No.

IN THE SUPREME COURT OF THE UNITED STATES

KWOK CHEUNG CHOW AKA RAYMOND CHOW

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Presley v. Georgia,* 558 U.S. 209 (2010), this Court held the right to a public trial in criminal cases extends to the entire trial, and any closure must be justified by an overriding governmental interest. Given that holding, have the federal courts of appeals undermined these constitutional principles by adopting a test that requires a lesser governmental interest to justify a closure that is deemed "partial."

2. The qualified right to counsel of choice is both the core of the Sixth Amendment right to counsel, and independent of the Sixth Amendment's guarantee of a fair trial. Accordingly, can the denial of counsel of choice occurring during post-trial proceedings be evaluated for harmless error?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner and the United States).

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Supreme Court Cases

Federal Circuit Cases

Statutes

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Kwok Cheung Chow aka Raymond Chow respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued on May 15, 2019, affirming the judgment of conviction. Appx. A.

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit affirming petitioner's convictions is unpublished and is attached as Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming petitioner's judgment of conviction and sentence was entered on May 15, 2019. Appx. A. This Petition is filed within 90 days of August 19, 2019, the date on which the Ninth Circuit denied a timely filed petition for rehearing. Appx. C. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides,

> In all criminal prosecutions, the accused shall have 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.

STATEMENT OF THE CASE

On April 3, 2014, a federal grand jury sitting in the Northern District of California returned a multicount indictment against petitioner and 29 codefendants. On October 15, 2015, following a severance Order, the grand jury returned a Third Superseding Indictment against petitioner alone. Count One alleged that on beginning at least by 2003, and continuing through March 26, 2014, petitioner and codefendants conspired to conduct and participate in the conduct of the affairs of the Chee Kung Tong enterprise through a

pattern of racketeering activity, in violation of 18 U.S.C. § 1961(1) and (5). The alleged racketeering activity included dealing in controlled substances, extortionate collection of unlawful debt, money laundering, interstate sale and receipt of stolen property, dealing in contraband cigarettes, murder for hire and murder. The indictment also alleged a substantive charge of murder in aid of racketeering, a separate conspiracy to commit murder in aid of racketeering, multiple counts of money laundering, and separate conspiracies to receive, possess and dispose of alcohol represented to be stolen and contraband cigarettes.

The case was tried to a jury between November 2, 2015, and January 8, 2016, on which date the jury convicted petitioner on all counts. On August 4, 2016, the district court sentenced him to a mandatory term of life imprisonment.

A significant portion of the trial – the entirety of the testimony of two FBI agents who worked undercover on the investigation -- was

closed to the public.[1] One of the agents, who testified using the pseudonym "Dave Jordan" was the government's primary witness against petitioner. The second undercover agent, who used the pseudonym "Jimmy Chen," also gave significant inculpatory testimony. Over defense objection, the court closed the courtroom during the testimony of witnesses "Chen" and "Jordan." The portion of the trial closed thereby was substantial, consisting of seven days of trial testimony. The trial, exclusive of voir dire, instructions, and closing arguments comprised 27 trial dates. Thus, approximately 25% of the trial was closed.

During the agents' testimony, the district court excluded the public from the courtroom, restricting them to the overflow viewing room, and disconnected the camera which usually focused on the witnesses. Thus, although the jury was able to see the faces of the testifying witnesses, the public could not.

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1 In addition to closing the trial, the court withheld from the public – and from defense counsel – the true identity of the two undercover FBI agents.

Explaining its ruling, the district court stated:

> My understanding is that justification for this is that one or both – maybe both – of these individuals are engaged in ongoing undercover operations. And if their identity, either by name or by face, is known or available to the public, that that will destroy their – one, it will destroy their effectiveness as an undercover agent; and two, it may endanger their lives. That's the argument that the Government has.

Appx. B-2. The court continued:

> And so for that reason, I'm going to allow – I'm going to opt for Option Number One, which is simply that the courtroom be closed, and the video as to the witness be disconnected. The audio will proceed.
> …
>
> But I think the Government has demonstrated a good and sufficient cause to depart from the normal open courtroom so that witnesses can be seen and heard. This way, with the proper admonition to the jury, the jury will be able to fully examine -- see the examination of the witness.

Appx. B-2—B-3. Subsequently, when it was revealed that the agents were not currently working undercover, the district court reiterated its ruling:

> THE COURT: I think my understanding is that he is

> used from time to time to engage in undercover operations. So he doesn't want to destroy his effectiveness today by disclosing his true identity. That's what I based it on.

Appx. B-6. The court added:

> THE COURT: Well, I don't know if it's a policy in the future. The policy is, as far as I understand it, a person who has been -- yeah -- who has been engaged in an undercover operation, and is currently employed by the Federal Bureau of Investigation, and it is the intention of the Bureau sometime in the future to use him again as an undercover officer, that his identity should not be disclosed -- his true identity.
>
> Based upon that, I ruled that his true identity shouldn't be disclosed. Anyway, that's the ruling. I mean, that was the ruling. So are you asking me to reconsider the ruling?
>
> And I'm not going to change it based upon the argument that he is not presently engaged in an undercover operation. Based upon that, I'm not going to change my ruling.

Appx. B-7—B-8.

Petitioner challenged his conviction on appeal, raising several constitutional challenges. He particularly challenged the exclusion of the public from the seven days of trial testimony. He also challenged the

district court's post-trial denial of his motion to relieve retained counsel, and the court's refusal to appoint substitute counsel. The United States Court of Appeals for the Ninth Circuit rejected his arguments.

Statement of Lower Court Jurisdiction Under Rule 14.1(i).

The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231. The jurisdiction of the court below was invoked under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Adopted a Penurious Interpretation of the Right to a Public Trial, Which allows Significant Closures When the Government Identifies Virtually Any Risk to a Law Enforcement Witness.

The Ninth Circuit decision concluded that because the district court only partially closed the courtroom, the closure did not have to be justified by an overriding governmental interest, but only by a substantial one. Appx. A-3. The court's ruling undermines both the Sixth Amendment right of a criminal defendant to a public trial and this Court's repeated caution that closures should be rarely employed and only when supported by an overriding governmental interest.

Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Any analysis must start with the fundamental principle that "[t]he presumption of openness may be overcome only by an overriding interest based on a finding that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise v. Superior Court,* 464 U.S. 501, 510 (1984); *see also Waller v. Georgia,* 467 U.S. 39, 46 (1984). This Court's summary reversal in *Presley v. Georgia,* 558 U.S. 209 (2010), in which the Georgia Supreme Court had upheld the exclusion of the public (in the form of one of the defendant's family members) from voir dire, supports the conclusion that any closure requires a compelling governmental interest.

This Court has not distinguished between partial and complete closures. The *Presley* decision suggests that there is no difference, emphasizing the requirement that any closure be justified by a compelling governmental interest. *See also Waller,* 467 U.S. at 45. *Presley* itself involved what might be termed a partial closure: the trial

court excluded the public in the form of one member of the defendant's family.

Prior to *Presley,* some federal courts of appeals adopted a test requiring a lesser showing for closures deemed "partial." *E.g., United States v. Deluca,* 137 F.3d 24, 33-34 (1st Cir. 1998); *Ayala v. Speckard,* 131 F.3d 62, 72 (2d Cir. 1997)(en banc); *United States v. Sherlock,* 962 F.2d 1349 (9th Cir. 1992). These courts have concluded a "partial" closure need be supported only by a substantial governmental interest, as opposed to a compelling one. *E.g., Sherlock,* 962 F.2d at 1356-58. Since *Presley,* the circuits have treated these decisions, and the distinction between a partial and complete closure, as controlling. *See* Appx. A-3; *Bucci v. United States,* 662 F.3d 18, 24-26 (7th Cir. 2011).

The circuit decisions on partial closure are noteworthy for their inconsistency on what constitutes a partial closure as opposed to a complete one. For example, the closure termed partial in *Sherlock* excluded the defendant's family members from the testimony of a minor victim of sexual assault, but allowed the public to remain. 962 F.2d at

1356-58. A similar closure in *Presley,* which excluded one member of the defendant's family from voir dire, was treated as a complete one. The closure in *Ayala v. Speckard* -- deemed partial -- excluded spectators from the testimony of undercover officers. 131 F.3d at 64-65. And the closure here excluded the public from the trial for the seven days of trial testimony given by the undercover agents.

