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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43583**
Plaintiff-Respondent,	)	
	)	**Benewah County Case No.**
v.	)	**CR-2014-956**
	)	
WILLIAM PATRICK DOUGHERTY, III,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

William Patrick Dougherty appeals from his conviction for felony eluding.

Statement Of The Facts And Course Of The Proceedings

The state charged Dougherty with felony eluding. (R., vol. I, pp. 24-25.) At Dougherty's arraignment the court asked if he "want[ed] an attorney." (9/12/14 Tr., p. 14, L. 9.) Dougherty responded by stating he wanted "the assistance of counsel" but "can't have someone re-present" him. (9/12/14 Tr., p. 14, L. 10 – p. 15, L. 2 (hyphen original, as apparently Dougherty continually stated "re-present" instead of "represent" (11/14/14 Tr., p. 33, Ls. 10-14)).) When asked directly, "Do you want an attorney or not," Dougherty replied, "It's not possible for me to accept an attorney. I can't accept a benefit." (9/12/14 Tr., p. 15, Ls. 12-14.) When the court began advising him on the perils of self-representation, Dougherty stated a desire to "clarify" what he wanted: "I am asking you to provide assistance of counsel. I'm not—I cannot have an attorney re-present me or give power of attorney over to some other individual. I'm not allowed to do that." (9/12/14 Tr., p. 15, L. 15 – p. 16, L. 9.) The court then told Dougherty to "fill out a financial statement and see if you qualify." (9/12/14 Tr., p. 16, Ls. 10-14.)

The district court subsequently granted Dougherty's request for limited appointment of counsel. (R., vol. I, pp. 29-30, 32, 36; 9/19/14 Tr., p. 26, Ls. 13-16.) When the public defender thereafter represented that he had not understood Dougherty wanted only the limited representation of counsel being available to assist Dougherty in representing himself (11/14/14 Tr., p. 33, Ls. 5-23), the court stated that counsel was appointed, pursuant to Dougherty's request, to "sit by and be available to advise

[Dougherty] during the trial as to objections to make, procedurally where to go" (11/14/14 Tr., p. 36, L. 15 – p. 37, L. 15). However, the court repeatedly stated that Dougherty was representing himself. (11/14/14 Tr., p. 35, Ls. 10-18; p. 36, Ls. 7-19; p. 38, Ls. 15-24.) When stand-by counsel asked if he would be served with filings, Dougherty indicated he wanted documents sent directly to him. (11/14/14 Tr., p. 39, L. 21 – p. 40, L. 9.)

Subsequently, private counsel appeared on Dougherty's behalf. (Aug., pp. 1-2.) Counsel shortly thereafter filed a motion to withdraw (R., vol. I, p. 43), which the district court granted (R., vol. I, pp. 46-47, 50).

The case proceeded to the scheduled trial date before a new judge, where Dougherty proceeded without counsel. (R., vol. I, pp. 55-57; 3/10/15 Tr., p. 7, Ls. 6-13.) Dougherty pointed out he had "been without counsel" since private counsel withdrew. (3/10/15 Tr., p. 13, L. 25 – p. 14, L. 7.) The district court (after concluding that a ruling on an uncontested matter would not bar a motion to disqualify him) ultimately denied appointment of counsel, and the attendant continuance of the trial, "at least for the purposes of today." (3/10/15 Tr., p. 21, L. 21 – p. 23, L. 3.) The trial judge, who was making his first appearance in court and was not listed on the earlier notice as a possible judge in the case, granted Dougherty's motion to disqualify him without cause. (R., vol. I, p. 58; 3/10/15 Tr., p. 29, L. 16 – p. 31, L. 19.) The judge informed Dougherty that trial would be rescheduled and if he had "motions that need to be addressed" he needed to "set them up in a timely course." (3/10/15 Tr., p. 31, Ls. 20-25.)

The matter proceeded to trial again four months later, on July 14, 2015. (7/14/15 Tr., p. 33, Ls. 6-10.) At the beginning of the trial proceedings the court addressed a motion to continue filed by Dougherty that morning. (R., vol. I, pp. 68-70; 7/14/15 Tr., p. 33, Ls.

