

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO.: 14-1249

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER KELLEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI - JEFFERSON CITY,
No. 2:12-CR-04043-BP-1

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. **THIS COURT MUST REVERSE FOR A NEW TRIAL BECAUSE MR. KELLEY’S REQUEST TO PROCEED PRO SE WAS UNEQUIVOCAL AND THE DISTRICT COURT DENIED HIS REQUEST WITHOUT EXPLANATION AND WITHOUT CONDUCTING A *FARETTA* INQUIRY.**

The Government argues the district court properly denied Mr. Kelley’s request for self-representation because it was: (1) equivocal; (2) untimely; and (3) “clearly designed to manipulate the court into appointing substitute counsel and granting a continuance of his trial date.” (Gov’t Brief at 31).

The Government’s argument fails because the record refutes the Government’s claim that Mr. Kelley’s request to proceed *pro se* was equivocal. The Government confuses an *equivocal* request for self-representation with a *conditional* request for self-representation. Mr. Kelley’s request was conditional. It was not equivocal. The law is well-settled in this Circuit and across the nation that if a defendant clearly and unequivocally invokes his Sixth Amendment right to self-representation, a *Faretta* hearing must follow to assess whether the defendant’s choice is knowing and voluntary.

The Government does not dispute that the district court denied Mr. Kelley’s request without explanation and without conducting a *Faretta* inquiry. Instead, the Government argues that the district court properly denied Mr. Kelley’s request for self-representation based on factual findings the district court never made. The

district court never found that Mr. Kelley's request was untimely, or merely an attempt to manipulate the proceedings. As a court of review, this Court should not make factual findings which were not resolved below. Had the district court properly acknowledged Mr. Kelley's request, found that it was untimely or disingenuous, and explained how these findings trumped Mr. Kelley's Sixth Amendment right to self-representation, this might be a closer case. But the district court did not make those findings and this Court should not entertain the Government's attempt to explain what the district court did not.

A. MR. KELLEY'S REQUEST WAS CONDITIONAL, NOT EQUIVOCAL

The Government's primary defense to Mr. Kelley's first argument is that his request to represent himself was equivocal, and thus properly denied by the district court. The Government offers two reasons to support its argument that Mr. Kelley's request was equivocal: (1) it was an alternative request to Mr. Kelley's request for substitution of counsel and (2) it was coupled with a request for a continuance. (Gov't Brief at 36-37).

Neither reason indicates equivocation. Mr. Kelley's request was indeed conditional, but it was not equivocal. In *Hamilton v. Groose*, 28 F.3d 859, 862 (8th Cir. 1994), this Court recognized that it "is true that a defendant may make a conditional waiver of his right to counsel" as long as the waiver is unequivocal. The *Hamilton* court relied on the Ninth Circuit's decision in *Adams v. Carroll*, 875

F.2d 1441 (9th Cir. 1989), which rejected precisely the argument the Government makes in this appeal.

In *Adams*, a state defendant requested the appointment of a different public defender. *Adams*, 875 F.2d at 1442. He argued that he did not trust his current public defender and accused him of incompetent representation. *Id.* The defendant stated: “If I can’t have another lawyer...I will have to go pro per.” *Id.* The state trial court found that the defendant had not shown cause for substitution, but allowed the defendant to proceed *pro se*. *Id.*

After representing himself for six weeks, the defendant ultimately requested the appointment of any public defender other than the one previously appointed to him. *Id.* He claimed he never wanted to proceed *pro se* given that he was not a lawyer and had a ninth-grade education, and only requested leave to proceed *pro se* because of his disdain for his previous public defender. *Id.* He also informed the state trial court he had filed a malpractice action against his previously appointed attorney. *Id.* The state court granted his request for appointment of counsel and reappointed the Public Defender’s office. *Id.*

When the Public Defender’s office assigned the defendant his previous attorney, he immediately filed several requests to represent himself once again. *Id.* at 1444. In his requests, the defendant made clear that “he did not consider himself competent to proceed without counsel,” but would rather do so than be represented

by this particular attorney. *Id.* The state court denied his request to proceed *pro se*, because the basis for the defendant's request for reappointment of counsel was that he was not able to represent himself adequately. *Id.* The case proceeded to trial and the defendant was found guilty on all counts.

