DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA

v.

ROY ALEXANDER McELROY-CARLOS,

Defendant.

1:22-cr-00011-WAL-EAH-1

TO: Daniel H. Huston, Esq., AUSA
Frederic Chardon-Dubos, Esq.

ORDER

THIS MATTER comes before the Court on Attorney Fredric Chardon-Dubos's Motion Requesting Leave to Withdraw filed on October 16, 2024. Dkt. No. 225. The Court held a hearing on the Motion on November 6, 2024. Based on the following, the Court finds that Defendant Roy McElroy-Carlos has voluntarily waived his right to an attorney and has constructively waived the same through his conduct. Therefore, the Court will grant Attorney Fredric Chardon-Dubos's Motion, except that Attorney Chardon-Dubos shall continue to serve as standby counsel for Mr. McElroy-Carlos.

BACKGROUND

In March 2022, Mr. McElroy-Carlos and his two codefendants were accused via Complaint of Possession of a Controlled Substance with Intent to Distribute While on Board a Vessel Subject to the Jurisdiction of the United States and Conspiracy to do the same. Dkt. No. 1.[1] The Court appointed the Federal Public Defender to represent Mr. McElroy-Carlos in May 2022. Dkt. No. 19. Attorney Gabriel Villegas filed a Notice of Appearance on behalf of Mr.

[1] The Government later issued an Information and ultimately an Indictment alleging the same charges. Dkt. Nos. 48, 80.

McElroy-Carlos shortly thereafter. Dkt. No. 29. Magistrate Judge Miller then held a detention hearing and ordered Mr. McElroy-Carlos be detained pending trial. Dkt. No. 34. He has been detained since then.

In December 2022, Mr. McElroy-Carlos filed a pro se motion seeking the appointment of new counsel. However, during a hearing on the motion before this Court, he verbally withdrew the request. The Court denied the motion as moot. Dkt. No. 70. In August 2023, Mr. McElroy-Carlos filed an *ex parte* motion requesting an immediate change of counsel. Dkt. No. 133. The motion stated that Attorney Villegas was operating under the assumption that Mr. McElroy-Carlos was guilty and that Attorney Villegas said that the Court would not believe Mr. McElroy-Carlos's claims because he is non-white. *Id*. Attorney Villegas then moved to withdraw as counsel for Mr. McElroy-Carlos, citing a "conflict of interest." Dkt. No. 134. After a hearing, the Court granted Attorney Villegas's motion to withdraw and denied Mr. McElroy-Carlos's motion as moot. Dkt. Nos. 136, 137. The Court then appointed Ramon Gonzalez, Esq., as CJA counsel for Mr. McElroy-Carlos. Dkt. No. 139.

In September 2023, Mr. McElroy-Carlos filed an *ex parte* "Motion of No Confidence in Attorney Ramon Gonzalez," arguing that Attorney Gonzalez did not believe what Mr. McElroy-Carlos had proffered, that he did not know the area of law involved in the case, and that he was prejudiced against Black people. Dkt. No. 142. At a hearing on this motion, Attorney Gonzalez stated that he could not access McElroy-Carlos's motion and thus did not file a response. However, upon hearing the allegations made against him, Attorney Gonzalez orally moved to withdraw, citing a breakdown of trust. Mr. McElroy-Carlos supported this

oral motion. The Court issued an order granting Attorney Gonzalez's oral motion to withdraw and denying Mr. McElroy-Carlos's motion as moot. Dkt. No. 147. However, the Court warned Mr. McElroy-Carlos that it was not inclined to appoint another attorney and might view another conflict with CJA counsel as a waiver of the right to counsel by conduct. Therefore, the Court gave Mr. McElroy-Carlos *Faretta* warnings, detailing the potential risks and consequences of representing himself. *Faretta v. California*, 422 U.S. 806 (1975). Specifically, the Court explained to Mr. McElroy-Carlos that he is not a lawyer and may find it difficult to understand the law, the charges against him, and the processes of defending himself. Additionally, he may have difficulty properly filing motions and citing to caselaw. The Court further explained that by proceeding pro se, Mr. McElroy-Carlos would be treated as a lawyer. If he could not adequately defend himself, he could be convicted of the charges against him and sent to prison. The Court explained that by acting pro se he would have to do everything that an attorney normally would do, such as writing motions, writing responses to the Government's motions, and locating and speaking to witnesses—even while detained. At trial, he would have to file a trial brief before the District Judge, file his own jury instructions, file a witness list, question witnesses, make his own arguments before the jury, and potentially file his own appeal. The Court asked Mr. McElroy-Carlos if, knowing this information, it was still his intent to represent himself if a conflict arose with his next appointed attorney. Mr. McElroy-Carlos answered affirmatively, and further said he understood and accepted the risk that he might have to proceed pro se if conflict arose with another CJA attorney.

