NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JAMES D. RUSSIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a criminal defendant's *pro se* filings can be read as stating a valid basis for substitution of counsel under circuit law, must a federal court, consistent with the liberal-construction rule of cases like Haines v. Kerner, read those filings in such a manner, or at least explore at an ensuing hearing whether that is in fact the complaint being made?

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PRAYER

Petitioner, James D. Russian, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on May 31, 2018.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, United States v. Russian, No. 17-3157, slip op. (10th Cir. May 31, 2018), is found in the Appendix at A1. The oral ruling of the United States District Court for the District of Kansas on Mr. Russian's *pro se* request to substitute counsel is found in the Appendix at A19. That court's prior ruling on an earlier, *pro se* motion that did not expressly make that request, and on counsel's request for a hearing on whether Mr. Russian should be allowed to proceed *pro se*, is found in the Appendix at A27.

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction over this criminal matter pursuant to 18 U.S.C. § 3231. The

United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, October 29, 2018, see A29, so this petition is timely.

CONSTITUTIONAL PROVISION INVOLVED

This case implicates Mr. Russian's right to the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., amend. VI.

STATEMENT OF THE CASE

This case arises from an appeal after a remand for resentencing. It concerns a court's duty to read *pro se* pleadings liberally and to ensure that *pro se* complaints are properly understood.

The proceedings in the district court

After the Tenth Circuit remanded his case for resentencing, Mr. Russian filed a *pro se* pleading that was dated June 17, 2017, and that the district court filed on receipt on June 20th. Vol. 1 at 780-86.[1] The pleading was docketed as a motion to disqualify counsel. Vol. 1 at 22 (docket sheet; entry 170). Earlier that same day, the district court first scheduled resentencing in this case for July 7th. Id. (docket sheet; entry 169).[2]

Mr. Russian's pleading made various complaints against his attorney -- who had represented him on appeal, but not at the trial -- and accused

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[1] For this Court's convenience in the event it deems it necessary to review the record to resolve the petition, see Sup. Ct. R. 12.7, this petition will cite to the record on appeal to the Tenth Circuit.

[2] Although the prison-mailbox rule may call for an earlier filing date, and this petition at times notes how Mr. Russian's *pro se* pleadings are dated, it will for ease of reference refer to the pleadings by the filing date used by the district court.

her of dishonesty. Id. at 780-81, 785-86. The pleading stated in its third line that "[t]o start and to limit this letter is to let it be know[n] [that counsel] is a LIER [sic.]." Vol. 1 at 785 (capitalization in original). It continued that counsel had lied, and "didn't keep her word" that, as she said when they first met in 2015, she would obtain relief for the violation of his right to represent himself at trial, guaranteed by Faretta v. California, 422 U.S. 806 (1975). Vol. 1 at 785. Mr. Russian protested that counsel then "lie[d] to me again" when he questioned her on this point at a May 23, 2017 meeting, by asserting there was not enough of a record to have made a Faretta argument in the prior appeal. Id. at 786.

Mr. Russian had in fact represented himself for a portion of the earlier proceedings, proceeding without counsel at a suppression hearing. But despite his familiarity with self-representation, he did not in his June 20, 2017 pleading ask to represent himself.

Ten days after the court filed Mr. Russian's pleading, counsel filed a motion. Although the June 20 pleading made no request to proceed without a lawyer, counsel asserted that Mr. Russian had sought in that filing to represent himself. Id. at 790. She also stated that Mr. Russian had

instructed her to "inform the Court that he no longer wants to be represented by counsel and would rather proceed pro se." Id. The motion asked the court to conduct a Faretta hearing "on whether [Mr. Russian] should be permitted to represent himself." Id. at 788. Counsel added that she was "unaware of any prohibitive conflict or debilitating breakdown in communication, *other than the distrust of counsel expressed by Mr. Russian*." Id. at 790 (emphasis added) (referencing, in an accompanying footnote, the last page of Mr. Russian's *pro se* pleading, Vol. 1 at 786).

On July 5th, the district court denied the request made in counsel's motion. A26-28. The order, like that motion, repeated that Mr. Russian's *pro se* pleading "sought reinstatement of the right of self-representation." A26. The order discussed only the Faretta request. It did not address whether counsel should be replaced. A26-28.

Between counsel's filing of the motion and the district court's ruling, Mr. Russian mailed to the court a motion captioned, "Defendant's Motion to Replace Counsel." Vol. 1 at 818. The pleading -- placed in the legal-mail system of the county jail on July 4th, and postmarked on July 5th -- asked

in its first sentence that the court "'Replace or Appoint' new counsel." Id. (capitalization in original).