13-15.) One of the grounds for the motion to continue addressed by the district court was a claim of denial of counsel. (R., vol. I, p. 69; 7/14/15 Tr., p. 33, L. 24 – p. 34, L. 1.) The district court rejected that claim. (7/14/15 Tr., p. 34, Ls. 1-9.) The trial proceeded and the jury found Dougherty guilty of felony eluding. (R., vol. I, p. 77.)

Two weeks after the conclusion of the trial Dougherty filed, along with another motion and a premature notice of appeal, a motion for acquittal based in part on an allegation that he had not been provided *Faretta*[1] warnings. (R., vol. I, pp. 81-123; see also pp. 124-67, 170-71.) With the *pro se* motion he filed a "Petition for Finding of Indigency, Appointment of Assistance of Counsel and Payment of Appeals Fees." (R., vol. I, pp. 168-69.) The motions were not scheduled for hearing, but the district court took them up at the scheduled sentencing. (11/6/15 Tr., p. 175, Ls. 5-17.) In relation to appointment of counsel, the district court instructed Dougherty to fill out the request for counsel form. (11/6/15 Tr., p. 175, L. 18 – p. 176, L. 1.) Dougherty refused. (11/6/15 Tr., p. 176, L. 2 – p. 178, L. 9.) When asked, "Do you want an attorney or don't you?" Dougherty responded, "I do not want someone to represent me" but he did "want assistance of counsel." (11/6/15 Tr., p. 179, L. 22 – p. 180, L. 16.) The court eventually appointed counsel and set over the sentencing. (R., vol. I, p. 181; 11/6/15 Tr., p. 194, L. 9 – p. 196, L. 5; p. 198, Ls. 4-9.)

Appointed counsel filed a motion to clarify the scope of appointment. (R., vol. I, p. 182-87.) The district court inquired as to what Dougherty wanted from counsel, and counsel represented that she did not know, and it was likely Dougherty did not know either. (12/11/15 Tr., p. 208, L. 24 – p. 210, L. 3.) Dougherty continued refusing to answer whether he wanted counsel, insisting that the assistance of counsel did not mean being

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

represented by counsel, and being represented by counsel was "a completely separate right to assistance of counsel." (12/11/15 Tr., p. 210, L. 17 – p. 212, L. 25.) The district court relieved the public defender from representing Dougherty because "he obviously doesn't want you." (12/11/15 Tr., p. 213, Ls. 12-14.)

The district court later took up Dougherty's *pro se* motions and denied them. (R., vol. I, pp. 194-99; vol. II, p. 200.) The district court set forth a thorough recitation of the proceedings. (R., vol. I, pp. 194-97.) The district court concluded that Dougherty was not entitled to hybrid representation as requested. (R., vol. I, pp. 197-98.) The district court further concluded that Dougherty's request for counsel on the day of trial was a dilatory tactic. (R., vol. II, p. 200.)

The district court entered an order withholding judgment and placing Dougherty on probation. (R., vol. II, pp. 205-17.) Dougherty filed a timely *pro se* notice of appeal. (R., vol. II, pp. 224-26.)

ISSUE

Dougherty states the issues on appeal as:

> 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?

(Appellant's brief, p. 13.)

The state rephrases the issue as:

Has Dougherty failed to show error in the district court's decision to proceed to trial where Dougherty made no efforts to replace private counsel but instead merely tried to postpone the trial for dilatory purposes?

ARGUMENT

Dougherty Has Failed To Show Error In The District Court's Decision To Proceed To Trial Where Dougherty Made No Efforts To Replace Private Counsel But Instead Merely Tried To Postpone The Trial For Dilatory Purposes

A. Introduction

The district court concluded that Dougherty's request for counsel on the first day of trial was a "dilatory tactic" because Dougherty had "known about the trial date for months and had made no effort to request counsel." (R., vol. II, p. 200.) Dougherty argues that the district court erred because he asserted at various points the right to hybrid representation and because he was not adequately advised of the perils of self-representation. (Appellant's brief, pp. 15-21.) Dougherty's claims fail.

B. Standard Of Review

The appellate court examines the "totality of the circumstances in determining the validity of a defendant's waiver of counsel." State v. Anderson, 144 Idaho 743, 746, 170 P.3d 886, 889 (2007).