The defendant filed a habeas petition in federal district court and the magistrate recommended granting his petition on the basis that the state court denied the defendant his right to self-representation. *Id.* The district court rejected the magistrate's recommendation, finding that because the defendant asked to proceed *pro se*, requested the appointment of counsel, and asked to proceed *pro se* a second time, his request was equivocal. *Id.* Moreover, the district court found that because the defendant only requested to proceed *pro se* as a means of dispensing with his attorney, "his request for self-representation was in fact a thinly veiled motion to substitute counsel," and not a genuine request for self-representation. *Id.*

The defendant appealed and the question before the Ninth Circuit was whether a defendant's request to proceed without counsel is unequivocal if he invokes the right solely as an alternative to the appointment of a particular defense attorney. *Id.* at 1442. The Ninth Circuit answered in the affirmative and reversed the district court. *Id.* at 1445. The Ninth Circuit explained:

The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a

defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation. A defendant who vacillates at trial between wishing to be represented by counsel and wishing to represent himself could place the trial court in a difficult position: If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim he had been denied the right to counsel. The requirement of unequivocalness resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel.

Id. at 1444 (internal citations omitted). Because the defendant in *Adams* was clear that he wanted to “represent himself if the only alternative was representation” by court-appointed counsel, the fact that his request for self-representation was “sandwiched around a request for counsel” was “not evidence of vacillation.” *Id.* at 1444-1445. According to the Ninth Circuit, while the defendant’s “requests no doubt were *conditional*, they were not equivocal.” *Id.* (Emphasis in original).

The same is true of Mr. Kelley’s request for self-representation. The Government attempts to portray Mr. Kelley’s request to proceed *pro se* as an alternative to Attorney Stabenow’s representation as “vacillation” that put the trial court in the “difficult position” the *Adams* court described. (Gov’t Brief at 35).

Mr. Kelley did not vacillate and his request did not put the district court in a difficult position. For five months, and in numerous pleadings and proceedings, Mr. Kelley practically begged Magistrate Whitworth for substitute counsel.

Regardless of the legitimacy of his gripes regarding Attorney Stabenow, Mr. Kelley was nothing if not consistent. On the first day of trial - which was Mr. Kelley's first appearance before Judge Phillips - he made a final plea for substitution, hoping Judge Phillips would see what Magistrate Whitworth had not. In the event she did not, Mr. Kelley made clear orally, and in writing, that he wanted to proceed *pro se*, and wanted a continuance to prepare.

To wit, *after* the district court denied his request for substitution, Mr. Kelley asked to represent himself at trial: "Since you won't provide substitution, I would like to move for the court to allow me to represent myself, contingent upon getting a continuance for me to review the evidence and prepare." (DCD 71 at 8). The district court denied Mr. Kelley's request for a continuance and stated: "Now, knowing that I'm not going to grant a continuance, is it your wish that you proceed *pro se* and without Mr. Stabenow representing you?" (DCD 71 at 9).

This portion of the district court's colloquy with Mr. Kelley is fatal to the Government's argument that Mr. Kelley's request was equivocal. Rather, it shows that the trial court understood Mr. Kelley was requesting self-representation as an alternative to Mr. Stabenow's representation. It also shows that the district court understood his request was conditioned on a request for a continuance.

However, before Mr. Kelley could respond to the district court's question regarding his desire to proceed *pro se* in light of the district court's indication that

it would not grant a continuance, the proceedings were interrupted by Mr. Kelley's girlfriend, who asked whether the district court had read Mr. Kelley's written motion for substitution. (DCD 71 at 9). The district court realized it had not read the motion and halted the proceedings "to take a break to read this document." (DCD 71 at 10).

In the "Remedies Requested" portion of that document, Mr. Kelley stated: "If the court denies substitution, I move for the court to allow me to represent myself with the understanding that I am forced to exercise a choice between incompetent or unprepared counsel and appearing *pro se*." (DCD 56 at 2). Mr. Kelley's written motion alerted the district court, for a second time, that if the district court denied his substitution request, he wanted to represent himself. Mr. Kelley did not vacillate. He made a conditional request to proceed *pro se* if the district court denied his request to substitute Attorney Stabenow. That the request was conditioned on substitution of counsel does not render it unclear or equivocal¹.

¹ The Third Circuit put it best: "[A]lmost all requests for pro se representation will arise from dissatisfaction with trial counsel. It is the rare defendant who will ask to proceed pro se even though he/she is thoroughly delighted with counsel's representation, ability, and preparation. Thus, that a defendant wishes to proceed without representation because s/he is dissatisfied with that representation is not usually relevant to whether that defendant's request is clear and unequivocal." *Alongi v. Ricci*, 367 Fed.Appx. 341, 346–47 (3d Cir.2010) (per curiam) (unpublished) (citations and internal quotation marks omitted) (cited approvingly in *Batchelor v. Cain*, 682 F.3d 400, 408 (5th Cir. 2012)).

