



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KILI MAYFIELD)	
)	
Defendant-Below,)	
Appellant,)	
)	
v.)	No. 493, 2019
)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff-Below,)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE’S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Wilmington Police Department (“WPD”) detectives arrested Kili Mayfield (“Mayfield”) in July, 2018, for a series of forcible rapes committed upon three different women in the city of Wilmington.¹ On July 30, 2018, a New Castle County grand jury returned an indictment which joined the charges against Mayfield,² and, on April 15, 2019, a New Castle County grand jury returned a superseding indictment charging Mayfield with four counts of Rape First Degree, five counts of Rape Second Degree, and one count each of Kidnapping First Degree, Strangulation, and Assault Third Degree.³

The Office of Defense Services appointed counsel to represent Mayfield and, on November 5, 2018, counsel requested discovery on Mayfield’s behalf.⁴ A Superior Court judge was specially assigned to Mayfield’s case.⁵ On November 15,

¹ A1 at DI 1; A22 at DI 2; A39 at DI 2. Mayfield’s crimes against each of the three women are assigned separate case identification numbers, and the dockets for each case are included in Mayfield’s Appendix at A1-20 (Case No. 1806010081); A21-38 (Case No. 1807016528); and A39-56 (Case No. 1807016545).

² A1 at DI 2; A22 at DI 1; A39 at DI 1. Mayfield’s charges were joined at indictment and remained joined through all subsequent Superior Court proceedings, and the docket entries for each case is identical following indictment. In presenting the procedural history of Mayfield’s case, the State refers to the docket entries in Case No. 1806010081 (A1-20).

³ A10 at DI 47; A57-61.

⁴ A3 at DI 11.

⁵ A2 at DI 6.

2018, the assigned judge established deadlines for the exchange of material pre-trial and set jury selection to begin on July 2, 2019 and trial to begin on July 8, 2019.⁶

In December of 2018, Mayfield attempted to communicate directly with the Superior Court but the court forwarded his correspondence to his counsel.⁷ On January 11, 2019, Mayfield filed a Motion to Proceed Pro Se.⁸ Mayfield's appointed counsel and the State informed the trial court of their concerns with Mayfield's self-representation.⁹ Mayfield responded by asserting his understanding of his election and continued desire to proceed *pro se*.¹⁰

The Superior Court held a hearing to address Mayfield's motion on February 4, 2019.¹¹ Acknowledging the concerns expressed by the State and by his appointed counsel, Mayfield unequivocally informed the court, "I wish to proceed pro se."¹² The Superior Court then engaged in a thorough colloquy with Mayfield which included a "searching inquiry to ensure [he] is fully advised of the dangers of self-representation."¹³ Recognizing that "[t]he right to represent oneself in a criminal

⁶ A3 at DI 9; A4 at DI 12.

⁷ A4-5 at DI 13, 14, 15, 17.

⁸ A5 at DI 21.

⁹ A6 at DI 26, 27; A73; A75.

¹⁰ A6 at DI 23; A76-77.

¹¹ A6-7 at DI 28; A78-113.

¹² A81.

¹³ A99.

proceeding is a fundamental right that is protected by the Sixth Amendment, the United States Constitution and by the Delaware Constitution[,]”¹⁴ and that “the [c]ourt is not permitted to substitute its own judgment as to what is best for any criminal defendant regarding his wish to proceed *pro se*[,]”¹⁵ the Superior Court granted Mayfield’s motion and ordered previously appointed counsel to serve in the limited capacity of Mayfield’s standby counsel.¹⁶

On February 21, 2019, Mayfield moved to dismiss all indicted charges.¹⁷ The Superior Court denied this motion on February 27, 2019, explaining that “[t]here is no mechanism for the court to grant dismissal of a criminal case upon a defendant’s pre-trial claim of insufficiency of evidence.”¹⁸ On March 11, 2019, Mayfield filed a motion to suppress evidence¹⁹ and a motion for production of discovery²⁰ which were denied during a status conference on April 5, 2019.²¹ In addition to the April 5, 2019, status conference, the Superior Court convened an in-person status

¹⁴ A98-99.

¹⁵ A102.

¹⁶ A6 at DI 27; A103.

¹⁷ A7 at DI 31.

¹⁸ A8 at DI 34.

¹⁹ A9 at DI 36.

²⁰ A9 at DI 42.

²¹ A9-10 at DI 43, 44.

conference with Mayfield on May 31, 2019.²² Between April 24, 2019 and June 17, 2019, Mayfield filed additional motions to suppress and responded to the State’s request for a protective order.²³ The Superior Court convened the parties for a hearing on Mayfield’s motions on June 17, 2019, and denied his evidentiary motions.²⁴ Mayfield, with the approval of the court and the consent of the State, waived trial by jury.²⁵

On July 8, 2019, the date previously established for the commencement of his jury trial, Mayfield, for the first time, asked the court, “is it too late to seek legal – my family was inquiring – was talking with three attorneys to take over my trial. Is it too late for that to happen?”²⁶ Standby counsel confirmed that Mayfield’s girlfriend consulted with an attorney who would enter his appearance upon payment of a retainer and rescheduling of Mayfield’s case.²⁷ Commenting that “once waived, the Sixth Amendment right to counsel is no longer absolute[,]”²⁸ the Superior Court assessed the facts, circumstances, and record in Mayfield’s case against extant

²² A12 at DI 60.

²³ A10 at DI 49; A11 at DI 53; A12 at DI 59.

