IN THE SUPREME COURT OF THE UNITED STATES

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ACHARAYYA "RUDY" RUPAK,

PETITIONER,

- vs -

UNITED STATES OF AMERICA,

RESPONDENT.

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

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Questions Presented for Review

1. This Court has held that the right to the retained counsel of one's choice is the "root meaning" of the Sixth Amendment guarantee. Here, the district court denied Rupak's request to change retained counsel before sentencing because it "wasn't inclined" to continue the hearing, which had been continued only once before. The Ninth Circuit then recharacterized the court's ruling as the denial of a continuance. Should this court address the standard of review for the denial of a request to substitute counsel?

2. Rupak pleaded guilty to a crime he did not commit and for which there was no record evidence. The Ninth Circuit, however, did not undertake the required analysis set forth by this Court in *United States v. Dominguez-Benitez,* instead finding that any error was not plain. Should this Court grant the petition to remind the lower courts that they are obligated to conduct meaningful plain-error review when there is a Rule 11 defect?

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Petitioner, Rudy Rupak, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below

The Ninth Circuit affirmed Petitioner's convictions and 24-month sentence for interstate or foreign travel in aid of racketeering in an unpublished memorandum. *United States v. Rupak*, 772 Fed. Appx. 591 (9th Cir. 2019).[1] The court denied his petition for rehearing and rehearing en banc on October 10, 2019.

Jurisdiction

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

Constitutional Provision

U.S. Const. Amend. VI

[1] The memorandum is attached as Appendix A.

Statement of the Case

Rudy Rupak was the founder and Chief Executive of Planet Hospital, a company that was in the business of obtaining medical services for persons seeking foreign medical providers. Specifically, Planet Hospital acted as an intermediary for persons who wanted cosmetic surgery, surrogacy, or organ transplants.

On June 10, 2016, the grand jury for the Southern District of California returned an indictment alleging three counts of wire fraud against Rupak. In general, the indictment alleged that Rupak made material misrepresentations to clients regarding how their money would be used at medical clinics and for various services.

On March 9, 2017, Rupak pleaded guilty to a superseding information alleging interstate or foreign travel in aid of racketeering under 18 U.S.C. § 1952. The information specifically alleged that the intended unlawful activity engaged in by Rupak was commercial bribery in violation of California law, which is defined as an acceptance or offer to "give[] an employee money or any thing of value" . . . "in return for [the employee] agreeing to use his or her position for the benefit of that other person." Cal. Pen. Code § 641.3(a). Neither the factual basis of Rupak's plea agreement nor his Rule 11 colloquy included any allegation or admission of commercial bribery, however.

On August 7, 2017, the district court sentenced Rupak to 24 months in custody. Before that hearing, the court denied Rupak's pending request to replace retained attorney David Baker with retained attorney Laura Marran because the court was unwilling to continue the sentencing hearing. Although attorney Janice Deaton specially appeared for Marran – who was out of town that day but had already filed a motion to replace Baker as Rupak's counsel of record – the district court refused the substitution, noting that it was "not inclined to continue the sentencing" and that it did "not allow Ms. Marran to substitute in because [the court] was concerned that she might not be prepared for this sentencing date."

After imposing a 24-month sentence (reflecting the low end of the guidelines after applying a two-level increase for vulnerable victims, which was not recommended in the plea agreement), the court scheduled a restitution hearing for September 13, 2017. Rupak then inquired: "I have no ability to ask for a trial instead?" The court answered "no."

On September 13, 2017, the court continued the restitution hearing to October 11 because the government had not filed any restitution "paperwork or briefs." On October 11, the court continued the restitution hearing again, to November 2, 2017. On November 2, the court entered a restitution order and an amended judgment. Rupak timely appealed his conviction and sentence to the

Ninth Circuit. On July 2, 2019, the court entered a memorandum affirmance. On October 10, 2019, it denied his petition for rehearing en banc.

Summary of the Argument

1. This Court has long held that "the erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *United States v. Gonzalez-Lopez,* 548 U.S. 140, 150 (2006). Here, the district court denied Rupak's motion to replace retained counsel with new retained counsel simply because it did not wish to grant a routine continuance of a sentencing hearing in a single-defendant case.

When reviewing a claim that a defendant was denied the right to the retained counsel of his choice, the Ninth Circuit Court of Appeals permits its panels to analyze the issue as "either a denial of a continuance or as a denial of a motion to substitute counsel." *United States v. Thompson,* 587 F.3d 1165, 1173 (9th Cir. 2009). Unsurprisingly, when the panel employs the former standard – as it did here – the appellant always loses. That was true in this case, even though a brief continuance would have inconvenienced no one and the district court continued the restitution hearing two more times before entering the amended judgment, anyway.

This Court should grant the petition to clarify which analysis a court of appeals should apply when a defendant wishes to replace his retained counsel and requires a short continuance to effect the change.

2. Rupak pleaded guilty to an offense for which there was no factual basis – either in the record or otherwise. Specifically, although he was originally indicted for fraud, he pleaded guilty to interstate or foreign travel in aid of racketeering under 18 U.S.C. § 1952(a)(3), which was based on "commercial bribery in violation of California Penal Code § 641.3." At no point during his plea colloquy did Rupak ever admit to a single act of bribery. Nor did even a single bribe appear anywhere in the record (or, for that matter, anyplace else). Although this deficiency was not seriously in dispute before the court of appeals, the panel failed to engage in the requisite plain-error review, finding instead that "even if the district court erred in deeming the alleged factual basis sufficient . . . such error was not plain." 772 Fed. Appx. at *3-4. This Court should grant the petition to clarify that when a reviewing court encounters plain error in a Rule 11 colloquy, it must undertake the plain-error analysis set out by this Court in *United States v. Dominguez-Benitez,* 542 U.S. 74, 76 (2004).

Reasons for Granting the Petition

I.

This Court should grant the petition to clarify that a district court may not deny a defendant's motion to substitute retained counsel merely because the change would require a garden-variety continuance.

A. Pertinent Facts

Rudy Rupak was the only defendant in what was essentially a straightforward fraud case. He was indicted (for fraud) on June 10, 2016. On March 9, 2017, he pleaded guilty to a superseding information alleging commercial bribery in furtherance of racketeering. His sentencing, originally scheduled for May 18, 2017, was continued only one time (by joint motion of the parties), and set for August 7. On August 2, 2017, Rupak filed a motion to replace his retained counsel with a different retained lawyer. On August 7, the district court denied that motion and proceeded to sentencing over his objection. In so doing, the court neither acknowledged the constitutional right at issue (retained counsel of choice at a critical stage) nor did it explain any reasons for denying the request, other than stating "everyone is entitled to closure."

Notwithstanding the perceived urgency of proceeding to sentencing on August 7, the court would then continue the restitution hearing two more times because the government wasn't prepared to go forward. In fact, it did not decide

the restitution amount (or issue the amended judgment) until November 6, 2017 – two months after the sentencing hearing.

B. *The Ninth Circuit has undermined the "root meaning" of the Sixth Amendment guarantee by permitting its judges to review right-to-counsel claims under the deferential standard for the denial of a continuance.*

This Court has held that "[t]he right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lopez,* 548 U.S. at 147. Further, this Court has admonished lower courts that it has "little trouble concluding that [the] erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." *Id.* at 150 (quotations and citation omitted). It has also observed that "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Morris v. Slappy,* 461 U.S. 1, 11-12 (1983).

Nonetheless, the Ninth Circuit permits its judges to analyze a right-to-retained-counsel claim "as either a denial of a continuance or as a denial of a motion to substitute counsel." *Thompson,* 587 F.3d at 1173. If a court opts for the latter test, unless the request "would have caused significant delay or impeded the fair, efficient and orderly administration of justice . . . [a defendant] is entitled to

discharge [his lawyer] for any reason or no reason." *United States v. Rivera-Corona,* 618 F.3d 976, 980 (9th Cir. 2010). On the other hand, if a reviewing court opts for the former test, it employs a deferential five-prong, reasonableness inquiry. *See Thompson,* 587 F.3d at 1174. That is what happened here, where the panel relied on *United States v. Turner* (an extreme case involving a vexatious, intermittently pro se litigant who had previously continued several trial dates while faking illnesses) to deny Rupak's reasonable request to change counsel before sentencing. *See* 772 Fed. Appx. at *3 (citing *Turner,* 897 F.3d 1084, 1102 (9th Cir. 2018)).

