No. _____

In The Supreme Court of the United States

DEREK LEVERT HALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

DEANNA LEE OSWALD
Assistant Federal Defender

TOBIE J. SMITH*
Appellate Attorney
**Counsel of Record*

505 20th Street North
Suite 1425
Birmingham, Alabama 35203
(205) 208-7170

Counsel for Petitioner

QUESTION PRESENTED

The federal courts of appeals are about evenly split over whether an indigent criminal defendant's waiver of trial counsel requires a clear and unequivocal request to proceed pro se. That important Sixth Amendment question has been percolating in the lower courts for decades, but no consensus has emerged. The deep and intractable circuit split appears likely to persist until this Court settles the matter.

The question presented is whether, under the Sixth Amendment, a trial court may find that an indigent defendant's request to fire his appointed lawyer, without clearly and unequivocally electing to represent himself, may waive the right to trial counsel.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal and State Cases **Page(s)**

Constitutional Provision **Page(s)**

United States Code **Page(s)**

Supreme Court Rules **Page(s)**

Secondary Source **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Derek Levert Hall respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's unpublished opinion affirming Mr. Hall's conviction is reported at 852 F. App'x 450 and is included in the Appendix. Pet. App. 1a. The district court's judgment is unreported.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Eleventh Circuit had appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. It affirmed Mr. Hall's conviction and sentence on April 8, 2021, and denied his petition for rehearing on May 12, 2021, Pet. App. 11a. This petition is timely under Supreme Court Rule 13.3 and this Court's March 19, 2020, order extending to 150 days the deadline for any petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

INTRODUCTION

The Court should grant certiorari to resolve an entrenched circuit split over whether an indigent criminal defendant may waive the Sixth Amendment right to counsel implicitly, without clearly and unequivocally electing to represent himself. This Court has never recognized a valid waiver of that express constitutional guarantee in those circumstances. And approximately half of the federal circuits require, as a prerequisite for a voluntary and knowing waiver, a defendant's clear and unequivocal request to proceed pro se.

Mr. Hall, however, was tried in the Eleventh Circuit, one of several courts of appeals that allow a trial judge to find that an indigent defendant has made a "waiver by conduct," or "implied waiver," of the right to trial counsel. The district court found at a pretrial conference that Mr. Hall waived his right to counsel when he asked to fire his appointed lawyer. He did not ask to represent himself—much less ask clearly and unequivocally—and the court did not ask if he wanted to. Mr. Hall told the court he is a "Moorish American National" who "took an oath under a different government," Pet. App. 14a, 18a, and he disputed the court's jurisdiction over him in terms that the court associated with "sovereign citizen" ideology.[1] Mr. Hall said he wanted a man he called "an advisor of the Moorish American National" to represent him. *Id.* at 16a. The court said the advisor needed to be a lawyer to represent him. But it reserved that determination until the morning of trial, while at the same time it

[1] *See Waters v. Madson*, 921 F.3d 725, 732 n.4 (8th Cir. 2019) ("Sovereign citizens are a loosely-affiliated group who believe government in the United States operates illegitimately and outside the bounds of its jurisdiction."). The argument has no role in Mr. Hall's appeal.

changed his appointed attorney to standby counsel and found Mr. Hall had waived the right to counsel. The day of trial, the court learned the advisor was not a licensed attorney, and the trial went forward with Mr. Hall pro se, assisted by standby counsel who had not prepared or discussed a defense with Mr. Hall in advance.

In many circuits, the waiver finding would be erroneous, and the conviction a violation of the Sixth Amendment, because Mr. Hall never clearly and explicitly requested to represent himself. But a rule of implied waiver by conduct gives a trial judge greater latitude to determine that a defendant has elected to represent himself at trial, even if the defendant has not said he wants to, or *has* said he *does not* want to. This Court has never addressed an implied waiver by conduct, and it is the subject of a sharp and persistent split among the circuits, resulting in uneven protection of the Sixth Amendment's guarantee across the federal courts. The Court should grant review to decide whether an indigent defendant may waive the right to counsel at trial without clearly and unequivocally electing to represent himself.