²⁴ A14 at DI 70; A14-15 at DI 74.

²⁵ A14 at DI 71, 72.

²⁶ A147.

²⁷ A151.

²⁸ A187.

caselaw and denied Mayfield's requests for a continuance and for the appointment of counsel.²⁹

Mayfield's non-jury trial commenced on July 9, 2019.³⁰ On July 16, 2019, the Superior Court judge found Mayfield guilty of all charges, ordered a presentence investigation, and scheduled sentencing to be held in November of 2019.³¹ On November 7, 2019, the Superior Court judge sentenced Mayfield to life imprisonment and an aggregate of 127 years of incarceration followed by descending levels of supervision.³²

Mayfield filed a timely notice of appeal and an Opening Brief. This is the State's Answering Brief.

²⁹ A192.

³⁰ A16 at DI 82.

³¹ A17 at DI 86.

³² Op. Brf. Ex. A.

SUMMARY OF THE ARGUMENT

- I. Appellant's Argument I is denied. The Superior Court did not abuse its discretion when it denied Mayfield's eve of trial request for counsel. Months prior to trial, Mayfield elected to represent himself and the Superior Court engaged in a searching inquiry, concluded his election was knowing, intelligent, and voluntary, and permitted him to proceed *pro se*. Thereafter, for nearly six months, Mayfield vigorously and professionally represented himself. Then, the day before trial, Mayfield requested counsel and a continuance of trial to permit counsel to prepare. The Superior Court, applying a framework adopted by federal and state courts across the country, assessed and denied Mayfield's request.

STATEMENT OF FACTS

On July 22, 2010,³³ October 17, 2014,³⁴ and April 15, 2017,³⁵ Mayfield raped three different women in the City of Wilmington. WPD investigations, through the collection and comparison of DNA evidence, witness interviews, and other evidence, established Mayfield as the perpetrator each of these rapes.

July 22, 2010

After enjoying a night out with a friend, S.S. decided to walk to another friend's house about five or ten minutes away from her home.³⁶ As she began walking, she asked a man for a ride.³⁷ The man, a "brown skinned" "big kind of guy" agreed to give her a ride in his car.³⁸ He directed her down an alleyway toward where he said his car was parked, and she soon "realized that something didn't seem right."³⁹ He then grabbed her arm and pulled her into the alleyway.⁴⁰

After pulling her into the alley, he "took [her] clothes off and started having

³³ A208.

³⁴ A250.

³⁵ A281.

³⁶ A298-299.

³⁷ A299.

³⁸ A299.

³⁹ A299.

⁴⁰ A299.

sex with [her].”⁴¹ At no time did S.S. consent to this sexual encounter; she was scared, “[h]e was too big,” and she could not get away.⁴² The man placed his penis in her vagina, then moved her to a chair where he “put his penis in [her] anal part,” then he put “his penis in [her] mouth.”⁴³ “Once he got tired or got up, [S.S.] put [her] clothes back on” and they walked out of the alley.⁴⁴ He then tried to give S.S. money, but she refused.⁴⁵

S.S. tried to flag down a passing car for assistance, then “just ran to the [Wilmington] hospital.”⁴⁶ and “told them at the desk that [she] just got done being raped.”⁴⁷ WPD Officer Joseph Lucyk⁴⁸ responded to the Wilmington Hospital to investigate S.S.’s rape.⁴⁹ S.S. provided Officer Lucyk with a description of her assailant, and drove with Officer Lucyk to identify the location where the crime

⁴¹ A299.

⁴² A300.

⁴³ A301.

⁴⁴ A301.

⁴⁵ A301.

⁴⁶ A301.

⁴⁷ A301.

⁴⁸ Officer Lucyk worked for WPD from September 2008 through September 2014. A207. He has been employed by the Delaware State Police since September 2014 and was so employed when he testified in 2019. A207.

⁴⁹ A208.

occurred.⁵⁰ Officer Lucyk then “transported [S.S.] to Christiana Hospital for a SANE examination.”⁵¹

Christine Parks, an emergency nurse with specialized training as a forensic nurse examiner (“FNE”) and sexual assault nurse examiner (“SANE”),⁵² examined S.S. at the Christiana Hospital.⁵³ S.S. informed Parks of the nature and extent of the sexual assault inflicted upon her.⁵⁴ Parks then swabbed areas of S.S.’s body for possible DNA and sealed the swabs in an evidence kit.⁵⁵ Parks documented and photographed S.S.’s injuries, including tenderness to her back, abrasions to her arm, and injuries to her vagina.⁵⁶

Melissa Newell, a DNA analyst employed by the Delaware Division of Forensic Science (“DFS”),⁵⁷ analyzed the swabs Parks acquired from S.S.’s body during her SANE exam.⁵⁸ In June of 2011, from the swabbing of S.S.’s labia-majora,

⁵⁰ A208.

⁵¹ A209.

⁵² A221-222.

⁵³ A222.

⁵⁴ A223.

⁵⁵ A224.

⁵⁶ A225.

⁵⁷ A227-228.

⁵⁸ A231.

