IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO.: 14-1249

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER KELLEY,

Defendant-Appellant

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

OPENING BRIEF OF DEFENDANT-APPELLANT

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SUMMARY OF THE CASE

Defendant-Appellant Christopher Kelley appeals his convictions for two separate acts of arson, in violation of 18 U.S.C. § 844(i). Although a jury convicted him after a three-day trial, the two issues Mr. Kelley raises in this appeal deal with his pretrial efforts to substitute court-appointed counsel.

Mr. Kelley requested substitution of counsel one month before the originally scheduled trial date, and again on the morning of trial before the jury was impanelled. The morning of the first day of trial, Mr. Kelley submitted a written motion to the district court requesting substitution of counsel. Alternatively, Mr. Kelley requested leave to represent himself at trial in the event the court declined to substitute counsel. When the district court denied his request to substitute counsel, Mr. Kelley reiterated his desire to proceed *pro se* at trial. The district court denied his request for self-representation without explanation and without conducting a *Faretta* inquiry.

Mr. Kelley's first argument is that the district court violated his Sixth Amendment right to represent himself at trial. His second argument is that the district court abused its discretion in denying Mr. Kelley's repeated attempts to substitute counsel. Mr. Kelley believes oral argument would assist the Court and respectfully requests 15 minutes per side.

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STATEMENT OF JURISDICTION

The United States District Court for the Western District of Missouri had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291, this Honorable Court has appellate jurisdiction over the judgment entered on January 28, 2014 (DCD 95) and timely appealed on January 30, 2014 (DCD 96). The judgment is a final order that disposes of all litigation pending before the district court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court violate Mr. Kelley's Sixth Amendment right to represent himself at trial?

- U.S. Const. amend. VI.
- *Faretta v. California*, 422 U.S. 806 (1975)
- *Reese v. Nix*, 942 F.2d 1276 (8th Cir. 1991)
- *Jones v. Norman*, 633 F.3d 661 (8th Cir. 2011)

2. Did the district court abuse its discretion when it denied Mr. Kelley's repeated requests for substitution of court-appointed counsel?

- *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991)
- *Lopez v. Scully*, 58 F. 3d 38 (2d Cir. 1995)

STATEMENT OF THE CASE

On June 27, 2012, a grand jury indicted Mr. Kelley for two separate acts of arson, in violation of 18 U.S.C. § 844(i). (DCD 1). According to Count One of the Indictment, Mr. Kelley committed arson in a building at Stephens College in Columbia, Missouri on May 18, 2011. (DCD 1). According to Count Two, Mr. Kelley committed arson in the Ellis Library building at the University of Missouri on September 10, 2011. (DCD 1). After a three-day trial, the jury returned a guilty verdict on both counts in the indictment. (DCD 64). The district court sentenced Mr. Kelley to 78 months imprisonment. (DCD 95).

A. MR. KELLEY'S FIRST ATTEMPT TO SUBSTITUTE COUNSEL

On July 3, 2012, the district court appointed a public defender, Attorney Troy Stabenow, to represent Mr. Kelley. (DCD 10). Trial was set for October 22, 2012. (DCD 12). On October 10, 2012, Mr. Stabenow moved to continue the trial date because forensic tests requested by the defense, including "fingerprint analysis and DNA testing," would not be completed in time for trial. (DCD 16). The Government did not oppose the motion and the district court reset the trial for January 7, 2013. (DCD 17).

On December 7, 2012, one month before trial, Attorney Stabenow filed a "Notice of Defendant's Request for Substitution of Counsel," which requested a hearing and stated that "Mr. Kelley requests that this Court appoint substitute

counsel on the basis that present counsel is ineffective." (DCD 19). Magistrate Judge Matt J. Whitworth heard the matter on December 10, 2012. During the hearing, Mr. Kelley stated that he recorded his two meetings with Attorney Stabenow, which occurred on October 9, 2012, and November 26, 2012. (DCD 84 at 13).

Mr. Kelley filed an exhibit with the district court which detailed his concerns with Attorney Stabenow's representation. (DCD 22). The exhibit included excerpts of the recorded meetings, as well as excerpts of email correspondence between Mr. Kelley and Attorney Stabenow. (DCD 22 at 2-8). In addition, in a cover letter to the exhibit, Mr. Kelley professed his innocence and indicated that he was troubled by Attorney Stabenow's belief that he was guilty: "I understand that it is not counsel's job to believe I am innocent. [Attorney Stabenow] has made it clear in his correspondence that he very much believes that I am guilty." (DCD 22 at 1).

In his exhibit, Mr. Kelley explained his concerns regarding Attorney Stabenow, including: (1) Attorney Stabenow's inconsistent responses to Mr. Kelley's requests for DNA testing of feces which were found on the fourth floor of the Ellis Library during the investigation (DCD 22 at p. 2); (2) Attorney Stabenow's responses to Mr. Kelley's concerns regarding the destruction of the original recording of the Ellis Library security surveillance footage and missing

portions of a copy of the library surveillance footage in the Government's possession (DCD 22 at p. 3-4); (3) a general breakdown in communication between Mr. Kelley and Attorney Stabenow (DCD 22 at p. 5-6); (4) Attorney Stabenow's lack of precision in calculating the base offense level flowing from the charged crimes (DCD 22 at p. 7); and (5) Attorney Stabenow's failure to provide guidance regarding the procedure for "obtaining a substitution of counsel" and "making a claim of ineffective assistance of counsel." (DCD 22 at p. 8).

At the outset of the hearing, Attorney Stabenow expressed concerns about the adversarial nature of the proceeding. Attorney Stabenow cautioned that Mr. Kelley's decision to submit documents in support of his argument for substitution would "require the waiver of privilege and for me to provide [the court] documents, putting into context the stuff that was chosen from prior emails." (DCD 84 at 7-8). Magistrate Whitwoth acknowledged the waiver problem and asked Mr. Kelley if he recognized "that by sharing discussions you may have had with Mr. Stabenow, you're in effect waiving [the attorney-client privilege] as to at least this hearing." (DCD 84 at 5). Mr. Kelley acknowledged that he understood the risk.

During the hearing, Attorney Stabenow accused Mr. Kelley of lying and fraudulently misrepresenting their interactions: "He sends e-mails that include lies and fraudulent misrepresentations of things that have happened." (DCD 84 at 17).