Mr. Kelley's request satisfies this Court's "reasonable person" test for determining whether a defendant clearly and unequivocally invoked his right to self-representation, which requires a defendant to "do no more than state his request [to proceed *pro se*], either orally or in writing, unambiguously to the court so that no reasonable person can say the request was not made." *Reese v. Nix*, 942 F.2d 1276, 1281 (8th Cir. 1991) (quoting *Dorman v. Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1986)).

When Judge Phillips returned to the courtroom, she denied the motion without explaining why Mr. Kelley was not permitted to represent himself and without conducting a *Faretta* inquiry. This is reversible error under *Faretta* and should end the inquiry. *See Bilauski v. Steele*, 13-2210, 2014 WL 2524736 (8th Cir. 2014) ("*Faretta* requires that a defendant assert his right to self-representation clearly and unequivocally. If the request is clear and unequivocal, a *Faretta* hearing must follow..." (Emphasis added) (Internal citations omitted)).

B. THE DISTRICT COURT NEVER FOUND MR. KELLEY'S REQUEST WAS UNTIMELY OR A TACTIC TO MANIPULATE THE PROCEEDINGS

The Government does not, and cannot, dispute that the district court never explained its basis for denying Mr. Kelley's request to proceed *pro se* without a *Faretta* hearing. As a result, the Government is forced to speculate as to the district court's reasoning, and scour the record for facts the district court might

have used to find that Mr. Kelley's request was untimely or manipulative. But the district court never made these findings.

This Court is precluded from affirming based on findings never made by the district court. Appellate courts, by their very nature, are courts of review, and finding facts on conflicting evidence does not comport with the appellate function. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952) (“Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded.”) (quoting *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930)); *Hall v. State*, 427 So.2d 957, 960, n. 3 (Miss.1983) (“We emphasize that we are not here making findings of fact on conflicting evidence. Appellate courts do not do this.”). Even if this Court were to accept the Government's invitation to notice findings never made by the district court, the Government's arguments are unavailing.

First, the Government argues the denial was proper because it was untimely. The problem for the Government is that the district court specifically asked Mr. Kelley: “Now, knowing that I'm not going to grant a continuance, is it your wish that you proceed *pro se* and without Mr. Stabenow representing you?” That question would have been wholly unnecessary if the district court found the request was untimely.

The district court never said, “I am rejecting your request because it is untimely.” Instead, just minutes prior to its ultimate denial of the request, the district court indicated that proceeding *pro se* without a continuance was a viable option for Mr. Kelley. Granted, that invitation was quickly rescinded without explanation, but in the absence of any finding regarding timeliness, the Government’s argument falls flat. This Court should not affirm the district court’s denial of Mr. Kelley’s request for self-representation on the basis that it was untimely, because the record indicates the district court did not consider Mr. Kelley’s request untimely.

Likewise, the district court never found that Mr. Kelley’s request was “a pretext to manipulate the court into appointing substitute counsel and gain a continuance date.” (Gov’t Brief at 36). And such a finding would have been nonsensical. Mr. Kelley’s request was not pretextual and he was not trying to “manipulate” anything. Mr. Kelley wanted substitute counsel and asked the court for it directly. He also wanted a continuance to prepare himself for trial. Above all, however, as is abundantly clear from the record, he did not want Mr. Stabenow as his attorney.

In *Adams*, the Ninth Circuit rejected the district court’s finding that the “request for self-representation was in fact a thinly veiled motion to substitute counsel,” rather than a genuine request for self-representation. The district court’s

rationale in *Adams* is the Government's here. Since the request in *Adams* mirrors the request here, this Court should reject it. Finally, the Government's theory that Mr. Kelley's request was disingenuous is seriously undermined by Mr. Kelley's post-trial discharge of Attorney Stabenow, after which he proceeded *pro se* until he retained a private attorney for sentencing.

II. EVEN IF THIS COURT FINDS MR. KELLEY'S CONCERNS REGARDING ATTORNEY STABENOW WERE UNFOUNDED, ATTORNEY STABENOW'S RESPONSES EVINced A CONFLICT OF INTEREST WHICH WARRANTED SUBSTITUTION OF COUNSEL.

In his Initial Brief, Mr. Kelley argued the district court erred when it denied Mr. Kelley's repeated requests to substitute counsel because "the nature of Mr. Kelley's accusations, coupled with Attorney Stabenow's responses to those allegations, *created a conflict of interest which warranted substitution of counsel.*" (Initial Brief at 32) (emphasis added). As authority, Mr. Kelley relied on *Lopez v. Scully*, 58 F. 3d 38 (2d Cir. 1995) and *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991), which held that justifiable dissatisfaction includes "a *conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.*" (Emphasis added). (Initial Brief at 1, 29-37).