The pleading reiterated what Mr. Russian had said in his June 20 pleading about counsel's lack of candor in the appeal. Mr. Russian recounted that "[w]e" -- that is, he and counsel -- "planned to raise Faretta v. California in my appeal brief." Id. And he again stated that, at a meeting on May 23, 2017, he had questioned counsel as to why she had not raised the issue. Id.

The pleading then turned to how counsel had misrepresented his position about representation at the upcoming resentencing hearing. Mr. Russian explained that the motion counsel filed was wrong in asserting he wanted to proceed *pro se*. "James D. Russian," he wrote, "never asked the court for self-representation at sentencing as stated in Document 173, page 1 of 'Defendant[']s Motion to Waive[] Counsel,'" id., the pleading the counsel filed on June 30th. And because of this, and what occurred in the direct appeal, Mr. Russian said he had "no faith" in counsel and wanted her replaced due to a breakdown in communication:

> Based on these facts, the defendant has no faith in Federal Public Defender Melody Brannon representing him in Case No.

> 6:14-cr-00018-EFM-1[.] Furthermore[,] the defendant moves the court to delay the sentencing on July 7th 2017 and replace counsel due to the debilitating breakdown in communication.

Id. at 819.

At resentencing held on July 7th -- the day after Mr. Russian's motion to replace counsel was filed, id. -- the court began by addressing its July 5 order. Speaking to Mr. Russian, the court said that its order had been in response to a motion "you filed . . . and then, pursuant to your directions, Ms. Brannon also filed a motion, reflecting your interest to represent yourself." A19. But, the judge continued, "I understand that, obviously, that's not your preference." Id. It then offered Mr. Russian the "opportunity to make any other statements or objections you have on that concern before we proceed." A20.

Mr. Russian invoked his pleading that the court filed on July 6th, which, he noted, evidently "crossed in the mail" with the court's July 5 order. Id. The court replied that the June 20 pleading had contained a request for new counsel and that was "actually the document that [it] ruled on." Id. It deemed his more recent motion to be something it had "already ruled on" and to have "pretty much raise[d] the same issues [Mr. Russian

had] raised in this initial document with respect to representation." A21. For that reason, the judge said, "I didn't address it again." Id.

Mr. Russian then largely read his more recent pleading to the court. Id. He added that he had asked counsel to correct the presentence report to reflect that, in keeping with his sovereign-citizen beliefs, he was not a United States citizen, and "she wouldn't even correct that." A22. After stating that Mr. Russian's disagreement with the presentence report was noted there, and recounting what the report said in this regard, id., the judge explained that it considered Mr. Russian's request to replace counsel to be based on counsel's refusal to follow his wishes:

> With respect to your position on counsel, *I understand that you are dissatisfied that Ms. Brannon has not followed all of your instructions or requests* with respect both to the processing of your appeal as well as to the instant matters here. And I considered those -- and of course I'm very familiar with your case -- but have decided overall -- well, first of all, I could replace her with another appointed attorney or I could let you represent yourself. Technically, there's not a waiver of counsel where you're unrepresented. If you don't have an outside attorney, then you're representing yourself, as you were at one point in these proceedings. I, for the reasons noted in my order of a couple of days ago, declined to reinstate your self-representation. And given the late date of this issue and, frankly, given my familiarity with Ms. Brannon, who has a national reputation for her skill in representing criminal defendants, I decided that I would not replace her with

> someone else. And so I considered your motion, both with respect to counsel and rescheduling the sentencing hearing, and denied them, as noted in my order at Document 175.

A22-23 (emphasis added).

After Mr. Russian commented on matters not relevant to the issue here, defense counsel asked to add something to the record. Without addressing Mr. Russian's claim that she had agreed to raise a Faretta claim on appeal, she said that "Mr. Russian did want me to raise the Faretta issue on appeal, and I did not." A24. She then had this to say about the fact that her June 30 motion stated that Mr. Russian wanted to represent himself at sentencing:

> . . . I understand that there's a distinction between representing himself and wanting new counsel. And to the extent that my motion did not accurately reflect his wishes, I think the Court's addressed all of that today.

A24-25.

