No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

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STANLEY DAN RECZKO III,

Petitioner,

v.

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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# PETITION FOR A WRIT OF CERTIORARI

COLEMAN & BALOGH LLP
ETHAN A. BALOGH
235 Montgomery Street, Suite 1070
San Francisco, CA 94104
Telephone: 415.391.0440
Email: eab@colemanbalogh.com

*Counsel for Petitioner*

## QUESTION PRESENTED

Does the Ninth Circuit's rule permitting it to decline to address a defendant's Sixth Amendment challenge (arising from the district court's denial of counsel) by substituting a different issue—a motion for a continuance that the defendant never made in the district court and didn't present on appeal—transgress the party presentation principle, as most recently set forth last term in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020)?

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The Ninth Circuit's decision can be found at *United States v. Reczko*, 818 F. App'x. 701 (9th Cir. 2020).

## JURISDICTION

The court of appeals filed its decision on June 29, 2020, and denied rehearing and rehearing *en banc* on October 9, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

**U.S. Const. amend. VI:**

> 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.

## STATEMENT OF THE CASE

On November 2, 2007, a grand jury returned an indictment charging Petitioner with traveling in foreign commerce for the purpose of engaging in illicit sexual conduct, and related crimes. (Petitioner ultimately proceeded to jury trial in February 2015 on one count of production of child pornography, with a recidivist allegation tried to the bench thereafter.)

As demonstrated by the district court record, the trial court litigation was disastrous. After laboring with two lawyers (Larry Bakman and Lisa Bassis) for

nearly six years—lawyers who repeatedly sought to withdraw from his case, expressed unequivocal contempt for their client, admitted conflicts in their representation, accused one another of misconduct and client abandonment, repeatedly asked the district court to remove the other, and refused to communicate with the client—and having his many requests for substitute, conflict-free counsel denied, Petitioner felt compelled to represent himself.[1] Although the Government's expert had previously concluded that Petitioner was competent to proceed to trial, but *not* competent to proceed *pro se*, in September 2013, the district court accepted Petitioner's *Faretta*[2] waiver, permitted him to proceed *pro-se*, extended the trial date to allow for sufficient time to prepare, *and* appointed standby counsel, to be ready at an instant, should Petitioner's mental-health problems affect the proceedings again. CR 626.

Unsurprisingly, Petitioner proved ineffectual as his own counsel, and complained about his inability to represent himself. *See e.g.*, ER 322-25. The Government shared his concerns, and in August 2014, asked the court to address

[1] Petitioner respectfully refers the reader to the Opening Brief ("AOB") filed in the court of appeals for a detailed factual presentation of this long-running matter. Also, as used herein, "ER" refers to the Appellant's Excerpts of Record, on file in the court of appeals' docket, "CR" to the docket entries in the district court record, "D.E." to the court of appeals' docket, and "Pet. Appx." to Petitioner's Appendix.

[2] *Faretta v. California*, 422 U.S. 806 (1975)

whether Petitioner sought to withdraw his Sixth Amendment waiver of right to counsel. ER 123-29. In so doing, the Government noted that Petitioner had "vociferously complained about the disadvantages of proceeding *pro se*, including that he was not given advisory counsel,[3] [did] not have unfettered access to a law library . . . [and he could not] do his own legal research." ER 125. The Government also noted the importance of Petitioner's observation that the court had "set [him] up for failure" by permitting him to self-represent. ER 126.

Thereafter, Petitioner continued to complain about his *pro se* status. For example, in a filing dated October 17, 2014, he complained that he was "ignorant of the law" and "ignorant of the Excludable Time Periods [in his case] and ha[d] no access to them." CR 938 at 2. Petitioner also noted that his lengthy pretrial detention was why he moved to self-represent "despite his lack of competency to self-represent[,]" and further noted that he did not actually want to waive counsel but "only wanted to have trial within a reasonable period of time." CR 938 at 2-3. Petitioner also complained he was being denied access to the law library and computer at the jail, and that he was receiving the Government's filings late. CR 912, 915, 916, 921. He noted that his standby counsel was not communicating

[3] Standby counsel had been specifically ordered not to participate in the defense in any manner. *See* ER 39-40, 65; *see also* CR 626, 981.

with him and requested the district court "appoint[] standby counsel for legal assistance." CR 921. The district court did not grant relief.

