NO:

In the

Supreme Court of the United States

JASON HARRIMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

WALLACE L. TAYLOR
Law Offices of Wallace L. Taylor
4403 1st Ave. S.E., Suite 402
Cedar Rapids, Iowa 52402
319-366-2428;(Fax)319-366-3886
e-mail: wtaylorlaw@aol.com

ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

An indigent defendant has a right to the appointment of counsel to represent the defendant. Defendants sometimes express dissatisfaction with appointed counsel and request that new counsel be appointed to represent them. The questions for review here are:

1. Whether a defendant's 6th Amendment right to counsel of choice extends to an indigent defendant who has appointed counsel.

2. The extent of the adequate inquiry the court should make to determine if new counsel must be appointed for a defendant.

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PRIOR OPINIONS IN THIS CASE

The following opinions in other courts in this case are attached and identified as follows:

> The Judgment of the United States Court of Appeals for the Eighth Circuit, filed August 17, 2020.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the Petitioner's conviction and which is sought to be reviewed was filed August 17, 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS REVIEW

The United States Constitution, Amendment VI, states in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Procedural Background

Jason Harriman was indicted on July 10, 2018, charged with two counts of Murder for Hire.

Mr. Harriman filed a Notice of Entrapment Defense on August 16, 2018. Mr. Harriman also filed two pro se motions prior to trial for appointment of a new attorney to represent him. Both of these motions were denied by the district court.

The case proceeded to trial and Mr. Harriman was convicted by jury verdict on both counts of the Indictment on January 29, 2019. On February 12, 2019, Mr. Harriman's attorney filed a Motion for Judgment of Acquittal and New Trial. That motion was denied by the district court on March 13, 2019. Mr. Harriman also filed three pro se motions for new trial. The district court denied those motions.

A sentencing hearing was held on July 23, 2019. Mr. Harriman was sentenced to 120 months in prison on each count of conviction, to be served consecutively, and a term of supervised release of 3 years. Mr. Harriman filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on August 5, 2019. The Court of Appeals affirmed his conviction on August 17, 2020.

B. Statement of the Facts

Mr. Harriman was incarcerated at the federal prison in Forrest City, Arkansas during 2017 and 2018. During October and November of 2017, another inmate, William Risinger, arrived at Forrest City and began engaging in conversations with Mr. Harriman. Mr. Risinger had been convicted of wire fraud and money laundering.

Mr. Risinger claimed that Mr. Harriman made statements that he wanted to kill his ex-wife. Mr. Risinger, sensing an opportunity to cooperate with law enforcement and receive a sentencing departure, told Mr. Harriman that Mr. Risinger might know someone who would kill Mr. Harriman's ex-wife.

Mr. Risinger then contacted law enforcement and was given a phone number that he was to give to Mr. Harriman to call.

Mr. Harriman called the phone number Mr. Risinger gave him, and Wesley Williamson, an ATF agent, answered. A series of phone calls and a personal visit between Mr. Harriman and Mr. Williamson ensued, in which Mr. Williamson pretended to be a hit man who could be hired to kill Mr. Harriman's ex-wife. Mr. Williamson had to encourage, if not pressure, Mr. Harriman into engaging in conduct that inferred that Mr. Harriman wanted Mr. Williamson to kill Mr. Harriman's ex-wife and her new boyfriend. Mr. Williamson engaged in what the district court, in giving a jury instruction on entrapment, described as "dogged insistence."

Mr. Harriman filed two motions requesting that a new attorney be appointed to represent him. A hearing was held on the first motion on October 30, 2018. At that hearing Mr. Harriman explained that his attorney was not taking the case seriously and had advised Mr. Harriman that the attorney would not prepare for trial if a guilty plea was being discussed. In the second motion Mr. Harriman stated that his attorney would not contact numerous witnesses that would have been beneficial to the defense. At the hearing, however, the district court did not give Mr. Harriman an opportunity to say anything in support of his motion. Both motions were denied by the court.

Mr. Harriman also filed pro se post-trial motions explaining why his attorney had not been effective.

Mr. Harriman filed a post-trial motion for retrial on March 21, 2019. In that motion Mr. Harriman made the following points:

● His attorney did not talk to witnesses or call witnesses who would have provided exculpatory evidence. These witnesses would have provided testimony that Mr. Harriman, in his communications with Mr. Williamson, was talking about business ventures, not killing his ex-wife.

● His attorney did not obtain physical evidence that would have assisted the defense.

● His attorney did not allow Mr. Harriman to go over and discuss the government's discovery file. This prevented Mr. Harriman from assisting in his defense.

● His attorney promised to address important issues in cross-examining government witnesses and in closing argument. The attorney did not address those issues.

● His attorney did not attempt to offer into evidence Mr. Harriman's acquittal in 2009 of a charge in Iowa state court that Mr. Harriman attempted to murder his ex-wife. This acquittal would have helped to negate the argument that Mr. Harriman had a predisposition to have his ex-wife killed.

On July 3, 2019, Mr. Harriman filed another pro se Motion for New Trial. In that motion Mr. Harriman stated that his attorney refused to provide Mr. Harriman with a review of the discovery materials, with specific emphasis on recorded prison phone calls in which Mr. Harriman participated. Mr. Harriman

further stated that when he was eventually allowed to represent himself pro se, after the verdict, he was able to review the discovery and found that phone call records were missing that were important to his defense.

On July 10, 2019, Mr. Harriman filed a pro se Supplemental Motion for New Trial, expanding on the statements made in the July 3, 2019, motion. Mr. Harriman explained that the missing phone calls in January, 2018, included several calls between Mr. Harriman and his ex-wife. Those calls were about their son and plans Mr. Harriman had for establishing a recreation center in Oelwein, Iowa, exactly what Mr. Harriman presented in his defense at trial. These calls between Mr. Harriman and his ex-wife were also about Mr. Harriman's plans for opening an auto body shop and car lot; again, exactly what Mr. Harriman presented in his defense at trial. The motion also discussed e-mails between Mr. Harriman and Mr. Williamson, the undercover agent, that would show that Mr. Harriman's intent was to open a business and a recreation center in Oelwein, not have his ex-wife murdered.

Mr. Harriman's July 10 motion also stated that the missing phone call records also include phone calls between Mr. Harriman and two men named Bill Baker and Ira Sojka. These calls would also confirm that Mr. Harriman's intent was to open a business and a recreation center in Oelwein. Mr. Harriman, in his motion, emphasized that these phone calls predated William Risinger's allegations that Mr. Harriman wanted his ex-wife killed.

The district court denied Mr. Harriman's pro se motions because Mr. Harriman did not present any evidence beyond his statements in his pleadings. Of course, Mr. Harriman was in prison without counsel to assist him, so he was not able to obtain any evidence.

REASONS FOR GRANTING THIS PETITION

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the assistance of counsel. This means that counsel must be appointed for a defendant who cannot afford to hire counsel. A defendant who privately retains counsel can replace that attorney for any reason that does not unduly impede the function of the court or create an injustice. An indigent defendant should not be treated any differently just because the defendant's attorney is appointed and not retained.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. New Counsel Must be Appointed for a Defendant in a Criminal Case When the Defendant Shows that the Request is Not Frivolous and is Not Made for Delay or Manipulation.

This Court, in *Gideon v. Wainright*, 372 U.S. 335, 342, 83 S.Ct. 792 (1963), recognized that the right to counsel is "fundamental and essential to a fair trial." The *Gideon* court, quoting from *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55 64 (1932), further explained:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the

> rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

"[A] primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense." *Wheat v. United States*, 486 U.S. 153,165, 108 S.Ct. 1692 (1988)(Marshall, J., dissenting).

The Sixth Amendment grants a defendant the right to counsel of his choice. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 77 (1932); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006); *Luis v. United States*, 136 S.Ct. 1083 (2016). As the Court said in *Luis*, supra at 1089:

> Given the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust, neither is it surprising that the Court has held that the Sixth Amendment grants a defendant "a fair opportunity to secure counsel of his own choice."

This Court has also made clear that, although certainly an important aspect of due process and a fair trial, the Sixth Amendment right to counsel stands on its own.

> 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. No additional showing of prejudice is required to make the violation "complete."

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> The right to select counsel of one's choice, by contrast, 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. . . . Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.

United States v. Gonzalez-Lopez, 548 U.S. 140, 146-148, 126 S.Ct. 2557 (2006).

In this case, Mr. Harriman had court-appointed counsel, but there is nothing in this Court's jurisprudence that directly dilutes or eviscerates a defendant's right to his attorney of choice, just because the attorney is court-appointed, rather than retained. The Court has, by way of passing comments in dicta, stated that "an indigent defendant, while entitled to adequate representation, has no right to have the Government pay for his preferred representational choice." *Id.* at 1089; see also, *Caplin & Drysdale v. United States*, 491 U.S. 617, 109 S.Ct. 2646 (1989). But the Court has apparently never considered why an indigent defendant does not have the same right to an attorney of his choice as does a defendant who can afford counsel.

The basis of the decision in *Gideon v. Wainright* was that an indigent person should have equal access to an attorney with someone who can afford to hire an attorney of choice. As the Court explained in *Gideon*, 372 U.S. at 344:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the

> money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

The point is that an indigent defendant should not be discriminated against with respect to the right to an attorney as compared with a defendant who can afford any attorney the defendant wants to hire. There is no valid reason why an indigent defendant must be required to accept any attorney who is appointed to represent the defendant, when a defendant who retains counsel can change attorneys on a whim. And, as explained above, this Court has never expressed any such reason. As this Court said in a different context in *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 590 (1956), "[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money [the person] has."

It may be argued that a defendant who is given an attorney at taxpayer expense has no right to an attorney of choice. But the fact of the matter is that attorneys who accept court appointments in federal court are restricted to the fee limits established by the court. So when a defendant asks for the appointment of a different attorney, the expense to the taxpayers would be the same. The argument about expense to the taxpayers essentially treats the right to an attorney as a privilege or a gift, rather than a right. That argument flies in the face of the spirit and intent of *Gideon* as set out above.

In addition, treating the appointment of counsel as a privilege and not a right violates the history and intent of the Sixth Amendment. This history was explained by this Court in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975). Although the issue in *Faretta* was a defendant's right to represent himself and refuse appointment of counsel, the reasoning of the Court in that case applies just as well to a defendant's request for appointment of a different attorney. The *Faretta* court pointed out that in the history of British law prior to the adoption of the Sixth Amendment the only court that forced counsel on an unwilling defendant was the infamous Star Chamber. In most cases a defendant represented himself. In the American Colonies the courts recognized the value of counsel in criminal cases. There were apparently no cases in the colonial courts, however, where a defendant was required to accept an unwanted lawyer. This was the state of play when the Sixth Amendment was drafted and adopted.

The *Faretta* court acknowledged that this view of the Sixth Amendment right to the assistance of counsel might seem at odds with other cases, such as *Gideon*, that held that a defendant cannot be convicted unless counsel has been appointed to represent the defendant. In response, the Court said:

> []t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them.

Faretta, 422 U.S. at 833.

The *Faretta* court concluded by saying:

> [I]t is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.

Id., 422 U.S. at 834.

The decision of this Court upon which subsequent courts have relied for the proposition that an indigent defendant is not entitled to a choice of appointed counsel, *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692 (1988), did not actually deal with that issue. In that case, the defendant wanted to hire the attorney who was representing a co-defendant. The issue was whether the defendant could waive the obvious conflict. This Court simply said that the district court did not abuse its discretion in denying the defendant his choice of attorney under those circumstances. The only hint the court gave about court-appointed counsel was the passing comment that "a defendant may not insist on representation by an attorney he cannot afford. *Id.*, 486 U.S. at 159.

Denying an indigent defendant the right to choose his attorney, when a defendant who retains an attorney has that right, violates the indigent defendant's right to equal protection. Although the Equal Protection Clause of the 14th Amendment to the United States Constitution applies only to the states, this Court has held that the 5th Amendment contains an equal protection guarantee applicable to the federal government through its Due

Process Clause. *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939 (1979); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895 (1976); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954). With specific relevance to this case, this Court has held that treating an indigent defendant differently than a defendant who retains counsel violates the due process clause of the 14th Amendment.

In *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), a California rule required the appellate court to determine if counsel would be of benefit to an indigent defendant before appointing counsel. Because such a procedure discriminated against the indigent defendant, the Court held that it was a violation of the Equal Protection Clause of the 14th Amendment. In *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956), this Court held that refusal to provide a transcript of court proceedings to be used in an appeal to an indigent defendant also violated the Equal Protection Clause of the 14th Amendment.

Douglas and *Griffin* were based on a rational basis test with respect to equal protection. The Court found that the ability of a defendant to pay and the requirement that expenses for an indigent defendant would be paid by the taxpayers were not rational bases for denying an indigent defendant the same rights as a defendant who can retain counsel.

Based on the foregoing, an indigent defendant has the right to request the appointment of a different attorney if the defendant believes the present

attorney is not adequately representing the defendant. The cases and history set out above make it clear that the decision to have another attorney appointed for the defendant is the defendant's choice, not the court's.

There may, of course, be cases where it is apparent that the defendant seeks new counsel for the purpose of delay or manipulation, e.g., as in *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610 (1983). But where a defendant bases his request for new appointed counsel on a good faith allegation that he is dissatisfied with his attorney, the right to counsel requires that the court appoint a new attorney. Because, as this Court said in *Luis v. United States*, 136 S.Ct. 1083 (2016), the Sixth Amendment right to counsel stands on its own and does not require any further showing to establish a violation.