C. The Record Supports The District Court's Determination That Dougherty's Day-Of-Trial Request For Counsel Was For Dilatory Purposes

The Sixth Amendment guarantees a criminal defendant the right to counsel during all "critical stages" of the adversarial proceedings against him. Estrada v. State, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006) (citing United States v. Wade, 388 U.S. 218, 224 (1967); State v. Ruth, 102 Idaho 638, 637 P.2d 415 (1981)). A criminal defendant also has a constitutional right of self-representation that derives from the Sixth Amendment. Faretta v. California, 422 U.S. 806, 818 (1975). To validly waive the right to counsel and invoke the right to self-representation the defendant must make a knowing, voluntary and

intelligent waiver. State v. Dalrymple, 144 Idaho 628, 633-634, 167 P.3d 765, 770-771 (2007) (citing State v. Lovelace, 140 Idaho 53, 64, 90 P.3d 278, 289 (2003)). See also Adams v. U.S. ex rel. McCann, 317 U.S. 269, 279 (1942) (Defendant "may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open").

The State bears the burden of proving that the defendant voluntarily waived his Sixth Amendment rights. Dalrymple, 144 Idaho at 633-634, 167 P.3d at 770-771. See also Brewer v. Williams, 430 U.S. 387, 404 (1977) (it is "incumbent upon the State to prove an intentional relinquishment or abandonment of a known right or privilege" (internal quotation and citation omitted)). When determining whether a waiver of the right to counsel was valid, the court examines the totality of the circumstances. Anderson, 144 Idaho at 746, 170 P.3d at 889; see also Lovelace, 140 Idaho at 64, 90 P.3d at 289; State v. King, 131 Idaho 374, 376, 957 P.2d 352, 354 (Ct. App. 1998). Determination of whether a waiver was valid is not limited to a review of the hearing at which the waiver was made: "[t]he particular moment of the waiver is not the only consideration; rather, the record as a whole is considered." Anderson, 144 Idaho at 746-747, 170 P.3d at 889-890; see also Dalrymple, 144 Idaho at 634, 167 P.3d at 771 ("While contemporaneous *Faretta* warnings are perhaps the most prudent means to ensure the defendant's grasp of the disadvantages of self-representation, we look to the record as a whole to determine if [appellant] knowingly, intelligently, and voluntarily waived his constitutional right." (citation omitted)). Therefore, there is no stand-alone right to a *Faretta* hearing. Rather, the purpose of a *Faretta* hearing is to determine whether a defendant's waiver of his Sixth Amendment right to counsel was made knowingly and intelligently. See Faretta, 422 U.S. at 835-836.

Finally, a defendant has no constitutional right to hybrid representation. McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) (judge not required to permit "hybrid" representation); State v. Averett, 142 Idaho 879, 886, 136 P.3d 350, 357 (Ct. App. 2006) (appointment of stand-by counsel "not a matter of constitutional right"). Indeed, "excessive involvement" of stand-by counsel may "erode the dignitary values that the right to self-representation is intended to promote and may undercut the defendant's presentation to the jury of his most effective defense." Wiggins, 465 U.S. at 181.

The record amply supports the district court's conclusion that Dougherty's morning-of-trial request for counsel was merely dilatory. As Dougherty made clear early and often, he did not want to be represented by counsel, for religious and other reasons, and wanted counsel only for limited purposes such as acting in a stand-by capacity as a court "interpreter" who understands judicial "customs" such as "how to file." (8/11/14 Tr., p. 9, L. 1 – p. 13, L. 2.) He was told at his initial appearance that if he wished counsel appointed for him he should fill out and submit the application. (8/11/14 Tr., p. 12, Ls. 21-25.) He later filed *pro se* a motion to reduce bond (R., vol. I, p. 16), but did not submit an application for the public defender (8/22/14 Tr., p. 1, Ls. 8-25). At his arraignment Dougherty continued to assert that he not be appointed counsel to represent him, but that he wanted an attorney as an "interpreter" of "legal English." (9/12/14 Tr., p. 14, L. 5 – p. 20, L. 4.) At this hearing he also refused to plead or provide a mailing address for service of legal documents such as discovery. (9/12/14 Tr., p. 19, L. 1 – p. 22, L. 23.) The court again informed Dougherty that if he wished appointment of counsel he could apply for the public defender. (9/12/14 Tr., p. 24, Ls. 5-24.)