Two months before trial, Petitioner moved to revoke his *Faretta* status and have his standby counsel—whose entire role was to be prepared to step in at an instant—represent him. Petitioner did *not* seek a trial continuance; he wanted standby counsel to take over and try the case as scheduled in February 2015.

But the standby lawyer demurred because he wasn't ready, and said he couldn't be ready in two months, *viz.*, this third lawyer declared nonfeasance. The district court then declined the requested appointment by construing it as a request for a trial continuance: the opposite of Petitioner's motion. The magnitude of the district court's error quickly became apparent. Petitioner suffered a mental breakdown on trial day one, the district court then appointed the same lawyer whom the court declined to appoint two months earlier, and who had claimed he was then unprepared, and could and would not be prepared by February, *i.e.*, trial's commencement.

That lawyer then abandoned Petitioner's trial defense: a reasonable mistake of age defense that was supported by a wealth of evidence. Petitioner lost his trial and was sentenced to life. (Petitioner had turned down a 10-year offer because he didn't trust the two lawyers who declared their many conflicts and animus towards

one another and towards Petitioner, showing additional significant prejudice by the district court's refusal to provide competent, conflict-free counsel to him.)

But when Petitioner assigned error to the district court's refusal to appoint counsel in December 2014, the Ninth Circuit dodged the issue by ruling that *its* case law—*United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2001)—permitted the panel to substitute an issue no party had raised in the district court, and no party had raised on appeal—the never-made motion for a continuance—rather than consider Petitioner's Sixth Amendment challenge:

> The district court also did not err by denying Reczko's explicit request for reappointment of counsel in December 2014, two months before Reczko's trial was scheduled to and ultimately did begin. The district court construed Reczko's request as a request for a continuance, as our caselaw permits. *See United States v. Nguyen*, 262 F.3d 998, 1001-02 (9th Cir. 2001).

Pet. Appx. 4. The court of appeals then found that the continuance Petitioner had *never* requested was properly denied, because "the district court did not display 'unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.'" *Id.* quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). This ruling made no sense because Petitioner made *no* request for delay at all.

Just one month earlier, this Court issued *Sineneng-Smith*, which rebuked the Ninth Circuit for refusing to honor the party presentation principle by substituting

issues the court preferred to decide rather than the issues presented by the parties. 140 S. Ct. 1575, 1579 (2020). The Ninth Circuit then failed to heed *Sineneng-Smith*—issued months after oral argument but before the court of appeals resolved Petitioner's case—and rejected his petition for rehearing when he brought *Sineneng-Smith* to the court's attention. Pet. Appx. 7; *see also* D.E. 122.

This Court should grant a writ of certiorari pursuant to Supreme Court Rule 10(c) because the Ninth Circuit's rule conflicts with this Court's clear pronouncement in *Sineneng-Smith*. To Petitioner's knowledge, no other circuit court permits itself or the district courts to resolve a Sixth Amendment request for counsel by resolving a different issue, raised by no party. At a minimum, the Court should grant certiorari, vacate the Ninth Circuit's decision, and remand the case ("GVR") for the Ninth Circuit to reconsider its rule in light of *Sineneng-Smith*.

## STATEMENT OF FACTS

This was most certainly a challenging case. It arose from Petitioner's marriage, before a Judge and the bride's family, in the Philippines. Petitioner believed his bride, Elecita Del Rosario, was 18, which was reasonable for many reasons, including that the legal age of marriage in the Philippines is 18. *See* AOB 37. The case itself centered on a trip the couple took to Manila in November 2006. The Government alleged that during that trip, Petitioner took some photographs of

himself and Del Rosario having sex, after which he then returned to the United States, burned the images onto a CD, and then returned to the Philippines with that CD, to be with Del Rosario and her family. Petitioner, in contrast, thought he was merely recording the events of the marital bedroom. The trial evidence showed Del Rosario to be 16 at the time.

Filed in California in November 2007, the case presented a host of challenges for counsel, including acquiring evidence from the Philippines, addressing joint action between the Government, Philippine authorities, and an NGO called International Justice Mission ("IJM"), whose conduct led to recovery of the Government's most critical evidence but did not comport with the Fourth Amendment.