Attorney Stabenow informed Magistrate Whitworth that these alleged misrepresentations caused Attorney Stabenow "some concern going forward" because Mr. Kelley was writing "things in a way that would lead people to draw bad conclusions" about the quality of his representation. (DCD 84 at 38). Attorney Stabenow also shared his unsolicited opinion regarding Mr. Kelley's innocence with the court: "As I've informed Mr. Kelley, he has a right to competent representation, not necessarily representation that believes he's innocent. I don't believe he's innocent." (DCD 84 at p. 34).

Regarding DNA testing of the feces, Mr. Kelley maintained that because he did not commit the crime and did not defecate in the library, the feces were "valuable" evidence. (DCD 84 at 13). Mr. Kelley claimed that during the October 9, 2012, meeting, Attorney Stabenow stated that the feces were collected by investigators, had not yet been DNA tested, but that a test could be conducted if requested. (DCD 22 at 22). According to Mr. Kelley, at their next meeting on November 26, 2012, Attorney Stabenow did not tell him the feces had not been preserved as evidence. (DCD 84 at 14). Instead, Attorney Stabenow advised Mr. Kelley that the feces were not important to the case. (DCD 22 at 2). Mr. Kelley disagreed, and requested the results of the DNA test in a follow-up email on November 28, 2012. (DCD 22 at 2).

Attorney Stabenow responded in a November 30, 2012, email, stating: "The

feces in this case was [sic] not preserved. To the best of my knowledge, no DNA testing has been completed in this case." (DCD 22 at 2). On December 3, 2012, Mr. Kelley emailed Attorney Stabenow, asking: "What happened to the feces? (DCD 22 at 2). Who last possessed it? What is your source on [that] information?" (DCD 22 at 2). Attorney Stabenow responded the next day: "The feces were [sic] not preserved. Period." (DCD 22 at 2).

At the hearing, Attorney Stabenow claimed he had, in fact, told Mr. Kelley the feces were not preserved during their meeting on November 26, 2012. (DCD 84 at p. 9). Attorney Stabenow explained to Magistrate Whitworth that the feces were "not collected into evidence" and were "disposed of by campus security the same night." (DCD 84 at p. 14-15). Regardless, the details surrounding the destruction of the feces did not matter to Attorney Stabenow, because as he explained to Magistrate Whitworth, the feces were much ado about nothing:

> …I also communicated to him my belief that that feces was of minimal value in his case. The feces was [sic] found on the fourth floor and every single fire in this case was on the first floor. And so the only area that's going to matter in his arson trial is the area where the fires were set, because those areas were captured on video. And the only person going in or out of those rooms on video was Mr. Kelley. So, in order for our defense to be successful, we have to come up with an alternate explanation for how the fires could have happened in those rooms and that our focus has to be on the first floor. As I told Mr. Kelley, even assuming that we can show the feces belonged to someone else, the Government response could be, well, some student went there and played a practical joke before the library closed that night and nobody noticed. It's not going to negate the arson cases unless we can deal with the evidence on the first floor.

(DCD 84 at 9-10).

Magistrate Whitworth found that Mr. Kelley's gripe about the DNA test was unfounded because "there's certainly nothing Mr. Stabenow can do about the fact that the investigators destroyed that evidence or somebody at the – maybe when they cleaned it up, somebody threw it all away." (DCD 84 at p. 10). Strangely, although the trial had not occurred and Mr. Kelley was steadfast in professing his innocence during the hearing, Magistrate Whitworth opined that "the fact that no tests were done actually is to your benefit." (DCD 84 at p. 10).

Magistrate Whitworth also informed Mr. Kelley that Mr. Stabenow could use the absence of the original surveillance recording and the Government's failure to preserve the feces to Mr. Kelley's advantage: "Mr. Stabenow, as your attorney, can argue in the adverse inference that the Government did a very poor investigation and by not preserving that evidence, that creates reasonable doubt." (DCD 84 at p. 11). Magistrate Whitworth asked Attorney Stabenow whether he was "prepared to make that argument," to which Attorney Stabenow responded, "Yes, Your Honor." (DCD 84 at p. 11).

Before the hearing concluded, Magistrate Whitworth instructed Mr. Kelley that his ineffective assistance of counsel claim was premature, and could only be raised in a habeas proceeding pursuant to 28 U.S.C. § 2255:

> [T]here is a question concerning you wanting to make a claim of ineffective assistance of counsel. You can't raise the claim of ineffective assistance of

> counsel prior to a finding of guilt in a case. That can only be raised in a -- what's called a § 2255, which is a post-conviction hearing or process -- procedure that when a defendant is convicted in a criminal case, they can claim, following their appeal, direct appeal on that conviction, assuming the case is affirmed, the conviction is affirmed on appeal, the next thing that can be raised is a § 2255 claim alleging that your constitutional rights were violated. And one of the claims that's frequently raised is ineffective assistance of counsel. But you can't raise that until there's been a conviction, the case has been affirmed on appeal and you want to claim that your attorney was ineffective in violation of the Constitution. That's the only time you can make that claim.

(DCD 84 at p. 25) (emphasis added). Mr. Kelley responded: "Thank you for letting me know. I did not know that. I was not informed." (DCD 84 at p. 25). Magistrate Whitworth then denied Mr. Kelley's motion to substitute counsel. (DCD 84 at p. 33).

B. MR. KELLEY RAISES MORE CONCERNS REGARDING ATTORNEY STABENOW AT A PRETRIAL STATUS HEARING

On December 18, 2012, Attorney Stabenow again moved to continue the trial date because the "forensic testing of several items of evidence seized during this case" would not be completed in time for the January 7, 2013, trial. (DCD 25 at p. 1). The motion was unopposed, and the District Court granted the continuance, resetting the trial for March 18, 2013. (DCD 26). On March 7, 2013, the District Court granted another continuance requested by Attorney Stabenow "to fully investigate the case and adequately prepare for trial" and reset the trial date for April 22, 2013. (DCD 28).

On April 17, 2013, Magistrate Whitworth conducted a status hearing requested by Attorney Stabenow to address ongoing issues between Mr. Kelley and Attorney Stabenow. At the beginning of the hearing, Magistrate Whitworth stated that he would be "glad to listen" to Mr. Kelley's concerns regarding Attorney Stabenow. (DCD 85 at 6). However, Magistrate Whitworth reiterated his instruction from the December 10, 2012, hearing, that if Mr. Kelley intended to allege ineffective assistance of counsel, he could only do so in a post-conviction motion pursuant to § 2255: "But, Mr. Kelley, typically if you – if defendants in criminal cases want to raise issues of ineffective assistance of counsel, at this stage of the proceedings that would normally not be something that you could raise. That's something that would be raised post-conviction – under 28 U.S. Code Section 2255." (DCD 85 at 6-7).

