Faretta* warning or otherwise ensuring that Mr. Dougherty was knowingly, intelligently, and voluntarily waiving his right to counsel and choosing to represent himself?

ARGUMENT

The District Court Violated Mr. Dougherty's Sixth Amendment Right To Counsel When It Allowed His Counsel To Withdraw, Leaving Mr. Dougherty Unrepresented For Trial And Sentencing, Without First Administering A *Faretta* Warning Or Otherwise Ensuring That Mr. Dougherty Was Knowingly, Intelligently, And Voluntarily Waiving His Right To Counsel And Choosing To Represent Himself

Under the Sixth Amendment, a criminal defendant not only has a right to the assistance of counsel, but also a right of self-representation. *Faretta v. California*, 422 U.S. 806 (1975). However, in order for a defendant to represent himself, he must first knowingly and intelligently waive the right to counsel. *Id*. at 835. He "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id*. (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

It is the State's burden to prove that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and chose to represent himself. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994); *State v. Dalrymple*, 144 Idaho 628, 633 (2007); *State v. Jackson*, 140 Idaho 636, 639 (Ct. App. 2004). If the State cannot meet its burden of showing a knowing, intelligent, and voluntary waiver of the right to counsel, the defendant's self-representation constitutes error, and that error requires automatic reversal of his conviction. *Mohawk*, 20 F.3d at 1484-85; *Jackson*, 140 Idaho at 641.

In this case, the State cannot meet its burden and, therefore, Mr. Dougherty's conviction should be vacated. Not only did the district court fail to give Mr. Dougherty a *Faretta* warning, but it failed to make even the most basic inquiry into whether Mr. Dougherty actually wished to represent himself. Indeed, the record clearly indicates he did not. At virtually every turn, Mr. Dougherty demanded the assistance of counsel.

A. The District Court Erred In Failing To Give Mr. Dougherty A *Faretta* Warning Or Otherwise Ensuring That He Was Knowingly, Intelligently, And Voluntarily Waiving His Right To Counsel And Choosing To Represent Himself

Relatively early in this case, the public defender was appointed to assist (but not represent) Mr. Dougherty. (9/19/14 Tr., p.26, L.7 – p.27, L.25; R., p.30.)[14] Thereafter, on January 5, 2015, a private attorney, Scot Nass entered an appearance on Mr. Dougherty's behalf. (Aug., pp.1-2.) Thus, rightly or wrongly,[15] Mr. Nass was Mr. Dougherty's counsel of record for a time.

A couple weeks later, when Mr. Nass moved to withdraw, Mr. Dougherty readily consented to his withdrawal (*see* 1/23/15 Tr., p.43, Ls.12-15); however, he did so without ever being told what would come next (*see generally* 1/23/15 Tr., p.42, L.1 – p.49, L.6). He was not told that he would be left completely unrepresented; he was never asked if he wanted to represent himself; and he was certainly never warned of the dangers and disadvantages of self-representation. (*See generally* 1/23/15 Tr., p.42, L.1 – p.49, L.6.) Nor did Mr. Dougherty ever express a desire to represent himself. Quite to the contrary, immediately after the district court allowed Mr. Nass to withdraw, leaving Mr. Dougherty wholly unrepresented, Mr. Dougherty spoke up, expressing his continued desire for the assistance of counsel:

> THE DEFENDANT: I still have business with the Court here. Sir?
>
> THE COURT: Okay. We'll take up State versus Lee Pullen, Case No. 15-34.
>
> THE DEFENDANT: Excuse me, Judge. I'm not finished here.
>
> THE COURT: You're finished here. There was no other motion before me. If you've got a motion you want to file, file it, and we'll take it up.

[14] As noted above, the public defender's expected role was not made entirely by the clear by the court and, thus, there some confusion as to what the public defender should have been doing in assisting Mr. Dougherty.

[15] As discussed above, every indication is that Mr. Dougherty never actually consented to Mr. Nass' representation.

THE DEFENDANT: I've been requesting counsel so I can file that. I'm obviously—

THE COURT: Obviously you had the ability to hire counsel[16]; so that's up to you to go—

THE DEFENDANT: No, actually I do not have—

THE COURT: —to hire your own attorney.

THE DEFENDANT: —the ability to [hire] counsel. That was somebody else trying to donate me counsel and then—

THE COURT: That's up—

THE DEFENDANT: —and stipulate how—

THE COURT: That's up to you, sir.

THE DEFENDANT: —stipulate how I—

THE COURT: Sir, that's up to you. You're done here today.

THE DEFENDANT: I object.

THE COURT: Fine. You object—

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[16] To the extent that the district court's assertion that Mr. Dougherty "[o]bviously … had the ability to hire counsel" could be considered a factual finding, it was clearly erroneous and should be set aside. This Court may set aside a trial court's findings of fact if they are clearly erroneous. *McCray v. Rosenkrance*, 135 Idaho 509, 513 (2001); *In re Williamson v. City of McCall*, 135 Idaho 452, 454 (2001). In deciding whether findings of fact are clearly erroneous, this Court determines whether the findings are supported by substantial, competent evidence. *In re Williamson* at 454.