A few days later Dougherty filed a motion for appointment of counsel and submitted an application for the public defender as "co-counsel" and, despite its defects (he refused to provide much of the information requested on "5th Amendment" grounds), the district court appointed the public defender to provide advice. (R., vol. I, pp. 29-32; 9/19/14 Tr., p. 26, L. 7 – p. 28, L. 25.) At the pre-trial conference, in response to inquiries from the defense, the court made clear that Dougherty, by his own request, was representing himself and that counsel was appointed only in the limited capacity of advising him regarding procedure. (11/14/14 Tr., p. 33, Ls. 4-23; p. 35, Ls. 12-18; p. 36, L. 7 – p. 37, L. 15.)

After that, private counsel made an appearance on Dougherty's behalf, but quickly moved to withdraw. (Aug., pp. 1-2; R., vol. I, p. 43.) Private counsel represented that he had been contacted by Dougherty's father, talked with Dougherty, gave Dougherty "legal analysis," but concluded he "probably was not the best fit for him representing him going forward." (1/23/15 Tr., p. 42, L. 15 – p. 43, L. 6.) He was moving to withdraw on Dougherty's request. (1/23/15 Tr., p. 43, Ls. 6-8.) He also represented that the motion to withdraw had "nothing to do with money. This is not a fees issue. This is a breakdown in the attorney/client communication between Mr. Dougherty and I [sic]." (1/23/15 Tr., p. 43, Ls. 8-11.) The district court granted the motion. (1/23/15 Tr., p. 45, Ls. 13-18; R., vol. I, p. 50.) Dougherty then asserted he was "trying to find a counsel that doesn't have a conflict" and that neither private counsel nor the public defender would file his motions. (1/23/15 Tr., p. 46, L. 1 - p. 47, L. 1.) The district court explained that the public defender did not currently represent Dougherty, and that if he wanted any motion considered he should file it and the court would take it up. (1/23/15 Tr., p. 47, Ls. 2-24.) Dougherty

stated he had “been requesting counsel so that [he] can file that.” (1/23/15 Tr., p. 47, L. 25 – p. 48, L. 1.) The district court responded that Dougherty obviously “had the ability to hire counsel” and terminated the hearing because there was “no motion before me.” (1/23/15 Tr., p. 48, Ls. 2-22.)

As noted in greater detail above, the third trial setting[2] was vacated when Dougherty moved to disqualify the district judge without cause. (3/10/15 Tr., p. 7, L. 6 – p. 32, L. 7.) The court informed Dougherty that he was not represented by counsel at that time. (3/10/15 Tr., p. 21, L. 21 – p. 22, L. 23.) The district court also instructed Dougherty that if he had motions that needed to be addressed he needed to “set them up in a timely course.” (R., vol. I, p. 58; 3/10/15 Tr., p. 31, Ls. 20-25.)

On the morning of the rescheduled trial, Dougherty moved to postpone the trial. (R., vol. I, pp. 68-70.) The grounds for the motion were claims that he had not been informed of the charges against him, that he had been denied the constitutional right to counsel, and that he had been denied the right to a speedy trial. (R., vol. I, pp. 69-70.) The district court denied the motion, rejecting each asserted basis. (7/14/15 Tr., p. 33, L. 13 – p. 35, L. 4.) In relation to the claim of denial of counsel the district court stated:

> The second ground is he states he’s been denied assistance of counsel in violation of the Constitution. However, reviewing the file, the public defender was appointed to assist him with the trial. The defendant then hired his own attorney, who withdrew subsequently. He stated—the attorney stated that, when he withdrew, it was not for financial reasons. That’s been several months ago. And Mr. Dougherty has had ample time up to this point to hire another attorney and apparently has chosen not to do so. And so that does not provide a basis.

[2] The first trial setting was postponed at Dougherty’s request. (11/14/14 Tr., p. 38, L. 4 – p. 39, L. 20.) The second trial setting was postponed at the state’s request based on the withdrawal of private counsel. (R., vol. I, p. 52; Aug., pp. 3-4.)

(7/14/15 Tr., p. 33, L. 24 – p. 34, L. 9.[3])

Dougherty also made clear he did not wish to be represented by counsel in relation to his post-trial motions. The district court appointed counsel to represent him on these motions (R., vol. I, p. 181), but the district court released the public defender when Dougherty made it clear he did not want counsel to represent him (R., vol. I, pp. 182-88, 197; 12/11/15 Tr., p. 202, L. 10 – p. 214, L. 14.)