Newell generated a DNA profile for a male contributor;⁵⁹ however, Newell did not have a known sample for comparison.⁶⁰ The generated profile remained available for future searching and comparison.⁶¹ In 2015, Jamie Armstrong, DFS CODIS administrator and lab manager,⁶² compared Mayfield's DNA profile to the profile generated by Newell in 2011 and found Mayfield to be a contributor to S.S.'s labia-majora swabbing.⁶³

October 17, 2014

On October 17, 2014, WPD Officer Nicholas Kroll responded to a 911 report of a woman screaming in an alley.⁶⁴ Unable to immediately locate the screaming individual, he "rolled [his] windows down so he could observe the sound," and after circling the block twice "was able to locate the sound of the screams."⁶⁵ In an alleyway running between Friend Court and West Third Street, Officer Kroll saw "two white legs sticking up in the air and a black male facing towards [him], obviously involved in sexual intercourse."⁶⁶ Officer Kroll illuminated the alleyway

⁵⁹ A231-232.

⁶⁰ A232.

⁶¹ A232.

⁶² A233.

⁶³ A236-237.

⁶⁴ A246.

⁶⁵ A247.

⁶⁶ A247.

causing the man to jump up and flee.⁶⁷ Officer Kroll exited his police car and ran after the “stocky black male” hurdling the woman and other items in the alleyway as he gave chase.⁶⁸ The rapist escaped that night.⁶⁹

WPD Officer James Wiggins and his partner arrived at the alleyway adjacent to Friend Court just after Officer Kroll.⁷⁰ As Officer Wiggins ran after Officer Kroll, he too ran down the alley and passed the woman and saw “a jacket – some clothes on the floor, on the ground.”⁷¹ Failing to catch the suspect, Officer Wiggins returned to the alley where he found R.S. visibly shaking and upset.⁷² Officer Wiggins described R.S. as crying, having “a scratch on her face,” and being “bruised up pretty good.”⁷³ R.S. told Officer Wiggins, “I was raped.”⁷⁴ An ambulance then transported R.S. to the hospital.⁷⁵

Officer Wiggins reconnected with R.S. at the hospital where she described her rape to him:

⁶⁷ A248.

⁶⁸ A248.

⁶⁹ A248.

⁷⁰ A250.

⁷¹ A251.

⁷² A251.

⁷³ A251.

⁷⁴ A255.

⁷⁵ A251.

She said she was offering – she offered to give somebody a blow job for a monetary exchange. She started to do it, and she stopped it and asked for her money. And she said that the suspect then pulled her down to the ground and put her head to the ground and began to rape her. She started screaming and she said, I’ll do anything you want me to do, just don’t hurt me anymore. And the police came and interrupted the – I guess right as he was – I’m trying to use the right words – inserting, I guess, began to rape her, the police came and interrupted, and he ran.⁷⁶

Beth Miller, FNE and SANE, examined R.S. at the Christiana Hospital on October 17, 2014.⁷⁷ R.S. informed Miller that her rapist told her “I’m going to choke you,” then “pushed [her] head on the ground.”⁷⁸ Miller then swabbed R.S. for possible DNA.⁷⁹ Subsequent analysis of the swabs was inconclusive.⁸⁰

In the alley where R.S. was raped, WPD Evidence Detective James Houck recovered a “gray-in-color Free Country jacket, size double XL” on the ground⁸¹ and found a Samsung cellphone and some money in the jacket’s front left chest pocket.⁸² Lauren Rothwell, a DNA analyst for DFS, analyzed a blood stain from the interior of the jacket and found it “produced a single-source DNA profile matching the

⁷⁶ A259.

⁷⁷ A267.

⁷⁸ A271.

⁷⁹ A272.

⁸⁰ A280.

⁸¹ A262

⁸² A264.

known DNA profile of Kili Mayfield.”⁸³ WPD Detective William Ball, “one of the few individuals [in his agency] that has taken the class to forensically download cellphones”⁸⁴ extracted data from the cellular phone found in the jacket pocket and produced a report detailing the phone’s contents.⁸⁵ The report documented messages from “Kili” to others, an outgoing e-mail address of “Kili.Mayfield@yahoo.com,” and photographic images of Mayfield.⁸⁶

April 15, 2017

On April 14, 2017, C.C. spent the evening hanging out with her boyfriend and her cousin at her cousin’s house.⁸⁷ Around midnight, after getting into an argument with her boyfriend, she left to walk to her daughter’s house.⁸⁸ As she was walking, a man approached her in a “darkish color”, “[f]our-door, older car” and offered her a ride, which she accepted.⁸⁹ C.C. entered the car and, after informing the driver that she had a boyfriend, “his whole demeanor changed.”⁹⁰ C.C. then tried to get out of

⁸³ A294.

⁸⁴ A326.

⁸⁵ A327.

⁸⁶ A328-329.

⁸⁷ A305.

⁸⁸ A306.

⁸⁹ A306.

⁹⁰ A306.

the car but “he hit [her] in the head and [her] head hit the console.”⁹¹ The next thing she remembered is “waking up to him pulling [her] out of the car by [her] feet.”⁹² C.C. tried to hold “onto the steering wheel and kicking and screaming and pleading why are you doing this to me.”⁹³ The man dragged her out of the car, got her on her knees, then ordered her to “suck [his] thing.”⁹⁴ Continuing to resist, C.C. “proceed[ed] to chew it, bite it, whatever was necessary.”⁹⁵ He then grabbed her neck, put his hands around her throat, and “that’s all [she] remember[ed] from there.”⁹⁶ C.C. explained that she “did not give [Mayfield] permission to sexually assault [her] or to abuse [her]. That’s the bottom line.”⁹⁷

When C.C. regained consciousness, she put her pants and shoes on and “stumbled to the Chase [Building]” where, dazed, she told the security guard that she was assaulted.⁹⁸ At about 5:00 a.m. on April 15, 2017, WPD Officer Molly McNulty “responded to the Chase Center at Fourth and King . . . [f]or a possible

⁹¹ A306-307.