As the court of appeals recognized in exemplary understatement: "[t]he record reflects extensive conflict between [Petitioner] and his counsel." Pet. Appx. 4. It does, including the following:[4]

[4] This list is not exhaustive. One thing to note, however, is that part of Petitioner's discontent arose from lead counsel Larry Bakman's repeated filing of attorney-client privileged materials with the district court. Petitioner included that errantly-filed correspondence in the ERs presented to the court of appeals. Review of those materials reflects that Bakman was the aggressor and forced the conflict with his client through intemperate and abusive letters, and Petitioner behaved like a client: he continually presented Bakman with information to assist in his defense and pursue, to which Bakman repeatedly expressed hostility. In sum, Petitioner had genuine cause for concern and dissatisfaction with Bakman's performance. His cause for concern and dissatisfaction with Lisa Bassis's performance is set forth in the text.

- In May 2009, trial counsel Bakman described his conflict with Petitioner, and announced his unwillingness "to remain on the case [even] as stand-by counsel." ER 893-94;

- In July 2009, Bakman again requested to be relieved. ER 843-58;

- In November 2009, Petitioner's other appointed attorney Bassis, sought an extension of time to file motions, and to be relieved if the district court would not grant one. The district court chastised Bassis publicly, further undermining Petitioner's faith in her. ER 806-11; & CR 246 at 1-2;

- In October 2011, Bakman twice sought to have Bassis relieved based on her deficient performance. ER 737-40, ER 727-32. In response, Bassis presented evidence showing a deeper conflict between her and Bakman arising from monies owed her from Bakman on other cases and outstanding personal issues. ER 661-701;

- In September 2012, Bakman again sought to be relieved because "at this point, [he] harbor[ed] such ill will towards the defendant that [he could] no longer communicate nor effectively represent the defendant in this action." ER 437;

- In October 2012, Bakman again sought to have Bassis relieved on the allegation that she "has retained criminal counsel in either a pre-textual attempt to shirk her responsibilities to [Petitioner], or to protect her from an investigation in her billing activities in connection with the instant matter[,]" and raising additional claims. ER 410-07; and

- In June 2013, Bassis sought to be relieved based on depression and lack of payment from the Court. ER 352-58. Later that month, Bakman declared he was leaving the law to become a reality-TV celebrity on a show, Hot Bench, and moved to withdraw.

The district court denied all of these requests, among others. With no sign of real counsel in sight, Petitioner felt compelled to try to save himself, and sought

*pro se* status. At that time, the record was clear: Dr. Faerstein, the Government's expert who led the court's several referrals for competency exams since 2009, concluded that Petitioner was competent to proceed to trial, but *not* competent to proceed *pro se*. CR 150. But something must have changed; the Government's experts now said Petitioner was competent to represent himself. CR 608, 621. The district court held a *Faretta* colloquy, accepted the waiver, discharged Bakman and Bassis, and appointed an attorney named Kaloyanides to be standby counsel. Standby counsel's job was made plain: he was ordered to be ready "in the event that there should be a determination by the court to revoke the *pro per* status of" the defendant. ER 39, 86, 88-89; CR 626. The court also vacated the trial date and provided standby counsel a "reasonable continuance," so that he could "be prepared to act in that role should that be necessary." ER 84; CR 660 at 91; CR 626.

Petitioner's lack of ability was plain from the outset, and he squandered his Fourth Amendment challenge at the scheduled evidentiary hearing. And to be sure, Petitioner's Fourth Amendment motion had significant merit, and its loss prejudiced Petitioner greatly. In brief, Petitioner contended that the IJM acted jointly with the United States and Philippine authorities, and their unlawful searches and seizures violated the Fourth Amendment. Significant evidence supported Petitioner's claim of joint venture, including IJM's press release

confessing it: "IJM worked closely with the Philippine and U.S. authorities to locate [Petitioner] under the auspices of the PROTECT Act." *See* CR 263 (motion to suppress).