The Court then found that it had properly warned him as to a potential waiver by conduct of his right to counsel and that Defendant had knowingly, intelligently, and voluntarily understood the warnings that the Court had given him and agreed to proceed pro se if another conflict arose.

The Court then appointed Attorney Anthony Kiture to represent Mr. McElroy-Carlos. Dkt. No. 146. While represented by Attorney Kiture, on November 22, 2023, Mr. McElroy-Carlos filed a pro se "Request for Political and Judicial Asylum" in which he requested a new attorney, claiming that Attorney Kiture had not contacted him in 40 days. Dkt. No. 165. Mr. McElroy-Carlos stated his belief that St. Croix was inhabited by "'alien races' not prone to follow the Constitution and Laws of the United States" and asked to be heard in a Court in Washington, D.C. by "White Anglo Saxon Protestant individuals who adhere to the Laws, and Constitution of the United States of America." *Id*. (quoting *Downes v. Bidwell*, 182 U.S. 244, 287, (1901)). He also requested a restraining order against the U.S. Marshal Service, the District Court of the Virgin Islands, "Warden. Angel Adan. of MDC Guaynabo," the U.S. Coastguard, and U.S. Attorney Delia Smith. Dkt. No. 165.

Five days later, Attorney Kiture filed a Motion to Withdraw as counsel. Attorney Kiture stated that Mr. McElroy-Carlos, in his "Request for Political and Judicial Asylum," requested a White Anglo-Saxon Protestant to represent him. Dkt. No. 168. Given that Attorney Kiture is not a White Anglo-Saxon attorney, he believed that his continued representation of McElroy-Carlos "would be hindered by Defendant's views towards Non-

White Anglo-Saxon individuals as well as his views towards individuals from the Virgin Islands." *Id*. The Court held a hearing on that motion on December 11, 2023. Dkt. No. 172.

Just before the hearing, Mr. McElroy-Carlos filed a pro se motion to strike Attorney Kiture's motion to withdraw, which accused Attorney Kiture of going on a "feelings based rant" and mischaracterizing Mr. McElroy-Carlos's statements as racist. Dkt. No. 182. The motion also requested that Attorney Kiture be sanctioned $50,000 and made to attend a remedial training as to federal criminal procedure. *Id*.

At the hearing on the motion to withdraw, Mr. McElroy-Carlos acknowledged that his citation to the *Insular Cases* might have been offensive and explained that he would not have a problem with a Black attorney, so long as the attorney was competent. Dkt. No. 184. Still, Attorney Kiture explained that based on everything Mr. McElroy-Carlos filed and said the attorney-client relationship was irreparably broken. Mr. McElroy-Carlos agreed. *Id*. The Court, therefore, granted the motion to withdraw. *Id*.

However, at the hearing the Court also found that Attorney Kiture had not visited or corresponded with Mr. McElroy-Carlos at all during the 11-week long period of his appointment. Dkt. No. 185. In light of this revelation, the Court considered the dispute with Attorney Kiture to be different from the disputes Mr. McElroy-Carlos had with his prior two attorneys. *Id*. The relationship with the first two attorneys was impaired because Mr. McElroy-Carlos refused to accept the attorneys' unwillingness to file a motion that contravened the attorneys' professional judgment. *Id*. Unlike Mr. McElroy-Carlos's "unreasonable demands" with those attorneys, the conflict with Attorney Kiture was

reasonable given Attorney Kiture's failure to contact Mr. McElroy-Carlos. Thus, the Court found that Mr. McElroy-Carlos had not constructively waived his right to counsel through his conduct. *Id*. Additionally, because Mr. McElroy-Carlos requested new counsel at the withdrawal hearing, the Court found he had not voluntarily waived his right to counsel. *Id*. Therefore, the Court granted Mr. McElroy-Carlos's oral motion to appoint new counsel but stated "it w[ould] not hesitate to find that he has waived his right to counsel in the future if he were to request a new attorney on an unreasonable basis." *Id*.