⁹² A307.

⁹³ A307.

⁹⁴ A308.

⁹⁵ A308.

⁹⁶ A308.

⁹⁷ A314.

⁹⁸ A308.

sexual assault.”⁹⁹ Officer McNulty found C.C. in the building’s front vestibule where it “appeared that [C.C.] was involved in some type of assault. The right side of her face was extremely swollen under her jaw area, and she had a contusion to her forehead. She was shaking and crying. She was kind of, like, curled up in the corner.”¹⁰⁰ C.C. “had a lot of trouble talking because her jaw was so swollen.”¹⁰¹ C.C. explained that her attacker forced her to perform oral sex, physically assaulted her, then “ripped off her pants” and “proceeded to sexually penetrate [her] vaginally with his penis twice.”¹⁰² C.C. provided Officer McNulty a description of her rapist – a black male, 50 to 55 years old – and disclosed a “partial tag number of 210” for the vehicle he was driving.¹⁰³

C.C. went to the hospital by ambulance.¹⁰⁴ Amy Hensel, FNE and SANE,¹⁰⁵ examined C.C. at the Christiana Hospital on April 15, 2017.¹⁰⁶ C.C. provided Hensel a description of her rape and of her attacker.¹⁰⁷ Hensel observed injury, including

⁹⁹ A282.

¹⁰⁰ A283.

¹⁰¹ A283.

¹⁰² A283.

¹⁰³ A283.

¹⁰⁴ A283-284.

¹⁰⁵ A285.

¹⁰⁶ A285.

¹⁰⁷ A286.

redness and swelling, to C.C.'s genital area,¹⁰⁸ and swelling and abrasions on her head, neck, back, and chest,¹⁰⁹ and recorded C.C.'s voice to document the strangulation injury to her trachea.¹¹⁰ Hensel then took swabs from different locations on C.C.'s body "to collect for potential DNA."¹¹¹

In July of 2017, DFS DNA analyst Lauren Rothwell compared swabs taken by Hensel to Mayfield's known DNA profile.¹¹² A sperm fraction from a rectal swab taken from C.C. produced a DNA profile consistent with Mayfield's profile "and provided a statistic that show[ed] the probability of selecting an unrelated individual with the same DNA profile would be one in 789,300,000."¹¹³ WPD Detective Sarah Bozeman's investigation found that a 2013 blue, four-door Ford Fusion bearing license plate number 210626 was registered to Mayfield.¹¹⁴

¹⁰⁸ A287.

¹⁰⁹ A288-289.

¹¹⁰ A290.

¹¹¹ A287.

¹¹² A295.

¹¹³ A296.

¹¹⁴ A323.

I. THE SUPERIOR COURT DID NOT ERR BY DENYING MAYFIELD’S EVE OF TRIAL REQUEST FOR COUNSEL AFTER MAYFIELD HAD PREVIOUSLY WAIVED HIS RIGHT TO COUNSEL.

Question Presented

Whether the Superior Court abused its discretion by denying Mayfield’s eve of trial request for counsel after Mayfield had previously waived his right to counsel.

Standard and Scope of Review

This Court generally reviews “issues of a constitutional dimension *de novo*,”¹¹⁵ and “questions arising from a defendant’s Sixth Amendment absolute right to professional legal counsel receive plenary review.”¹¹⁶ But, when the right to counsel has been waived, it is within the discretion of the trial court to consider a defendant’s post-waiver request for counsel.¹¹⁷

Merits of the Argument

Mayfield argues that the Superior Court “erred when it denied [him], a *pro se* defendant, any appointed counsel to represent him after he unequivocally reasserted

¹¹⁵ *Williams v. State*, 56 A.3d 1053, 1055 (Del. 2012) (citing *Hartman v. State*, 918 A.2d 1138, 1140 (Del. 2007); *Zuppo v. State*, 807 A.2d 545, 547 (Del. 2002); *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996)).

¹¹⁶ *United States v. Leveto*, 540 F.2d 200, 207 (3d Cir. 2008) (internal citation omitted).

¹¹⁷ *Id.* (noting “wide agreement that, once waived, the Sixth Amendment right to counsel is no longer absolute” and the “broad consensus of other courts that the consideration of a defendant’s post-waiver request for counsel is well within the discretion of the [trial] court.”) (internal citations omitted).

his right to counsel prior to jeopardy attaching.”¹¹⁸ But, Mayfield recognizes that “the issue of whether the [Superior Court] must appoint counsel when a *pro se* defendant, who previously waived his right to counsel pre-trial, unambiguously requests appointed counsel has never been reviewed in Delaware.”¹¹⁹

Mayfield contends that, because the Sixth Amendment right to counsel is a fundamental right, a trial court must provide counsel to a defendant who previously waived this right regardless of the timing of the request or of the impact of the request on the court or the parties.¹²⁰ But, his unwavering proposition fails to account for a defendant’s equally fundamental right to self-representation.¹²¹ Rather than adopt Mayfield’s circular framework,¹²² the Superior Court followed the “broad consensus of other courts” and concluded that “once waived, the Sixth Amendment right to counsel is no longer absolute.”¹²³ And, the Superior Court did not abuse its

¹¹⁸ Op. Brf. at 18.

¹¹⁹ Op. Brf. at 22.

¹²⁰ Op. Brf. at 36.