Perhaps more importantly, the aforementioned circuit decisions are inconsistent with *Presley. Presley* did not distinguish between types of closures, but emphasized instead the overriding interest needed for any closure. And, *Presley* itself involved what might be termed a partial closure: the exclusion of a member of the defendant's family from *voir dire.* Despite the limited nature of the closure in *Presley,* this Court did not minimize its significance, differentiate between a partial or complete closure, or establish a lower level of governmental interest necessary for its justification. Instead, this Court simply vacated the judgment of conviction. *Presley,* 558 U.S. at 214-15.

This case well presents the issue at hand. The court of appeals first found that the closure was a partial one, because the public was not excluded from the entire trial and was permitted to hear the witnesses' testimony if not to see their faces and demeanor. Appx. A-3. The court relied on its decision in *Sherlock* and concluded that the government need not demonstrate a compelling or overriding interest to justify closure. *Id.*

The rule adopted by a significant number of federal circuits undermines is in contradiction with this Court's rulings on the Sixth Amendment right to a public trial. This Court should grant certiorari to clarify whether any non-trivial closure may be justified by something less than a compelling governmental interest.

II. The Interest Articulated by the Government was Not Sufficient to Justify Closure.

The Ninth Circuit's decision is further marred by its summary conclusion that the government here articulated a substantial interest. The record showed that the anonymous witnesses were not currently involved in undercover operations that would have been placed at risk.

"Jimmy Chen" was nearing retirement. "Dave Jordan" testified that he was currently not involved in any other undercover operations. Nonetheless, the district court found that the government's desire to preserve the secrecy of its undercover witnesses' identity, largely so they could work undercover in the future, was substantial. Appx. A-3.

The government's interest in using an agent in a future undercover investigation cannot outweigh a defendant's Sixth Amendment right to a public trial. "The presumption of openness may be overcome only by an overriding interest based on a finding that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise v. Superior Court,* 464 U.S. 501, 510 (1984). The government's interest in continuing to use an agent in an undercover capacity is not such an interest. Rather, the government's interest in the continued effectiveness of undercover agents involves a decision regarding the use of governmental resources. The government has the right to control the use of its staff, including undercover agents, but decisions have consequences. Training an agent

in undercover techniques does not mean that agent can work undercover forever. Our system is one of openness, and the government's desire to preserve the secrecy of its undercover agents' identity should not be used to justify closing a trial. Preserving the future is not a compelling governmental interest, at least not in the usual case.

Moreover, even if such an interest can be deemed substantial in some cases, the facts articulated in support of the interest here were too weak to support closure. *Compare United States v. Lucas,* 932 F.2d 1210, 1216-17 (8th Cir. 1991)(undercover agent was one of only a small number of black female detectives and, at the time of trial, was involved in extensive drug investigations). There was little offered to suggest that the agents would be endangered by public testimony, and matters of national security were not involved. *Cf. United States v. Sterling,* 724 F.3d 482, 515-17 (4th Cir. 2013) (no confrontation clause violation when CIA operatives were allowed to testify behind screen: disclosure of their identities presented the danger of exposing them to targeting by

foreign intelligence services and terrorist organizations); *cf. also United States v. De Jesus-Casteneda,* 705 F.3d 1117, 1119-21 (9th Cir. 2013)(concluding that district court decision allowing a confidential informant to testify wearing a wig, sunglasses and a mustache did not violate the Confrontation Clause, given evidence that the informant was currently involved in investigations with the notorious Sinaloa Cartel).

The court's ruling allows the government to obtain closure in virtually every case involving an undercover agent. Under the Ninth Circuit's analysis, closure may be obtained routinely, when the government offers the truisms that (a) undercover agents are at risk; and (b) the agents' identities cannot be exposed because exposure may prevent them from working undercover in the future. While in rare cases closing the trial to the public can be justified by national security concerns or particularized dangers to the agents, closure cannot be the general rule. If the government's mere desire to keep secret the identities of its undercover agents is sufficient to justify closure,

without a particularized and powerful showing of danger, then closure will become the rule, not the exception.

The use of government staff, including undercover agents, is a matter of administrative discretion, concerning the use of government resources. The government's decision to use undercover agents in the investigation and prosecution of cases does not outweigh the defendant's – and the public's – right to a public trial. Preserving the opportunity of a law enforcement agent to work undercover in the future is not a overriding governmental interest, either in the usual case or in this one.