Mr. Kelley went on to explain that he did not understand why, after Attorney Stabenow had requested to continue the trial to conduct forensic testing on certain evidence, no testing had been requested or performed. (DCD 85 at 15). Attorney Stabenow claimed there was no reason for the defense to test anything that had not already been tested by the Government, and no reason to conduct independent testing on any of the evidence tested by the Government. (DCD 85 at 16). Magistrate Whitworth agreed, and once again intimated that Mr. Kelley was guilty. To wit, Magistrate Whitworth advised Mr. Kelley that since the Government's

DNA and fingerprint tests did not point to Mr. Kelley's guilt, instead of seeking further testing, he "better stop right there" because "you're never sure if you ask for retesting what they're going to find." (DCD 85 at 17).

Mr. Kelley also expressed concern that although Attorney Stabenow had previously indicated that he wanted to consult expert witnesses, none had been contacted. (DCD 85 at 21). Attorney Stabenow explained that based on his experience with arson cases he knew that consulting an expert witness would not be helpful. (DCD 85 at 23). Magistrate Whitworth stated that he had also "handled many arson cases over the years," and based on that experience, thought consulting expert witnesses would be a "dead end" for Mr. Kelley. (DCD at 24).

During the status conference, Attorney Stabenow explained a few of the angles he pursued to prepare for trial. Attorney Stabenow told Magistrate Whitworth he asked the Honorable Beth Phillips, who was trying the case, to ask the jurors certain questions during *voir dire*. (DCD at 20). For instance, Attorney Stabenow asked Judge Phillips, "for the benefit of Mr. Kelley, that she, as a perceived neutral party, do the questioning about people's loyalty or close affiliation with the University of Missouri and Stephens College," because Attorney Stabenow felt such questions "would be better received coming from the judge than coming [sic] from Mr. Kelley's attorney." (DCD 85 at 20). Magistrate Whitworth agreed this strategy was "a very good idea" (DCD 85 at 20-21),

indicated that Mr. Kelley was lucky to have Attorney Stabenow as his attorney, and wished Mr. Kelley good luck at trial. (DCD 85 at 25-26).

C. MR. KELLEY AGAIN MOVES TO SUBSTITUTE COUNSEL AND ALTERNATIVELY REQUESTS TO REPRESENT HIMSELF AT TRIAL

On the morning of the first day of trial, April 22, 2013, Mr. Kelley provided the District Court with his *pro se* "Motion to Replace Court Appointed Attorney for Ineffective Assistance of Counsel." (DCD 56). In the motion, Mr. Kelley elaborated on some of the concerns he raised with Magistrate Whitworth during the previous hearings. Mr. Kelley also raised some new concerns. Once again, Mr. Kelley attached email correspondence with Attorney Stabenow to support his claims.

One of the previously raised concerns Mr. Kelley explained further was Attorney Stabenow's equivocation regarding expert witnesses for the defense. Mr. Kelley alleged that after "promising for months that we would thoroughly explore expert witnesses, I begged him to please seek experts to shed light on the inaccuracies I've pointed out." (DCD 56 at 4). Mr. Kelley asserted that Attorney Stabenow refused to consult experts and told him that maybe if Mr. Kelley was a billionaire they could consult the expert witnesses he was suggesting. (DCD 56 at 4).

One of Mr. Kelley's new concerns dealt with the timing of the library surveillance footage. Mr. Kelley was adamant he was "not in the library when the

timestamp indicates," and was thus eager to present evidence which would undermine the Government's timeline of events. (DCD 56 at 3). Mr. Kelley claimed that Attorney Stabenow refused to consult an expert witness to authenticate the timing of the video footage. (DCD 56 at 3). In addition, according to Mr. Kelley, Attorney Stabenow refused to request "street camera footage" from the Columbia Police Department which Mr. Kelley believed would conflict with timestamp on the library surveillance footage. (DCD 56 at 3).

Due to these concerns, in the "Remedies Requested" portion of his motion, Mr. Kelley requested that, in the event the District Court denied his motion to substitute, he be permitted to represent himself, rather than moving forward with Attorney Stabenow. (DCD 56 at 2). In addition, the email correspondence attached to Mr. Kelley's motion reflects that the weekend before trial, Mr. Kelley asked Attorney Stabenow to request a continuance because, *inter alia*, Mr. Kelley thought they needed expert witnesses at trial. (DCD 56 at 9). Mr. Kelley indicated that if Attorney Stabenow was unable to procure a continuance, he would "proceed with the fully-documented motion for substitution of counsel, and a motion to represent myself" if the court denied the substitution request. (DCD 56 at 9). He also asked Attorney Stabenow whether he needed to send the document to Attorney Stabenow and the prosecutor before submitting it to the court. (DCD 56 at 9).

Attorney Stabenow responded that the "court will not let you file anything unless it goes to me first." (DCD 56 at 10). Attorney Stabenow also asked: "If the court does not grant you a delay, do you still intend to represent yourself?" (DCD 56 at 10). If so, Attorney Stabenow stated that he could act as stand-by counsel. (DCD 56 at 10). Mr. Kelley responded that he was not "asking for the judge to grant me a delay," rather, he wanted time to prepare and review the evidence before "I represent myself." (DCD 56 at 10). Mr. Kelley also asked for the records filed in conjunction with his previous requests to Magistrate Whitmore for substitution of counsel to show Judge Phillips that he was not "just delaying the court or seeking a [sic] needless 11th hour continuance." (DCD 56 at 11).

On the morning of trial, Judge Phillips vetted Mr. Kelley's concerns with Attorney Stabenow, found them unavailing, and held the following discussion with Mr. Kelley:

> THE COURT: The other principle that I think is important to remember is that Mr. Stabenow is a very experienced attorney, he's very knowledgeable, not only in the rules of federal procedure, but also in the rules of evidence. In addition, he has extensive experience in presenting trials and evidence to a jury. And so -- and those are both areas that you have no experience in; is that correct?
>
> MR. KELLEY: That is correct, that I'm not a legal professional of any kind."
>
> THE COURT: Right. Right. And so I firmly believe, and I think that Mr. Stabenow has very clearly explained that he is making decisions in your best interests. They may be decisions that you don't fully understand because you don't understand the rules of evidence and you don't understand the rules of criminal procedure, and you've never presented a case to a jury, but I do not

> find based upon the comments that you have made and the response that Mr. Stabenow has made that Mr. Stabenow is doing anything other than acting in your best interests. In fact, I believe he's probably gone above and beyond what his responsibilities entail in this particular case. And so I am not at this point or at any point in this trial going to grant your request for a new attorney or to discharge Mr. Stabenow.
>
> Furthermore, I did -- I was aware of the fact that there was a possibility that a continuance would be requested. Based upon the information that was provided to me, I don't see a basis for a continuance in this case and also trust Mr. Stabenow's explanation as to why no continuance was necessary.