¹²¹ *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996) (internal citations omitted). “The right to represent oneself in a criminal proceeding is fundamental. It is protected by the Sixth Amendment to the United States Constitution and by Article I, Section 7 of the Delaware Constitution.” *Id.*

¹²² Mayfield appears to advocate for a Constitutional rule that would allow a criminal defendant to alternate between representation and self-representation until, at earliest, jeopardy attaches to his case and, simultaneously, provide the Superior Court no discretionary oversight. *See e.g.* Op. Brf. at 36.

¹²³ *Leveto*, 540 F.3d at 207.

discretion when it balanced Mayfield’s “reassertion of his right to counsel” against the impact of his last minute request on the court, counsel, and witnesses, and denied his motions.¹²⁴

In late 2018 and early 2019, Mayfield expressed his desire to represent himself. On January 11, 2019, he docketed his motion to proceed *pro se*.¹²⁵ The Superior Court considered the positions expressed by Mayfield, his appointed counsel, and the State, and addressed Mayfield directly on February 4, 2019.¹²⁶ Mayfield reiterated his desire to dismiss counsel and proceed *pro se*.¹²⁷

“The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged.”¹²⁸ “The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.”¹²⁹ “The Sixth Amendment, when naturally read, thus implies a right of self-representation[;] . . . [a] reading reinforced by the Amendment’s roots

¹²⁴ *See, id.* at 210 (citing *United States v. Tolliver*, 937 F.2d 1183, 1187 (7th Cir. 1991)).

¹²⁵ A5 at DI 21.

¹²⁶ A78-115.

¹²⁷ A80-81.

¹²⁸ *Faretta v. California*, 422 U.S. 806, 818 (1975).

¹²⁹ *Id.* at 819.

in English legal history.”¹³⁰ Of course, Delaware recognizes the fundamental nature of a defendant’s right to self-representation.¹³¹ But “before allowing a criminal defendant to proceed *pro se*, the court must ‘1) determine that the defendant has made a knowing and voluntary waiver of his constitutional right to counsel; and 2) inform the defendant of the risks inherent in going forward in a criminal trial without the assistance of legal counsel.’”¹³²

The Superior Court thoroughly assessed Mayfield’s request to proceed *pro se*.¹³³ Mayfield informed the Superior Court that he was familiar with the Delaware criminal justice system and, in fact, previously represented himself in a robbery and assault trial in which he secured a dismissal.¹³⁴ Mayfield understood that he must comply with the rules of evidence and the rules of procedure, and that his lack of legal training and his incarceration status may hinder his self-representation.¹³⁵ He understood the charges against him and that, if convicted, he faced the possibility of

¹³⁰ *Id.* at 821.

¹³¹ *Stigars*, 674 A.2d at 479. In fact, “[i]n a criminal proceeding, the right to self-representation is structural.” *Hartman v. State*, 918 A.2d 1138, 1144 (Del. 2007) (citing *United States v. Peppers*, 302 F.3d 120, 127 (3rd Cir. 2002)).

¹³² *Christopher v. State*, 930 A.2d 894, 896 (Del. 2007) (quoting *Hartman*, 918 A.2d at 1140-41).

¹³³ A82.

¹³⁴ A82-83. In fact, Mayfield confirmed that he participated in the required colloquy to permit him to proceed *pro se* in that case. A83.

¹³⁵ A83-84.

life imprisonment.¹³⁶ Mayfield stated he had researched potential defenses and evidence available to mitigate the charges against him.¹³⁷ Satisfied that he had sufficient time to consider his decision to proceed *pro se*,¹³⁸ the Superior Court appointed standby counsel to assist him with logistical matters “like getting subpoenas issued and the like.”¹³⁹

At the conclusion of the colloquy, the Superior Court summarized its findings:

I have engaged in a colloquy that is prescribed by the Third Circuit in *United States v. Welty*, which was adopted and adapted by the Delaware courts. For instance, in *Briscoe v. State*, which is a 1992 decision that cites *Welty*. After undertaking that colloquy and the inquiry, whether there is a proper waiver must be clearly determined by the trial court and the determination must appear on the record, and that is what the [c]ourt is doing here.

The [c]ourt is not permitted to substitute its own judgement as to what is best for any criminal defendant regarding his wish to proceed *pro se*. Counsel, cases like *Stigars* and I believe *Snowden* tell us that. So I cannot, even if I believed Mr. Mayfield would be better served by having trained counsel, which I think in many circumstances, almost all circumstances [c]ourts might believe, the [c]ourt need only [make] the determination of whether or not he is knowingly choosing to take on his

¹³⁶ A85-93. When asked whether he was familiar with the range of allowable punishments for the charges he faced, Mayfield responded, “[t]o me it would be life in jail.” A91.

¹³⁷ A94.

¹³⁸ A95-96.

¹³⁹ A96. The Superior Court appointed standby counsel “to help facilitate” Mayfield’s compliance with the rules of evidence and procedure but emphasized that standby “counsel is no longer your attorney and is not somebody who just runs errands for you. [Standby] Counsel assists you in explaining some finer points of the law sometimes, some of the rules and things like that.” A97.

own representation, understanding the risks that go along with that. I do believe Mr. Mayfield does.