Here, there was not substantial, competent evidence for the district court to conclude Mr. Dougherty was able to hire an attorney. In fact, there is absolutely *no* evidence in the record to suggest Mr. Dougherty had the means to hire counsel. The information on Mr. Dougherty's financial disclosure form indicates he was homeless and jobless and, as noted, based on that form, a public defender had previously been appointed to assist him. (*See* R., pp.29-30; 9/19/14 Tr., p.26, L.7 – p.28, L.1.) After that, the only thing that changed was that Mr. Nass, a private attorney, had entered an appearance, on Mr. Dougherty's behalf. However, there is no evidence in the record to suggest Mr. Dougherty ever paid (or intended to pay) Mr. Nass. In fact, both Mr. Dougherty and Mr. Nass indicated Mr. Nass had been engaged by a third party—Mr. Dougherty's father. (*See* 1/23/15 Tr., p.42, Ls.20-25, p.48, Ls.4-8.)

Regardless, even if Mr. Dougherty had the means to hire private counsel, he still should not have been forced to proceed *pro se* in the absence of a knowing, intelligent, and voluntary waiver of his right to counsel. *See State v. Farfan-Galvan*, 161 Idaho 610, 613-15 (2016).

THE DEFENDANT: I've been—

THE COURT: You object—

THE DEFENDANT: I've been asking for counsel—

THE COURT: You objected. You have no motion before me. You've got nothing pending before me.

THE DEFENDANT: Sir, I'm—

THE COURT: I've got—

THE DEFENDANT: I'm entitled to counsel at all parts of this.

THE COURT: You're about ten seconds away from having me have that deputy sheriff take you away.

Thank you, Mr. Nass.

THE DEFENDANT: I object.

(Proceedings concluded at 9:40 a.m.)

(1/23/15 Tr., p.47, L.16 – p.49, L.6.) Notably, Mr. Dougherty continued to express his desire for the assistance of counsel when he appeared *pro se* for: (1) his originally-scheduled trial date (*see, e.g.*, 3/10/15 Tr., p.13, L.25 – p.14, L.7 (explaining that allowing Mr. Nass to withdraw only "half fixed" the error of Mr. Nass's unauthorized appearance because the public defender was not re-appointed), p.24, Ls.21-24 (specifically requesting the assistance of counsel)); (2) his re-set trial date (*see, e.g.*, 7/14/15 Tr., p.39, L.22 – p.40, L.5 (objecting to the fact that the public defender had not been reappointed with Mr. Nass was allowed to withdraw), p.42, Ls.8-10 (specifically requesting the assistance of counsel); and (3) his sentencing hearing (*see, e.g.*, 2/19/16 Tr., p.217, Ls.14-21 (objecting to the fact that he was being denied the assistance of counsel).

Plainly, Mr. Dougherty did not choose to go to trial *pro se*; nor did he choose to forgo counsel at his sentencing hearing. At virtually every turn, he sought the "assistance of counsel,"

which he envisioned as hybrid counsel ("co-counsel"). Although such hybrid representation is fundamentally different from traditional representation by counsel, it certainly is not self-representation. *See* Colquitt, Joseph, *Hybrid Representation: Standing the Two-Sided Coin on its Edge*, 38 WAKE FOREST L. REV. 55, 59-77 (2003) (detailing the various types of representation available to criminal defendants, and making it clear that while "advisory" and "standby" counsel are modified forms of self-representation, "hybrid counsel" or "co-counsel" is a form of representation by counsel). Thus, when Mr. Dougherty requested the assistance of counsel, he cannot be deemed to have been invoking his right to self-representation. Further, even if this Court were to construe hybrid counsel as a variation of self-representation, such that Mr. Dougherty's demand for the "assistance of counsel" could be characterized as a request to represent himself, the fact is that any such requests could not be said to have been knowing, intelligent, and voluntary. He certainly did not envision his requests as a plea to go it alone at trial or sentencing. (*See, e.g.*, 7/14/15 Tr., p.43, Ls.14-16 ("Your Honor, I don't see how I'm going to be able to participate in this without the assistance of counsel.").) Mr. Dougherty was never told that his demands for hybrid counsel or co-counsel would leave him wholly unassisted at trial and/or sentencing, and he was certainly never apprised of the dangers and disadvantages of persisting with his demands. Accordingly, the district court violated his Sixth Amendment right to counsel.