III. This Court Should Grant Certiorari to Clarify that a Denial of the Sixth Amendment Right to Counsel of Choice is not Subject to Harmless Error Review.

The court of appeals concluded, relying on circuit authority, that the deprivation of the right to counsel of choice at sentencing and in connection with post-trial motions is not structural error. The court further ruled any error in not allowing petitioner to discharge retained counsel between June 16 and July 19, was harmless. Appx. A-6. *See*

United States v. Walters, 309 F.3d 589, 592-93 (9th Cir. 2002); *United States v. Maness*, 566 F.3d 894, 897 (9th Cir. 2009). The Ninth Circuit's decision is based on circuit authority effectively overruled by *United States v. Gonzalez-Lopez,* 548 U.S. 140, 147-48, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The Ninth Circuit's continued evaluation of the denial of counsel of choice for harmless error undermines the core of the constitutional right, and should be corrected by this Court.

At the commencement of criminal proceedings, petitioner was indigent and qualified for the appointment of counsel. Subsequently, retained counsel entered their appearance on petitioner's behalf. Counsel represented they would be representing petitioner on a pro bono basis, and lead counsel, Tony Serra, continued to represent petitioner pro bono throughout the proceedings. Ultimately, however, Mr. Serra's assistant attorneys began receiving payments pursuant to the Criminal Justice Act. Mr. Serra remained as retained counsel.

Attorney-client relations broke down after conviction. Despite petitioner's repeated instructions to counsel to move to withdraw,

counsel continued to represent petitioner in post-trial motions. Finally, after the district court denied a late-filed motion for new trial, trial counsel moved to withdraw. At a hearing on June 15, 2016, petitioner asked that all of his attorneys – retained/pro bono and appointed, be relieved and asked for appointment of substitute counsel. The court evaluated the motion as if it were a motion to substitute appointed counsel, and relieved only one of petitioner's appointed attorneys. The court refused to relieve retained counsel and denied the motion to appoint replacement counsel.

On July 19, 2016, petitioner filed a substitution of counsel under which a new pro bono attorney, Matthew Dirkes, entered his appearance. On July 21, 2016, at a hearing on the substitution, Dirkes stated that he was replacing attorney Serra and his assistant attorney Smith. After conducting some research, the court agreed that petitioner had an absolute right to discharge attorneys Smith and Serra and relieved them.

Four days later, petitioner moved for reconsideration of the court's prior Order denying his June motion to relieve all counsel and appoint replacement counsel. Petitioner again requested the appointment of counsel. The district court denied the motion for reconsideration as moot, since it previously had allowed the substitution of pro bono counsel.

On appeal, the Ninth Circuit ruled that the court's erroneous refusal to allow petitioner to discharge retained counsel was harmless. Appx. A-6.

The Sixth Amendment guarantees to the criminal defendant the right to retain his counsel of choice. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *see also*, *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 624 (1989); *Powell v. Alabama*, 287 U.S. 45, 53 (1932)("…a defendant should be afforded a fair opportunity to secure counsel of his own choice"); *see also Faretta v. California*, 422 U.S. 806, 834 (1975).

The right to counsel of choice is the "root meaning of the constitutional guarantee." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)(quoting *Wheat v. United States, supra,* 486 U.S. at 159). The right is independent "from the Sixth Amendment's purpose of ensuring a fair trial." *Id.* at 147. Further, the wrongful denial of a criminal defendant's qualified right to counsel of choice is a type of error that cannot be quantified. *Id.* at 150, 152. Therefore, deprivation of the right to counsel of choice is not subject to harmless error analysis. *Id.*; *see United States v. Jimenez-Antunez,* 820 F.3d 1267, 1271-72 (11th Cir. 2016). Recognizing the independence of the qualified right to counsel of choice, the Ninth Circuit has concluded that the right includes the right to terminate retained counsel when a criminal defendant no longer desires counsel's services. *United States v. Rivera-Corona,* 618 F.3d 976, 979-80 (9th Cir. 2010).

While the right to retain or discharge counsel of choice is not absolute, it may be abridged only to secure a compelling purpose.

