No. 21-5978

In The Supreme Court of the United States

DEREK LEVERT HALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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

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Mr. Hall's petition asks the Court to decide an important constitutional question that is the subject of a deep and persistent split among the lower federal courts: whether a defendant's request to fire his appointed lawyer, without clearly and unequivocally electing to proceed pro se, may waive his Sixth Amendment right to trial counsel. The government asks the Court to deny the petition, arguing that on this question there is no real division among the courts of appeals and that, even if there were, the waiver in this case would be valid under the law of any circuit.

That misreads the lower courts' decisions. The courts of appeals themselves believe that they are divided and apply different rules. And they're right—the split is real and has persisted for decades. It produces real divergent results: some circuits affirm waiver findings where a defendant asked to fire his lawyer but did not commit to self-representation; others reverse in the same circumstances because they require a defendant's clear and unequivocal election of self-representation over the assistance of counsel.

The validity of Mr. Hall's conviction rests on the choice between those rules, because when he asked to fire his appointed lawyer and the district court found he'd waived the Sixth Amendment right, he had expressed no desire to represent himself. And remarkably, the district court found waiver without even asking if that was Mr. Hall's intention. He was tried in the Eleventh Circuit, which is among those that accept a district court's finding that an indigent defendant has waived counsel by his conduct. Other circuits reject the validity of such a finding where the defendant has

not clearly expressed a desire to represent himself. The result is an enduring disparity in the protection of the right to counsel across circuits, which appears likely to continue until this Court decides the matter.

I. The lower courts are genuinely divided over the important waiver-of-counsel question here, contrary to the government's claim.

A. The federal courts of appeals believe that their waiver rules differ.

The circuit split that the petition describes—between those that allow a judge to find that a defendant's conduct waived counsel even when his words say otherwise, and those that don't—is real. The government's brief in opposition argues that the disagreement is illusory, or at least inconsequential: "The courts of appeals broadly agree that a defendant can waive his right to counsel by rejecting his court-appointed counsel when it is clear to the defendant that the alternative is to proceed pro se." U.S. Br. in Opp'n 17. But the courts themselves do not see it that way, and several have specifically contrasted other courts' rules with their own.

The court that decided this case, the Eleventh Circuit, provides a useful example. In *United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008), it reconsidered en banc its precedents that held "anything less than a 'clear and unequivocal' written or oral invocation of the right to self-representation is insufficient to invoke the right to self-representation" and waive counsel. 540 F.3d at 1264 (citing *Marshall v. Dugger*, 925 F.2d 374, 377 (11th Cir. 1991)). The court in *Garey* ultimately joined "several of [its] fellow circuits" in adopting a rule recognizing implied waiver by conduct. *See id.* at 1264–65 (citing *King v. Bobby*, 433 F.3d 483, 492 (6th Cir. 2006); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005); *United States v. Oreye*,

263 F.3d 669, 670–71 (7th Cir. 2001); *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981)). But it acknowledged that the courts of appeals were not unanimous, citing as an example Third Circuit precedent that "only dilatory behavior or other misconduct might justify waiver by conduct," *id.* at 1264 (citing *Fischetti v. Johnson*, 384 F.3d 140, 146 (3d Cir. 2004)).

The Seventh Circuit also recognized the split while finding implied waiver by conduct in *Oreye*: "[S]ome cases from other circuits require evidence of *mis*conduct to establish waiver by conduct. But, with all due respect, we think these cases are wrong." 263 F.3d at 670 (7th Cir. 2001) (emphasis added) (citing *United States v. Goldberg*, 67 F.3d 1092, 1100–01 (3d Cir. 1995); *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983)). The Fourth Circuit later offered *Oreye* as an example of a contrary view when it cited other circuits that, like the Fourth, hold that valid waiver requires a defendant's "unmistakable expression" that he wishes to proceed pro se. *United States v. Ductan*, 800 F.3d 642, 650 & n.3 (4th Cir. 2015) (emphasis omitted) (quoting *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir. 1995) (en banc), and citing *United States v. Byron Jones,* 778 F.3d 375, 389 (1st Cir. 2015); *United States v. Campbell,* 659 F.3d 607, 612 (7th Cir. 2011); *United States v. Long,* 597 F.3d 720, 725 (5th Cir. 2010); *United States v. Christopher Jones*, 452 F.3d 223, 231 (3d Cir. 2006)).

In short, the government's argument overlays the circuits' case law with a patina of consensus that the circuits themselves do not recognize. And as the following sections explain, (1) the rules actually conflict, producing divergent results,

and (2) this case lies beyond any common ground among the circuits, in area where a waiver's validity depends on the jurisdiction's rule.

B. The courts of appeals are right: their rules actually differ and yield divergent results.

The circuits part ways over a surpassingly common scenario that repeatedly arises in waiver-of-counsel controversies:

- ***Garey*:** "Three days before trial was slated to begin, Garey demanded a new lawyer, contending Huggins was unable to advocate zealously on his behalf. The trial judge disagreed, and offered Garey two options: accept Huggins' representation or try the case yourself. Not satisfied with either alternative, Garey refused to choose, repeatedly rejecting Huggins while adamantly refusing to waive his right to counsel." 540 F.3d at 1257.

- ***Fischetti*:** "Judge Novak denied Fischetti's request for new counsel and gave him three choices: continue to have Fitzgerald represent him, represent himself with Fitzgerald assisting as co-counsel, or represent himself without co-counsel. Fischetti refused the first two options and claimed that he could not represent himself." 384 F.3d at 144.

- ***Oreye*:** "The judge gave Oreye a choice between staying with Shanin, finding another lawyer who would be ready to go to trial on schedule, and representing himself. The judge . . . added that if Oreye decided to go the pro se route the court would appoint Shanin as standby counsel . . . . Oreye asked the judge whether he could get a fair trial with standby counsel, and the judge said yes. Oreye never said he wanted to proceed pro se . . . ." 263 F.3d at 670.

- ***Ductan*:** "When the magistrate judge asked Ductan if he wanted to represent himself, he responded 'No.' But Ductan also adamantly refused appointed counsel, repeatedly stating that he did 'not want an attorney appointed to [him],' and did 'not want to contract with the government at all, as far as counsel's concerned.'" 800 F.3d at 650–51 (citations and footnotes omitted)

In each case, an indigent defendant rejected his appointed counsel; the trial court refused to appoint a different lawyer; and the defendant would not commit to the alternative of representing himself. Each defendant was tried pro se.

Despite the practically identical factual scenarios, though, the results refute the government's claim of "broad[] agree[ment]" about the law. U.S. Br. in Opp'n 17. In *Garey*, the Eleventh Circuit found voluntary waiver: "Garey was presented with two constitutional options: accept representation by a competent, unconflicted lawyer or represent yourself. . . . By rejecting appointed counsel, Garey voluntarily chose to proceed pro se as surely as if he had made an affirmative request to do so." 540 F.3d at 1269. The Third Circuit reached the opposite conclusion in *Fischetti*[1]: "The threshold question in determining whether a defendant can proceed pro se is whether he wants to do so. . . . Fischetti rejected—rather than asserted—the desire to represent himself. Thus, there was no voluntary waiver . . . ." In *Oreye*, the Seventh Circuit found voluntary waiver: "As a matter both of logic and of common sense, . . . if a person is offered a choice between three things and says 'no' to the first and the second, he's chosen the third even if he stands mute when asked whether the third is indeed his choice." 263 F.3d at 670–71. The Fourth Circuit concluded in *Ductan* that although "Ductan . . . adamantly refused appointed counsel, . . . the magistrate judge correctly determined that Ductan had *not* . . . knowingly and intentionally waived his right to counsel," 800 F.3d at 651 (internal quotations omitted).[2]

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[1] *Fischetti* involved a habeas corpus challenge, under 28 U.S.C. § 2254, to a state conviction, so although the Third Circuit held that the waiver-of-counsel finding "was error," it denied relief on that claim because the state court's decision "was not contrary to, or an unreasonable application of, Supreme Court precedent." 384 F.3d at 153.

[2] Mr. Ductan was without counsel because the district court found he had *forfeited* his right to counsel, not waived it, and the government responds that his case is inapposite for that reason. *See* U.S. Br. in Opp'n 20. But as the petition notes, in this context courts often use the word "waiver" where "forfeiture" might be the more precise term for the finding. Pet. for Cert. 19. The fact that *Ductan* used the latter term hardly removes that case to a distinct context. On appeal, "[t]he parties . . . describe[d] the question . . . as one involving waiver," *Ductan*, 800 F.3d at 647, and although the Fourth Circuit disagreed with that characterization, it still passed on waiver—which would have provided an

The divergent results are not explained by divergences in facts that sometimes complicate a waiver analysis, such as the eleventh-hour timing of a defendant's request, or the number of times a court previously appointed substitute counsel. The dispositive facts line up, but the courts of appeals place them on different sides of the waiver line because their respective waiver rules differ.

C. The affirmance of the waiver finding in this case depended on the Eleventh Circuit's rule of implied waiver by conduct.

The government argues that the waiver finding below would hold up under any circuit's standard, U.S. Br. in Opp'n 17–18, but the case for waiver here is objectively weaker than the fact scenario that split the courts of appeals in *Garey*, *Fischetti*, *Oreye*, and *Ductan*. Mr. Hall sought to discharge the only lawyer who'd been appointed for him, *cf. Oreye*, 263 F.3d at 670; *United States v. Culbertson*, 670 F.3d 183, 187 (2d Cir. 2012), and less than a month had passed since his initial appearance, *cf. Fischetti* 384 F.3d at 145 (request on eve of trial); *Garey*, 540 F.3d at 1259 (request three days before trial). When the district court found he'd waived counsel at a pretrial conference, he had not expressed even equivocal interest in representing himself. *Cf. Garey*, 540 F.3d at 1259–60; *Christopher Jones*, 452 F.3d at 226–27; *United States v. Gates*, 557 F.2d 1086, 1088 (5th Cir. 1977). Nor had the court seriously tried to find out whether that was his intention; it hadn't asked. *Cf. Garey*, 540 F.3d at 1259; *Long*, 597 F.3d at 725; *United States v. Mendez-Sanchez*, 563 F.3d

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alternative legal justification for the district court's action—as well as forfeiture, finding neither, *id.* at 651. If anything, the Fourth Circuit's conclusion that "waiver" was clearly the wrong term, and that Mr. Ductan's conduct effected neither waiver nor forfeiture, only underscores the conflict between *Ductan* and decisions where other courts found waiver by conduct on equivalent facts.

935, 942 (9th Cir. 2009). Those facts do not push the case toward an area of legal consensus; they remove it even further from a clear and unequivocal choice of self-representation.

It would be one thing if the issue arose only where a defendant refuses to answer when asked if he desires counsel or self-representation. But as this case illustrates, a rule of implied waiver by conduct does not require obstinacy about exercising one's rights; the district court found waiver without even asking Mr. Hall whether he wanted to be rid of just a particular lawyer, or the assistance of counsel itself. The finding could only stand under a rule of implied waiver by conduct. And the affirmance of Mr. Hall's conviction shows how far that rule can stretch—and how great the distance between the lower courts' differing waiver rules can be.

II. The sharp and enduring split among the lower courts appears likely to persist until this Court decides the matter.

The lower courts' division over whether to recognize implied waiver by conduct is decades old. *Compare McKee*, 649 F.2d 931–32 (waiver valid though not clear and unequivocal), *and United States v. Bauer*, 956 F.2d 693, 694–95 (7th Cir. 1992) (same), *with United States v. Welty*, 674 F.2d 185, 190 (3d Cir. 1982) (waiver not valid because not clear and unequivocal), *and United States v. Lespier*, 558 F.2d 624, 630 (1st Cir. 1977) (same). This Court has instructed courts to "indulge in every reasonable presumption against waiver [of counsel]," *Brewer v. Williams*, 430 U.S. 387, 404 (1977), and "ha[s] 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," *Patterson v. Illinois*, 487 U.S.

285, 298 (1988). But the Court thus far has not stepped in to resolve the split of authority over the constitutional adequacy of an implied-waiver rule, and the split endures.

With no consensus rule, protection of the Sixth Amendment right to assistance of counsel varies significantly across the federal circuits. And there is no sign that further percolation is likely to produce consensus. The Court should grant review to decide whether a court may find that a defendant waived the right to counsel by asking to fire his lawyer but not clearly and unequivocally electing to proceed pro se. And this case is an excellent vehicle because the question is squarely presented and plainly dispositive. Mr. Hall respectfully asks the Court to grant the writ.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted this, the 28th day of January, 2022.

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

DEANNA LEE OSWALD
Assistant Federal Public Defender

TOBIE J. SMITH
Appellate Attorney

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