NO. 19-_____

In the Supreme Court of the United States

GERALD CLAUDE CARLSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Carlson* Court's Memorandum Opinion conflicts with other Ninth Circuit opinions holding that a finding of substantial or undue delay is required to deny a criminal defendant's motion to terminate his retained counsel pursuant to his Sixth Amendment right to counsel of his choice and that the extent of conflict inquiry is inapt in such circumstances?

2. Whether this Court should exercise its supervisory powers where the *Carlson* Court conceded that the District Court's "description of its reasons for denying the request [to terminate retained counsel] may not have been stated in the clearest and most comprehensive of manner, it is apparent here that the denial was primarily based on the demands of its calendar" and where the District Court cited only to the vaguest notions of efficiency and neither court made a finding of substantial or undue delay?

3. Whether the *Carlson* Court's Memorandum Opinion conflicts with other Ninth Circuit cases holding that a court must balance a criminal defendant's Sixth Amendment right to counsel of choice with the delay and inconvenience resulting from the substitution of counsel?

4. Whether this Court should resolve an apparent internal Circuit split regarding the proper standard for a motion to terminate retained counsel?

PARTIES TO THE PROCEEDING AND RELATED CASES

PARTIES

Petitioner: Gerald Claude Carlson

Respondent: United States of America

RELATED CASES

- *United States of America, Plaintiff, v. Gerald Claude Carlson, Defendant*, No. 17-cr-05188-RBL-1, U.S. District Court for the Western District of Washington. Judgment entered on April 27, 2018.
- *United States of America, Plaintiff-Appellee, v. Gerald Claude Carlson, Defendant-Appellant*, No. 18-30096, U.S. Court of Appeals for the Ninth Circuit, No. 18-30096. Memorandum opinion affirming Mr. Carlson's convictions entered November 7, 2019. The Court entered its Order denying Mr. Carlson's timely filed Petition for Rehearing on November 26, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gerald Carlson respectfully requests that this Court issue a writ of certiorari to reverse the decisions below and remand for new trial.

I. OPINIONS BELOW

The Ninth Circuit's Memorandum Opinion in *United States v. Carlson,* 783 Fed.Appx. 781 (Mem) (November 7, 2019), appears at Appendix 1a.

The District Court's Judgment and Sentence appears at Appendix 5a.

The Oral Colloquy and Bench Ruling Denying Motion to Terminate Retained Counsel entered by the United States District Court for the Western District of Washington in No. CR17-5881-RBL in open court on January 22, 2018 appear at Appendix 17a

The Ninth Circuit's Order denying rehearing appears at Appendix 30a.

II. JURISDICTIONAL STATEMENT

The Ninth Circuit Court of Appeals entered its Memorandum opinion affirming Mr. Carlson's convictions on November 7, 2019. *See* App. 1a.

The Ninth Circuit entered its Order denying Mr. Carlson's timely Petition for Rehearing on November 26, 2019. *See* App. 30a.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution 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 defense.

IV. STATEMENT OF THE CASE

A. INTRODUCTION

On the Friday prior to trial—the result of which would be a mandatory 15-year sentence if he was convicted—Gerald Carlson traveled approximately two hours to meet with his attorney, Karen Unger, to prepare for trial. In their prior meetings, counsel emphasized her opinion that Mr. Carlson should plead guilty, but did not discuss trial strategy.

During this meeting, counsel provided a copy of the Government's motions in limine and trial brief, which noted that the Defense had not filed any pre-trial motions. Mr. Carlson was shocked that he was proceeding to trial based on drugs discovered pursuant to search warrant, yet counsel failed to file

to file a motion to suppress. Mr. Carlson was likewise shocked that counsel had not filed a motion to suppress his alleged statements, which were potentially incriminating. Despite his congestive heart failure and corresponding explanation that methamphetamine increased his heart function, counsel also failed to obtain his medical records. Counsel, finally, provided discovery for the first time.

Mr. Carlson, as a result, told Unger that he no longer wanted her representation. She contacted the clerk, who was unable to schedule a hearing until the following Monday, the first day of trial. Unger assured Mr. Carlson that the Court would grant a continuance to permit him to retain new counsel.

During the subsequent ex parte colloquy, Mr. Carlson specifically sought to terminate his attorney because she: had not filed any motions; had conducted only the briefest investigation; never discussed trial strategy; requested continuances to accommodate her busy schedule; and only communicated to Mr. Carlson her belief that he should plead guilty. He had relied upon her to exercise diligence, competence, and promptly communicate with him, but instead discovered on the eve of trial that counsel had done very little work in his case, had filed no motions to suppress, had no witnesses to present at trial, and was, generally, poorly prepared to proceed to trial.