This record shows that Dougherty repeatedly made clear that he had no desire to be represented by counsel. Rather, he wanted counsel in some sort of stand-by or hybrid capacity. However, he had no such constitutional right. Averett, 142 Idaho at 886, 136 P.3d at 357. After withdrawal of private counsel Dougherty was twice informed by the court that he was not represented by counsel, but that he could file any motions he wished. Despite this, Dougherty filed no motion or other request for counsel, but instead waited until the day of trial and moved for a continuance because he did not have an attorney. Dougherty's attempt to invoke his constitutional right to counsel on the morning of the trial[4] was rightly found by the district court to be disingenuous and dilatory.

[3] Dougherty challenges the district court's findings, pointing to evidence in the record that he had not hired private counsel, but that private counsel had been funded by his father. (Appellant's brief, p. 16, n. 16.) However, even assuming the record shows it was Dougherty's father who provided the funds to hire private counsel, Dougherty never establishes the relevance of that fact. The record shows that the "money" to pay counsel's "fees" was not an "issue." (1/23/15 Tr., p. 43, Ls. 3-11.) It also establishes that Dougherty was able to pay a $25,000 cash bond. (R., vol. I, p. 1.) That a family member was willing to pay for an attorney supports the district court's determination that the lack of an attorney at the trial was the result of Dougherty's knowing choice and dilatory tactics.

[4] Because of his assertion that the right to assistance of counsel is different from being represented by counsel, Dougherty's motion can be interpreted as yet another request for a form of hybrid representation. (Compare 12/11/15 Tr., p. 209, Ls. 6-15; p. 210, L. 20 – p. 212, L. 25 with R., vol. I, p. 69.)

On appeal Dougherty argues he did not knowingly, intelligently or voluntarily waive the right to counsel. (Appellant's brief, pp. 14-21.) Specifically, he asserts the record shows he was not given *Faretta* warnings and that he did not "actually wish[] to represent himself." (Appellant's brief, p. 14.) This argument does not withstand scrutiny.

As to the claim that he did not receive adequate *Faretta* warnings, this claim fails as a matter of law. The Supreme Court of the United States has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." Iowa v. Tovar, 541 U.S. 77, 88 (2004). Rather, the "information a defendant must possess in order to make an intelligent election … will depend on a range of case-specific factors." Id. "[T]he decision to waive need not itself be counseled." Montejo v. Louisiana, 556 U.S. 778, 786 (2009). Generally an accused who has been provided the warnings required by Miranda v. Arizona, 384 U.S. 436, 479 (1966), "has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." Patterson v. Illinois, 487 U.S. 285, 296 (1988). See also Montejo, 556 U.S. at 786 (waiver of *Miranda* rights "typically does the trick" under the Sixth Amendment, "even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment" (emphasis original)).

When Dougherty stated it was "not possible for [him] to accept an attorney" the district court specifically asked Dougherty if he understood "the pitfalls of proceeding on your own" and explained that "there are certain problems" in self-representation, including the possibility of making "procedural mistakes" that one trained in the law could avoid, but Dougherty insisted that he "cannot have an attorney re-present me or give power of attorney over to some other individual." (9/12/14 Tr., p. 15, L. 12 – p. 16, L. 9.)

This colloquy, in combination with the other times the issue of counsel was addressed as set forth above in detail, demonstrates that Dougherty clearly understood he had the right to counsel and the consequences of a choice to not be represented by counsel. Dougherty understood and repeatedly explained that he did not want his attorney making decisions about what defense he wished to pursue. This desire was perfectly consistent with the underlying rationale for the right to self-representation. As stated by the Supreme Court of the United States, because counsel has "the power to make binding decisions of trial strategy in many areas," the "defense presented is not the defense guaranteed [a defendant] by the Constitution" unless he has consented to "accept counsel as his representative." Faretta, 422 U.S. at 820-21. Dougherty repeatedly and emphatically made known that he did not desire to be represented by counsel because to do so would be to relinquish control over his defense. (8/11/14 Tr., p. 9, L. 1 – p. 13, L. 2; 9/12/14 Tr., p. 14, L. 5 – p. 20, L. 4; 11/14/14 Tr., p. 33, Ls. 4-23; p. 35, Ls. 12-18; p. 36, L. 7 – p. 37, L. 15. See also R., vol. II, p. 254.[5]) Dougherty's repeated statements that he did not wish to be represented by counsel, and expressed reason that his desire was based on an unwillingness to give up control of his own defense, demonstrate that he knowingly and intelligently waived the right to representation by counsel.