Critically, two months before trial, Petitioner unequivocally stated (as he had already demonstrated) he was ill-equipped to defend himself, and asked the court to revoke his *pro se* status and change Kaloyanides' status from standby counsel to lead counsel. CR 977. But counsel shockingly declared he had not met his obligations because he wasn't ready then to step in, and couldn't be ready in the two months remaining before trial's commencement. He propositioned that he was "willing to represent" defendant, but if so, "it will be necessary to continue the trial date and reopen pretrial motions filing deadlines in order . . . to provide effective representation under the Sixth Amendment." CR 981.

Rather than simply appoint Kaloyanides, reject his nonsense about relitigating the entire seven years of prior litigation, and overrule his assessment of what "will be necessary"— and despite the fact that Petitioner did *not* seek a continuance at all—and finding zero fault and expressing no concern with Kaloyanides' failure to be ready, and inability to be ready in two months despite the prior Order already providing Kaloyanides additional time and requiring him to "be prepared to represent [Petitioner] in the event that termination of Defendant's

pro se rights is necessary[,]" CR 626, the district court instead chose to construe Petitioner's motion as a request for a continuance, and then denied it. ER 288-93.

Petitioner and Kaloyanides would have been far better off had standby counsel met his obligations to the client and accepted the appointment he was standing by to receive: Petitioner had a breakdown on the first day of trial, the court appointed Kaloyanides to take over, counsel then abandoned Petitioner's reasonable mistake of age defense (likely because he was utterly unprepared, as he had previously announced he would be even *if* he had two months to prepare), the jury convicted, and the court sentenced Petitioner to die in prison.

On appeal, Petitioner focused on the December 2014 request for counsel, and that issue dominated oral argument. But the court of appeals refused to address it, and addressed a different issue altogether:

> The district court also did not err by denying Reczko's explicit request for reappointment of counsel in December 2014, two months before Reczko's trial was scheduled to and ultimately did begin. The district court construed Reczko's request as a request for a continuance, as our caselaw permits. *See United States v. Nguyen*, 262 F.3d 998, 1001–02 (9th Cir. 2001).

Pet. Appx. 4. The Court then found no basis to support reversal based on a request for a continuance that Petitioner had not sought. Pet. Appx. 4-5.

## ARGUMENT

Last term, during the pendency of this appeal and shortly before the court of appeals issued its decision, this Court reversed the Ninth Circuit for failing to follow the party presentation principle: "in both civil and criminal cases, in the first instance and on appeal[,] . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Sineneng-Smith*, 140 S. Ct. at 1579 (citing *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

> In short: "[C]ourts are essentially passive instruments of government." *United States v. Samuels*, 808 F.2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid.*

*Sineneng-Smith*, 140 S. Ct. at 1579.

In so holding, the Court recognized that exceptions to the party presentation principle may be made for the *pro se* litigant—but not to his detriment.

> "In criminal cases, departures from the party presentation principle have usually occurred "to protect a *pro se* litigant's rights." *Id.*, at 244, 128 S.Ct. 2559; see, *e.g.*, *Castro v. United States*, 540 U.S. 375, 381–383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (affirming courts' authority to recast *pro se* litigants' motions to "avoid an unnecessary dismissal" or "inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a *pro*

> *se* motion's claim and its underlying legal basis" (citation omitted)).

*Sineneng-Smith*, 140 S. Ct. at 1579. Otherwise, the party presentation principle applies. Certainly, courts have no authority to deny the indigent *pro se* defendant the benefit of a rule generally applicable to all parties.

Below, the district court first violated the party presentation principle, but not "to protect a *pro se* litigant's rights," and instead to indulge a request for a continuance from a non-party litigant (standby counsel), who had already been provided extra time and ordered to be ready to step into the case at any moment (and certainly two months before trial). The district court acknowledged it was transgressing this principle when it recognized that "Defendant's Request is technically one to substitute counsel." ER 287. The district court then supported that transgression as follows: "because we cannot appoint counsel without delaying trial, we view Defendant's Request as one for a continuance[.]" ER 287. But that ruling was clearly erroneous. The district court most certainly could have appointed counsel without delaying trial, as was proven on the first day of trial in this case when it finally appointed the unprepared Kaloyanides.

On appeal, Petitioner framed the issue to be addressed as follows:

> Whether the district court's denial of Reczko's requests for reappointment of counsel after he went *pro se* constituted a denial of counsel in violation of the Sixth Amendment?