Although the Court found the *Faretta* warnings provided at the previous hearing to still be in effect, the Court reissued *Faretta* warnings to Mr. McElroy-Carlos at the hearing on Attorney Kiture's motion out of an abundance of caution. He again stated that he understood the risks of proceeding pro se and stated he was prepared to accept those risks if his relationship with his fourth attorney broke down. *Id*. The Court denied Mr. McElroy-Carlos's motions for sanctions against Attorney Kiture, his motion to strike, and oral motions he made requesting that the Court immediately grant his motions for political asylum and Speedy Trial Act dismissal.[2] *Id*. Attorney Chardon-Dubos was then appointed as his new CJA counsel. Dkt. No. 186.

On December 21, 2023—less than one week after he was appointed—Attorney Chardon-Dubos filed a motion requesting a competency hearing as to Mr. McElroy-Carlos,

[2] The Court notes for clarity that it did not and could not rule on the motions to dismiss and for political asylum themselves, but only on Mr. McElroy-Carlos's request that this Court immediately act on those motions. The substantive merits of such dispositive motions may only be determined by the District Judge. 18 U.S.C. § 636(b)(1).

asserting that his client refused to cooperate with him about the case and instead repeatedly insisted that he wanted a motion to dismiss filed regarding his jurisdictional defense. Dkt. No. 191. Mr. McElroy-Carlos indicated that he did not trust the people interviewing him and said they might be U.S. Attorneys trying to interview him in a deceptive way. *Id*. After twenty minutes, Mr. McElroy-Carlos abruptly got up, said "Thank you, sir," and ended the interview. *Id*.

The motion argued that Mr. McElroy-Carlos's conduct, pro se motions, and the content of the asylum request demonstrate "some degree of feeling persecuted by everybody," which interfered with the mental processes necessary to assist in his defense properly and adequately. *Id*. The Government did not file a response to the motion. Dkt. No. 192. Nevertheless, the Court found that there was not sufficient evidence to establish reasonable cause to believe Mr. McElroy-Carlos was suffering from a mental disease or defect. *Id*.

After the Court issued the Order denying a competency hearing, Mr. McElroy-Carlos filed four motions pro se. The first was captioned a response to his attorney's motion for a competency hearing, but exclusively argued in favor of the jurisdictional defense Mr. McElroy-Carlos had been asking his attorneys to raise. Dkt. No. 197. The motion requested that "judicial notice" be taken of the validity of the jurisdictional defense. *Id*. The second and fourth motions alleged that conditions in MDC Guaynabo were unconstitutionally inadequate and that corrections officers had taken and destroyed his legal documents and personal property. Dkt. Nos. 199, 205. The third motion reiterated his request that the Court

take judicial notice that it was without jurisdiction over him. Dkt. No. 200. Shortly after those motions were filed, the District Judge struck them from the record. Dkt. No. 208.

In June 2024, the District Judge held an evidentiary hearing as to Mr. McElroy-Carlos's second motion to dismiss. At that hearing Mr. McElroy-Carlos demonstrated dissatisfaction with Attorney Chardon-Dubos's representation, apparently stemming from the fact that Attorney Chardon-Dubos cautioned Mr. McElroy-Carlos against testifying at the hearing, which Mr. McElroy-Carlos took as an attempt to suppress his rights. Mr. McElroy-Carlos explained that he did not believe that Attorney Chardon-Dubos had his best interests at heart. The District Judge further examined Mr. McElroy-Carlos as to his willingness to proceed with Attorney Chardon-Dubos representing him. After being satisfied that Attorney Chardon-Dubos and Mr. McElroy-Carlos still had an operable attorney-client relationship, the hearing proceeded.

Then on September 17, 2024, Attorney Chardon-Dubos filed a motion requesting leave to withdraw as counsel. The Clerk's Office flagged the motion for having a proposed order with the incorrect defendant's name and instructed Attorney Chardon-Dubos to file a notice with the proper proposed order. Instead, on October 16, 2024, he filed the same motion, but with the proper proposed order. Dkt. No. 225. The motion states that on July 29, 2024, he visited MDC Guaynabo for an in-person interview with Mr. McElroy-Carlos. Dkt. No. 224. Again, Mr. McElroy-Carlos refused to listen to his attorneys and insisted they move for his jurisdictional defense until he abruptly got up and ended the interview. *Id*. The interview

lasted 24 minutes. *Id*. The motion states that "the attorney-client relationship has reached its end." Dkt. No. 225. The Court held a hearing on the motion on November 6, 2024.