Given these circumstances, the trial court erroneously deprived Mr. Carlson of his constitutional right to the attorney of his choice in favor of vague efficiency concerns.

The Ninth Circuit, in turn, ignored the body of case law holding that such vague concerns for

efficiency cannot trump a criminal defendant's Sixth Amendment right to counsel of choice.

The Ninth Circuit thus also sanctioned such a departure by the District Court as to warrant an exercise of this Court's supervisory power.

B. BACKGROUND FACTS

Gerald Carlson toiled as a power lineman for 32 years before retiring due to congestive heart failure and Type 2 insulin dependent diabetes. In early 2009, he succumbed to pneumonia, which required hospitalization. He lost 63 pounds in water weight due to heart failure, and was diagnosed with congestive heart failure and diabetes. His heart doctor then advised that he was no longer able to work.

While employed, Mr. Carlson earned a significant amount of money. Upon retirement, he continued to receive compensation through his union benefits, a Vanguard annuity fund, and Social Security. In addition to the $4,200.00 he receives monthly and his casino winnings, he collected a substantial insurance settlement just prior to retirement. Due to the mortgage crisis, moreover, Mr. Carlson did not make a house payment for seven years; all he had were power, water, and internet bills.

On advice from a friend that methamphetamine would help his heart, Mr. Carlson began using the drug. The methamphetamine helped increase his heart rate from 10% when he was first diagnosed in 2009 to 28% in 2016. While he had previously purchased a few ounces of methamphetamine to self-medicate, about one month before execution of the search warrant on his property, Mr. Carlson bought his first pound for his own personal consumption.

During service of a search warrant, officers located over 500 grams of methamphetamine, a host of firearms, scales, baggies, $34,000 in cash, and a loan/ suspected drug ledger. While most of the guns, which Mr. Carlson could legally possess, were locked in a safe, two of the weapons were in the bedroom where officers discovered the drugs.

As to the firearms, Mr. Carlson hunts, fishes, and has always been an outdoorsman. Others also entrusted their guns to him for safe storage.

The Government charged Mr. Carlson by Indictment dated May 3, 2017 with Count 1, possession with intent to distribute methamphetamine, and Count 2, possession of a firearm in furtherance of a drug trafficking offense. Karen Unger was initially appointed as counsel, and Mr. Carlson later retained her; she entered her official Notice of Appearance on May 22, 2018.

C. FACTS RELEVANT TO THE TRIAL COURT'S ERRONEOUS DEPRIVATION OF MR. CARLSON'S SIXTH AMENDMENT RIGHT TO RETAINED COUNSEL OF HIS CHOICE[1]

Jury trial commenced on January 22, 2018. Mr. Carlson immediately, even before jury selection, attempted to fire Unger so he could retain new counsel of his choice.

During an ex parte colloquy, defense counsel related that although she had maintained contact with Mr. Carlson and had filed all of the motions she

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1 The following factual recitation is primarily a summary of the trial court's findings of fact and conclusions of law that are contained in Appendix 17a-29a.

felt were relevant (this actually consisted of just one motion and no trial brief, which was required by LCrR 23.1), Mr. Carlson no longer had any confidence in her and told her the prior Friday before trial that he did not want her to represent him. Counsel immediately contacted the court clerk to relay that Mr. Carlson wanted to retain new counsel. *See* App. at 17a-19a.

Mr. Carlson apprised the court that when he met with counsel, they did not discuss the specifics of the case, but rather talked about a potential plea resolution. More specifically, when he met with her the Friday prior to trial, he "didn't see anything she has done to prepare for my defense or anything." He was shocked and appalled that he was proceeding to trial, yet counsel failed to file a motion to suppress the search warrant or a motion to suppress his statements. *Id.* at 19a-20a.

The court rejoined that the case is "pretty straightforward" and that it had "looked at all of the evidence, trial memorandum." *Id.* at 19a. The defense, however, did not file a trial memorandum.

Mr. Carlson responded that counsel filed to file any motions to suppress; the court replied that counsel "almost succeeded" on her motion to exclude the expert witness. *Id.*

Mr. Carlson cited to irreconcilable differences between he and counsel and stated that he did not believe she was going to offer any defense. *Id.* at 20a.

The court then asked whether Mr. Carlson had sought the services of a different attorney. He answered that he did not realize he needed a new attorney until after he met with Ms. Unger the prior Friday afternoon and that he thus did not yet have time to find new counsel. *Id.*

The court admonished that Mr. Carlson "waited way beyond the 11th hour." Due to the "compelling" evidence, "it strikes me that that is little more than an effort to delay the inevitable." The court continued: "You know, you throw [the alleged confession] out, and you are still left with meth, guns, money, Pay O, scales. Is that a romper room for your grand[kids]?" The court also referenced the cash officers found, much of it bundled into $1,000 stacks. *Id.* at 20a-21a.