STATEMENT OF THE CASE

Mr. Hall's case proceeded with exceptional speed through trial, where he was assisted only by standby counsel that had not discussed the trial with him or prepared a defense.

In October 2018, Mr. Hall was indicted.

In November, he made his initial appearance in federal court, where he was appointed counsel and arraigned.

In December, he asked to fire his appointed counsel. The district court granted his request, found that Mr. Hall had waived his constitutional right to the assistance of counsel, and made the appointed lawyer his standby counsel.

In January 2019, Mr. Hall was tried and convicted in a single day, with proceedings before the jury lasting less than four hours before deliberations began. He received a 40-year prison sentence for his convictions.

1. Pretrial Proceedings and Waiver-of-Counsel Finding. Mr. Hall was charged in the Northern District of Alabama on three counts: possessing with intent to distribute marijuana, crack cocaine, powder cocaine, and ecstasy in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); carrying a firearm in furtherance of the drug count, in violation of 18 U.S.C. § 924(c); and possessing a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). A few weeks after his initial appearance, his appointed attorney asked the district court for a pretrial status conference to "address . . . some communication problems that Mr. Hall and I are having," Pet. App. 13a. Mr. Hall identified himself as "Derek Levert Hall Bey," a "Moorish American National," and said the court lacked jurisdiction over him because he took "an oath under a different government." *Id.* at 14a, 18a. He said his appointed attorney wouldn't listen to him about those matters, so "I asked him to release himself off of this case because I talked to my government and they are going to represent me." *Id.* at 15a, 21a. Specifically, he told the court that Maurice Parham Bey, a Moorish American National "advisor," had agreed to represent him. *Id.* at 15a–16a.

The district court told Mr. Hall,

> [Y]ou have an absolute right to represent yourself. . . . But if somebody wants to represent you that's not a lawyer—they're not practicing law, they're not licensed to practice law—then by the laws of the United States of America you will not be able to use them as a lawyer . . . and you are going to be stuck by yourself in a case.

Id. at 16a. But Mr. Hall explained that he wasn't seeking to represent himself: "I gave [Maurice Parham Bey] full power of attorney of—all of me. . . . So with that being said, *he [is] going to represent me* to the fullest of our knowledge of being a Moorish American National, part of the United States of America Republic." *Id.* at 17a (emphasis added).

The court told Mr. Hall that the case was scheduled for trial in less than four weeks and confirmed that he had told Mr. Parham Bey the date. It explained that a jurisdictional theory of defense was frivolous, but said Mr. Hall could pursue such a defense. The court warned that if he did, though, the trial would be "a slam dunk" conviction. *Id.* at 18a. At the court's request, the government recited the charges in the indictment. A prosecutor also mentioned that the government might seek (1) a superseding indictment (which it ultimately did not) and (2) a recidivist enhancement (which it did) that together would subject Mr. Hall to a mandatory life sentence on the drug count. Aside from that, neither the court nor the government discussed the possible penalties for any count at the pretrial conference.

After the prosecutor recited the drug count, Mr. Hall asked how he could be charged with that when the drugs had been seized without a search warrant. The district court told him, "That could be something you could raise through your lawyer . . . . All of that stuff you can raise at trial." *Id.* at 26a. Mr. Hall responded that he

didn't trust his lawyer. When the court asked if he wanted witnesses subpoenaed for trial, Mr. Hall asked to have all the officers who searched the house—key fact witnesses for the government. The court obliged: "We'll make sure they are here." *Id.* at 31a.

Mostly, though, Mr. Hall wanted to make sure that Mr. Parham Bey would be able to represent him:

> THE DEFENDANT: I would rather have my people to represent me than [my appointed lawyer]. This is my life that I am fighting, so—
>
> THE COURT: Okay. Well, if they show up here, I will look at their credentials, who they are, and see. And if they show up—and I am telling you, I have had them before that have not shown up. If they show up, I will talk to them and I will ask them the questions about them being legally qualified to represent you. And you will be here.
>
> THE DEFENDANT: The only way that they will not show up is that you don't have me here or you change the date that I—
>
> THE COURT: I am going to have you here.
>
> THE DEFENDANT: All right.

Id. at 27a.