We have discussed the fact that he will have to abide by the rules and how he may be hampered in doing so in presenting his own best defense, that his effectiveness might be diminished by his dual role as attorney and accused. He has expressed his understanding of the nature of the charges, including lesser included offenses and the range of allowably punishments thereunder. He indicates that he is familiar with what his possible defenses may be and circumstances that might mitigate either guilt and/or sentencing, and that he has shown an understanding of other facts and procedures and circumstances that leave the [c]ourt to find that he is knowingly, intelligently and voluntarily waiving his right to counsel as provided by the Sixth Amendment and the Delaware Constitution. Therefore, the Court will grant the motion to allow Mr. Mayfield to proceed *pro se*. The Court is also appointing . . . standby counsel for him.¹⁴⁰

Mayfield recognizes, “[t]he court’s inquiry discussed each factor under *Welty*” and his waiver “is not disputed.”¹⁴¹ But, Mayfield contends on appeal, despite his knowing, voluntary, and intelligent election to proceed *pro se*, that he must be provided counsel if he, at any time prior to trial, makes such a request of the trial court. Mayfield is incorrect.

After receiving the Superior Court’s approval to represent himself, Mayfield mounted a persistent and aggressive defense. He “filed motion after motion, making it very clear that he has read everything . . . picking apart times, dates, statements,

¹⁴⁰ A101-103 (citing *United States v. Welty*, 674 F.2d 185 (3d Cir. 1982); *Briscoe v. State*, 606 A.2d 103 (Del. 1992); *Snowden v. State*, 672 A.2d 1017 (Del. 1996); *Stigars v. State*, 674 A.2d 477 (Del. 1996)).

¹⁴¹ Op. Brf. at 30-31.

inconsistencies, and concerns with the evidence that he had.”¹⁴² And, importantly, “[a]t all points he indicated a full wish to proceed *pro se*.”¹⁴³ “[F]rom February 4 until [July 8, 2019], [Mayfield] showed absolutely no desire for counsel.”¹⁴⁴

Then, during a status conference the day before trial – July 8, 2019 – the Superior Court addressed Mayfield and asked, “is there anything that you need to discuss with the court today prior to us starting trial tomorrow.”¹⁴⁵ Mayfield then asked if it was too late for him to hire an attorney.¹⁴⁶ He clarified that he was not only looking to retain counsel, but to reschedule his trial at least 60 days to provide counsel time to prepare.¹⁴⁷ The Court then learned that, while Mayfield’s girlfriend recently consulted with an attorney, counsel had not been retained.¹⁴⁸ Commenting that “[t]his is not a situation where he’s trying to change counsel like *Carletti*[,]”¹⁴⁹ the trial court recessed to research Mayfield’s request.¹⁵⁰ After hearing the respective positions of the parties, the Superior Court ruled on the motion to appoint

¹⁴² A183.

¹⁴³ A183.

¹⁴⁴ A185.

¹⁴⁵ A147.

¹⁴⁶ A147.

¹⁴⁷ A149.

¹⁴⁸ A151.

¹⁴⁹ A168.

¹⁵⁰ A169.

counsel which, as the court observed would “also then . . . entail[] a continuance of the case.”¹⁵¹

The court recognized that Mayfield’s request involved “the intersection of two very important rights, first of all the right to counsel . . . [which] the courts . . . [generally] recognize . . . is paramount” and the right to proceed *pro se*.¹⁵² The court noted that “sometimes those two rights, right to counsel and right to proceed *pro se*, collide in certain ways.”¹⁵³ At the intersection of these two rights, the right to counsel generally prevails.¹⁵⁴ For this reason, a trial court must scrupulously assess a defendant’s request to relinquish his right to counsel and proceed *pro se*.¹⁵⁵ After an “exhaustive colloquy,” the court found “Mayfield had waived his right to counsel.”¹⁵⁶

On the eve of trial, “Mayfield, for the very first time, indicated either to his standby counsel, to the State, or to the [c]ourt that he no longer felt comfortable representing himself, that perhaps he had bit off a bit more than he believed he could

¹⁵¹ A181.

¹⁵² A181.

¹⁵³ A181.

¹⁵⁴ A181.

¹⁵⁵ A182.

¹⁵⁶ A182-183.

chew.”¹⁵⁷ To that point, without any indication from Mayfield that he was dissatisfied with his decision to represent himself, the State diligently prepared for trial.¹⁵⁸ The State “lost one complaining witness due to the time[,]”¹⁵⁹ but mustered and prepared the remaining witnesses including three expert witnesses of whom, the court was assured, Mayfield was well aware.¹⁶⁰ Mayfield himself went “unabated . . . and undeterred about his wish to proceed *pro se*.”¹⁶¹ He vigorously prepared his case and arranged witnesses for his defense.¹⁶² He “issued no complaint, no concern about proceeding *pro se* until [the day before trial].”¹⁶³

Drawing from *Leveto*,¹⁶⁴ and the cases cited therein, the Superior Court noted “that there is wide agreement that, once waived, the Sixth Amendment right to counsel is no longer absolute.”¹⁶⁵ Further, once waived, “consideration of a defendant’s post-waiver request for counsel is well within the discretion” of the trial

¹⁵⁷ A183-184.

¹⁵⁸ A185.

¹⁵⁹ A185.

¹⁶⁰ A185.

¹⁶¹ A189.

¹⁶² A189.

¹⁶³ A189.

¹⁶⁴ *Leveto*, 540 F.3d 200.

