

I contend that since the Supreme Court has not had an opportunity to rule on these issues so that I may exhaust all State Court avenues before seeking federal habeas review, I now resubmit the unexhausted issues.

A. Issues Presented For Review

1. Whether the trial court erred in failing to substitute counsel based on whether an irreconcilable conflict existed.
2. Whether the Court abused its discretion in not granting a continuance before the jury was impaneled when I requested that I be allowed to proceed pro se due to counsels failure to inform me on important aspects of my case, and failed to present evidence and witnesses that I had identified as crucial to my case.

Argument I.

I contend that the Court should allow me to reargue my issues because in the past two decades, the United States Supreme Court with the recent concurrence of Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, has erected elaborate procedural obstacles to federal habeas corpus review.

Most particularly, the Court and Congress have replaced the deliberate bypass rules of *Fay v. Noia*, 372 U.S. 391(1963), for legal claims and *Townsend v. Sain*, 372 U.S. 293(1968) for evidence supporting those claims with a more restrictive procedural default doctrine barring claims not "properly" raised in State Court's specifically as federal constitutional claims. See e.g., *Bloyer v. Peters*, 5 F.3d 1093(7th Cir. 1993).

Additionally, in section 2254(b) Congress has clearly stated its intent and policy objectives, in the interest of comity,

that Appellant Vu must first present all federal constitutional claims to the State Court and wait their review by the State highest Court in that State. See e.g., *Rose v. Lundy*, 455 U.S. 509, 515(1982).

Argument II.

In determining whether a trial court erred in failing to substitute counsel based on whether an irreconcilable conflict exist, the Court must first determine (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the request. See *U.S. V. Moore*, 159 F.3d 1154, 1158-59, n.3(9th Cir. 1998).

1. The extent of the conflict.

In the instant case, the trial court did not inquire carefully into the extent of the conflict that led to a breakdown of the relationship between my attorney and me from irreconcilable differences, and the refusal to substitute counsel, or allow me to proceed pro se with standby counsel or grant a continuance so that I could have prepared a defense, denied me my Sixth Amendment right to effective assistance of counsel, right to self representation and my 5th Amendment right to Due Process.

2. The adequacy of the inquiry.

Before a Court can engage in a measured exercise of discretion, it must first conduct an inquiry adequate to create a significant basis for reaching an informed decision. See e.g., *D'Amore*, 56 F.3d 1202, 1205(9th Cir. 1995), *U.S. v. Gonzales*, 113 F.3d 1026, 1029(9th Cir. 1997).

The problem faced by a defendant who has an irreconcilable conflict and distrusts his attorney is solved by the trial

courts inquiry into the defendants subjective reasons for his conflict and his distrust. See U.S. v. McKenna, 327 F.3d 830(9th Cir. 2003).

A penetrating and comprehensive examination by the trial court would have served as a basis of whether different counsel needed to be appointed or standby counsel, or a continuance was needed to prepare myself to proceed pro se. See State v. Lopez, 79 Wn.App. 756-758(1997), Gonzales, 113 F.3d at 1205.

I adamantly contend that this inquiry was extremely important, where I went to trial with an attorney whom I had no faith in, would not communicate with, and the relationship was full of quarrels, and I was stuck with a choice of either continuing with appointed counsel or appearing unprepared to proceed pro se. See e.g., State v. Staten, 60 Wn.App. 163, rev. den. 117 Wn.2d 1011(1991).

3. Timeliness of request.

In D'Anore, 56 F.3d at 1206, the Ninth Circuit Court of Appeals, in evaluating the timeliness of a request for substitution of counsel determined "that it was timely even on the eve of the hearing." See also Moore, 159 F.3d 1154(9th Cir. 1998), U.S. v. Wadworth, 830 F.2d 1500(9th Cir. 1987).

So I strongly contend, that I was well within my rights when I requested substitution of counsel or standby counsel, or a continuance to properly prepare myself.

Argument III.

In Avila v. Roe, 298 F.3d 750(9th Cir. 2002), the Court of Appeals for the Ninth Circuit, in a unanimous decision had a case factually similar as mine, where appellee Avila moved to substitute counsel on the day of trial but prior to jury

selection, on the ground that counsel was dilatory in pursuing Avila's case.

The trial Court interpreted Avila's statements as a Faretta request but denied the request as untimely.

The trial Court reasoned that the jury "is waiting to come in, and....I'm not going to delay the trial." The trial proceeded on schedule and Avila was convicted.

Avila then appealed through the state courts arguing that the trial court erred in denying his Faretta request and argued that the request was not made for the purpose of delay.

The state appellate courts concluded that Avila's request for self representation was untimely and therefore it was properly denied by the trial court.

Avila filed a petition for writ of habeas corpus, and the U.S. District Court granted Avila's habeas petition and the state timely filed a notice of appeal.

The Ninth Circuit Court of Appeals, held in a unanimous decision that "the Sixth Amendment to the United States constitution guarantees a criminal defendant the right to self representation." *Faretta*, 422 U.S. at 819-820, 95 S.Ct. at 819820, 95 S.Ct. 2525.

Determining that a Faretta request is timely if made before the jury impanelment, "unless it is shown be a tactic to secure "delay." *Fritz v. Spalding*, 682 F.2d 782, 784(9th Cir. 1982), *Moore v Calderon*, 108 F.3d 261, 264(9th Cir. 1997).

Here as in Avila, Appellant's request to proceed pro se was not made for the purpose to delaying the proceedings.

And I also contend that the trial court erred when it failed to examine the irreconcilable difference that existed and failed

to examine on the record the effect if any, that any delay would have had on the proceedings if I would have been given time to prepare my defense pro se.

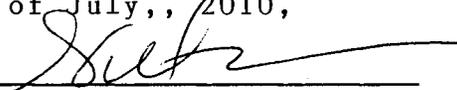
Therefore I adamantly contend that this Court should consider the persuasive reasoning applied in Avila, and also determine as the Ninth Circuit Court of Appeals, that my Sixth Amendment rights to self representation were violated and grant me a new trial and or an evidentiary hearing where I can introduce substantial material evidence to show that my request was not made for the purpose of delay.

Conclusion

Wherefore, the Appellant Viet Vu, humbly and respectfully request that this Court grants my statement of additional grounds on the merits and or in the alternative to remand to the Superior Court for resentencing or a reference hearing so that I may develop the record and place material evidence to the Court showing that my Faretta request was not made as a delaying tactic.

Dated this 20 day of July,, 2010,

Respectfully Submitted



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