It must be emphasized that the right to counsel should not be confused with determining effective assistance of counsel in a habeas corpus proceeding. This distinction was made clear in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146-148, 126 S.Ct. 2557 (2006). In *Gonzalez-Lopez* Justice Scalia made clear that the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), is limited to the context of an alleged denial of a fair trial. As previously noted, the right to counsel under the Sixth Amendment stands on its own and is not simply a subset of the right to a fair trial. So, whether or not a defendant is correct that his court-appointed attorney is not representing him properly, the defendant is still entitled to a new attorney if he can show that his request is in good faith.

B. This Court Has Never Determined the Extent of the Adequate Inquiry a District Court Must Make to Determine If New Counsel Should Be Appointed For a Defendant.

Having established that an indigent defendant has a right to appointed counsel of his choice, absent an improper motive for requesting new counsel, this Court should determine the extent of the inquiry a district court should make in determining whether new counsel should be appointed. The court does not need to, and should not, undertake to determine if the attorney is actually ineffective. As explained above, that is not the point. The court should only seek to determine if the request for new counsel is made in good faith or for a non-frivolous reason.

In this case, for example, Mr. Harriman's first motion for new counsel stated that he wanted "new counsel and representation." So, at the outset, although not clearly articulated, Mr. Harriman indicated that he was concerned about the representation he was receiving from his court-appointed attorney. The magistrate judge then held a hearing and inquired in some more detail why Mr. Harriman felt his attorney was not adequately representing him. Mr. Harriman explained that his attorney would not obtain character witnesses and did not visit Mr. Harriman enough to adequately prepare the defense; that Mr. Harriman had to tell the attorney to present an entrapment defense; and that the attorney would not prepare for trial if there was a possibility of a plea agreement, even though Mr. Harriman made it clear that he wanted a trial. The magistrate judge responded by determining that the

attorney-client relationship had not completely broken down and that the court was confident that Mr. Harriman's attorney would do his best to defend Mr. Harriman. As explained above, however, none of that is relevant to a defendant's right to counsel. It was readily apparent, whether misguided or not, that Mr. Harriman's request was in good faith and because he honestly believed his attorney was not adequately representing him.

In his second motion for new counsel Mr. Harriman stated that he had informed his attorney of "numerous witnesses for defense" and that the attorney only talked to one witness." Mr. Harriman further stated in his motion that the actions and inaction of his attorney "hurt the defendant's case if pursuing to go to trial at this time." At the hearing on the motion the court did not give Mr. Harriman a chance to say anything. The court simply told Mr. Harriman that his attorney had the right to make decisions on how to conduct a defense and that a new attorney would not be appointed.

There was never any indication that Mr. Harriman sought to remove his attorney in bad faith or for any manipulative or frivolous reason. That was the inquiry the district court should have made.

The various circuit courts have adopted a standard for appointing new counsel that requires the court to find that the attorney-client relationship has completely broken down or there is an irreparable conflict that prevents the attorney from adequately representing the defendant. See, e.g., *United States v. Gonzalez-Arias*, 946 F.3d 17 (1st Cir. 2019); *United States v. Amede*, (11th Cir.

10-8-20); *United States v. Jonas*, (5th Cir. 2020), citing *United States v. Romans*, 823 F.3d 299 (5th Cir. 2016); *United States v. Byers*, (4th Cir. 2020), citing *United States v. Smith*, 640 F.3d 580 (4th Cir. 2011). But that standard runs counter to what this Court has said about the right to counsel not being dependent on whether the attorney is effective. Therefore, the circuit courts have been making the wrong inquiry to determine if a new attorney should be appointed to represent the defendant. If the defendant in those cases had retained counsel and wanted to retain different counsel, the court would not prevent the defendant from doing that even if there was not a breakdown in the attorney-client relationship. Nor would the court seek to determine if the attorney being terminated was effective as a condition of allowing new counsel to be retained. In other words an indigent defendant, under the current procedure employed by the lower courts, is discriminated against with respect to his right to counsel under the Sixth Amendment. And if new counsel is not appointed, the indigent defendant's right to counsel is violated.

CONCLUSION

This Court has made it clear that a defendant has a 6th Amendment right to an attorney of choice. There is no rational reason why that same right must also be afforded to an indigent defendant who has appointed counsel. In violation of that right, however, the lower courts have held indigent defendants to a higher standard and have required indigent defendants to demonstrate a

breakdown in the attorney-client relationship to the point that the attorney cannot adequately represent the defendant.

This Court should now grant this Petition for Writ of Certiorari to establish that an indigent defendant has a right to appointment of new counsel so long as the request is not frivolous or made in bad faith.

WALLACE L. TAYLOR
Law Offices of Wallace L. Taylor
4403 1st Ave. S.E., Suite 402
Cedar Rapids, Iowa 52402
319-366-2428;(Fax)319-366-3886
e-mail: wtaylorlaw@aol.com

ATTORNEY FOR PETITIONER