Mr. Carlson explained that the guns were locked in a safe, he knew nothing of any drug ledger, and he kept his money divided into easy to use bundles in his safe. He then declined the court's question invitation to represent himself. *Id.*

The court cited to the two continuances *requested by defense counsel* due to her busy schedule and because her daughter had a baby as contrary to the public's interest in speedy trials, and asked whether counsel was ready to proceed to trial. Counsel stated she was ready for trial and had met with Mr. Carlson enough times to prepare. *Id.* at 21a-22a.

Unger did acknowledge, though, that on the prior Friday, Mr. Carlson pointed to several deficiencies in the search warrant application which he supposedly had not previously broached. *Id.* at 22a. The reason for this is clear from the record—they had never before had a substantive conversation about the propriety of the search warrant.

The court noted that it had read *Brown v. United States*[2] and other opinions and was "mindful of the public's right. The defendant has serious rights to be protected and guarded against abuse. The public has an equal – a right to see justice occur

2 *United States v. Brown*, 785 F.3d 1337 (9th Cir. 2015).

expeditiously, efficiently, and not allow people to make a mockery of the rule of law." The court further noted that it would have ordered detention despite the magistrate's decision otherwise. The court thus denied the motion. *Id* at 22a-23a.

In open court on the record, the court summarized: "He had not retained another lawyer. My reasons are delay. He is just – it is just a game. That is what I said." The court then, again, pointed to the two continuances—granted to accommodate defense counsel's busy schedule—to support its decision. *Id.* at 24a.

Mr. Carlson, though, was about to proceed to trial on charges that would result in a mandatory minimum term of incarceration of 15 years if the jury found him guilty, yet counsel filed no motions to suppress. This was no game, but rather Mr. Carlson's last-minute realization that counsel had taken his money and done no work—other than pushing a plea deal in which he had little interest.

The Court, further indicating its opinion of Mr. Carlson, iterated: "It is not my first rodeo, but I have been bucked off a couple of times." *Id.*

The court added that it spent more than twice as many hours on the bench as any of its colleagues and that its "trial schedule is packed going forward. I like being in trial and giving people a chance to tell their story. That puts added pressure on the existing schedule, and to stay to it to the best of my ability." *Id.* at 26a. The court, though, did not expressly find that a continuance would impact its calendar.

In a follow up ex parte colloquy, counsel reiterated that Mr. Carlson had no confidence in her, he was upset he could not retain different counsel, and

they did not agree as to the specifics of the case. The court responded by lauding the Unger's skills and terminating any further discussion of the matter: "Ms. Unger is one of the premier defense lawyers that comes in time and time again into my courtroom to represent her client. I have every confidence in Ms. Unger. If I were ever in trouble, I would always be in front of a jury, not a judge, and Ms. Unger would be on my short list." *Id.* at 28a-29a.

The Court thus denied Mr. Carlson's Sixth Amendment motion based on its: (1) own assessment of the evidence—absent any motions to suppress or trial brief; (2) misplaced confidence in the abilities of defense counsel; and (3) vague notion of delay.

D. THE NINTH CIRCUIT'S MEMORANDUM OPINION

In its Memorandum Opinion, the Ninth Circuit correctly delineated the controlling standards, but seems to have considered only the following:

> The issue did not arise until the Friday before the Monday that Carlson's trial was scheduled to begin. Though the attorney had been representing him for more than six months, it was on that Friday that Carlson told her that he wanted to replace her. The attorney notified the clerk that day but the matter could not be presented to the court until the following Monday morning when trial was to begin. By that time, a jury pool had been gathered, and counsel and witnesses were prepared to proceed with trial. Carlson did not want to represent

> himself, so he would need new counsel if the prior attorney was dismissed, but he had not obtained or even sought another attorney by the day trial was to begin, though he had not been in custody. In denying the request, the district court noted that its calendar was busy, that two continuances had already been granted in the case, and that granting the request would cause delay.

See. App. at 2a-3a.

The Ninth Circuit acknowledged that the trial court's "description of its reasons for denying the request may not have been stated in the clearest and most comprehensive manner," but nonetheless found that "it is apparent here that the denial was primarily based on the demands of its calendar." *Id.* at 2a.

E. PROCEDURAL HISTORY/ BASIS FOR FEDERAL JURISDICTION

The Government charged Mr. Carlson by Indictment dated May 3, 2017 with: Count 1, possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. § 2, and Count 2, possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (2). The district court thus had jurisdiction under 18 U.S.C. § 3231, which grants district courts original jurisdiction of all offenses against the laws of the United States.