The appeal to the Tenth Circuit

In the resentencing appeal, Mr. Russian argued that the district court had abused its discretion in denying his request for substitute counsel based on a complete breakdown in communication. His theory was that

the district court misunderstood his claim. When the court addressed the claim at the resentencing hearing, it considered him to be complaining about counsel's tactics (which is not a ground for substitution under Tenth Circuit law), though he was instead complaining about her lack of candor and the complete breakdown in communication that it produced (which is a ground for substitution under Tenth Circuit law).

The Tenth Circuit denied relief on the substitution-of-counsel claim. It first wrote that Mr. Russian's June 20 filing was not a request to replace counsel. A8. It noted that although Mr. Russian "purported to fire" counsel, he did not expressly say he wanted a different lawyer, and "could have been asking to represent himself in a pro se capacity." Id.[3]

The Tenth Circuit also decided there was not a complete breakdown in communication. A10-12. In this regard, it did not mention the fact that Mr. Russian had said that there was. Nor did it mention that counsel's own June 30 motion suggested there may well have been such a breakdown. There, counsel said there was not a conflict or complete

[3] Mr. Russian had asserted that the relevance of the June 20 filing was in the complaints it made that bore on his later, express request that he be given new counsel because of a complete breakdown in communication.

breakdown in communication "*other than the distrust of counsel expressed by Mr. Russian*." Vol. 1 at 790 (emphasis added). And the court of appeals did not acknowledge that the issue went entirely unexplored at the sentencing hearing.

Instead, the Tenth Circuit treated instances that Mr. Russian pointed to as showing counsel's lack of candor that ultimately prevented communication as having been fully cured by counsel's later explanations and corrections. With respect to counsel "saying she would raise the Faretta issue and not doing so," A10, the court of appeals treated her after-the-fact explanation for not doing so as showing there was communication, id. Likewise, counsel's incorrect statement in her June 30 motion that Mr. Russian wanted to go *pro se* was, said the court, corrected at the resentencing hearing and this remedied any communication problem. A12.

Turning to Mr. Russian's appellate theory, the Tenth Circuit also considered the district court to have addressed his substitution claim on its own terms. In doing so, the Tenth Circuit converted counsel's failure to do as she said she would (and not, as far as appears from the record, what Mr.

Russian instructed her to do) from a claim that she showed a lack of candor that poisoned the communication well, into a claim that she "misleadingly failed to follow [Mr. Russian's] instructions," A13:

> As we explained, Mr. Russian argued his counsel lacked candor by saying she would raise the issue of holding a Faretta hearing, yet failing to do so. In other words, his counsel misleadingly failed to follow his instructions.

Id.

The Tenth Circuit then held that the district court ruled on what it had redefined Mr. Russian's theory to be (even though the district court did not even mention any misleading by counsel):

> The district court directly referenced this theory, noting it understood Mr. Russian was "dissatisfied that Ms. Brannon ha[d] not followed all [his] instructions or requests."

Id. (quoting record) (brackets by the Tenth Circuit).

REASONS FOR GRANTING THE WRIT

This Court should grant review so that it can give content to the liberal-construction rule for *pro se* pleadings, something that its decisions in this area have not meaningfully done.

This Court has long held that *pro se* pleadings are to be afforded a liberal construction. E.g., Polk County v. Dodson, 454 U.S. 312, 326 (1981); Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). The allegations of a *pro se* petitioner, this Court said in the leading case of Haines, are held "to less stringent standards than formal pleadings drafted by lawyers." Haines, 404 U.S. at 520.

But this Court has not given this instruction real content. It has, in the main, announced that the rule applies, and then said that a valid claim is, or is not, stated. E.g., Hughes v. Rowe, 449 U.S. 5, 9, 10-12 (1980); Haines, 404 U.S. at 520-521.

This case provides an ideal vehicle for this Court to flesh out the liberal-construction rule. The district court converted Mr. Russian's claim into something that it decidedly was not, and the Tenth Circuit endorsed that reading. Those courts thereby transformed Mr. Russian's complaint

from one that does warrant substitution under Tenth Circuit law, into one that does not. That is the antithesis of liberal construction.

Starting with his June 20 filing, Mr. Russian stressed his counsel's lack of candor. He called her a liar, and said she had not kept her word about raising Faretta to get him relief for the violation of his right of self-representation. Vol. 1 at 785. He continued that she had "lie[d] . . . again" when he questioned her about this. Id. at 786.