(DCD 71 at 7-8).

Mr. Kelley responded: "Since you won't provide substitution, I would like to move for the court to allow me to represent myself, contingent upon getting a continuance for me to review the evidence and prepare." (DCD 71 at 8). Judge Phillips responded that she did not believe a continuance was "necessary, or appropriate," and asked Mr. Kelley: "Now, knowing that I'm not going to grant a continuance, is it your wish that you proceed *pro se* and without Mr. Stabenow representing you?" (DCD 71 at 9).

Before Mr. Kelley could answer, his girlfriend, Tara Ballenger, who was present to testify as a defense witness, called out: "Has she seen the document?" (DCD 71 at 9). Mr. Kelley and Attorney Stabenow indicated to Judge Phillips that Ms. Ballenger was referring to Mr. Kelley's *pro se* motion. (DCD 71 at 9). Judge Phillips indicated that she had not read the motion and took a 10 minute recess to review it. (DCD 70 at 10).

When she returned to the courtroom, she disposed of the motion thusly:

> I have had the opportunity to review the motion to replace court-appointed attorney for ineffective assistance of counsel that Mr. Kelley provided. And, Mr. Kelley, I don't see anything in this document that changes my opinion or is essentially anything new from the conversation that you and I had…So I'm going to deny your motion, deny your request for substitute counsel, and proceed today with a trial.

(DCD 70 at 10-11). Judge Phillips never resumed questioning Mr. Kelley regarding his desire to proceed *pro se*.

D. TRIAL

The crux of the defense theory of the case was that someone else started the fires. (DCD 73 at 19). Although Attorney Stabenow previously explained to Magistrate Whitworth during the December 10, 2012, hearing that nothing that occurred on the fourth floor of the library would be important, events which occurred on the fourth floor featured heavily at trial.

As early as its opening statement, the Government emphasized the damage to the fourth floor. Specifically, there "was a window that was knocked out" and "someone had urinated and defecated on one of the study carrels there." (DCD 70 at 23). The Government also noted that a forensic examination of the clothes Mr. Kelley purportedly wore on the night of the library fire revealed the presence of glass fragments. (DCD 70 at 26).

The most damning evidence the Government presented against Mr. Kelley was the surveillance footage from Ellis Library. The Government introduced the

surveillance footage through the assistant head of security at Ellis Library, Julie Rogers. Ms. Rogers testified that on the morning of the Ellis Library fire, at approximately 4:05 a.m., she was called into the library to review the surveillance footage to "see if we could see anybody that was in the building." (DCD 72 at 45).

Ms. Rogers testified that she reviewed all footage captured from 8:15 p.m. on the night in question through 4:15 a.m., from 10 different cameras. (DCD 72 at 45). Ms. Rogers testified that it took her approximately two and a half to three weeks to complete her review. (DCD 72 at 79). However, rather than copying all the pertinent surveillance footage and furnishing it to the Government, Ms. Rogers copied extremely limited portions of the footage. (DCD 72 at 49).

Specifically, Ms. Rogers only copied and provided the Government the surveillance footage from cameras which captured Mr. Kelley's presence in the library. Ms. Rogers did not preserve any footage captured after 3:25 a.m., because that was when "the suspect left" the library and "we got him on camera leaving the building." (DCD 72 at 49). Ms. Rogers agreed, however, that as of 3:25 a.m., no surveillance footage from anywhere in the library captured signs of smoke, haze, or anything else related to a fire. (DCD 72 at 81-82).

All of the footage following 3:25 a.m. and, in fact, all of the footage other than that Ms. Rogers decided was worth preserving, was erased. Although all footage was saved automatically by the surveillance system for a period of time

between 30 and 42 days, it was not requested by law enforcement. (DCD 72 at 82). In response to questioning from the Government, Ms. Rogers testified that she was requested to preserve certain video and followed orders. (DCD 72 at 84). Attorney Stabenow did not ask Ms. Rogers who gave the orders regarding which video evidence to preserve and why.

Although Mr. Kelley appeared in the surveillance recordings, there was no footage of him starting a fire, and no footage of the areas the Government maintained were the origins of the fire. After the Government played the surveillance footage for the jury, however, Ms. Rogers testified that there was "no way possible" that someone "could have entered those areas where the fire took place without being captured on video surveillance." (DCD 72 at 71).

On cross-examination, Attorney Stabenow sought to undermine her testimony by theorizing that someone else entered the library through the broken window on the fourth floor. (DCD 72 at 84-85). Ms. Rogers did not dispute that someone could have entered through the fourth floor window and committed the acts in question without being captured by surveillance. Instead, Ms. Rogers believed such a theory was unrealistic because she did not think a perpetrator could fit through the window. (DCD 72 at 84-85).

The Government also called April Colvin, a lieutenant with the University Police Department, to testify regarding the collection of the feces on the fourth

floor. She testified that the feces were, in fact, originally collected as evidence, but were not preserved. (DCD 72 at 108). The Government asked her why the feces were not preserved and she responded that she called a "Sergeant Spalding to determine if he needed us to keep it and how to go about preserving it, if he did. And he stated that it was not necessary." (DCD 72 at 109).

On cross-examination, Attorney Stabenow did not ask Ms. Colvin who Sergeant Spalding was, or whether he worked for the University Police Department, Columbia law enforcement, or the Federal Government. (DCD 72 at 111). Attorney Stabenow did not ask Ms. Colvin whether she knew why Sergeant Spalding believed preserving the feces was unnecessary. (DCD 72 at 111). In fact, Attorney Stabenow did not ask Ms. Colvin any question regarding the feces at all. (DCD 72 at 111). The record does not reflect any attempt to secure Sergeant Spalding's attendance at trial.