United States v. Lillie, 989 F.2d 1054, 1055-56 (9th Cir. 1993), *overruled in part on other grounds by United States v. Garrett*, 179 F.3d 1143, 1145 (9th Cir. 1999). Such compelling purposes include, for example, a serious conflict of interest, or causing an undue delay in the proceedings. *Wheat v. United States*, 486 U.S. at 159; *United States v. Zimny,* 873 F.3d 38, 51-52 (1st Cir. 2017); *United States v. Bolton,* 908 F.3d 75, 99-100 (5th Cir. 2018)(affirming decision not to allow counsel of choice to appear at sentencing, where the defendant did not notify the court or government of new counsel, and counsel did not seek pro hac vice admission or enter his admission on defendant's behalf).

Although the Ninth Circuit has recognized the independence of the qualified right to counsel of choice in the context of discharging retained counsel, the court has not retreated from its prior decisions holding that a deprivation of the right may be reviewed for harmless error. In *United States v. Walters*, 309 F.3d at 592-93, decided before *Gonzalez-Lopez*, the court of appeals concluded that a deprivation of the right to counsel of choice did not constitute structural error when it was

limited to sentencing. Subsequent to *Gonzalez-Lopez,* however, the Ninth Circuit did not alter its view that a deprivation of the right to counsel of choice, occurring post-trial, could be reviewed for harmless error. *See United States v. Maness*, 566 F.3d at 896-97 (applying harmless error analysis to request for self-representation on post-conviction remand proceeding). Instead, the Ninth Circuit reiterated the flawed conclusion that the deprivation of the right to counsel of choice – at least one occurring post-trial – could be reviewed for harmless error, because a Sixth Amendment deprivation at a single proceeding did not infect the trial. *Id.* at 897.

Gonzalez-Lopez's reasoning undermines entirely the Ninth Circuit's conclusion that harmless error analysis is applicable to a post-trial deprivation of the right to counsel of choice. Although the right to counsel of choice may be limited by matters such as an attorney's conflict of interest, or lack of qualifications, *Gonzalez-Lopez* offers no suggestion that an erroneous deprivation of the right to counsel of choice can be reviewed for harmless error. Indeed, *Gonzalez-Lopez*

supports the opposite conclusion because of its emphasis that the right to counsel of choice is distinct from the right to a fair trial.

The Ninth Circuit's reasoning is flawed. *Walters* and *Maness* conflate the qualified right to counsel of choice with the Sixth Amendment's general guarantee of a fair trial, disregarding utterly the point that the right to counsel of choice is independent from the general guarantee of a fair trial. *Gonzalez-Lopez,* 548 U.S. at 146 ("In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous.). The Ninth Circuit's holding instead subsumes the right to counsel of choice within the Sixth Amendment guarantee of a fair trial. The notion that a post-trial deprivation of the right to counsel of choice is not structural error contradicts *Gonzalez-Lopez's* constitutional rationale.

Further, the Ninth Circuit's reasoning fails to acknowledge the reality that both sentencing – at issue in *Walters* -- and a motion for new trial – at issue in petitioner's case -- are critical stages of the

criminal proceeding. *E.g., Gardner v. Florida,* 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); *Mempa v. Rhay,* 389 U.S. 128, 134-35, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *see Marshall v. Rodgers,* 569 U.S. 58, 61, 133 S. Ct. 1446; 185 L. Ed. 2d 540 (2013)(assuming without holding that preappeal motion for new trial is critical stage). Indeed, these proceedings may be some of those most important to the criminal defendant. Having been convicted, a defendant has limited options remaining in the criminal process and being represented by counsel of choice at post-trial critical stages is just as important as at earlier ones.

Finally, the harm stemming from the deprivation of the Sixth Amendment right to counsel of choice at a critical post-trial proceeding is as difficult to assess as the deprivation of counsel of choice in relation to trial and pretrial proceedings. It is no easier to evaluate whether a defendant was harmed by deprivation of his right to counsel of choice at sentencing or in connection with a motion for new trial than during pretrial or trial proceedings. This factor strongly supports the conclusion that the deprivation of the Sixth Amendment right to

counsel of choice, regardless when it occurred, constitutes structural error. *Gonzalez-Lopez*, 548 U.S. at 150.

The Ninth Circuit's decision, treating the denial of counsel of choice at proceedings other than trial as harmless, is inconsistent with this Court's decision in *Gonzalez-Lopez.*

IV. CONCLUSION

Based on the foregoing arguments, petitioner respectfully requests this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: November 18, 2019

Respectfully submitted,

/s/Karen L. Landau
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