¹⁶⁵ A186-187 (quoting *Leveto*, 540 F.3d at 207).

court.¹⁶⁶ Factors, including the timing of the defendant’s post-waiver request, evidence of dilatory motive, and a trial court’s “practical concerns of managing its docket,” may be considered in exercising this discretion.¹⁶⁷ Addressing the parameters of a defendant’s election to proceed *pro se*, the court quoted *Solina*:

A criminal defendant has a constitutional right to defend himself, and with rights come responsibilities. If, at the last minute, he gets cold feet and wants a lawyer to defend him, he runs the risk that the judge will hold him to his original decision in order to avoid the disruption of the Court’s schedule that a continuance granted on the very day that trial was scheduled is bound to cause.¹⁶⁸

Here, Mayfield made his request “less than 24 hours from starting [his] trial,”¹⁶⁹ despite ample opportunity to express any concerns to standby-counsel or the court.¹⁷⁰

Mayfield participated in a proceeding three weeks earlier – June 17, 2019 – and expressed no concerns with his self-representation,¹⁷¹ yet he represented at the July 8, 2019 status conference that he was already seeking counsel at that time.¹⁷²

Balancing all of the factors surrounding his request, the Superior Court exercised its

¹⁶⁶ A187 (citing *Leveto*, 540 F.3d at 207).

¹⁶⁷ A187-188.

¹⁶⁸ A188 (quoting *United States v. Solina*, 733 F.3d 1208, 1211-12 (7th Cir. 1984)).

¹⁶⁹ A188.

¹⁷⁰ A190.

¹⁷¹ A14-15 at DI 74; A128-144.

¹⁷² A157.

discretion and denied Mayfield’s continuance request and his request for appointment of counsel.¹⁷³ The Superior Court did not err.

Mayfield argues “[t]he court conducted an inquiry and balancing test as if [he] was represented by trained and learned counsel and was asking to substitute his current counsel.”¹⁷⁴ Not so. Rather, positing that *Carletti*¹⁷⁵ may offer some guidance, the Superior Court recognized the overlap of Mayfield’s *pro se* request for counsel and his associated request for a continuance.¹⁷⁶ Nonetheless, the Superior Court squarely addressed Mayfield’s request at the “intersection of two very important rights”¹⁷⁷ – the right to counsel and the right to self-representation – and not as a delayed request to change attorneys as proffered by Mayfield on appeal. While self-representation may involve risks, it is a fundamental right held by a criminal defendant. “Indeed, a *pro se* defendant’s knowing and voluntary

¹⁷³ A192.

¹⁷⁴ Op. Brf. at 22.

¹⁷⁵ *Carletti v. State*, 2008 WL 5077746 (Del. Dec. 3, 2008).

¹⁷⁶ A162; A192. While considering Mayfield’s motions, the Superior Court commented, “[o]ne case I can think of that’s at all helpful is a case called *Carletti v. State*. But that was a situation in which somebody wanted to substitute counsel as opposed to withdrawing their request to proceed *pro se*.” A162. This is an accurate assessment of *Carletti*, a case in which a defendant sought a last-minute continuance “to allow counsel of his choice to enter the case.” *Carletti*, 2008 WL 5077746, at *5.

¹⁷⁷ A181.

assumption of such risks is at the heart of [the] requirement that a defendant’s waiver of the right to counsel is explicit, uncoerced and well-informed.”¹⁷⁸

Mayfield’s reliance upon *Pollani*¹⁷⁹ and *Proctor*¹⁸⁰ fails to support the position he advances on appeal. In *Pollani*, the *pro se* defendant requested a continuance and sought to enlist counsel four days prior to trial.¹⁸¹ The trial court rejected both requests; a jury convicted Pollani and he appealed.¹⁸² Because stand-by counsel “had been retained and was available to act as trial counsel . . . [the Fifth Circuit Court of Appeals] conclude[d] that Pollani was thereby deprived of a fundamental right,” and reversed his convictions.¹⁸³ The appellate court acknowledged that “the right to reassert a previously waived right to counsel has its boundaries,” and that a “pro se litigant may not abuse his right by strategically requesting special appearances by counsel or by repeatedly altering his position on counsel to achieve delay or obstruct the orderly administration of justice.”¹⁸⁴ The court found “[t]his case is different because Pollani had arranged to be represented by counsel instead

¹⁷⁸ *Leveto*, 540 F.3d at 207 (citing *United States v. Welty*, 674 F.2d 185, 188-89 (3d Cir. 1982); *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995)).

¹⁷⁹ *United States v. Pollani*, 146 F.3d 269 (5th Cir. 1998).

¹⁸⁰ *United States v. Proctor*, 166 F.3d 396 (1st Cir. 1999).

¹⁸¹ *Pollani*, 146 F.3d at 271.

¹⁸² *Id.* at 271-72.

¹⁸³ *Id.* at 272.

¹⁸⁴ *Id.* at 273. (internal citations omitted).

of representing himself, and no delay was required for Pollani to exercise his right to do that.”¹⁸⁵ “The Constitution protects Pollani’s right to counsel *under these circumstances*.”¹⁸⁶

Similarly, in *Proctor*, the First Circuit recognized that “the right to counsel is not unqualified” and that it is within the discretion of a trial court “to refuse a defendant’s request to withdraw from self-representation after a valid waiver if a defendant seeks counsel in an apparent effort to delay or disrupt proceedings on the eve of trial, or once trial is well underway.”¹⁸⁷ *Proctor* initially elected to represent himself.¹⁸⁸ Then, during a hearing approximately a month prior to trial, *Proctor* ambiguously invoked his right to counsel, which the trial court summarily dismissed as “too late.”¹⁸⁹ The record failed to indicate whether *Proctor* sought counsel for the hearing, or sought to revoke self-representation altogether.¹⁹⁰ While “it is incumbent upon a court to be as vigilant in rejecting a request for counsel following assertion of the right to self-representation as the court is required to be in initially granting *pro se* status[,]” the trial court must resolve any ambiguity to assess whether a

¹⁸⁵ *Id.* at 273.