Dougherty's second argument, that he made clear he did not want to represent himself, also fails. Dougherty very clearly expressed his waiver of his right to representation as provided by the Sixth Amendment, and requested only a form of hybrid

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[5] Although filed after trial, this motion for counsel succinctly states Dougherty's desire, consistent with what he requested throughout the proceedings, for counsel who would be engaged only in a capacity of Dougherty's "choosing" and would not take any action without "express written permission" (spelling and capitalization corrected).

representation that is not a right under the Sixth Amendment (or from any other source of rights). See Wiggins, 465 U.S. at 183 (judge not required to permit "hybrid" representation); Averett, 142 Idaho at 886, 136 P.3d at 357 (appointment of stand-by counsel "not a matter of constitutional right"). Dougherty's clear expression that he did not want to be represented by counsel, but that he wanted counsel in some form of hybrid or stand-by fashion, was a waiver of the right to representation as provided by the Sixth Amendment.[6]

Dougherty also argues that because he never requested to "go it alone," and was never told he would have to do so, his waiver was not knowing and intelligent. (Appellant's brief, p. 18.) This argument is refuted by the record.

Immediately after private counsel withdrew at Dougherty's request, Dougherty explained that he had been "trying to find a counsel that doesn't have a conflict" and informed the court that he had been having trouble communicating with his public defender. (1/23/15 Tr., p. 46, Ls. 4-11.) The district court informed Dougherty that the public defender was "no longer [his] attorney." (1/23/15 Tr., p. 46, Ls. 12-13; see also p. 47, L. 2 ("He no longer represents you—").) Dougherty responded, "I know." (1/23/15 Tr., p. 46, Ls. 12-13.) The court concluded by telling Dougherty that if he had a motion he wished to file, "file it, and we'll take it up." (1/23/15 Tr., p. 47, Ls. 23-24.)

Dougherty did not file any motions prior to the trial date 46 days later. (See generally R., vol. I, pp. 46-55.) As set forth above in greater detail, on this trial date the judge disqualified himself and set the trial over. Notably, however, prior to his

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[6] Dougherty does not claim any abuse of discretion short of denying the Sixth Amendment right. (See Appellant's brief.)

disqualification, the trial judge discussed the issue of counsel extensively with Dougherty, culminating with a denial of a request for counsel to assist Dougherty in a hybrid capacity "at least for the purposes of today." (3/10/15 Tr., p. 17, L. 17 – p. 23, L. 3.) After the judge disqualified himself the judge informed Dougherty that if he had "motions that need to be addressed" he needed to "set them up in a timely course." (3/10/15 Tr., p. 31, Ls. 20-25.)

Despite a demonstrated capacity to file his own motions, including motions for counsel (e.g., R., vol. I, p. 32), Dougherty waited until the next scheduled trial date, four months later, to file a motion to postpone because he did not have counsel (R., vol. I, pp. 68-70). In the almost six months after withdrawal of private counsel and the jury trial Dougherty was repeatedly informed he was without counsel and that if he wanted counsel he should make a motion. His argument that he did not know he would not have counsel until the morning of trial is without support in the record. To the contrary, the judge's conclusion that Dougherty's efforts to delay the trial to secure some form of assistance of counsel was merely dilatory is amply supported in the record.

The record establishes that Dougherty repeatedly and emphatically stated that he would not be represented by counsel. The record also shows that this decision was a knowing and intelligent decision to not relinquish control of his defense. He did request hybrid representation, but he had no Sixth Amendment right to appointment of counsel on a stand-by or advisory basis. Moreover, he was repeatedly told after private counsel withdrew but before trial that no attorney had been appointed to assist him, yet waited almost six months to request counsel, on the morning of trial, for dilatory reasons.

Dougherty has failed to show on this record that he was denied his Sixth Amendment right to counsel.

CONCLUSION

The state respectfully requests this Court to affirm Dougherty's judgment of conviction.

DATED this 21st day of November, 2017.

_/s/ Kenneth K. Jorgensen_____________
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of November, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

ERIK R. LEHTINEN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

_/s/ Kenneth K. Jorgensen______________
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd