NEW YORK LAW SCHOOL

NYLS Law Review

Volume 54
Issue 2 *Submissions Issue*

Article 8

January 2009

United States v. Leveto

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New York Law School Class of 2009

VOLUME 54 | 2009/10

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In the American criminal justice system, a defendant's right to counsel is among one of the most fundamental and essential rights.[1] The importance of that constitutional right is highlighted by the process that a criminal defendant must go through to waive this right and represent himself pro se.[2] In order to allow the defendant to continue pro se, a trial court must determine that the defendant's waiver of his right to counsel is both knowing and voluntary.[3] Moreover, even after a criminal defendant waives his right to counsel, the waiver does not bar the defendant from later requesting counsel.[4]

In *United States v. Leveto*, the United States Court of Appeals for the Third Circuit considered the circumstances under which a defendant's waiver of his Sixth Amendment right to counsel could be relinquished.[5] The defendant, Daniel Leveto, made a knowing and voluntary waiver of his right to counsel at a pre-trial hearing, but requested the assistance of counsel on the morning his trial was scheduled to begin.[6] The district court denied this request, stating that he had validly waived his right to counsel and that it was too late to reassert that right.[7] The Third Circuit affirmed the district court's decision, holding that the timing of a request for counsel and the potential for delay constitute good cause to deny a post-waiver request for counsel.[8] This case comment contends that the Third Circuit ignored a clear trend of narrowing the bases upon which a post-waiver request for counsel can be denied. The standard crafted by the Third Circuit gives trial courts undue discretion in deciding whether to grant counsel, which may result in the subordination of the right to counsel to a judge's perception of "inconvenience." In such cases, defendants who have done nothing improper may lose their liberty due to a lack of legal skill.[9]

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1. *See* Penson v. Ohio, 488 U.S. 75, 84 (1988) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956) (internal quotation marks omitted))). The right to counsel can be found in the Sixth Amendment, which states, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

2. *See* United States v. Proctor, 166 F.3d 396, 401 (1st Cir. 1999). "Pro se" is defined as "[f]or oneself; on one's own behalf; without a lawyer." Black's Law Dictionary 1258 (8th ed. 2004).

3. United States v. Welty, 674 F.2d 185, 188 (3d Cir. 1982) ("The court, however, has the responsibility of ensuring that any choice of self-representation is made knowingly and intelligently, with an awareness of the dangers and disadvantages inherent in defending oneself.").

4. Menefield v. Borg, 881 F.2d 696, 700 (9th Cir. 1989) ("We are certainly unwilling to deny counsel because of some conception that the defendant's initial decision to . . . represent himself at trial is a choice cast in stone.").

5. United States v. Leveto, 540 F.3d 200 (3d Cir. 2008).

6. *Id.* at 204–05.

7. *Id.* at 205–06.

8. *Id.* at 210.

9. *See id.* at 213. The standard gives trial courts far too much discretion in determining whether a defendant should be granted counsel and undermines the Sixth Amendment presumption that "it is representation

Defendant Daniel Leveto was indicted for federal income tax fraud on February 15, 2001.[10] When he was brought to the district court in March 2004 for his first appearance, he expressed an interest in representing himself.[11] The district court held a hearing on June 7, 2004 to ascertain whether Leveto was asserting his right to self-representation.[12] After receiving a clear explanation of the ramifications of proceeding pro se from both the judge and his attorney, Leveto made a knowing and voluntary waiver of his Sixth Amendment right to counsel.[13]

Between this waiver and the day of trial, Leveto represented himself with zeal.[14] He made several motions and filed a lawsuit.[15] One motion alleged that the execution of a search warrant was unconstitutional, and although the district court found no violation, the Third Circuit later ruled in Leveto's favor.[16] A week before trial, Leveto sued Judge Cohill, alleging the judge was biased in his handling of pre-trial motions.[17] Specifically, Leveto argued that Judge Cohill improperly extended the government's time to answer pre-trial motions.[18] On the evening before trial, Leveto moved to recuse Judge Cohill, arguing that the judge's status as a defendant in the civil lawsuit created a conflict of interest.[19] The next morning, Judge Cohill denied this motion.[20]

Just before jury selection began, Leveto requested the assistance of counsel.[21] Although the court denied this request, Leveto continued to request counsel throughout *voir dire*.[22] When asked if he wanted to make an opening statement,

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by counsel that is the standard, not the exception." Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 161 (2000).

10. *Leveto*, 540 F.3d at 204.

11. *Id.*

12. *Id.*

13. *See id.* Specifically, a defendant must be made aware of:

> [T]he magnitude of the undertaking and the "disadvantages of self-representation,": an awareness that there are technical rules governing the conduct of a trial, and that presenting a defense is not a simple matter of telling one's story. In addition, the accused should have a general appreciation of the seriousness of the charge and of the penalties he may be exposed to before deciding to take a chance on his own skill.

Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976) (quoting Faretta v. California, 422 U.S. 806, 835 (1975)) (citations omitted).

14. *Leveto*, 540 F.3d at 205.

15. *Id.*

16. *Id.* at 216 (Rendell, J., dissenting).

17. *Id.* at 205 (majority opinion).

18. *Id.* at 216 (Rendell, J., dissenting).

19. *Id.* at 205 (majority opinion).

20. *Id.*

21. *Id.*

22. *Id.* at 205–06. "*Voir dire*" is "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. Loosely, the term refers to the jury-selection phase of a trial." Black's Law Dictionary 1605 (8th ed. 2004).

Leveto explained that "due to the sheer intimidation of all this . . . I seem to be having difficulties and mental blocks, and I am asking you again to have an attorney represent me."[23] The district court denied each request for counsel.[24] Significantly, standby counsel had participated in all pre-trial proceedings and was required by law to be prepared to step in immediately.[25] Ignoring this circumstance, as well as the fact that Leveto never asked for a continuance,[26] Judge Cohill stated, "[u]nder the circumstances of this case, I can't imagine stopping now and appointing [the standby counsel] or anyone else to represent you and prepare to defend a case like this."[27] Later in the trial, Leveto claimed he was not aware that he could not reassert his right to counsel, and Judge Cohill responded that it was not possible to relinquish a waiver on the day of trial.[28] Throughout Leveto's trial, the court denied his repeated requests for counsel.[29] Although Leveto represented himself to the best of his ability, he was ultimately found guilty.[30]

Following his trial, Leveto appealed to the Third Circuit.[31] He contended that the district court's refusal to appoint a lawyer violated his right to counsel.[32] The Third Circuit affirmed the district court's conclusion, holding that the timing of a request for counsel constitutes good cause for denying a post-waiver request for counsel.[33] The Third Circuit rejected Leveto's assertion that the potential for delay was not an adequate basis for denying a motion to appoint counsel, concluding that district courts are always charged with managing their dockets.[34] The majority held that "the last-minute timing of a motion is generally a proper factor in considering whether to grant the motion, particularly where, as is the case here, the timing of the motion is part and parcel with the consideration of whether disruption would result if the motion was granted."[35]

In reaching its conclusion, however, the majority did not consider the reasoning employed by other Circuit Courts that had analyzed the issue.[36] Relying strictly on

23. *Leveto*, 540 F.3d at 205.

24. *Id.* at 205–06.

25. *Id.* at 217 (Rendell, J., dissenting).

26. *Id.*

27. *Id.* at 205 (majority opinion) (alteration in original).

28. *Id.* at 206.

29. *Id.* at 205–06.

30. *Id.* at 206.

31. *Id.*

32. *Id.*

33. *Id.* at 210.

34. *Id.* at 209–10.

35. *Id.* at 210.

36. *See id.* at 206–07, 210 (referring to the fact patterns and outcomes of cases without any in-depth analysis of the deciding court's reasoning).

dicta and factual similarities,[37] the *Leveto* majority missed a major shift in this area of Sixth Amendment jurisprudence. While the Third Circuit has given courts great discretion to deny criminal defendants' last-minute requests for counsel, other Circuit Courts have shifted to rules that provide such defendants greater protection of their Sixth Amendment right to counsel.[38]

The dissent questioned the majority's holding and its reasoning. While the majority held that trial courts can consider delay as a factor weighing against granting a last-minute request for counsel, the dissent argued that prior case law did not preclude Leveto's request.[39] Relying on many of the same cases cited by the majority, the dissent contended that a defendant's last-minute request for counsel can only be denied when meaningful trial proceedings have begun, or when a defendant abuses his right to counsel in order to cause delay.[40] Since no meaningful trial proceedings had begun when Leveto made his first request for counsel, the first ground for denying such a request did not provide a basis for the trial court's decision.[41] Moreover, since standby counsel would have been ready to proceed immediately,[42] and there was no evidence that Leveto's request was made with the goal of delaying trial, the dissent opined that the second basis for denial was also unavailable and that the trial court should have been reversed.[43]

The Third Circuit's holding that last-minute requests for counsel may be denied based on possible delay, even if the defendant does not request a continuance, allows courts far too much discretion. While older cases support the Third Circuit's approach, the clear trend in the Circuit Courts has been to protect the right to counsel by rejecting tests based on the nebulous concept of delay, and adopting tests that narrow the circumstances under which post-waiver requests for counsel can be denied. First, the Seventh Circuit transformed vague concerns over delay into a bright-line rule to determine when last-minute requests can be denied.[44] The Fifth Circuit separated the issues of delay and counsel, ensuring that defendants are not denied counsel if standby counsel is able to assume representation without causing delay.[45] Finally, the First Circuit held there are only two grounds for denying counsel, one of which resembled the Seventh Circuit test.[46]

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37. *See id.*

38. *See infra* text accompanying notes 63–84.

39. *See Leveto*, 540 F.3d at 213–14.

40. *Id.* at 213 (citing *Proctor*, 166 F.3d at 402 and United States v. Merchant, 992 F.2d 1091, 1095 (10th Cir. 1993)).

41. *Id.* at 213–14.

42. *Id.* at 217.

43. *See id.* at 213–14 ("It is clear, however, that Leveto attempted to reinvoke his right to counsel prior to trial and jury selection, before any trial proceedings, let alone 'meaningful' ones. . . . There is no evidence of a purpose that would justify the court's refusal here—namely to delay or disrupt trial.").

44. United States v. Tolliver, 937 F.2d 1183, 1188 (7th Cir. 1999).

45. United States v. Pollani, 146 F.3d 269, 273–74 (5th Cir. 1998).

46. *Proctor*, 166 F.3d at 402.

These more specific guidelines reduce judicial discretion over last-minute requests for counsel, and thus, provide greater protection of Sixth Amendment rights. Had any of these approaches been adopted by the Third Circuit, Leveto would likely have been granted counsel. This case comment contends that the Third Circuit misconstrued the existing body of law and ignored a trend of increased protection of the post-waiver right to counsel. It further argues that the Third Circuit's holding runs afoul of the Sixth Amendment because it does not provide adequate protection of the right to counsel. Given that the average person lacks the requisite level of legal skill and knowledge to adequately litigate in court, and considering the liberty interests at stake in a criminal trial, it is important to create a legal standard that ensures defendants are not denied counsel without good reason.[47]

The Third Circuit's holding is reminiscent of the Seventh Circuit's decision in *United States v. Solina*, in which two defendants were tried for assault in one proceeding.[48] One defendant was represented by a public defender, while the other proceeded pro se.[49] On the day of trial, the first defendant's attorney moved for a continuance, and the pro se defendant requested counsel due to his inability to adequately defend himself.[50] Notwithstanding the suspicious nature and timing of both requests, the *Solina* court held that "the scheduling problems the continuances would have caused were *in themselves* sufficient ground for refusing to delay the trial, in the absence of any showing that either . . . appointed counsel or [defendant] (assisted by standby counsel) were incapable of conducting an adequate defense."[51]

The *Leveto* court erroneously followed the very broad and dated approach of the Seventh Circuit in *Solina*.[52] *Solina* was decided in 1984, and while it has not been overruled, the Seventh Circuit has since tightened its standards for denying last-minute requests for counsel.[53] For example, in *United States v. Tolliver*, the Seventh Circuit paid lip service to *Solina*, but applied a more restrictive standard to last-

47. *See Pollani*, 146 F.3d at 272–73.

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence[.]

Id. (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

48. United States v. Solina, 733 F.2d 1208, 1211 (7th Cir. 1984).

49. *Id.*

50. *Id.*

51. *Id.* at 1212 (emphasis added).

52. *Compare id.* (stating that "the *scheduling problems* the continuances would have caused were in themselves sufficient ground for refusing to delay the trial" (emphasis added)), *with Leveto*, 540 F.3d at 210 (noting that "the *last-minute* timing of a motion is generally a proper factor in considering whether to grant the motion" (emphasis added)).

53. *See Tolliver*, 937 F.2d 1183.

minute requests for counsel.[54] The defendant requested counsel after the government had presented its first witness at trial.[55] Distinguishing a case in which the Eleventh Circuit held that a defendant was entitled to counsel when his request came approximately fifteen minutes prior to trial,[56] the Seventh Circuit held that a trial court may deny "requests for counsel made after meaningful trial proceedings have begun."[57] Thus, the start of trial serves as a decisive, clear line for determining whether a request for counsel should be granted.

This bright-line approach was more definitive and workable than the approach used in *Solina*, signifying a departure from the Seventh Circuit's previous reliance on "scheduling problems" as an acceptable basis for denial of counsel.[58] Had the *Leveto* court applied the "meaningful trial proceedings" standard used in *Tolliver*, Leveto's request for counsel would have been granted. Tolliver requested counsel after jury selection and the fact-finding process had already begun.[59] In contrast, Leveto requested counsel prior to the start of jury selection.[60] Therefore, it is clear that Leveto's request did not come after "meaningful trial proceedings" had started. Though Judge Cohill ruled that requests made on the day of trial are too disruptive to be granted,[61] *Tolliver* explicitly held otherwise.[62]

Some courts have gone further than the *Tolliver* court, crafting standards even more protective of Sixth Amendment rights. For example, in *United States v. Pollani*, the Fifth Circuit severed the issue of "continuance" from the issue of "counsel,"

54. *Id.* at 1187. The Seventh Circuit cited *Solina* for the proposition that when a defendant chooses to proceed pro se, the trial court will hold him to his decision. *Id.* However, rather than focus on the vague concept of "delay" established in *Solina*, the *Tolliver* court specifically noted, "[i]t is well within the discretion of the court to deny as untimely requests for counsel made *after meaningful trial proceedings have begun*." *Id.* (emphasis added).

55. *Id.* at 1186.

56. Horton v. Dugger, 895 F.2d 714, 715–16 (11th Cir. 1990). While the *Tolliver* court did not disagree with the result in *Horton*, it distinguished the facts of the two cases. It noted that granting a continuance in the middle of a trial, as Tolliver asked the trial court to do, would be far more disruptive than the situation in *Horton*, which merely postponed the trial before it even began. *Tolliver*, 937 F.2d at 1187.

57. *Tolliver*, 937 F.2d at 1187.

58. *Compare id.* ("It is well within the discretion of the court to deny as untimely requests for counsel made *after meaningful trial proceedings have begun*." (emphasis added)), *with Solina*, 733 F.2d at 1212 ("[T]he *scheduling problems* the continuances would have caused were in themselves sufficient ground for refusing to delay the trial . . . ." (emphasis added)).

59. *Tolliver*, 937 F.2d at 1186. Specifically, opening statements and the first witness's testimony had already begun. *Id.*

60. *Leveto*, 540 F.3d at 205.

61. *See id.* at 206 ("Leveto: I just was not aware that you couldn't relinquish [a waiver of the right to counsel]. I know that I did it. I am sure that everyone knows that I did it here. . . . Judge: But, you can't relinquish it the day of the trial. This has been pending for years and no lawyer could possibly go in and act as a lawyer the day of the trial in a case like this without preparation time.").

62. *See Tolliver*, 937 F.2d at 1188 (discussing the facts of *Horton,* 895 F.2d at 717).

thereby strengthening the Sixth Amendment right to counsel.[63] Pollani had originally proceeded pro se, but four days before trial, moved the court to allow standby counsel to act as his attorney for the trial.[64] Although the defendant wanted to be represented by his standby counsel even if no continuance was granted,[65] the trial court denied his motion, stating that "Pollani had made a 'knowing decision' to represent himself, and an eleventh hour substitution of counsel would not be permitted."[66]

On appeal, the Fifth Circuit agreed that the district court "validly protected [its interest in maintaining its docket and keeping cases on schedule] by refusing to allow Pollani to manipulate the trial date by strategically timing the hiring of counsel."[67] The Fifth Circuit explicitly held that "[t]he justifications for proceeding on schedule do not, however, justify the district court's refusal to allow [standby counsel] to participate. . . . [The defendant] still had the option to be represented by counsel to the extent that he could do so without interrupting the orderly processes of the court."[68] Ultimately, the Fifth Circuit determined that the defendant's interest in proceeding with adequate counsel outweighed concerns about delay and the attorney's lack of preparation.[69] It held that when a defendant makes a pre-trial motion to have standby counsel represent him at trial, and appointing counsel would not cause delay, the court must grant the motion.[70]

It is obvious that had the more protective rule enumerated in *Pollani* been applied, Leveto's request for counsel would have been granted. *Pollani* authorized the appointment of standby counsel without giving counsel time to prepare in order to avoid delay.[71] In that case, there were no conflicts or other issues that prevented the standby attorney from fully representing Pollani.[72] Similarly, Leveto's attorney was present and able to represent Leveto; he "had been standby counsel for almost a year, participated in pre-trial conferences, received discovery, attended the suppression hearing, and arranged his schedule to be present at trial and available should Leveto

63. *See Pollani*, 146 F.3d at 273–74 (holding that the lower court's denial of a continuance was entirely justified, but that its denial of counsel was not).

64. *Id.* at 270–71.

65. *Id.* at 271.

66. *Id.*

67. *Id.* at 272. The court even accepted as fact "that Pollani was vigorously attempting to delay the start of trial." *Id.* at 273.

68. *Id.* at 273–74. Interestingly, the Third Circuit has implicitly acknowledged that standby counsel is sometimes required to assume full representation. *See Leveto*, 540 F.3d at 217 (noting that one of the inherent duties of standby counsel is that "he or she 'must be ready to step in if the accused wishes to terminate his own representation.'" (quoting United States v. Bertoli, 994 F.2d 1002, 1018–19 (3d Cir. 1993))).

69. *See Pollani*, 146 F.3d at 273–74.

70. *Id.*

71. *Id.*

72. *Id.*

require assistance in his defense."[73] Because these facts indicate that standby counsel could have represented Leveto without any delay,[74] the *Pollani* rule would have required the court to appoint standby counsel without requiring an allowance of time to prepare.

While courts in subsequent cases have not been as generous to defendants as the *Pollani* court was, they have set out more predictable, workable factors than "delay," and consequently are more protective of Sixth Amendment rights. For example, the First Circuit has outlined a particularized and disciplined test, which has been the approach of many Courts of Appeals.[75] In *United States v. Proctor*, the defendant requested counsel at a pre-trial suppression hearing.[76] The trial court denied his motion, but the defendant thought the judge had denied counsel for not only the suppression hearing, but also for the trial.[77] The First Circuit began its analysis by outlining a clear framework: "It . . . is within the district court's discretion 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."[78]

Applying this standard in *Proctor*, the court noted that since the trial was not due to begin for a month, the "after meaningful proceedings" rule was not a proper basis for denying the request for counsel.[79] With respect to the argument that Proctor's request was in fact a manipulation designed to cause delay,[80] the First Circuit noted:

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73. *Leveto*, 540 F.3d at 217.

74. *Id.*

75. *See Proctor*, 166 F.3d at 402; *see also Tolliver*, 937 F.2d at 1187; *Merchant*, 992 F.2d at 1095 (adopting the "meaningful trial proceedings" standard); United States v. Taylor, 933 F.2d 307, 311 (5th Cir. 1991) (noting that a defendant may not "repeatedly . . . alternate his position on counsel in order to delay his trial or otherwise obstruct the orderly administration of justice"); Menefield v. Borg, 881 F.2d 696, 700 (9th Cir. 1989) ("When, for example, for purposes of delay, criminal defendants have sought continuances on the eve of trial, we have refused to disrupt the proceedings to accommodate their wishes.").

76. *See Proctor*, 166 F.3d at 398–400.

77. *See id.* at 400 ("Proctor contends that the district court violated his Sixth Amendment right to an attorney when it refused at the July 16th hearing to allow him to 'go ahead and get another lawyer' to represent him *at trial*." (emphasis added)). The court accepted his argument that if the trial judge denied him counsel for the entire trial, it would be a violation of his Sixth Amendment rights. *Id.* at 403. It held it would not be a violation of his Sixth Amendment right to counsel if the denial applied only to the July 16th hearing. *Id.*

78. *Id.* at 402. Thus, according to the First Circuit, the first acceptable reason to deny a post-waiver request for counsel—if the defendant "seek[s] to manipulate the trial process to suit his own interests"—distinguishes the type of delay requested for "good cause" from the type requested for the sake of delay. *Id.* at 403. The second basis for denying a last minute request for counsel applies when the request is made "once trial is well underway"—practically the same standard that had been applied in *Tolliver*. *See id.* at 402; *see also Tolliver*, 937 F.2d at 1187 ("It is well within the discretion of the court to deny as untimely requests for counsel made after meaningful trial proceedings have begun.").

79. *See Proctor*, 166 F.3d at 403.

80. *See id.* (noting that there was no abuse of the right to counsel in order to cause delay, *after* determining that trial was a month away, and the "meaningful trial proceedings " standard did not apply).

> [W]hile Proctor's earlier rejection of two attorneys and the timing of his most recent flip-flop over representation may have afforded some grounds for suspicion that he was seeking to manipulate the trial process to suit his own interests, these factors alone—without judicial inquiry eliciting further evidence and express findings on the issue of bad faith manipulation—were insufficiently compelling to permit a court to reject out of hand any new request for counsel.[81]

Thus, the *Proctor* court required very specific findings on the issue of whether the motion for counsel was made for the purpose of delaying trial.[82] It was not enough, according to the court, to merely raise an *inference* of what the defendant's motivation could be.[83] Moreover, the *Proctor* court attributed the defendant's request to a realization of "the value of counsel once confronted with the inadequacy of his own legal skills in the face of actual courtroom problems."[84]

Ignoring this framework entirely and relying solely on the fact that the *Proctor* court affirmed the denial of counsel for the suppression hearing, the *Leveto* court broadly concluded that a trial judge may consider delay when deciding whether or not to appoint counsel.[85] However, the First Circuit's decision to uphold the denial of counsel did not rest only on the possibility of delay. Rather, the *Proctor* court considered *several* factors, including the judge's grasp of the issues, the merits of the defendant's arguments, the non-dispositive nature of the motion, and the breadth of the defendant's request.[86] Most importantly, the *Leveto* majority overlooked the very clear legal standard applied in *Proctor*, which provided two specific grounds for denying post-waiver requests for counsel made immediately before the start of trial,[87] and focused merely on the timing of the request.[88]

Under the *Proctor* standard, Leveto's request for counsel would not have been denied. The first basis for denying counsel—requesting counsel with a solely dilatory motive—does not apply here. At the time of his request, Leveto had failed to settle the case, lost an important suppression motion, and lost a motion to recuse only

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81. *Id.*

82. *See id.* (noting that "without judicial inquiry eliciting further evidence and express findings on the issue of bad faith manipulation," the rejection of two attorneys was insufficient for denying a new request for counsel).

83. *See id.*

84. *Id.*

85. *See Leveto*, 540 F.3d at 206 ("Yet the defendant in *Proctor* made his request at a motions hearing one month before the start of trial. Further, the court stated in *dicta* that the 'last minute timing' of a request could provide a basis for the denial of a request that would pass constitutional scrutiny.").

86. *See Proctor*, 166 F.3d at 403. The defendant requested counsel "for the rest of the trial proceedings, or only for the rest of the day." *Id.*

87. *See id.* at 402 (applying the "apparent effort to delay or disrupt proceedings on the eve of trial" test).

88. *See Leveto*, 540 F.3d at 206 ("Further, the [*Proctor*] court stated in *dicta* that the 'last minute timing' of a request could provide a basis for the denial of a request that would pass constitutional scrutiny.").

moments before trial.[89] It is surely reasonable for any defendant to request counsel after this string of personal failures.[90]

The second basis for denying counsel calls for an examination of the defendant's relationship with his attorneys to determine whether there was bad faith on the part of the defendant to delay trial.[91] There is nothing in the *Leveto* record, apart from the timing, evidencing such an abuse of the right to counsel.[92] Leveto had never dismissed or substituted counsel, nor had he ever flip-flopped in his decisions.[93] Although the majority inferred a dilatory motive from Leveto's motion to recuse the trial judge,[94] the *Proctor* test did not analyze the defendant's motions, delays due to plea bargaining, or other procedural facts; it parsed the defendant's history with his attorneys to determine if the defendant was abusing his Sixth Amendment right in order to delay trial.[95] As a matter of policy, a defendant should not be forced to waive his right to make motions and arguments in order to preserve his right to counsel.

While the *Proctor*, *Pollani*, and *Tolliver* tests differ, they all place a special importance on the right to counsel. This is likely due to the policy concerns underlying the Sixth Amendment. It is a widely accepted truism that even the most prepared pro se defendant is often less efficient and effective in court than the least prepared professional lawyer.[96] The familiarity with rules of criminal procedure and evidence, and general trial structure alone, make any criminal lawyer more efficient and effective than a pro se defendant.[97] Particularly in criminal cases, the stakes are too high to ignore the importance of counsel.

Deferring to these policy concerns, the majority of Circuit Courts have created rules designed to appoint counsel to worthy defendants and deny unreasonable or abusive requests.[98] For example, *Tolliver* focused on whether the request for counsel

89. *See id.* at 216 (Rendell, J., dissenting).

90. *Id.*

91. *See Proctor*, 166 F.3d at 403.

92. *See Leveto*, 540 F.3d at 216.

93. *Id.* at 215–16.

94. *See id.* at 208 (majority opinion). The court noted:

> We find here that events just prior to Leveto's motion for counsel obviated the need for a formal inquiry about the underlying reasons for his request and the District Court's decision.
>
> Immediately before Leveto's morning-of-trial request for counsel, the District Court considered his motion to recuse, mailed from prison the night before. . . . The District Court ruled that this motion lacked merit, and it went further to characterize the motion to recuse as a thinly veiled tactic to manipulate the proceedings.

Id.

95. *See Proctor*, 166 F.3d at 403.

96. *See Pollani*, 146 F.3d at 274 ("[I]t is eminently reasonable to expect that [standby counsel] could have presented a better defense with three days of preparation than could Pollani with three months.").

97. *See supra* note 47 and accompanying text.

98. *See, e.g.*, *Proctor*, 166 F.3d 396; *Tolliver*, 937 F.2d 1183; *Pollani*, 146 F.3d 269.

occurred before or after trial had begun.[99] The *Pollani* court held that a request to be fully represented by standby counsel should be granted even if a continuance was inappropriate.[100] Finally, the *Proctor* court stated that there are only two specific reasons for denying counsel, one of which incorporated the *Tolliver* test.[101] These standards grant judges almost no discretion in appointing counsel, and guarantee that criminal defendants will not be denied their right to counsel when standby counsel is readily available.

Nevertheless, the *Leveto* majority moved in the opposite direction, reasoning in a manner more consistent with cases decided a quarter century ago, and focusing solely on the maintenance of court schedules.[102] The majority's decision is very likely to significantly alter the landscape of Sixth Amendment law. In rejecting more specific rules for the "last minute" standard—even when a defendant is willing to forgo a continuance—the Third Circuit gave trial courts wide latitude in deciding post-waiver requests for counsel. Such discretion is inappropriate in the context of the Sixth Amendment right to counsel. The inherent danger in granting this discretion to trial courts is that judges will choose efficiency interests over a criminal defendant's right to counsel, when in fact, the right to counsel should prevail. To prevent courts from wielding unnecessarily broad power when deciding these motions, courts considering this issue should adopt clear and more specific guidelines such as those used in *Pollani*, *Tolliver*, and *Proctor*.[103]

99. *See Tolliver*, 937 F.2d at 1188.

100. *Pollani*, 146 F.3d at 273–74.

101. *See Proctor*, 166 F.3d at 402 ("It also is within the district court's discretion 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 under way."); *Tolliver*, 937 F.2d at 1188.

102. *Compare Proctor*, 166 F.3d 396, *Tolliver*, 937 F.2d 1183, *and Pollani*, 146 F.3d 269, *with Leveto*, 540 F.3d at 215–16 *and Solina*, 733 F.2d 1208.

103. *See Proctor*, 166 F.3d at 405–06; *Tolliver*, 937 F.2d at 1187–88; *Pollani*, 146 F.3d at 273.