AOB at 3. But the court of appeals refused to address that Constitutional challenge. It instead applied circuit precedent which authorized it to consider a different issue, and one not raised by any party, because Petitioner had *not* asked the district court to continue the trial. Rather, he asked the court to appoint Kaloyanides to try the case as scheduled and who had already been ordered to be ready at a moment's notice.

Brass tacks: the Ninth Circuit's rule violates the party presentation principle, and the Court should grant this petition to set the lower court straight, and require fidelity to this Court's decisions. This need for review is especially important here, for when reviewed properly, it is plain that Petitioner should have been provided counsel at the time he requested. The court of appeals reviews denial of a motion for substitution of counsel for abuse of discretion, and considers "(1) the timeliness of the motion; (2) the adequacy of the trial court's inquiry; and (3) the extent of conflict created." *Nguyen*, 262 F.3d at 1004. This three-factor inquiry required reappointment of counsel.

The motion for reappointment of counsel was timely, especially considering Kaloyanides's court-ordered role and requirement to be ready at any time, including the day the district court heard the motion for appointment of counsel. *See United States v. Williams*, 594 F.2d 1258, 1259 (9th Cir. 1979) (one-month and one-week notice before the trial is timely). The court had appointed standby

counsel in September 2013, more than one year before the trial date, "so that standby counsel [could] be prepared to act in that role should that be necessary." ER 84.

Second, the trial court made no adequate inquiry, because it analyzed a different question: whether the court should grant a motion for continuance to provide more time for counsel to prepare and "reopen pretrial motions filing deadlines[,]" long after motions had been litigated and decided, and without identifying any basis for reconsideration. CR 981. But this was not Petitioner's request, and counsel was not a party. Nor was Kaloyanides's role to *restart* the case; his role was to be prepared to *step into* it, and continue the proceedings without unnecessary delay. ER 79-80. By construing Petitioner's Sixth Amendment request for counsel to try the case on time in February 2015 as a never-made motion for continuance, and then denying it, the court most certainly denied Petitioner any counsel. That error is *per se* prejudicial as well. *Strickland v. Washington,* 466 U.S. 668, 692 (1984).

The third factor, "extent of conflict," was not applicable because Petitioner had been *pro se.* While the right to counsel is no longer absolute after a defendant waives it, a trial court nonetheless has a "duty to protect defendants' right to counsel," and must therefore "indulg[e] all reasonable inferences against the waiver of counsel." *McCormick v. Adams,* 621 F.3d 970, 978-70 (9th Cir. 2010).

The constitutional right in *Faretta* is not about forcing self-representation. *Faretta* is about allowing self-representation against the court's better judgment, even if counsel's assistance is essential. *Faretta,* 422 U.S. at 822-23.

Finally, even if the district court wanted to guard against a bad-faith attempt by Petitioner to continue the trial— an odd concern given that Petitioner didn't seek a continuance—it still could (and should) have appointed counsel, and held firm on the trial date. *See, e.g. United States v. Garrett*, 179 F.3d 1143, 1146 (9th Cir. 1999) (the district court encouraging the *pro se* defendant to receive assistance of counsel while denying further motions for continuance). On this point, the district court's claimed helplessness and inability to rule in that fashion was clearly erroneous.

## CONCLUSION

Petitioner had a strong Fourth Amendment challenge and a viable trial defense. He turned down a 10-year offer because his lawyers refused to communicate with him, squandered any trust, and fought with each other, with him, and with the district court; this mentally-ill man sat in a cage, helpless to get assistance to mount a defense in a challenging case. All the while, the district court sanctioned this egregious state of affairs. When, with plenty of time to right the ship, Petitioner made the correct choice and asked for the assistance of counsel, the district court would not even consider that request, and instead denied one

Petitioner had not made, and based on a showing that was wholly unreasonable. The court of appeals followed suit, refused to consider his Sixth Amendment challenge, and ignored this Court's clear directive that it was required to address Petitioner's substantial challenge.

Petitioner respectfully contends that the Ninth Circuit's decision conflicts with *Sineneng-Smith*. The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

DATED: January 7, 2021

COLEMAN & BALOGH LLP

ETHAN A. BALOGH
235 Montgomery Street, Suite 1070
San Francisco, California 94104

Attorneys for Appellant
STANLEY DAN RECZKO III