That analysis is hardly worthy of the "root meaning of the constitutional guarantee." As a practical matter, virtually every request to substitute counsel will require at least a short continuance. Permitting lower courts to review the denial of those requests under a toothless standard re-characterized as the denial of a continuance gives short shrift to this important Constitutional right. This Court should grant the petition to clarify the requisite analysis where a request to change retained counsel would necessarily require a garden-variety continuance.

II.

The Court should grant the petition to ensure that lower courts apply the proper standard when reviewing plain errors under Rule 11.

A. Pertinent Facts

Rudy Rupak was convicted of a crime that he did not commit. That simple fact is not seriously in dispute, as the panel repeatedly pointed out at oral argument. Indeed, although Rupak stands convicted of commercial bribery, he never bribed anyone. The Rule 11 colloquy is bereft of any instances of bribery. Moreover, there is not a single instance of bribery anywhere in the record. Yet the panel affirmed Rupak's conviction without any analysis, stating in a single sentence that "we conclude that any such error was not plain." 772 Fed. Appx. At *3-4.

B. This Court should grant the petition to remind lower courts that Rule 11 defects require the plain-error review articulated by this Court in United States v. Dominguez-Benitez.

1. This was error and it was plain.

Although originally indicted for fraud, Rupak pleaded guilty to *bribery*. Specifically, he pleaded guilty to an information alleging a violation of 18 U.S.C. § 1952, which incorporated § 641.3 of the California Penal Code. Section 641.3, in turn, is a commercial bribery statute and it proscribes *bribery,* not generic fraud. To that end, it requires that an employee who accepts any thing of value from another person do so "in return for using or agreeing to use his or her position for the

benefit of that other person" and it concomitantly prohibits another person from offering an employee "any thing of value under those circumstances" (i.e., a bribe). This rather obvious proposition – that bribery is something different than simple theft, embezzlement, or generic fraud – has also been restated by the California courts. *See, e.g., People v. Riley*, 240 Cal. App. 4th 1152, 1162 (2015) (§ 641.3 "requires proof that a *bribe* was offered and accepted or solicited"). Yet there was not a single instance of bribery anywhere in the record. This was error. And it was plain.

2. The reviewing court was required to determine whether there was a reasonable probability that Rupak would have gone to trial but for the plain error.

Under *United States v. Dominguez-Benitez,* the panel was therefore obligated to determine whether there was "a reasonable probability that, but for the error, [Rupak] would not have entered [his] plea." 542 U.S. at 76. Importantly, the inquiry is not whether the defendant would have made a wise choice but rather, whether he might have made a different choice under the circumstances:

> The point of the question is not to second-guess a defendant's actual decision; if it is reasonably probable he would have gone to trial absent the error, it does not matter that the choice may have been foolish. The point, rather, is to enquire whether the omitted warning would have made the difference required by the standard of reasonable probability.

Id. at 85.

Here, Rupak's plea colloquy was punctuated by his equivocation and discomfort. He was repeatedly "hesitating," stated twice that he was "overwhelmed," and was forced by the magistrate judge to take a break. As noted above, he also tried to change counsel before sentencing because he wanted to withdraw his plea. He also requested a trial at the same hearing where the district court denied him the right to the retained counsel of his choice. Accordingly, "[a] review of the entire record shows a reasonable probability of a different result, sufficient to undermine confidence in the outcome of the proceeding." *Id.* at 82. Yet the Ninth Circuit panel did not even entertain this analysis, instead perfunctorily concluding that any error was not plain. This Court should grant the petition to maintain the viability of the important standard it articulated in *Dominguez-Benitez*.

Conclusion

This Court should grant the petition to address these important questions.

Respectfully submitted,

Date: January 6, 2020

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