Although Mr. Dougherty plainly objected to the district court compelling him to proceed to trial and sentencing *pro se*, he did not specifically invoke *Faretta*'s requirement of a knowing, intelligent, and voluntary waiver of the right to counsel which included recognition of the

dangers and disadvantages of self-representation.[17] Because Mr. Dougherty continuously objected to the district court's decision to leave him without counsel for trial or sentencing, he contends the claims made on appeal are adequately preserved. *See Ada County Highway District v. Brooke View, Inc.*, 162 Idaho 138, __, 395 P.3d 357, 361 n.2 (2017) (holding that while an appellant may not raise a new "substantive issue" on appeal, where that issue was repeatedly discussed below, it is preserved for appeal even if "specific arguments" evolve by the time of appeal). However, to the extent that this Court disagrees, he argues in the alternative that the district court's error in this case satisfies the standard for fundamental error. *See State v. Perry*, 150 Idaho 209, 228 (2010) (adopting a three-part standard for presentation of appellate claims of unpreserved error). First, the error goes to an unwaived constitutional right—Mr. Dougherty's Sixth Amendment right to counsel. Second, the error plainly exists. The Sixth Amendment violation is clear from the record for the reasons set forth above. And there was no objectively reasonable strategic or tactical reason for Mr. Dougherty not to have specifically cited the *Faretta* standard. Finally, the error was not harmless. It cannot be harmless, as the acceptance of a "waiver" of counsel that was not knowingly, intelligently, and voluntarily given is a structural error that is not subject to a harmless error analysis. *United States v. Mohawk*, 20 F.3d 1480, 1484-85 (9th Cir. 1994); *State v. Jackson*, 140 Idaho 636, 641 (Ct. App. 2004). *See also Weaver v. Massachusetts*, __ U.S. __, 137 S. Ct. 1899, 1907-08 (2017) (holding that violation of the defendant's right to self-representation is a structural error).

[17] Of course, if Mr. Dougherty, a layman acting *pro se*, would have had the legal expertise to make such a specific argument, there would be no reason for *Faretta*'s requirement that defendants be warned of the dangers and disadvantages of self-representation in the first place. Thus, it would be absurd to require *pro se* defendants to specifically cite *Faretta* in order to preserve for appeal their challenges to *Faretta* violations.

Whether the Sixth Amendment violation in this case is reviewed as preserved error or fundamental error, the result should be the same. This Court should hold that where the district court allowed Mr. Dougherty's attorney to withdraw (leaving Mr. Dougherty unrepresented for purposes of his trial and sentencing), without having first obtained a waiver of Mr. Dougherty's right to counsel, much less a knowing, intelligent, and voluntary waiver which included a warning as to the dangers and disadvantages of self-representation, it violated his Sixth Amendment right to counsel.

B. The District Court Erred In Denying Mr. Dougherty's Motion For A New Trial

Pursuant to Idaho Code section 19-2406(5) and Idaho Criminal Rule 34, a defendant may seek a new trial if the district court erred as to a decision of law during the course of the trial, so long as the motion is timely filed. Here, Mr. Dougherty filed a timely motion for a new trial, based in relevant part on the district court's legal error in failing to give him a *Faretta* warning or otherwise obtain a knowing, intelligent, and voluntary waiver of the right to counsel before forcing him to proceed to trial *pro se*. (*See* R., pp.95-103.) This is a proper basis for a new trial under section 19-2406(5).

Although the district court initially suggested it would be willing to grant Mr. Dougherty's motion for a new trial (*see* 11/6/15 Tr., p.188, Ls.23-25, p.193, L.20 – p.194, L.4; 12/11/15 Tr., p.205, Ls.14-17), after becoming frustrated with him at an intervening hearing (*see* 12/11/15 Tr., p.210, L.17 – p.213, L.15), the court denied his motion without a hearing on the merits (*see* R., pp.194-200). The district court's order, however, failed to directly address the contention relevant to this appeal—whether it had previously erred in failing to give Mr. Dougherty a *Faretta* warning or otherwise obtaining a knowing, intelligent, and voluntary

waiver of his right to counsel before forcing him to go to trial *pro se*. (*See generally* R., pp.194-200.)

Because the district court denied his motion *in toto*, Mr. Dougherty contends it implicitly rejected his contention that it had previously erred in forcing him to go to trial *pro se* without having given him a *Faretta* warning or otherwise obtaining a knowing, intelligent, and voluntary waiver of the right to counsel. Assuming that to be the case, Mr. Dougherty contends the district court erred for the very same reasons that are detailed in Section A, above (which are incorporated herein by this reference).

Alternatively though, to the extent that this Court determines the district court's order denying Mr. Dougherty's motion for a new trial failed to decide the critical issue, he asks that this Court remand the case to the district court for a ruling on this issue.

CONCLUSION

For the reasons set forth above, Mr. Dougherty respectfully requests that this Court vacate his conviction and remand his case to the district court for a new trial.

DATED this 5th day of October, 2017.

_____/s/_____
ERIK R. LEHTINEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of October, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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ERL/eas