Mr. Hall's appointed attorney asked the court to explain what his role in the case would be, and the court said that he would act as "back-seat," or standby, counsel, answering questions Mr. Hall might have, but "[i]n effect" Mr. Hall would represent himself. *Id.* at 36a–37a. A prosecutor then asked, "Do we need a *Faretta* colloquy . . . ?"[2] *Id.* at 37a. The court initially balked, saying, "Well, he is refusing to

[2] *See Faretta v. California*, 422 U.S. 806, 835 (1975) ("[I]n order competently and intelligently to choose self-representation, [a defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942))).

accept counsel. So I don't know how I can go through it and determine whether or not he has competency to—he is obviously a smart individual." *Id.* Eventually, though, the court asked Mr. Hall-Bey about his criminal history and confirmed he had been prosecuted and convicted before. And the court asked about his education and work experience, learning he had gotten a GED in prison and had worked at a car wash and "[d]id . . . okay with that," *id.* at 38a.

The court found that Mr. Hall was competent to waive his right to counsel and that he had done so. It said, "I will allow you to represent yourself," though he had not asked to. *Id.* at 39a. The court then concluded the hearing by reassuring Mr. Hall that it had not ruled out representation by Mr. Parham Bey: "If you get a lawyer that shows up here that you have called your advisor, I am going to talk to them, no matter who they are, with you here on the 7th at 8:30 that morning. Okay? 8:30. And we'll go from there." *Id.*

2. Trial, Conviction, and Sentence. On the morning that Mr. Hall's trial was to begin, the district court spoke with Mr. Parham Bey, learned that he was not a licensed attorney, and told him to sit in the gallery. The court then told Mr. Hall about aspects of trial procedure like the burden of proof beyond a reasonable doubt, jury selection, opening statements, witness examination, and closing arguments. It encouraged Mr. Hall to let his standby counsel help, but he "stated that he did not understand why [his appointed attorney] was there, that he still wanted Parham-Bey to represent him, and that the court had told him in the previous hearing that it would allow Parham-Bey to represent him." Pet. App. 5a.

Mr. Hall's standby counsel sat beside him throughout the trial and spoke for the defense at all times in front of the jury, though not with complete autonomy. The lawyer read a list of Moorish American tenets that he said Maurice Parham Bey had provided. The trial progressed quickly, with the jury beginning deliberations less than six hours after it was sworn, despite a two-hour lunch recess. While the jury was deliberating, Mr. Hall's standby counsel told the court that his role had significantly hindered his ability to assist Mr. Hall. He said he had expected that Mr. Hall would conduct the defense and that he (the standby attorney) would simply answer questions if Mr. Hall had any. The lawyer also said Mr. Hall only let him ask Mr. Hall's questions, not his own; Mr. Hall disagreed and said the lawyer could have asked anything. After deliberating for about an hour and a half, the jury returned a guilty verdict on all counts.

At a scheduled sentencing hearing, the district court continued sentencing to allow Mr. Hall more time to review the presentence report ("PSR"). When the court asked if he would like his appointed lawyer's assistance with reviewing the PSR and raising objections, Mr. Hall replied, "Have any—someone else besides [him]?" The court initially said no, but then told Mr. Hall it would listen if he wanted to explain why he was rejecting his appointed lawyer. Mr. Hall said, "The very first day that I met him, he wanted me to cop out to 15 years without asking me any questions. So if you going to throw my life away that quick, I don't even care for you to be around me, period."

The court asked whether he would work with a different lawyer. Mr. Hall said he wouldn't work with someone who would do the same as his first lawyer, and the court replied that a new lawyer wouldn't encourage him to plead guilty, because he had been convicted already. Ultimately, Mr. Hall told the court not to bother: "I don't see what else that I can say or do to make the situation no better. So whatever you have out for me, you going to give it to me on your time anyway."

Before the date of the rescheduled sentencing hearing, though—for reasons not disclosed in the record—the district court entered an order removing Mr. Hall's standby counsel and appointing a federal public defender. Mr. Hall let the new attorney be the voice of the defense at sentencing, filing written objections to the PSR, answering questions the court directed to the defense, and arguing the appropriate sentence for Mr. Hall. The district court sentenced Mr. Hall to 40 years' imprisonment.

3. Affirmance on Appeal to Eleventh Circuit. Mr. Hall appealed his conviction, arguing that the district court erred in finding at the pretrial conference that he waived his right to trial counsel. The court of appeals affirmed the waiver finding on the authority of its prior decision in *United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008) (en banc):

> [W]hen confronted with a defendant who has voluntarily waived counsel by his conduct and who refuses to provide clear answers to questions regarding his Sixth Amendment rights, it is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a pro se litigant. So long as the trial court is assured the defendant (1) understands the choices before him, (2) knows the potential dangers of proceeding pro se, and (3) has rejected the lawyer

> to whom he is constitutionally entitled, the court may, in the exercise of its discretion, discharge counsel or (preferably, as occurred here) provide for counsel to remain in a standby capacity. In such cases, a *Faretta*-like monologue will suffice.

Pet. App. 8a (quoting *Garey*, 540 F.3d at 1267–68).

The court of appeals acknowledged shortcomings in the advisements Mr. Hall received: "the district court's inquiry during the pre-trial hearing wasn't a formal *Faretta* hearing," and "it would have been better had the district court advised Hall more on trial procedures and the hazards of proceeding without an attorney." *Id.* Still, it concluded, the district court "did enough. Hall clearly rejected his appointed counsel, and the district court made it clear that his only remaining options were representing himself and finding another licensed attorney." *Id.* at 9a. The court of appeals wrote that Mr. Hall was uncooperative because he disputed the federal courts' jurisdiction over him; he said he was "Derek Levert Hall-Bey," not the person named in the indictment; and he "refus[ed] to acknowledge that he understood the charges against him or anything that the court was telling him."[3] *Id.* That conduct, the court of appeals concluded, was "evidence that he was trying to manipulate the proceedings by insisting that the court allow Parham-Bey to represent him," and it "establishes that Hall knowingly and voluntarily waived his right to counsel and elected to represent himself," *id.* at 10a.

[3] Several times, when the court asked Mr. Hall if he understood something that was said, he responded that he "heard" it. *See* Pet. App. 27a–30a, 35a–36a. The court accepted his response each time. *See id.*

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to decide whether an indigent defendant's Sixth Amendment right to trial counsel may be waived by conduct, without a clear and unequivocal decision to represent himself. The Sixth Amendment's guarantee of counsel's assistance is sturdy, not to be surrendered inadvertently. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (waiver requires "an *intentional* relinquishment or abandonment of a known right" (emphasis added) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))). That is truest at trial, where courts must take affirmative steps to prevent inadvertent waiver. *Id.* at 298 ("[W]e have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial."); *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("courts indulge . . . every reasonable presumption against waiver").

Even in recognizing the directly contrary right of self-representation in *Faretta*, the Court carried forward the principle that only an explicit, willful, informed request can waive counsel. The Court has never suggested that something less could suffice. *Faretta* addressed the case of a defendant who "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." 422 U.S. at 835. And to ensure that *Faretta*'s holding would not dilute the rigorous prerequisites for waiver, the Court instructed that before a defendant's request may be granted, "he should be made aware of the dangers and disadvantages

of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* (quoting *Adams*, 317 U.S. at 279).

Several federal courts of appeals have held, however, that a defendant can waive counsel—even where he has expressed no interest in or has expressly rejected the only alternative, self-representation—if a court finds that his conduct demonstrates a desire to proceed pro se. That is how Mr. Hall found himself without the assistance of counsel on the morning of his trial[4]: both of the lower courts concluded that he had waived the right. But the courts of appeals nationally are sharply divided over implied waiver by conduct, and the rule has been rejected by at least as many courts as have approved it. In the First, Third, Fourth, Fifth, Eighth, and Tenth Circuits, at least, an indigent defendant like Mr. Hall would not have been tried without the assistance of counsel because he did not clearly and unequivocally express a choice to proceed pro se.