The Government fails to address these cases. Rather, the Government spends the majority of its brief explaining that Mr. Kelley's dissatisfaction was

unjustified because Attorney Stabenow communicated with Mr. Kelley adequately, and that any breakdown in communication was Mr. Kelley's fault. (Gov't Brief at 14-26). The Government argues this Court's decisions in *United States v. Taylor*, 652 F.3d 905 (8th Cir. 2011) and *United States v. Exxon*, 328 F.3d 456 (8th Cir. 2003), control this case. (Gov't Brief at 21-23). Not so.

Those cases hold that a defendant who refuses to communicate with appointed counsel in a "stonewalling effort" cannot later claim his dissatisfaction with counsel is justified due to a lack of communication. But Mr. Kelley never argued in his Initial Brief that his dissatisfaction with Attorney Stabenow was justified because of a lack of communication. Nor could he. The record is clear that Attorney Stabenow and Mr. Kelley communicated frequently. Mr. Kelley's dissatisfaction was justifiable because his allegations regarding Attorney Stabenow, coupled with Attorney Stabenow's reactions to those allegations, established that their loyalties were divided and they had a conflict of interest.

Because the majority of the Government's argument is non-responsive on this issue, for the most part, Mr. Kelley stands on his Initial Brief. However, to rebut Mr. Kelley's claim that Attorney Stabenow's conduct evinced a conflict of interest the Government does provide a fleeting response which merits a brief response. (Gov't Brief at 26-27). The Government asserts that Mr. Kelley's conflict of interest is "without basis," but the only fact the Government recognizes

as potentially evincing a conflict of interest is Attorney Stabenow's accusation that Mr. Kelley misrepresented their email communications. The Government's response is unpersuasive because it ignores crucial facts rather than dealing with them head-on.

For instance, for no apparent reason, Attorney Stabenow offered his unsolicited opinion to Magistrate Whitworth that Mr. Kelley was guilty, even though Mr. Kelley maintained his innocence. (DCD 84 at p. 34). This was no trivial matter. Magistrate Whitworth adopted Attorney Stabenow's belief regarding Mr. Kelley's guilt and based his decision that Attorney Stabenow's decision to reject Mr. Kelley's requests for further evidentiary testing was sound strategy because further testing would only reveal evidence which would prove Mr. Kelley's guilt. (DCD 84 at 10, 17).

The Government also attempts to undermine Mr. Kelley's conflict of interest argument by asserting that "Kelley's suggestion in his brief that counsel's trial strategy might have been affected by Kelley's accusations that counsel was deficient is completely baseless." (Gov't Brief at 27). However, the Government never disputes Mr. Kelley's argument that he need not show prejudice if his requests for substitution were improvidently denied because the erroneous deprivation of a defendant's right to counsel is a structural constitutional error not subject to harmless error review. (Initial Brief at 30-31, 37). As a result, even if

this Court agrees that Attorney Stabenow's trial performance was not affected by Mr. Kelley's accusations, it should still reverse for a new trial if it finds Mr. Kelley was entitled to substitute counsel *at the time of his pretrial requests*.

He was. Mr. Kelley repeatedly alleged ineffective assistance of counsel against Attorney Stabenow. Attorney Stabenow responded vociferously to each allegation, accused Mr. Kelley of lying and misrepresenting their communications, and continually threatened waiver of the attorney-client privilege if Mr. Kelley persisted with his allegations. Although Mr. Kelley maintained his innocence, Attorney Stabenow volunteered to the district court his belief that Mr. Kelley was guilty. The nature of Mr. Kelley's accusations against Attorney Stabenow and Attorney Stabenow's responses to those accusations evince a conflict of interest. The conflict of interest warranted a substitution of counsel. The district court abused its discretion by denying Mr. Kelley's repeated requests for substitution.

CONCLUSION

Based upon the foregoing arguments and legal authority, Defendant-Appellant, CHRISTOPHER KELLEY, respectfully requests that this Honorable Court vacate the judgment and sentence and remand for a new trial.

DATED this 24th day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on June 24, 2014, which will furnish a copy to all parties to this litigation.

/s/ Michael M. Brownlee
Michael M. Brownlee

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,248 words. I FURTHER CERTIFY that, pursuant to Eighth Circuit Rule 28A(h)(2), the Opening Brief and addendum have been scanned for viruses and that the brief is virus-free.

s/ Michael M. Brownlee
Michael M. Brownlee