A jury found Mr. Carlson guilty of the charged offenses on January 25, 2018. On April 27, 2018, the District Court imposed a sentence of 180 months in a

final Judgment and Sentence. *See* App. at 5a. The Ninth Circuit thus had jurisdiction over the direct appeal pursuant to 28 U.S.C. § 1291, which grants federal appellate courts jurisdiction of appeals from all final decisions of the district courts.

Mr. Carlson timely filed his appeal. While still pending, he filed an Urgent Motion for Release Pending Appeal to obtain hip replacement surgery that had been previously scheduled. In order to maintain his blood sugar level for his diabetes as well as maintain (and hopefully increase) his heart function, Mr. Carlson needs to be as active as he possibly can. But, due to the pain from his untreated hip—for which he was scheduled to receive surgery in February of 2018—he could not exercise, and he was losing heart function while his blood sugar levels were rising. If this persisted, Mr. Carlson would likely die prematurely in custody.

Before the hearing on the motion, the Government transferred Mr. Carlson to the Federal Medical Center at Rochester, Minnesota. He still has not gotten the hip surgery, but at least his heart condition and diabetes are being monitored.

The Ninth Circuit entered its Memorandum Opinion affirming Mr. Carlson's convictions on November 7, 2019. *See* App. at 1a.

Mr. Carlson then timely filed a Petition for Rehearing, which was denied on November 26, 2019. *See* App. at 30a.

V. REASONS FOR GRANTING THE PETITION

As the Ninth Circuit ignored conflicting decisions from the Ninth Circuit holding that: the public right to trial cannot prevail over a criminal

defendant's Sixth Amendment right to counsel of his choice; the extent-of-conflict inquiry thus does not apply to motions to substitute retained counsel; and vague calendar concerns are an insufficient basis to deny a motion to terminate retained counsel, this Court should grant the petition for writ of certiorari.

In like manner, given that the Ninth Circuit sanctioned the District Court's egregious departure from the usual course of proceedings, exercise of this Court's supervisory power is warranted.

Finally, guidance from this Court is required in regards to what standard to apply to motions to terminate retained counsel in order to retain new counsel.

A. THE *CARLSON* COURT'S MEMORANDUM OPINION CONFLICTS WITH OTHER NINTH CIRCUIT DECISIONS HOLDING THAT ONLY SIGNIFICANT DELAY CAN OVERRIDE A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL OF HIS OR HER CHOICE AND THE EXTENT OF CONFLICT INQUIRY DOES NOT APPLY TO MOTIONS TO SUBSTITUTE RETAINED COUNSEL

The District Court employed the extent-of-conflict inquiry and cited only to some vague notion of delay, but *did not* find that the requested substitution would cause significant or undue delay sufficient to override Mr. Carlson's Sixth Amendment right to retained counsel of his choice. The Ninth Circuit, in turn, overlooked the relevant body of precedent commanding that the extent-of-conflict inquiry is inapt in such circumstances and there must be not

just mere delay, but rather substantial or undue delay to justify abrogating a defendant's Sixth Amendment rights in favor of administration-of-justice concerns.

It is now axiomatic that a defendant who can afford to retain counsel has a Sixth Amendment constitutional right "to be represented by the attorney *of his choice*." *United States v. Brown*, 785 F.3d 1337, 1343–44 (9th Cir. 2015) (adding emphasis) (*quoting United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010) (*citing United States v. Gonzalez–Lopez,* 548 U.S. 140, 147–48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)). "This 'right to select counsel of one's choice' is 'the root meaning of the constitutional guarantee' found in the Sixth Amendment." *Id.* (*quoting Gonzalez–Lopez,* 548 U.S. at 147–48). The denial of this right thus "does not depend on 'the quality of the representation ... received.'" *Id.* at 1344 (*quoting Gonzalez–Lopez,* 548 U.S. at 148).

While this right is not absolute, there are few limitations: it does not apply to indigent defendants; a defendant may not insist on representation by a non-bar member or demand waiver of conflict-free representation; the trial court has wide latitude in balancing the right against the needs of fairness and against its calendar demands; and the trial court has "an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Gonzalez-Lopez*, 548 U.S. at 151-52 (citations omitted).

Unless, therefore, "the substitution would cause significant delay or inefficiency or run afoul of the other considerations we have mentioned, a defendant can fire his retained *or* appointed attorney

and retain a new attorney for any reason or no reason." *Rivera-Corona*, *supra*, at 979-80.

Denial of the right to counsel of one's choice is structural error mandating new trial without a showing of prejudice. *Brown*, *supra*, at 1350 (*citing Gonzalez-Lopez*, *supra*, at 150).

As the right to counsel of choice is more expansive than the right to effective assistance, the "three-part-extent-of-conflict analysis" applicable to defendants seeking new appointed counsel is inapposite. *Rivera-Corona*, *supra*, at 979 (citation omitted). Instead, a defendant who can retain counsel "may have the counsel of his choice unless a contrary result is compelled by 'purposes inherent in the fair, efficient and orderly administration of justice.'" *Id.* (citation omitted).

While the *Carlson* Court correctly iterated the general controlling standards, it ignored the requirement that only substantial or undue delay can constitute a sufficient administration-of-justice concern so as to outweigh this core Sixth Amendment right post *Gonzalez-Lopez*. *See* App. at 1a.

Subsequent to *Gonzalez-Lopez*, the fundamental Sixth Amendment right to retain counsel of choice no longer equally balances with other rules, inconveniences, and impediments. While a trial court must still balance the core right against efficiency considerations, the latter must be "compelling" to prevail. A trial court also, of course, maintains an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." 548 U.S. at 152.

With respect to delay, the *Rivera-Corona* Court was unequivocal: "Unless the substitution would cause **significant** delay … a defendant can fire his retained *or* appointed attorney for any reason or no reason." 618 F.3d at 978-80 (boldface added, italics in original). "Because an additional constitutional right is at stake, such motions have ***never*** been governed by the three-part extent-of-conflict analysis applicable to defendants seeking new court-appointed counsel." *Id.* (emphasis added).

The Court then held, *in dicta*: "Conflict between the defendant and his attorney enters the analysis solely when the court is required to balance the defendant's reason for requesting substitution against the scheduling demands of the court." *Id.* at 980 (citation omitted). But, the Court also held that such "extent-of-conflict review is inappropriate here," where the defendant wishes to discharge retained counsel. *Id.* at 981.

In the more recently decided *Brown*, the Court was explicit: "The appropriate standard must reflect the Sixth Amendment right which governs a particular case. **Where, as here, the right to retained counsel of choice is implicated,** *Rivera-Corona* specifically held that 'the extent-of-conflict review" is inappropriate." 785 F.3d at 1346 (emphasis added) (*quoting Rivera-Corona*, 618 F.3d at 981). The very beginning of the *Brown* opinion, in fact, states:

> *United States v. Rivera–Corona,* 618 F.3d 976 (9th Cir.2010), held that an indigent criminal defendant need not establish a conflict with his attorney amounting to the constructive denial of counsel as a prerequisite to substituting appointed counsel for his retained

> attorney. The district court in this case, like the parties, appears to have been unaware of *Rivera–Corona,* and instead applied the conflict requirement applicable to substitutions of appointed counsel for appointed counsel … A defendant enjoys a right to discharge his retained counsel for any reason …"

Id. at 1340.

Absent *significant* delay, then, a defendant has a nearly unconditional right to discharge retained counsel, subject to the standard constitutional prerequisites. *See*, *e.g.*, *Brown*, *supra*.

Brown is directly analogous and highlights the errors made by the district and appellate courts. In *Brown*, two and one-half weeks prior to trial, Brown's retained counsel filed a motion to withdraw. 785 F.3d at 1341. Citing strained communications and an actual conflict of interest, counsel advised that Brown wanted him to withdraw and attached an email from Brown attesting thereto. One week later, counsel filed a motion to continue. *Id*.

At the hearing on the motion to withdraw, counsel informed the court of the "extreme divergence of philosophical opinion as to how the case should be carried on." The court then inquired whether the true basis of the motion to withdraw was Brown's failure to pay the trial fee; counsel reiterated that there was a significant trust issue. *Id*. The court then ordered the hearing to be continued *ex parte*, obtained Brown's assent as to the motion, and explained that as withdrawal would necessitate a continuance, the court found "great fault with your late filing of this motion, on the eve of trial, and what appears to be

simply because there's a disagreement over payment and your inability, or unwillingness, to prepare for trial. *Id.*

Counsel replied that there was no fee dispute and he was ready to proceed to trial, but Brown wanted him to withdraw.

During a colloquy with the court, Brown—like Mr. Carlson—related that he and counsel had never discussed his defense and all of their communications focused on potential plea resolution. *Id.* at 1342.

Similar to here, the court then complimented counsel's skills and advised that counsel was required, subject to ethical constraints, to present the case and Brown's defenses. The court ascertained that although Brown had difficulty paying counsel and eventually fulfilled his payment plan, Brown still believed it was an issue because it had always been an issue. *Id.* After ensuring that counsel would not set up an ineffective assistance of counsel claim, the court denied the motion for withdrawal, but granted a continuance. *Id.* at 1342-43.

Applying the standards from *Gonzalez-Lopez*, *supra*, and *Rivera-Corona*, *supra*, the *Brown* Court concluded that the trial court abused its discretion in denying the motion to withdraw. *Id.* at 1347. The Court first noted that the trial court failed to conduct a proper analysis of Brown's right to his choice of counsel and focused, instead, on counsel's reasons for withdrawing: "But where, as here, it is apparent that the defendant, not the attorney, instigated the withdrawal motion, the defendant's Sixth Amendment rights should trump whatever concerns the court has about the lawyer's motives." *Id.* As the Court specifically held:

> The district court did not explicitly discuss *either* the constitutional right to retained counsel of choice *or* the extent-of-conflict analysis. Nor, indeed, did it ever discuss how, if at all, it believed Brown's Sixth Amendment rights were implicated. But, to the extent that the court did implicitly consider a Sixth Amendment right, it focused on considerations pertinent to the right to constitutionally adequate counsel, rather than to the right to choice of counsel Brown actually enjoyed. Reflecting the district court's misunderstanding of the right at issue, the reasons the district court gave for denying the motion are inadequate to preclude the discharge of retained counsel.

Id.

As in the present case, Brown's reasons for terminating representation included: (1) extreme philosophical differences; (2) lack of communication; and (3) financial tensions. *Id.* at 1348. The *Brown* Court held that "any of these concerns was more than sufficient" to warrant withdrawal. "Brown's *reasons* for wanting to discharge his retained lawyer were not properly the court's concern at all. He had the right to 'fire his retained lawyer … *for any reason or [for] no reason*." *Id.* (adding emphasis) (*quoting Rivera-Corona*, *supra*, at 980).

The trial court's consideration of the potential quality of the representation was, in turn, misplaced. *Id.* at 1348-49 (*citing Gonzalez-Lopez*, *supra*, at 148) (the right to counsel of choice is "the right to a

particular lawyer *regardless of comparative effectiveness*") (adding emphasis).

As to the trial court's concerns about delay, the *Brown* Court concluded that the trial court "did not, in fact, deny the motion *because of* 'the demands of its calendar' … nor, on this record, would that concern suffice as an administration-of-justice basis for denial of the constitutional right to discharge retained counsel." *Id.* at 1349 (*quoting Gonzalez-Lopez*, *supra*, at 148). The Court then found that even if delay was an issue, the court granted a continuance and never inquired how much time it would take for new counsel to get up to speed. *Id.*

Here, although the trial court pronounced that it was familiar with *Brown*, it nonetheless seems to have engaged in a haphazard and insufficient constructive denial of counsel/ extent-of-conflict inquiry—but without finding that substitution would cause significant delay.

The court, moreover, deemed the case "straightforward," yet never made any attempt to ascertain how long it would take for Mr. Carlson to retain new counsel—or provide him the opportunity to seek such information. More importantly, the court never entered any findings that the substitution would cause *significant* delay.

The Ninth Circuit found that the district court's "description of its reasons for denying the request may not have been stated in the clearest and most comprehensive of manner," but that it was nonetheless "apparent here that the denial was primarily based on the demands of its calendar the district court noted that its calendar was busy, that two continuances had already been granted in the

case, and that granting the request would cause delay." App. at 2a-3a.

But, neither Court found that there would be *significant* or *undue* delay sufficient to undermine the Sixth Amendment. Lacking such a finding, the *Carlson* Court's Memorandum Opinion conflicts with *Brown* and *Rivera-Corona* and warrants review by this Court. This joint error that departed so far from the accepted course of judicial proceedings also warrants exercise of this Court's supervisory power.

As further argued below, this Court should grant Mr. Carlson's Petition to delineate proper application of the extent-of-conflict inquiry and, more specifically, what standard to apply to motions to substitute retained counsel for retained counsel.

B. THE *CARLSON* COURT'S MEMORANDUM OPINION CONFLICTS WITH OTHER NINTH CIRCUIT CASES HOLDING THAT A COURT MUST BALANCE A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE WITH THE DELAY AND INCONVENIENCE RESULTING FROM SUBSTITUTION OF COUNSEL

Rather than conduct such balancing, the trial court held merely that Mr. Carlson's motion to terminate counsel was untimely. There was no inquiry about how much additional time new counsel would require or the nature of any resulting delay or inconvenience. The *Carlson* Court sanctioned this lack of balancing and seemed to have blindly followed the trial court's errant lead.

In evaluating timeliness, a court balances "the resulting inconvenience and delay against the defendant's important constitutional right to counsel

of his choice." *Daniels v. Woodford*, 428 F.3d 1181, 1200 (9th Cir. 2005) (citations omitted). "Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay." *Id.* (*citing United States v. Adelzo–Gonzalez*, 268 F.3d 772, 780 (9th Cir. 2001). No specific amount of advance notice is required "because sometimes, a defendant would be unable to make a motion until shortly before trial—such as in a case where a defendant realized his or her counsel was not prepared." *United States v. Velazquez*, 855 F.3d 1021, 1037 (9th Cir. 2017)

This case exemplifies such circumstances.

Where the motion is "made on the day of trial, the court must make a balancing determination, carefully weighing the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice." *Adelzo-Gonzalez*, 268 F.3d at 780 (citation omitted). In *Adelzo-Gonzalez*, for example, the Court found a motion for substitution timely even though it was filed the day before trial.

The Court's reasoning is apropos here:

> The district court made no inquiry into the extent of delay or inconvenience from bringing in a new attorney on the day before trial. Nor was any attempt made to determine whether there was any means, perhaps involving the [retained] counsel's cooperation, of permitting the substitution without causing excessive delay. Although our ability to evaluate the timeliness of this last motion is

> hampered by the court's inadequate inquiry, we cannot conclude that any delay which would have been required to allow for substitution of attorneys justified denial of the motion. Here, as in *United States v. Nguyen,* the district court 'failed to adequately balance Nguyen's Sixth Amendment rights against any inconvenience and delay from granting the continuance.' 262 F.3d 998, 1004 [(9th Cir. 2001)].

Id.

The *Nguyen* Court, in turn, held that the "mere fact that the jury pool was ready for selection or even that the jury was ready for trial does not automatically outweigh [a defendant's] Sixth Amendment right." 262 F.3d at 1004. The critical questions are the length of any needed continuance, the degree of inconvenience caused by the delay, and why the motion was not made earlier. *Id.* at 1005 (citations omitted). In *Nguyen*, *Adelzo-Gonzalez*, and here, as the district court failed to ask about and consider such questions, "the inquiry was inadequate." *Id.*

Here, the length of any continuance—about which the district court failed to query—would be short, even in the trial court's estimation; there would be little inconvenience—about which the district court failed to query—to the few witnesses; and Mr. Carlson could not have possibly filed his motion any earlier because he was unaware the deficiencies in his representation until just three days before trial. Only then did he realize that if he proceeded with present counsel, he would surely be convicted and sentenced to the 15-year mandatory minimum—which is amply

demonstrated on the record. All of these considerations dictate that his motion, though on the morning of trial, was nevertheless timely.

As *Carlson* thus conflicts with *Adelzo-Gonzales* and *Nguyen*, this Court should grant Mr. Carlson's Petition.

C. THIS COURT SHOULD DETERMINE WHEN AND UNDER WHAT CIRCUMSTANCES THE EXTENT-OF-CONFLICT INQUIRY, WHICH MANDATES REVERSAL, APPLIES

As noted above, the *Rivera-Corona* Court held that the extent-of-conflict inquiry cannot apply to a defendant's motion to substitute retained counsel due to the additional constitutional right at stake. 618 F.3d at 978.

The Court then held, *in dicta*, that conflict between the defendant and his or her attorney may enter the analysis (which analysis—appointed for retained, retained for appointed, or retained for retained—though, is unclear) solely when "the court is required to balance the defendant's reason for requesting substitution against the scheduling demands of the court." *Id.* at at 980 (citations omitted).

But, the Court also held that such "extent-of-conflict review is inappropriate here," where the defendant wishes to discharge retained counsel. *Id.* at 981.

The *Brown* Court then held that under *Rivera-Corona*, the extent-of-conflict inquiry is inapposite to cases involving retained counsel. 785 F.3d at 1346.

The standard to be applied is thus unclear.

If *Brown* controls, the district court and the *Carlson* Court erred in failing to enter a finding that the substitution would cause *significant* or *undue* delay.

If the seeming *dicta* from *Rivera-Corona* applies, both the district court and *Carlson* Court failed to enter a finding that the substitution would cause *significant* or *undue* delay such as to trigger application of the extent-of-conflict inquiry.

Under either standard, then, the *Carlson* Court's Memorandum Opinion is in conflict as it lacks a finding that the substitution would cause *significant* or *undue* delay. The Court held only that the trial court did not err in denying the motion to terminate retained counsel based upon its vague calendar concerns.

Assuming, *arguendo*, that there would be substantial or undue delay, the extent-of-conflict inquiry may or may not apply—depending upon whether *Rivera-Corona's* seeming dicta or *Brown's* more definitive statement controls. Again, assuming it applies, the trial court engaged in an insufficient, incomplete, and reversible inquiry.