The roughly even split among the circuits is open, deep, and persistent, and it concerns an exceptionally important federal constitutional question. This Court has emphasized "the enormous importance and role that an attorney plays at a criminal trial," *Patterson*, 487 U.S. at 298, often enough that the point doesn't require elaboration. But findings of implied waiver by conduct raise particularly thorny questions

[4] Access to standby counsel is not the "Assistance of Counsel" that the Sixth Amendment guarantees. *See McKaskle v. Wiggins*, 465 U.S. 168, 177–78 & n.8 (1984) (access to standby counsel carries no right to effective assistance); *Faretta*, 422 U.S. at 834 (same); *New York v. Hill*, 528 U.S. 110, 115 (2000) (counsel's assistance includes counsel's "full authority to manage the conduct of the trial" (quoting *Taylor v. Illinois,* 484 U.S. 400, 417–18 (1988))). Moreover, the right to assistance of counsel at trial is a right to *prepared* counsel. *See Avery v. Alabama*, 308 U.S. 444, 446 (1940) (Sixth Amendments contemplates that counsel has been able "to confer, to consult with the accused and to prepare his defense").

where the accused is indigent. A finding of waiver by conduct often results from a defendant's request to fire his attorney. Where the request is made by one who hired his own counsel and has the means to hire a replacement, there is less need for a court to determine whether the defendant intends to waive the right entirely and represent himself. An indigent defendant needs the court's assistance to get a new lawyer, though, so it's crucial that the court understand whether the defendant wants substitute counsel or plans to represent himself. This Court should grant review to resolve the sharp circuit split on this important federal question, and this case is an excellent vehicle because the validity of Mr. Hall's conviction depends on the answer.

I. This Court's precedents require that a waiver of the right to trial counsel be voluntary and knowing, and have not held or suggested that the right may be waived without a clear and unequivocal election to proceed pro se.

A criminal defendant's right to have the assistance of counsel for his defense is explicit in the Sixth Amendment, and it extends to "all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004). Like other fundamental rights, the assistance of counsel may be waived; "the Constitution 'does not force a lawyer upon a defendant,'" *id.* at 87–88 (quoting *Adams*, 317 U.S. at 279). But a valid waiver can't be perfunctory. It "must . . . be [a] voluntary, . . . knowing and intelligent relinquishment or abandonment of a known right or privilege," *Edwards v. Arizona*, 451 U.S. 477, 482 (1981), and "must be . . . 'done with sufficient awareness of the relevant circumstances,'" *Tovar*, 541 U.S. at 81 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

This Court has long held that the courts must perform an active, essential role in protecting the right to counsel against inadvertent waiver:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

Johnson, 304 U.S. at 465. "[T]he strong presumption against waiver of the constitutional right to counsel" obligates the trial judge to "investigate as long and as thoroughly as the circumstances of the case before him demand." *Von Moltke v. Gillies*, 332 U.S. 708, 723–24 (1948) (plurality opinion). "[O]nly . . . a penetrating and comprehensive examination of all the circumstances" will do. *Id.* at 724.

That duty is greatest where formal judicial proceedings are involved—with trial the most formal proceeding and most critical stage of all. The Court's precedents do not prescribe a single standard for a valid waiver without regard to the circumstances:

> Instead, we have taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

Patterson, 487 U.S. at 298. "[A] less searching or formal colloquy may suffice" "at earlier stages of the criminal process," *Tovar*, 541 U.S. at 89—for instance, post-indictment questioning by police, *see Patterson*, 487 U.S. at 298. But waiver of trial counsel requires "the most rigorous" colloquy. *Id.*

The Court did not retreat from those principles even in holding that the Sixth Amendment guarantees a right to self-representation—which a defendant can't exercise *without* waiving the right to counsel. *Faretta*, 422 U.S. at 835. *Faretta* cited the Court's earlier admonitions in *Johnson* and *Von Moltke* about the need for a rigorous waiver inquiry, and for "the record [to] establish that '[the defendant] knows what he is doing and his choice is made with eyes open.'" *Id.* (quoting *Adams*, 317 U.S. at 279). *Faretta* has since become the eponym for the hearing or colloquy in which a court conducts the inquiry. But those safeguards against an impulsive or inadvertent waiver of the right to counsel were established long before. As *Faretta* itself makes clear, the same precautions are required even where they could discourage the exercise of the constitutional right to defend oneself.

II. The circuits are deeply divided over whether and how the right to counsel may be impliedly waived, resulting in disparate protection of the right to counsel across the federal courts.

Among the Court's precedents that address waiver of counsel at trial, *Faretta* is exceptional in that the Court found a valid waiver. There, the record showed Mr. Faretta had acted voluntarily and knowingly, because he "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." 422 U.S. at 835. Where the record has not shown a voluntary decision to proceed pro se at trial, the Court has consistently declined to recognize a constitutionally adequate waiver. *See Powell v. Alabama*, 287 U.S. 45, 52 (1932); *Johnson*, 304 U.S. at 469; *Von Moltke*, 332 U.S. at 726.

This Court's merits decisions, however, "ha[ve] never confronted a case in which an uncooperative defendant has refused to accept appointed counsel or engage in a colloquy with the court." *Garey*, 540 F.3d at 1257. The most common reason for an indigent defendant to want to fire his lawyer is the same as for a defendant of means: he wants substitute counsel. A federal court has discretion to grant that request "in the interests of justice," 18 U.S.C. § 3006A(c), and courts commonly do so with the expectation that justice will be served best if a defendant does not have a hostile relationship with his lawyer. But a court is not required to substitute counsel anytime a defendant asks—assuming the attorney is competent and has no conflict of interest—because "an indigent defendant . . . has no right to have the Government pay for his preferred representational choice." *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (plurality opinion) (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989)).

If the trial court won't appoint new counsel and the defendant continues to reject his attorney, the court might wonder, and ask, whether the defendant actually prefers to represent himself, especially where that result could become inevitable. The lower courts uniformly agree that "[a] defendant's right to counsel is not without limit and cannot be the justification for inordinate delay or manipulation of the appointment system," and "if the court has 'made the appropriate inquiries and has determined that a continuance for substitution of counsel is not warranted, the court can then properly insist that the defendant choose between representation by his existing counsel and proceeding pro se.'" *Fischetti v. Johnson*, 384 F.3d 140, 146–47

(3d Cir. 2004) (quoting *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982)). But "an unwilling defendant can foil a district court's best efforts to engage in dialogue," *Garey*, 540 F.3d at 1267, raising questions about how a court should—and constitutionally may—proceed when a defendant "rejects appointed counsel but refuses to cooperate with the court by affirmatively expressing his desire to proceed pro se," *id.* at 1264.

This is where the circuits diverge. One view holds that waiver requires a defendant's clear and unequivocal request to represent himself. This Court has long made held that, unlike the right to self-representation, "the right to counsel does not depend upon a request by the defendant." *Brewer*, 430 U.S. at 404 (citing *Carnley v. Cochran*, 369 U.S. 506, 513 (1962)). Under this view, rejecting a lawyer is not by itself a request to proceed pro se, and if a defendant will not say he chooses self-representation, then he is only repudiating particular counsel, not the right to counsel itself.

That can create a fraught situation, though. "Determining what a defendant has elected to do regarding representation is a recurring dilemma for the courts," *United States v. Miles*, 572 F.3d 832, 836 (10th Cir. 2009), because there is "'a thin line' between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation." *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc) (quoting *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)). "To ameliorate this problem, and because a waiver of the right to counsel should not be lightly inferred," several courts of appeals have concluded that

the best solution is to make the thin line bright, requiring that "a defendant's 'election to represent himself . . . be clearly and unequivocally asserted.'" *Miles*, 572 F.3d 832, 836–37 (citations omitted) (quoting *United States v. Treff*, 924 F.2d 975, 978 (10th Cir. 1991))).[5]

But several other circuits have held that a clear and unequivocal request to proceed pro se is not essential to waiver, because "a defendant can waive his right to counsel through conduct as well as words." *United States v. Oreye*, 263 F.3d 669, 670 (7th Cir. 2001). As the Seventh Circuit explained, "If you're given several options, and turn down all but one, you've selected the one you didn't turn down . . . provided the [set of options] is clear . . . ." *Id.* at 670–71. Under this rule, if a defendant "reject[s] all of his options except self-representation," he has "necessarily chose[n] self-representation," *King v. Bobby*, 433 F.3d 483, 492 (6th Cir. 2006)—even if he *also* rejects self-representation, *see id.*[6]

---

[5] *Accord United States v. Proctor*, 166 F.3d 396, 401 (1st Cir. 1999) ("'Where the [right to counsel and the right to self-representation] are in collision, the nature of the two rights makes it reasonable to favor the right to counsel . . . .' [A] waiver must be stated in unequivocal language . . . ." (quoting *Tuitt v. Fair*, 822 F.2d 166, 174 (1st Cir. 1987))); *Fischetti*, 384 F.3d at 146–47 ("Fischetti rejected—rather than asserted—the desire to represent himself. . . . If a defendant refuses to proceed with counsel and also refuses to proceed pro se, the proper course is to move forward with existing counsel."); *United States v. Ductan*, 800 F.3d 642, 650 (4th Cir. 2015) ("[A]s between counsel and self-representation, counsel is the 'default position' unless and until a defendant explicitly asserts his desire to proceed pro se."); *United States v. Long*, 597 F.3d 720, 725 (5th Cir. 2010) (finding no waiver where "Long seems to have made a request to fire his appointed attorney, but not a clear and unequivocal request to represent himself"); *United States v. Brown*, 956 F.3d 522, 524 (8th Cir. 2020) ("A defendant must assert his right to self-representation 'clearly and unequivocally.'" (quoting *Bilauski v. Steele*, 754 F.3d 519, 522 (8th Cir. 2014))).

[6] *Accord United States v. Culbertson*, 670 F.3d 183, 193 (2d Cir. 2012) ("it is reasonable for the court to require an intractable defendant either to proceed with the current appointed lawyer, or to proceed *pro se*" and to treat refusal of the first option as waiver of counsel); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) ("declining every constitutionally recognized form of counsel while simultaneously refusing to proceed *pro se* . . . amount[s] to an unequivocal waiver of the right to counsel"); *Garey*, 540 F.3d at 1265 (recognizing "a valid waiver of counsel . . . when an uncooperative

This latter rule is often termed "waiver by conduct," as it holds that "a defendant can waive his right to counsel through conduct as well as words." *Oreye*, 263 F.3d at 670. But some judges and commentators have noted that "[t]hese are not 'waiver' cases in the true sense of the word." *United States v. Goldberg*, 67 F.3d 1092, 1101 (3d Cir. 1995); *see also* 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.3(c) (4th ed. Dec. 2020 update) ("Most often, the analysis offered by the courts fits the category of 'forfeiture' rather than 'waiver.'"). *Goldberg* characterizes waiver by conduct as "a hybrid situation that combines elements of waiver and forfeiture." 67 F.3d at 1100 (parenthetical omitted). Consistent with that, courts finding an implied waiver often cite *mis*conduct by the defendant. *See, e.g.*, *United States v. Irorere*, 228 F.3d 816, 826 (7th Cir. 2000) ("defendant . . . waive[d] his right to counsel through his own contumacious conduct" by "frustrat[ing] four attempts by the district court to provide [him] with representation"); *Culbertson*, 670 F.3d at 193 ("the court ha[d] already replaced counsel more than once, and [as] the case approache[d] trial" the defendant remained "intractable"); *Massey*, 419 F.3d at 1010 ("Massey attempted to hinder his trial by declining every constitutionally recognized form of counsel while simultaneously refusing to proceed *pro se*.").

Earlier cases finding waiver by conduct often involved defendants who were not indigent and unreasonably delayed in hiring counsel. *See, e.g.*, *United States v. Gates*, 557 F.2d 1086, 1088 (5th Cir. 1977) ("[D]efendant, an attorney, . . . assured the

---

defendant rejects the only counsel to which he is constitutionally entitled, understanding his only alternative is self-representation with its many attendant dangers").