The only question Attorney Stabenow asked regarding the feces during the entire trial was directed to Gregory Wills, an investigator for the Federal Public Defender's Office, who was called as a defense witness. (DCD 72 at 151). Attorney Stabenow asked Mr. Wills, "We did hear some evidence that there was some feces found on the fourth floor. Mr. Kelley had also requested DNA testing of the feces; is that correct?" (DCD 72 at 152). Mr. Wills responded, "Yes, he did," and Attorney Stabenow asked: "And that's when all of us, the defense side

and the government's side, found out that it had not been preserved for testing?" (DCD 72 at 152). Mr. Wills responded, "That's correct." (DCD 72 at 152).

During the trial, the defense did not provide any expert testimony to rebut the testimony of either the fire investigator called by the Government, Debbie Sorrell (DCD 72 at 122-143), or the Government's computer expert, Christopher Herbold (DCD 72 at 193-196). The jury ultimately returned a guilty verdict on both counts of the Indictment on April 24, 2013. (DCD 73 at 33-34).

E. THE DISTRICT COURT GRANTS ATTORNEY STABENOW'S POST-TRIAL REQUEST TO WITHDRAW FROM REPRESENTING MR. KELLEY

On July 23, 2013, prior to sentencing, Attorney Stabenow filed a Motion to Withdraw as Counsel. (DCD 74). In his motion, Attorney Stabenow indicated that Mr. Kelley contacted Attorney Stabenow on July 23, 2013, and "unequivocally" indicated that he wanted to release Attorney Stabenow as counsel and wished to proceed *pro se*. (DCD 74 at 2).

On July 24, 2013, Mr. Kelley submitted a *pro se* letter to the district court with attached exhibits. In his letter, Mr. Kelley stated he "would strongly prefer that new counsel be appointed," but that if substitution "is not an option provided to me as a result of Mr. Stabenow's motion to withdraw," he would rather represent himself. (DCD 78 at 2). According to Mr. Kelley, the purpose of his letter was not only to reiterate the concerns he had previously expressed about

Attorney Stabenow's representation, but also to "add to the record" his "deep dissatisfaction with counsel's post-conviction representation." (DCD 78 at 3). One of the concerns raised in Mr. Kelley's letter was his discovery that Attorney Stabenow was employed by the University of Missouri as a professor. (DCD 78 at 3).

Magistrate Whitworth heard the matter on July 31, 2013. At the outset of the hearing, Magistrate Whitworth once again warned Mr. Kelley that if he accused Attorney Stabenow of ineffective assistance of counsel, he would waive attorney-client privilege and Attorney Stabenow would be permitted to respond to his allegations. (DCD 86 at 5). Mr. Kelley responded that he had already accused Attorney Stabenow of ineffective assistance in the two previous hearings. Magistrate Whitworth responded that he understood, but that "typically, ineffective assistance of counsel claims are not litigated until after the conviction occurs and the case has been affirmed on appeal." Magistrate Whitworth further advised:

> You haven't been sentenced yet. And normally ineffective assistance of counsel claims cannot be raised until after there is an affirmance of the conviction on appeal. And then under 28 U.S.C. Section 2255, you have the right to file pleadings accusing counsel of ineffective assistance of counsel and alleging that your constitutional rights were denied. Do you understand that?

(DCD 86 at 6). Mr. Kelley responded, "I believe – well, so I have to wait until a certain time to allege that he's ineffective?" (DCD 86 at 6). Magistrate Whitworth replied, "Normally that's the case, yes." (DCD 86 at 6).

Magistrate Whitworth then asked Mr. Kelley if Attorney Stabenow's representation that Mr. Kelley wished to release him and proceed *pro se* was accurate. (DCD 86 at 10). Mr. Kelley responded that if Attorney Stabenow was withdrawing, he would prefer a substitution of counsel. (DCD 86 at 10). Magistrate Whitworth indicated he would not appoint new counsel because Attorney Stabenow "was a very good lawyer" and "had done a good job" for Mr. Kelley thus far. (DCD 86 at 12).

Mr. Kelley disagreed and asked Magistrate Whitworth if he had read the letter. (DCD 86 at 13). After Magistrate Whitworth said he had, Mr. Kelley reiterated that he would rather have counsel appointed, but if forced to choose between Attorney Stabenow and no counsel, he would rather proceed *pro se*. (DCD 86 at 13). Magistrate Whitworth began a *Faretta* inquiry, during which Mr. Kelley again reiterated his desire to have substitute counsel appointed. (DCD 86 at 18). Magistrate Whitworth indicated that "wasn't his decision to make" and told Mr. Kelley he needed to "take that up with Judge Phillips," but that "normally courts don't provide [sic] substitute counsel." (DCD 86 at 18). Magistrate Whitworth finished the *Faretta* inquiry and orally granted Attorney Stabenow's motion to withdraw. (DCD 86 at 22).

Magistrate Whitworth then asked whether Mr. Kelley had any additional questions. Mr. Kelley asked if Magistrate Whitworth "would consider it a conflict

of interest that my former attorney worked as a professor with the University of Missouri who is also a victim in my case?" Magistrate Whitworth responded: "That's not the issue before me. We're here for the motion to withdraw counsel…And that's something that would apply to the claim of ineffective assistance." (DCD 86 at 25).

After Attorney Stabenow's withdrawal, Mr. Kelley privately retained a California attorney who was admitted *pro hac vice* and appeared on his behalf at sentencing. The district court ultimately sentenced Mr. Kelley to 78 months imprisonment. (DCD 95).

SUMMARY OF THE ARGUMENT

Mr. Kelley clearly and unequivocally invoked his right to proceed *pro se*, both orally and in his written motion submitted the morning of trial. The district court recognized he was attempting to exercise his right to self-representation. But it denied his request without conducting a *Faretta* inquiry and without explanation. The district court therefore violated Mr. Kelley's Sixth Amendment right to self-representation.

In addition, the district court erred in denying Mr. Kelley's repeated requests for substitution of counsel. Mr. Kelley first requested substitution of Attorney Stabenow a month before trial was set to commence. His request was not a delay tactic. Mr. Kelley repeatedly alleged ineffective assistance of counsel against Attorney Stabenow. Attorney Stabenow responded vociferously to each allegation, accusing Mr. Kelley of lying and misrepresenting their communications. Although Mr. Kelley maintained his innocence, for no apparent reason, Attorney Stabenow volunteered to the district court his belief that Mr. Kelley was guilty. The nature of Mr. Kelley's accusations against Attorney Stabenow and Attorney Stabenow's responses to those accusations evince a conflict of interest. The conflict of interest warranted a substitution of counsel. The district court abused its discretion by denying Mr. Kelley's repeated requests for substitution.

ARGUMENT

I. THE DISTRICT COURT VIOLATED MR. KELLEY'S SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION WHEN IT DENIED HIS REQUEST TO PROCEED *PRO SE* AT TRIAL.

A. STANDARD OF REVIEW

This Court reviews *de novo* a district court's ruling on a defendant's request to proceed *pro se*. *United States v. Washington*, 596 F. 3d 926 (8th Cir. 2013).

B. ARGUMENT ON THE MERITS

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to represent himself. *Faretta v. California*, 422 U.S. 806 (1975). *Faretta* established that the "right to defend is personal." *Id*. at 834. As a result, "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Id*. at 817. A defendant who knowingly, intelligently, and voluntarily elects to represent himself has a constitutional right to refuse the services of a government-appointed attorney and to develop and present his own defense. *Id*. at 835-836. Denial of a defendant's right to self-representation is structural error. *Washington v. Recueno*, 548 U.S. 212, 219 n. 2 (2006). "The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984).

To invoke the right to self-representation, a defendant must knowingly, intelligently, voluntarily, and unequivocally waive his right to counsel and state his

intention to represent himself. *See, e.g., Reese v. Nix*, 942 F.2d 1276, 1280–81 (8th Cir.1991), cert. denied, 502 U.S. 1113 (1992). A defendant's request to proceed *pro se* may be conditional. *See Hamilton v. Groose*, 28 F.3d 859, 862 (8th Cir. 1994) (recognizing it "is true that a defendant may make a conditional waiver of his right to counsel" as long as the waiver is unequivocal) (citing *Adams v. Carroll*, 875 F.2d 1441, 1444-1445 (9th Cir. 1989)) (request for self-representation which is "sandwiched around a request for counsel" is not evidence of "vacillation" and is still a valid waiver of the right to counsel).

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

No reasonable person can say Mr. Kelley did not clearly and unequivocally state his request. He made it in writing before trial began in his April 22, 2013, motion: "If the court denies substitution, I move for the court to allow me to represent myself…" (DCD 56 at 2). Mr. Kelley pressed the issue after Judge Phillips denied his request for substitution: "Since you won't provide substitution,

I would like to move for the court to allow me to represent myself, contingent upon getting a continuance for me to review the evidence and prepare." (DCD 71 at 8). Judge Phillips responded that she did not believe a continuance was "necessary, or appropriate," and asked Mr. Kelley: "Now, knowing that I'm not going to grant a continuance, is it your wish that you proceed *pro se* and without Mr. Stabenow representing you?" (DCD 71 at 9). Judge Phillips' question to Mr. Kelley regarding his desire to proceed *pro se* removes any doubt that he clearly and unequivocally invoked his right to self-representation.

Moreover, before Mr. Kelley responded, Judge Phillips realized she had not read Mr. Kelley's *pro se* motion and took a recess to review the document. (DCD 70 at 10). That document contained Mr. Kelley's unequivocal request to represent himself if the district court denied his request for substitution. Nonetheless, when Judge Phillips returned to the courtroom, she did not begin a *Faretta* inquiry or otherwise address Mr. Kelley's request to proceed *pro se*. Instead, she simply announced that she was denying the motion. (DCD 70 at 10-11).

The district court's denial of Mr. Kelley's request to proceed *pro se* constitutes reversible error. It is beyond peradventure that when a defendant clearly and unequivocally invokes his Sixth Amendment right to self-representation, unless a court finds the request is made solely for purposes of delay, the court *must* engage in the questioning required by *Faretta*. Further, if the

Faretta inquiry reveals that a defendant is knowingly and voluntarily waiving his right to counsel, the court *must* grant the request. *See, e.g., United States v. Farias*, 618 F.3d 1049, 1053 (9th Cir. 2010) (holding that "when a defendant makes an unequivocal, voluntary, and intelligent request to proceed *pro se*, a district court may refuse the request only in limited circumstances. In fact, a timely request to proceed *pro se*…must be granted so long as it is not made for purposes of delay and the defendant is competent.") (internal citations omitted). The district court's failure to engage in a *Faretta* inquiry or otherwise explain its denial of Mr. Kelley's Sixth Amendment right constitutes reversible error, in and of itself.

Although the district court did not explain its basis for denying Mr. Kelley's request to proceed *pro se*, a review of the record reveals only one plausible basis for its decision. To wit, the district court questioned Mr. Kelley about his lack of trial experience and familiarity with governing rules of procedure. (DCD 71 at 7-8). This Court's precedent is clear, however, that even if the District Court relied on this concern as the basis for denying Mr. Kelley's request, it committed reversible error.

Jones v. Norman, 633 F.3d 661 (8th Cir. 2011), is directly on point. In *Jones*, the district court granted Mr. Jones' habeas petition and the Government appealed. Mr. Jones argued that the state court violated his rights under *Faretta* when it denied Mr. Jones' request to proceed *pro se*. *Jones*, 633 F.3d at 665. The

state court reasoned that Mr. Jones' waiver of the right to counsel was not "knowing and voluntary" because, *inter alia*, he did not know the applicable rules of procedure and had only an 11th grade education. *Id*. at 664. After the state court denied his request, Mr. Jones filed a motion for new counsel and renewed his request to proceed *pro se*. The state court denied his motion for new counsel, but never ruled on his renewed request to proceed *pro se*. *Id*.

The district court granted Mr. Jones' habeas petition, concluding that the state court relied on improper factors in determining that Mr. Jones' waiver was not knowing and voluntary. *Id*. at 666. This Court agreed and affirmed. *Id*. Specifically, this Court quoted *Faretta* and held that a defendant's "technical legal knowledge" is irrelevant to whether his waiver of the right to counsel is voluntary. *Id*. at 667. "Requiring knowledge of the substance of the rules, rather than merely requiring understanding of their existence and importance, shifts the focus away from whether a defendant's waiver is informed toward whether the defendant is actually prepared to ably represent himself." *Id*. at 668. This violates the defendant's right to represent himself. If a defendant knowingly and voluntarily chooses to represent himself, denying such a request violates the Sixth Amendment, "regardless of whether doing so is to his detriment." *Id*. Although it empathized with the state court's concern that Mr. Jones would not be able to sufficiently prepare himself for trial, this Court affirmed the grant of Mr. Jones'

habeas petition because "under clearly established Supreme Court precedent, denying a defendant's right to represent himself is not a permissible response to this concern." *Id*. at 669.

Although it is not entirely clear from the record, it appears the district court may have denied Mr. Kelley's request to proceed *pro se* because he lacked trial experience and legal knowledge. *Jones* is clear that such a consideration is improper. Mr. Kelley clearly and unequivocally requested to represent himself at trial. The district court recognized he was attempting to exercise his Sixth Amendment right to self-representation. It denied his request without assessing whether it was knowing and voluntary and without explanation. The Constitution and United States Supreme Court precedent require more. This Court should reverse for a new trial.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. KELLEY'S REPEATED REQUESTS TO SUBSTITUTE COUNSEL.

A. STANDARD OF REVIEW

This Court reviews a denial of a motion for new counsel under the abuse of discretion standard. *United States v. Baisden*, 713 F.3d 450, 454 (8th Cir. 2013).

B. ARGUMENT ON THE MERITS

Appointment of new counsel is warranted when the defendant demonstrates justifiable dissatisfaction with his appointed attorney. *United States v. Barrow*,

287 F.3d 733, 737 (8th Cir.2002) (citing *United States v. Swinney*, 970 F.2d 494, 499 (8th Cir.1992)). Justifiable dissatisfaction includes "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991).

"Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." *Id*. Generally, a conflict exists when an attorney is placed in a situation conducive to divided loyalties. *Id*. This can include situations in which the caliber of an attorney's services "may be substantially diluted." *Id*. (citing *United States v. Hurt*, 543 F.2d 162, 166 (D.C. Cir.1976)). Counsel must be willing "to advocate fearlessly and effectively" on behalf of the client. *Id*.

When faced with a motion to appoint substitute counsel, the district court must balance several factors, including "the need to ensure effective legal representation, the need to thwart abusive delay tactics, and the reality that a person accused of crime is often genuinely unhappy with an appointed counsel who is nonetheless doing a good job." *Barrow*, 287 F.3d at 737 (quoting *Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir.1995)). Once good cause is shown, however, the trial judge must appoint different counsel. *Smith v. Lockhart*, 923 F.2d at 1320. Finally, the erroneous deprivation of a defendant's right to counsel is a structural

error that requires reversal of the conviction and is not amenable to harmless error review. *Baisden*, 713 F.3d at 454 (citing *United States v. Gonzalez–Lopez*, 548 U.S. 140 (2006)).

The first factor that works in Mr. Kelley's favor is that his efforts to obtain substitute counsel were clearly not a delay tactic. He first requested substitution of counsel on December 7, 2012. (DCD 19). At that point, trial was a month away. (DCD 17). Thus, the district court's denial was not based on a need to "thwart abusive delay tactics." *Barrow*, 287 F.3d at 737 (quoting *Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir.1995)).

In addition, Mr. Kelley's requests for substitution of counsel were based on Mr. Kelley's belief that Attorney Stabenow was violating his constitutional rights by providing ineffective assistance of counsel. While the district court addressed some of Mr. Kelley's concerns and concluded Attorney Stabenow was performing adequately, Magistrate Whitworth refused to delve too deeply into Mr. Kelley's allegations concerning ineffective assistance of counsel. Magistrate Whitworth repeatedly advised Mr. Kelley that his allegations were premature because ineffective assistance claims can *only* be raised in a habeas petition. This advice was problematic for two reasons.

First, as a technical matter, it was not correct advice. Ineffective assistance claims can be raised in a motion for new trial pursuant to Rule 59 of the Federal

Rules of Criminal Procedure. *See, e.g., United States v. Williams*, 897 F.2d 1430, 1434 (8th Cir. 1990) (holding that ineffective assistance claims can be raised on direct appeal where a record on the issue is sufficiently developed through post-trial proceedings). Given the timing and specificity of Mr. Kelley's allegations, it is highly likely that Mr. Kelley could have developed a proper record through a motion for new trial.

More importantly, Magistrate Whitworth's preoccupation with the procedural posture of Mr. Kelley's claims suggests that Magistrate Whitworth did not give proper weight to *the effect* of Mr. Kelley's allegations. Even if Magistrate Whitworth was correct that the preferred approach is to raise ineffective assistance of counsel claims in a habeas petition, he failed to consider whether the nature of Mr. Kelley's accusations, coupled with Attorney Stabenow's responses to those allegations, created a conflict of interest which warranted a substitution of counsel. They did.

At the first hearing, Attorney Stabenow expressed concerns about the adversarial nature of the proceeding. Attorney Stabenow cautioned that Mr. Kelley's accusations against him warranted a response, which would require waiver of the attorney-client privilege. (DCD 84 at 7-8). Attorney Stabenow went on to accuse Mr. Kelley of lying and fraudulently misrepresenting their interactions. (DCD 84 at 17). Attorney Stabenow informed Magistrate Whitworth

that these alleged misrepresentations caused Attorney Stabenow "some concern going forward" because Mr. Kelley was writing "things in a way that would lead people to draw bad conclusions" about the quality of his representation. (DCD 84 at 38). Attorney Stabenow also shared his unsolicited opinion regarding Mr. Kelley's innocence with the court: "As I've informed Mr. Kelley, he has a right to competent representation, not necessarily representation that believes he's innocent. I don't believe he's innocent." (DCD 84 at p. 34).

Mr. Kelley understands he was not entitled to "a meaningful relationship" with Attorney Stabenow. *Swinney,* 970 F.2d at 499. These circumstances, however, evince more than the lack of a meaningful relationship. The relationship was clearly acrimonious. More importantly, however, Mr. Kelley did not simply lob up patently frivolous accusations of ineffective assistance of counsel. He made specific claims regarding important evidence in his case and supported them with detailed accounts of his communication with Attorney Stabenow.

For instance, the main issues Mr. Kelley identified during his first effort to substitute counsel were Attorney Stabenow's inconsistent responses to his questions regarding the preservation of the feces and Mr. Kelley's questions regarding Attorney Stabenow's efforts to ascertain the status of the hours of surveillance footage that were not provided to the Government by Ms. Rogers. According to the documentation provided by Mr. Kelley, Attorney Stabenow's

responses were indeed inconsistent.

Regarding the feces, Attorney Stabenow first told Mr. Kelley that the feces were collected by investigators, had not yet been DNA tested, but that a test could be conducted if requested. (DCD 22 at 22). Just a few days later, however, Attorney Stabenow said the feces were not preserved and no DNA testing had been performed. (DCD 22 at 2). When Mr. Kelley pressed the issue, Attorney Stabenow claimed the feces were not important because they were collected on the fourth floor, and even if a DNA test showed the feces belonged to someone else, the Government could simply argue someone else played a practical joke the same night Mr. Kelley allegedly started the fire. (DCD 84 at 9-10).