As Mr. Carlson, "with legitimate reason, completely lost trust in his attorney" and the trial court refused to remove the attorney, he was "constructively denied counsel." *United States v. Velazquez*, 855 F.3d 1021, 1033–34 (9th Cir. 2017) (*citing Daniels*, *supra*, at 1198 (*citing Adelzo-Gonzalez, supra*, at 779). A showing of prejudice is not required "when the breakdown of a relationship between attorney and client from irreconcilable differences results in the complete denial of counsel." *Id.* at 1034 (citations omitted).

To determine whether the district abused its discretion in denying a motion to substitute counsel, this Court considers: (1) the adequacy of the district court's inquiry; (2) the extent of the conflict between the defendant and counsel; and (3) the timeliness of the substitution motion. *Id.* (citation omitted).

1. The Court's Inquiry was Deficient

During the required colloquy on a motion to substitute counsel, the district court must conduct "such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern" and which is a "sufficient basis for reaching an informed decision." *Adelzo-Gonzalez*, *supra*, at 777 (citations omitted). Towards this end, the district court "may need to evaluate the depth of any conflict between defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to prepare, and any delay or inconvenience that may result from substitution." *Id.*

The district court's inquiry was clearly deficient in neglecting to ask about the length of any potential delay and extent of any potential inconvenience. This, standing alone, seems to mandates reversal.

The court, moreover, through its open-ended questions, "put the onus on Mr. Carlson to articulate why … counsel could not provide competent representation. While open-ended questions are not always inadequate, in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." *Id.* at 777-78 (citations omitted). Also here, as in *Adelzo-Gonzalez*, the court placed "too much emphasis on [retained] counsel's ability to provide adequate representation and not enough attention to

the status and quality of the attorney-client relationship. *Id.* at 778

For multiple reasons, then, the district court's inquiry was deficient.

2. The Conflict was Irreconcilable

As noted above, given that Mr. Carlson had, "with legitimate reason, completely lost trust in his attorney, and the trial court refuse[d] to remove the attorney," he was "constructively denied counsel." *Velasquez*, *supra*, at 1033-34 (citations omitted). This applies "even where the breakdown is the result of the defendant's refusal to speak with counsel, unless the defendant's refusal to cooperate demonstrates 'unreasonable contumacy.'" *Daniels*, *supra*, at 1198 (citations omitted). Even where trial counsel is competent, "a serious breakdown in communications can result in an inadequate defense." *Id.* (*quoting Nguyen, supra*, at 1003-04 (*citing United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000); *citing also United States v. D'Amore*, 56 F.3d 1202, 1206 (9th Cir. 1995), ("[A] court may not deny a substitution motion simply because [it] thinks current counsel's representation is adequate."), *overruled on other grounds by United States v. Garrett*, 179 F.3d 1143 (9th Cir. 1999).

A defendant is likewise denied his or her Sixth Amendment right to counsel when he or she is "forced into a trial with the assistance of a particular attorney" with whom he or she or dissatisfied, with whom he or she will not cooperate, and with whom, he or she will not in any manner whatsoever, communicate." *Nguyen*, *supra*, at 1003-04 (*citing Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970); see *also Adelzo-Gonzalez*, *supra*, at 779 ("While loss of

trust is certainly a factor in assessing good cause, a defendant seeking substitution … must nevertheless afford the court with legitimate reasons for the lack of confidence.") (citation omitted).

Here, given Mr. Carlson's complete and total lack of trust in an attorney he felt had: failed to follow up on any of his investigative leads, failed to file any motions to suppress, not spoken with any of his proposed witnesses, and failed to properly communicate with him and discuss trial strategy rather than advocating a plea resolution, he lost any faith is counsel and thus had legitimate grounds to terminate retained counsel and substitute new retained counsel.

3. The Motion was Timely

Given that Mr. Carlson was unaware of the grounds for his motion to discharge retained counsel, his motion was timely as argued in the previous section.

Even if Mr. Carlson's motion "could be considered untimely—a reason the district court never relied on in its rulings on the motions to substitute—the court's failure to conduct an adequate inquiry and the extent of the conflict outweigh any untimeliness in the balance of factors. Taken together, the factors weigh in favor of finding an abuse of discretion." *Velazquez*, *supra*, at 1037.

Under any standard, then, as neither the trial court nor the *Carlson* Court entered a finding that the substitution would cause undue delay, their conclusions conflict with the holdings in *Brown* and *Rivera-Corona*. This Court should further clarify the proper standard to apply when a criminal defendant seeks to substitute new retained counsel for present

retained counsel as this issue implicates the core right of the Sixth Amendment.

VI. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Carlson's Petition for Writ of Certiorari.

DATED this 24th day of February, 2020

Respectfully submitted,

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