Mr. Hall has been unable to find any D.C. Circuit decision either finding or disapproving of implied waiver by conduct.

court on three occasions he would get counsel, and told the court that he would try the case himself if he did not secure counsel. . . . Over three months elapsed between his arrest and the date of trial. The court could conclude that defendant was engaged in delaying tactics and had waived his right to counsel."); *United States v. Weninger*, 624 F.2d 163, 167 (10th Cir. 1980) ("Weninger's stubborn failure to hire an attorney constituted a knowing and intelligent waiver of the right to assistance of counsel."); *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992) ("[T]he combination of ability to pay for counsel plus refusal to do so *does* waive the right to counsel at trial."). There is an obvious logic to such a rule where a defendant fires and unreasonably fails to replace retained counsel, because a defendant with notice of the trial date and no right to appointed counsel knows what he must do to have the assistance of counsel in his defense. But harder questions arise from extending the rule to an indigent defendant, and treating his desire to fire his lawyer as a waiver of the constitutional right to counsel itself. *See supra* p. 13. The sharp circuit split on that issue should be resolved in this Court.

III. The waiver finding here demonstrates the constitutional hazards in a rule of implied waiver by conduct, and this case is a good vehicle for the Court to decide the question that has split the circuits.

The Eleventh Circuit relied on its waiver-by-conduct precedents to hold that Mr. Hall voluntarily and knowingly waived his Sixth Amendment right to counsel. As that holding shows, a rule of waiver by conduct is not necessarily confined to cases where a defendant tries to delay or otherwise abuse the legal process.

Mr. Hall appeared before the district court with frivolous theories and false beliefs about the federal courts' jurisdiction over him, along with naive hopes about his representation and the arguments that could be made in his defense. At a status conference a few weeks after he was arraigned, he told the court he had taken an oath as a Moorish American National. He asked to discharge his appointed lawyer, whom he did not trust, so a Moorish American National advisor could represent him. But he did not express any interest in representing himself, and he did not try to delay his trial. Still, the Eleventh Circuit found Mr. Hall to be "an uncooperative defendant," and held that a waiver finding was proper because "he was trying to manipulate the proceedings by insisting that the court allow Parham-Bey to represent him." Pet. App. 9a–10a.

By its nature, a voluntary and knowing waiver of counsel is a decision to represent oneself, because without a lawyer, a defendant must be the voice of the defense. *McKaskle*, 465 U.S. at 177. But there is good reason to doubt that Mr. Hall's waiver was either voluntary *or* knowing. It was not at all clear that Mr. Hall wished to represent himself, only that he wanted to fire the lawyer who was appointed for him a few weeks earlier. Mr. Hall did not say he wanted to represent himself. When he asked to have his attorney removed, he explained the request as a preference to be represented by someone else (Maurice Parham Bey), not to represent himself. And the district court never asked if he wanted to do so before finding he'd waived counsel.

Moreover, while the district court warned that Mr. Hall could end up representing himself if Mr. Parham Bey was not a licensed attorney, its last words to Mr.

Hall at the pretrial conference were an assurance that "[i]f you get a lawyer that shows up here that you have called your advisor, I am going to talk to them, no matter who they are, with you here . . . that morning. Okay? 8:30. And we'll go from there." Pet. App. 39a. Nothing in the record shows that Mr. Hall knew Mr. Parham Bey could not represent him, and the court left that matter unresolved until the morning of trial, when Mr. Hall found himself with no lawyer who was prepared to defend him, and no time to do anything about it. Even then, he did not ask for a continuance or try to delay the proceedings by any other means. Rarely does a federal criminal case carrying the possibility of life imprisonment move to and through trial as quickly as Mr. Hall's did.

This case is a good vehicle for the Court to decide whether the Sixth Amendment permits a finding of waiver by conduct under such circumstances. The differing rules in the lower courts result in uneven protection of this crucial right in the perilous context of a criminal trial. Mr. Hall did not clearly and unequivocally ask to represent himself, and in much of the country, he would not have been tried without counsel. The Court should grant review to resolve this deep and continuing divide among the circuits.

CONCLUSION

For the foregoing reasons, Mr. Hall prays that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted this, the 12th day of October, 2021.

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

DEANNA LEE OSWALD
Assistant Federal Public Defender

TOBIE J. SMITH
Appellate Attorney

Federal Public Defender's Office
Northern District of Alabama
505 20th Street North, Suite 1425
Birmingham, Alabama 35203
(205) 208-7170
Tobie_Smith@fd.org