At the hearing Attorney Chardon-Dubos explained that Mr. McElroy-Carlos repeatedly engaged in behavior that undermined the attorney-client relationship including pointing his finger at Attorney Chardon-Dubos and calling him a liar. Mr. McElroy-Carlos responded by saying that Attorney Chardon-Dubos was a liar and was lying to the Court about his conduct. The Court inquired as to whether Mr. McElroy-Carlos was willing to continue to be represented by Attorney Chardon-Dubos. Mr. McElroy-Carlos said he would prefer to proceed pro se because he knew his case better than anyone. But after making that statement, Mr. McElroy-Carlos indicated that he wanted Attorney Chardon-Dubos to seek a plea deal for him—the first time in this case that Mr. McElroy-Carlos indicated a willingness to seek a plea. Despite that statement, Mr. McElroy-Carlos simultaneously maintained that he wanted to proceed pro se. The Court then, for the third time, issued *Faretta* warnings. The Court advised Mr. McElroy-Carlos of the potential pitfalls and difficulties of representing himself. The Court further advised Mr. McElroy-Carlos of the charges he faced and the potential range of punishments allowable if convicted of those charges. Mr. McElroy-Carlos stated he understood each of the Court's warnings and the possible punishments he faced if convicted of each charge against him. Despite the Court's warnings, Mr. McElroy-Carlos said he still wanted to proceed pro se.

DISCUSSION

I. Applicable Legal Principles

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. However, there are certain circumstances in which a defendant can be found to have waived or forfeited this right. *United States v. Goldberg*, 67 F.3d 1092 (3d Cir. 1995). This can occur when a defendant waives, forfeits, or waives by conduct their right to counsel. A waiver is "an intentional and voluntary relinquishment of a known right," usually by affirmative, verbal request. *Id*. at 1099. For a waiver of counsel to be knowing and intelligent, the defendant must be made aware of the dangers and disadvantages of self-representation with an apprehension of "the nature of the charges, the statutory offenses included within them, and the range of allowable punishments thereunder." *United States v. Booker*, 684 F.3d 421, 425-26 (3d Cir. 2012).

A forfeiture of the right to counsel, by contrast, occurs regardless of whether the defendant intended to relinquish the right. This typically applies in situations of "extremely serious misconduct" where, for example, the defendant is abusive toward his attorney. *Goldberg*, 67 F.3d at 1100, 1102. A defendant forfeits his right to an attorney only in the most extreme cases. *Id*. at 1102 For example, even alleged death threats against an attorney were not sufficient to demonstrate forfeiture of the right to counsel. *Id*.

Waiver by conduct is the middle ground between voluntary waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in "dilatory

tactics," any misconduct thereafter may be treated as "an implied request to proceed pro se and, thus, as a waiver of the right to counsel." *Id*. at 1100.

A defendant may waive his right to counsel by conduct even if it is the attorney who moves to withdraw from the case. In *United States v. Thomas*, 357 F.3d 357, 359-360 (3d Cir. 2004), after the defendant's first and second public defenders had withdrawn due to breakdowns in communications, the court appointed a third public defender but warned the defendant that he could be deemed to waive his right to counsel if he makes "unreasonable demands," which "may constitute what the law considers misconduct by the Defendant client." *Id*. The court also explained the risks of proceeding pro se. *Id*. After the third public defender withdrew due to a breakdown of the relationship with the defendant, the court refused to appoint another attorney to represent the defendant, finding that the defendant waived his right to counsel by conduct. The Third Circuit upheld that finding. *Id*. at 365.

Regardless of whether a waiver of counsel is made through verbal assent or through conduct, a defendant must "be warned about the consequences of his conduct, including the risks of proceeding pro se." *Goldberg*, 67 F.3d at 1101. These warnings require an "on-the-record colloquy evincing both a knowing, voluntary and intelligent waiver of the right to counsel and an explanation by the district court of the risks of self-representation." *Id*. at 1099. A court should advise the defendant in "unequivocal terms both of the technical problems he may encounter in acting as his own attorney and of the risks he takes if his defense efforts are unsuccessful[.]" *Id*. at 1099-1100. "[A] defendant's waiver of counsel can be deemed effective only where the district judge has made a searching inquiry sufficient to

satisfy him that the defendant's waiver was understanding and voluntary." *Id*. The Third Circuit found warnings of "the difficulties [a defendant] would face if he proceeded pro se, the procedural requirements with which he would have to comply, the nature of the charges against him, and the possible range of punishments that could be imposed upon him," sufficient to determine that a waiver of counsel by conduct was made knowingly and intelligently. *Thomas*, 357 F.3d at 361.