Based on the documentation provided by Mr. Kelley, he was right to be concerned regarding Attorney Stabenow's responses to his inquiries regarding the feces, as they reflected a lack of understanding, and potentially a lack of due diligence, on investigating the circumstances surrounding the preservation of potentially exculpatory evidence. More importantly, Attorney Stabenow's explanation regarding the lack of importance a DNA test proving the feces came from someone else were dubious. The defense theory of the case was that someone else started the fires. As such, Attorney Stabenow's explanation regarding the evidentiary value of the feces would have been troubling to any defendant in Mr. Kelley's position.

In his subsequent attempts to displace Attorney Stabenow, Mr. Kelley complained that despite Attorney Stabenow's repeated requests to continue the trial to conduct DNA and other forensic testing of the evidence, and despite Attorney Stabenow's assurances that he would consult experts, no testing had been requested, and no experts had been consulted. Attorney Stabenow's response to Mr. Kelley's concerns regarding forensic and DNA testing was that there was no reason to conduct tests, partly because Attorney Stabenow believed Mr. Kelley was guilty and was concerned that testing would strengthen the Government's case. (DCD 85 at 17). Given that Mr. Kelley maintained his innocence, Attorney Stabenow's responses would not have offered Mr. Kelley any solace whatsoever.

In addition, Mr. Kelley's second-guessing of Attorney Stabenow on the failure to consult expert witnesses was legitimate. Mr. Kelley maintained his innocence and wanted to at least consult an arson expert and an expert to investigate the timestamp on the library surveillance footage. These were reasonable requests. In fact, the First Circuit has specifically held that the failure to consult an expert witness to investigate a "not arson" defense constitutes ineffective assistance of counsel. *See, e.g.*, *Dugas v. Coplan*, 428 F.3d 317, 326 (1st Cir. 2005) (affirming district court's finding of ineffective assistance of counsel because the attorney's "decision to forego expert advice regarding the state's forensic evidence and attack that evidence without the benefit of expert

guidance was below the standard of competence expected of practicing criminal defense lawyers.").

While Attorney Stabenow disputed the veracity of the factual basis for Mr. Kelley's claims, Attorney Stabenow obviously believed the claims were serious. Every time Mr. Kelley raised his claims in court, Attorney Stabenow stated on the record that he believed Mr. Kelley's accusations warranted a response to protect his professional integrity. This alone should have indicated to the district court that Attorney Stabenow was operating under a conflict of interest.

The Second Circuit's decision in *Lopez v. Scully*, 58 F. 3d 38 (2d Cir. 1995) is instructive. In *Lopez*, the defendant filed a habeas petition with the district court, arguing his attorney was ineffective at sentencing because he was operating under a conflict of interest. *Lopez*, 58 F. 3d at 41. On the day of sentencing in state court, Lopez filed a motion to withdraw his guilty plea, alleging that misinformation provided by the attorney led him to accept the plea. *Id*. at 40. The attorney responded by stating: "I deny each and every allegation contained herein." *Id*. The court denied Lopez's motion to withdraw his plea and Lopez was represented at sentencing by the attorney. *Id*. The district court denied Lopez's habeas petition and he appealed.

The Second Circuit reversed and remanded for resentencing. *Id*. at 41. According to the Second Circuit, the moment Lopez alleged his attorney coerced

him into taking the plea, "the attorney had an actual conflict of interest: to argue in favor of his client's motion would require admitting serious ethical violations and possibly subject him to liability for malpractice; on the other hand, "[a]ny contention by counsel that defendant's allegations were not true would ... contradict his client." *Id*. at 41 (quoting *United States v. Ellison*, 798 F.2d 1102, 1107 (7th Cir.1986)). The conflict was underscored by the attorney's response: "As it happened, the attorney put his own interests ahead of his client's by denying the truth of Lopez's allegations and thereby attacking his own client's credibility." *Id*.

For the same reasons the Second Circuit held there was a conflict in *Lopez*, this Court should find there was a conflict between Mr. Kelley and Attorney Stabenow. Plus, Attorney Stabenow did not just deny the truth of Mr. Kelley's allegations. He accused Mr. Kelley of lying, misrepresenting their communications, and for no apparent reason, told the district court he believed Mr. Kelley was guilty.

Furthermore, although he should not have to show that he was prejudiced by the conflict of interest, it is worth noting that the record suggests Attorney Stabenow's trial strategy may have been affected by Mr. Kelley's accusations. For example, Attorney Stabenow never pressed Ms. Rogers regarding who gave her orders to preserve only the video evidence which showed Mr. Kelley at the library. Likewise, he did not make any inquiry during trial whatsoever to Ms. Colvin

regarding the decision not to preserve the feces. This gives rise to at least a plausible inference that Attorney Stabenow did not want to delve too deeply into these matters because he was concerned they might substantiate Mr. Kelley's accusations that he failed to take adequate pretrial steps to ensure the evidence was preserved.

Finally, Mr. Kelley's claim that Attorney Stabenow may have been laboring under a conflict of interest due to his employment with the University of Missouri certainly warranted inquiry from the district court. Mr. Kelley asked if Magistrate Whitworth "would consider it a conflict of interest that my former attorney worked as a professor with the University of Missouri who is also a victim in my case?" Magistrate Whitworth responded: "That's not the issue before me. We're here for the motion to withdraw counsel…And that's something that would apply to the claim of ineffective assistance." (DCD 86 at 25).

Dismissing Mr. Kelley's claim as procedurally inappropriate was error. As argued above, a conflict of interest is a viable basis for substitution of counsel. Instead of addressing the allegation, Magistrate Whitworth allowed Attorney Stabenow to withdraw, left Mr. Kelley without counsel, and left the issue unresolved. Magistrate Whitworth's cursory dismissal of Mr. Kelley's allegation regarding Attorney Stabenow's employment with the University of Missouri is especially troubling given that according to the University of Missouri School of

Law's website, it appears to be true. *See* University of Missouri School of Law, Adjunct Faculty *available at* https://law.missouri.edu/faculty/directory/adjunct-directory.html (last visited March 24, 2014).

CONCLUSION

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

DATED this 26th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on March 26, 2014, which will furnish a copy to all parties to this litigation.

/s/ Michael M. Brownlee
Michael M. Brownlee

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,161 words. I FURTHER CERTIFY that, pursuant to Eighth Circuit Rule 28A(h)(2), the Opening Brief and addendum have been scanned for viruses and that the brief is virus-free.

s/ Michael M. Brownlee
Michael M. Brownlee