¹⁸⁶ *Id.* at 274. (emphasis added).

¹⁸⁷ *Proctor*, 166 F.3d at 402 (collecting cases).

¹⁸⁸ *Id.* at 398.

¹⁸⁹ *Id.* at 400.

¹⁹⁰ *Id.* at 405.

defendant is seeking to retract a waiver.¹⁹¹ The appellate court reversed Proctor's conviction because the trial court failed to resolve this ambiguity.¹⁹²

Pollani and *Proctor* acknowledged the discretion afforded to trial courts to deny requests to withdraw self-representation following a valid waiver. Drawing from this precedent, the Third Circuit, in *Leveto*, explained that neither of these cases nor any other precedent found by the court “supports [the] extreme position that a defendant’s post-waiver request for counsel is to be given virtually unqualified deference.”¹⁹³ Rather, “once waived, the Sixth Amendment right to counsel is no longer absolute[,]” and the broad consensus of courts considering the issue hold that “consideration of a defendant’s post-waiver request for counsel is well within the discretion of the [trial] court.”¹⁹⁴ The Third Circuit then presented a non-exclusive list of factors a trial court may consider when assessing a post-waiver request for counsel, including: (1) “defendant’s dilatory motive;” (2) “the practical concerns of managing its docket;” and (3) “the impact that a request may have on its general responsibilities for the prudent administration of justice.”¹⁹⁵ A reviewing court “will not find a Sixth Amendment violation in a trial court’s denial of a defendant’s post-

¹⁹¹ *Id.* at 405-406.

¹⁹² *Id.* at 406.

¹⁹³ *Leveto*, 540 F.3d at 207.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

waiver request for counsel unless the [trial] court’s good cause determination was clearly erroneous, or the [trial] court made no inquiry into the reason for the defendant’s request.¹⁹⁶ Here, the Superior Court made a thorough inquiry into Mayfield’s request and did not err.

Federal courts confronting the “tension that can exist between [the right to counsel and the right to self-representation] when a defendant who elected to proceed *pro se* later demands an attorney” consistently recognize that “once waived, the right to counsel is no longer unqualified.”¹⁹⁷ In *Kerr*, the Second Circuit held, “in agreement with [its] sister Circuits that have considered the issue, that once a defendant voluntarily and intelligently waives his right to counsel and elects to proceed *pro se*, the decision whether to grant or deny his ‘post waiver request for counsel is well within the discretion of the [trial] court.’”¹⁹⁸ State courts are in

¹⁹⁶ *Id.* at 207-08.

¹⁹⁷ *United States v. Kerr*, 752 F.3d 206, 220 (2d Cir. 2014) (citing *United States v. Thompson*, 587 F.3d 1165, 1175 (9th Cir. 2009); *United States v. Leveto*, 540 F.3d 200, 207 (3d Cir. 2008); *United States v. Proctor*, 166 F.3d 396, 403 & n. 8 (1st Cir. 1999); *United States v. Reddeck*, 22 F.3d 1504, 1510–11 (10th Cir.1994); *United States v. Taylor*, 933 F.2d 307, 311 (5th Cir. 1991); *United States v. West*, 877 F.2d 281, 286 (4th Cir.1989); *United States v. Solina*, 733 F.2d 1208, 1211–12 (7th Cir. 1984); *see also United States v. Brasch*, 205 F.3d 1325 (2d Cir. 1999)).

¹⁹⁸ *Kerr*, 752 F.3d at 221.

accord,¹⁹⁹ and the State’s research failed to reveal any case declining to afford a trial court discretion in this assessment.

Here, the Superior Court correctly applied the framework set forth in *Leveto* and adopted by federal and state courts across the country and found no good cause to continue Mayfield’s trial for the appointment of counsel.²⁰⁰ Unlike the defendant in *Pollani*, Mayfield’s standby counsel was not prepared to immediately assume the reigns of his defense.²⁰¹ Mayfield’s last minute request “look[ed] like manipulation”²⁰² and, despite his proficiency in communicating with the court and opposing counsel and his participation in multiple status conferences, he waited until the day before trial to request counsel.²⁰³ Importantly, the Superior Court found that Mayfield’s request, if granted, would inject “another four to five months before both sides could be prepared for trial[,]”²⁰⁴ and was mindful of the impact this would have on the State’s witnesses and the court’s docket.²⁰⁵ The Superior Court heard and

¹⁹⁹ See, *State v. Campbell*, 2018 WL 1352541, *8 (Kans. Ct. App. Mar. 16, 2018); *State v. Eddy*, 68 A.3d 1089, 1101 (R.I. 2013); *State v. Rhodes*, 807 N.W. 2d 1, 7-8 (Wis. Ct. App. 2011); *Wilkerson v. State*, 688 S.E. 2d 648, 652 (Ga. 2009).

²⁰⁰ A192.

²⁰¹ A165.

²⁰² A158.

²⁰³ A190.

²⁰⁴ A192.

²⁰⁵ A185.

thoroughly considered Mayfield's request, and its denial of his request for counsel was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the State respectfully submits that this Court should affirm the judgment below.

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Dated: December 4, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KILI MAYFIELD)	
)	
Defendant-Below,)	
Appellant,)	
)	
v.)	No. 493, 2019
)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff-Below,)	
Appellee.)	

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Dated: December 4, 2020

/s/ Sean P. Lugg