When counsel followed up with a motion claiming that Mr. Russian had said in his June 20 filing that he wanted to represent himself, and had instructed her to the same effect, id. at 790, Mr. Russian directly disputed this. He declared that she had misrepresented his position, and that he had never asked to represent himself. Id. at 818. His pleading also recounted that "[w]e" -- that is, he and counsel -- had planned to raise a Faretta issue on direct appeal, id., which she had not done. "Based on these facts," Mr. Russian stated, he had no faith in counsel and wanted her replaced "due to the debilitating breakdown in communication" that flowed from her lack of candor. Id. at 819.

A liberal reading of these pleadings would surely focus on the claimed lack of candor by counsel, and the communication breakdown to which it led. This was a persistent theme throughout the *pro se* pleadings, from Mr. Russian's description of her as a liar; to his saying that she had not kept her word about what she would do on appeal; to his contention that she lied again when he confronted her about this; and to the claim, in a second pleading, that she had misrepresented his position when she wrote that he had said (both in his June 20 filing and to her) that he wanted to represent himself.

A liberal reading would also not take Mr. Russian's complaint as being that counsel would not follow (or had not followed) his wishes. His filings made no such claim directly. Instead, when he spoke of counsel's failure to raise a Faretta issue on appeal, he spoke of what "we" agreed to raise. This reflects on its face a joint decision by Mr. Russian and his attorney, and not an insistence by him that she follow his wishes. And the former is certainly the reading that is required by any reasonable application of the liberal-construction rule. After all, it is supportive of a lack of candor that could lead (and was claimed to have led) to a complete

breakdown in communication, which could under Tenth Circuit law support substitution of counsel. The liberal-construction rule is, by its own terms, one that affords to *pro se* pleadings a construction that states a claim if that can fairly be done. Haines, 404 U.S. at 520-21.

Instead, the district court ascribed to Mr. Russian a position that he simply did not take, and that would not be a basis under Tenth Circuit law for substitution of counsel. The district court said at the resentencing hearing, when Mr. Russian reread his most recent pleading expressly seeking substitute counsel, that it understood that he was "dissatisfied that Ms. Brannon ha[d] not followed all of [his] instructions or requests." Vol. 3 at 11. But there is nothing in Mr. Russian's complaints about his attorney regarding her not following *his* instructions. Instead, his complaints repeatedly and consistently sounded in counsel not doing what *she* said she would do.

The district court's position would be troubling enough on just a down-the-middle reading of Mr. Russian's complaints. It is much worse when the court was obligated to read his filings, and his oral statements in

support of them, generously to state a legitimate claim if such a reading were fairly possible, as it surely was here.

More troubling still is the fact that the Tenth Circuit also recast Mr. Russian's *pro se* complaint in the same manner, even though it claimed to be "generously reading [his] pro se motion." A10. It treated his complaint about counsel "saying she would raise" a Faretta issue "yet failing to do so," A13, as "counsel misleadingly fail[ing] to follow his instructions," id. And it then considered the district court to have "directly referenced this theory" when it stated that it "understood Mr. Russian was 'dissatisfied that Ms. Brannon ha[d] not followed all [his] instructions or requests.'" Id. (quoting record) (brackets by Tenth Circuit).

The Tenth Circuit thus made the same mistake as the district court did. For the reasons already explained, Mr. Russian's pleadings are not naturally read as the Tenth Circuit read them. And a generous reading of them surely requires treating them as asserting a lack of candor that led to a complete breakdown in communication, rather than, as the Tenth Circuit took them to be, a complaint that counsel failed to follow his instructions.

This case is a particularly good vehicle for addressing the liberal-construction rule. Although the Tenth Circuit purported to apply the rule, it read Mr. Russian's complaints not to state a claim for relief, when even an ordinary reading of them would support relief. This Court's decision would inevitably address the very flawed reasoning of the court of appeals, and in the process give much-needed content to the liberal-construction rule. See *supra* at 13.

There are two additional benefits of granting review in this case. First, this Court's cases in the area are in the context of civil complaints. This case would allow this Court to confirm that the rule also applies to *pro se* pleadings in the criminal context. This case is the natural first step for such a pronouncement, as Mr. Russian's complaints implicated the Sixth Amendment right to effective counsel, the foundation of both a fair trial and a fair sentencing.

Second, this case involves a hearing at which the complaints made in *pro se* pleadings were aired. The district court therefore had a chance to explore directly with Mr. Russian the nature of his complaints, something that it failed to do. This Court's cases have not addressed the obligation of

a district court to ascertain the nature of a *pro se* complaint at a hearing, and how it should approach this task. This Court could do so here.

CONCLUSION

This Court should grant Mr. Russian a writ of certiorari.

Respectfully submitted,

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