II. Application

The Court issued three separate warnings to Mr. McElroy-Carlos about the dangers and disadvantages of representing himself pro se. Therefore, the Court finds that when Mr. McElroy-Carlos voluntarily waived his right to counsel through verbal assent at the hearing on Attorney Chardon-Dubos's motion to withdraw, he did so knowingly and intelligently. *See Booker*, 684 F. 3d at 425-26.

Furthermore, the Court advised Mr. McElroy-Carlos three times as to the risks he faced if he continued to make unreasonable demands of his attorneys, including that he could be made to proceed pro se. Each time the Court warned Mr. McElroy-Carlos that he could waive his right to counsel by conduct, the Court further provided *Faretta* warnings about the dangers of proceeding pro se. The Court finds that each of its inquiries were sufficiently searching to satisfy itself that Mr. McElroy-Carlos knew and understood the risks of his continued unreasonable demands and the risks of proceeding pro se. *See Thomas*, 357 F.3d at 364.

Nevertheless, Mr. McElroy-Carlos continued to file pro se motions to dismiss the charges against him on bases that had already been denied by the District Judge. He continued to demand each of his attorneys file motions they believed they could not file given their ethical duties to the Court and to their profession. He refused to meet with his attorneys after being told that they would not file the motion he demanded, despite being told that the defense he sought was not warranted or appropriate in this case. Even at this latest hearing, after being advised that his basis for a motion to challenge the Court's jurisdiction had already been addressed and decided by the Court, he continued to demand that his counsel file such a motion. The Court noted that McElroy-Carlos did all of the above even after repeated warnings from the Court about his continued unreasonable demands being viewed as a waiver of counsel by conduct. Given Mr. McElroy-Carlos's repeated acceptance of that risk, as well as his repeated acceptance of the risks of proceeding pro se and his understanding of the charges against him and their potential punishments, the Court finds that Mr. McElroy-Carlos also knowingly and intelligently waived his right to counsel by conduct.

Despite his oral waiver and his waiver by conduct of his right to counsel, the Court finds it significant that Mr. McElroy-Carlos is now, for the first time, seeking to engage with the Government in plea negotiations. Negotiating pleas is a critical and significant step in the criminal justice process and, while the Defendant has waived his right to counsel, the Court believes that it would be in the Defendant's best interest to have standby counsel assist him in plea negotiations and will do so here. Furthermore, "[t]he Court may appoint standby

counsel in order to overcome routine obstacles that may hinder effective *pro se* representation." *United States v. Bertoli*, 994 F.2d 1002, 1019 (3d Cir. 1993). The Court recognizes that it would be difficult for a pro se defendant, especially one incarcerated pending trial, to negotiate a plea agreement with the Government. Accordingly, though the Court will grant Attorney Chardon-Dubos's Motion to Withdraw, it will require him to remain in service as standby counsel for Mr. McElroy-Carlos to facilitate plea negotiations between Mr. McElroy-Carlos and the Government. Attorney Chardon-Dubos shall remain as stand-by counsel for Mr. McElroy-Carlos should plea negotiations breakdown, absent an Order granting Attorney Chardon-Dubos leave to withdraw as standby counsel.[3]

Consequently, it is hereby **ORDERED**:

1. Attorney Chardon-Dubos's Motion Requesting Leave to Withdraw as Attorney for Defendant McElroy-Carlos is **GRANTED.**
2. Based on his voluntary, knowing, and intelligent waivers of the right to counsel, Mr. McElroy-Carlos shall be permitted to proceed in this matter pro se.
3. Attorney Chardon-Dubos shall serve as standby counsel to assist Mr. McElroy-Carlos in plea negotiations.

[3] Mr. McElroy-Carlos agrees that the appointment of standby counsel will be in his best interest and does not object to Attorney Chardon-Dubos serving in that capacity. Attorney Chardon-Dubos likewise does not object to serving as standby counsel.

4. The Clerk of the Court shall cause a copy of this Order to be delivered to Mr. McElroy-Carlos.

ENTER:

Dated: November 18, 2024

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE