No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

VILASINI GANESH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LISA A. RASMUSSEN
Counsel of Record
THE LAW OFFICES OF KRISTINA
WILDEVELD & ASSOCIATES
550 E. Charleston Blvd., Suite A
Las Vegas, Nevada 89104
Tel: (702)222-0007
Fax: (702)222-0001
E-Mail: lisa@veldlaw.com

Counsel for Petitioner

I. QUESTIONS PRESENTED

A. Do Sixth Amendment safeguards require trial courts to inquire into existing conflicts between counsel and the defendant before a trial court may deny substitution on the basis of calendar management alone?

B. What criteria are circuit courts required to examine to determine the adequacy of conflict inquiries which serve to protect defendants?

C. Does the "needs of fairness" factor permit trial courts to consider the lack of adverse effects upon the defendant, contrary to *United States v. Gonzalez-Lopez?*

D. Are trial court decisions "unreasonable and arbitrary" when they disregard the unequivocal and uncontradicted assurances of readiness by retained counsel in a criminal case?

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IV. PETITION FOR WRIT OF CERTIORARI

Vilasini Ganesh petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

V. OPINIONS BELOW

The unpublished decision of the Ninth Circuit Court of Appeals denying Dr. Ganesh's direct appeal is located at *United States v. Belcher*, 857 Fed. Appx. 390, 2021 U.S. App. LEXIS 15370 (9th Cir. May 24, 2021), which is attached at Appendix ("App.") 1. The Ninth Circuit's denial of rehearing is attached at App. 2.

VI. JURISDICTION

Dr. Ganesh's appeal was denied on May 24, 2021. Rehearing was denied on July 30, 2021. Dr. Ganesh invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within ninety days of the Ninth Circuit Court of Appeals' order denying the Petition for Panel and En Banc Rehearing. SCR 13(3).

VII. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 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 defence.

VIII. STATEMENT OF THE CASE

This petition presents unique questions concerning Sixth Amendment rights to conflict-free counsel, substitution of appointed counsel with retained counsel, and the inquiries to be made by district courts in considering motions relating to same.

1. Overview

Dr. Vilasini Ganesh ("Dr. Ganesh"), the criminal defendant, sought to substitute her appointed counsel months before trial and was denied. Due to increasing conflict with her attorney, she again sought to substitute her appointed counsel with retained counsel a week before trial was to begin. Declining Dr. Ganesh's request to discuss the nature and extent of the conflict with counsel, the magistrate denied the motion after only giving Dr. Ganesh the option of representing herself or going to trial with her conflicted appointed counsel.

In the third instance, Dr. Ganesh sought to substitute her appointed counsel with retained counsel several weeks before sentencing and was again denied. The magistrate reasoned that (1) the needs of fairness require retention of appointed counsel because no adverse effects would arise therefrom, and (2) the court's calendared sentencing date might be jeopardized by delays arising from the substitution of the very counsel who ensured the magistrate they would not seek any delays.

2. The Requests for Substitution of Counsel Prior to Trial

In May 2016 Dr. Ganesh and a codefendant were indicted on various counts of health care fraud and false statements relating to health care, in which the

government alleged that Dr. Ganesh engaged in myriad forms of billing fraud including upcoding, billing too many patients in one day, billing on Saturdays or on different days than when the work was performed and billing under the name and address of a different physician.

After the setting of a trial date in January 2017, Dr. Ganesh's retained attorney, Mr. Horowitz, filed a notice pursuant to Rule 12.2 of the Federal Rules of Criminal Procedure that he intended to present a mental state or mental defect defense for Dr. Ganesh as related to both guilt and punishment. Although the notice did not bring into question Dr. Ganesh's competency to stand trial, the government requested an inquiry into her competency due to a filing notice error which mislabeled the notice as one for an insanity defense. In lieu of agreeing that Dr. Ganesh was competent to stand trial, Mr. Horowitz consumed five months preparing for an unnecessary competency hearing in which counsel himself wanted to testify and be questioned on the undisputed fact of Dr. Ganesh's competency. Counsel ignored Dr. Ganesh's demands that he focus instead on trial preparation.

On September 8, 2017, Dr. Ganesh moved to dismiss Mr. Horowitz, who had inexplicably requested CJA appointment status, a request granted on that date. The magistrate denied her request to substitute counsel. On September 21, 2017, a month before trial, the court conducted a competency hearing, finding Dr. Ganesh to be competent.

Following the competency debacle, Dr. Ganesh's concerns over Mr. Horowitz' lack of trial preparation only escalated. He had done nothing other than the bare

minimum required by the trial court: he did not file a single pretrial motion other than motions in limine, he hired no investigators or experts to prepare for trial, he had interviewed no witnesses, and he had failed to review any of the government's evidence with Dr. Ganesh. Having dedicated the majority of his time and resources to the government's competency issue, Mr. Horowitz was simply unprepared for trial. More importantly, he had rejected every request Dr. Ganesh made that he interview witnesses to prepare for trial. There was an irreconcilable conflict and it arose over the course of months, not a week before trial.

Upon Dr. Ganesh's request, Mr. Horowitz filed a motion to substitute counsel on October 17, 2017. An open hearing was held before the magistrate on October 18, 2017, wherein the magistrate first asked proposed retained counsel, Mr. Jinkerson, about his intentions. Mr. Jinkerson informed the court vaguely that Dr. Ganesh had some concerns and stated his unpreparedness to take the case at the moment.

Mr. Jinkerson specifically informed the court that Dr. Ganesh wanted to address the conflict with the court in a sealed hearing outside the presence of the government. Declining the invitation, the magistrate denied substitution and gave Dr. Ganesh two options: either proceed with Mr. Horowitz or proceed in pro per. Instructing Dr. Ganesh to decide which option to pursue, the magistrate directed her to consult with Horowitz and return with a decision, while expressing its hope that Dr. Ganesh and Mr. Horowitz might work the problem out so that a hearing on pro per representation would not be necessary.

Thereafter, Mr. Horowitz informed the magistrate that the two had cleared up a few misunderstandings. Due to the open nature of the hearing, the tangible conflicts between counsel and client were not discussed. There was no inquiry, and no facts were ever sought by the magistrate as to the conflict or the nature of the conflict.

Trial commenced five days later on October 23, 2017, and continued for 14 days, spread out across October, November and December. The jury found Dr. Ganesh guilty of five counts in violation of 18 U.S.C. § 1035 and five counts in violation of 18 U.S.C. § 1347. Dr. Ganash was acquitted on the conspiracy and money laundering counts but was later sentenced to a total of 63 months imprisonment on the remaining counts, imposition of which is scheduled to commence on November 10, 2021.

3. The Request for Substitution of Counsel Prior to Sentencing

After the verdicts, and upon Dr. Ganesh's insistence, Mr. Horowitz moved to withdraw on December 19, 2017. On January 9, 2018, the motion to withdraw Mr. Horowitz was granted and retained counsel, Mr. Cassman, appeared on Dr. Ganesh's behalf. Mr. Cassman filed several post-trial motions, prompting Dr. Ganesh to file a proper person declaration outlining her problems with previous counsel Mr. Horowitz and his failings over the course of his representation. Therein, Dr. Ganesh complimented Mr. Cassman on his post-trial efforts.

Irritated with Dr. Ganesh's declaration containing issues he did not want to raise (e.g. an abundance of Sixth Amendment ineffective assistance of trial counsel issues), Mr. Cassman promptly motioned for withdrawal, which was granted. Dr.

Ganesh neither desired nor requested Mr. Cassman's withdrawal. Mr. Whelan was appointed as CJA counsel to represent Dr. Ganesh, but after repeated attempts could not obtain subpoenas to gain data necessary for the sentencing proceedings and to support necessary sentencing arguments. Dr. Ganesh was desperate to find someone who could help her.

In early August 2018, Dr. Ganesh retained Mr. Schamel and Mr. Naples to represent her at sentencing, who in turn submitted pro hac vice applications, which were granted on August 9, 2018. A hearing was set for the substitution of counsel. During the August 13, 2018, hearing thereon, Mr. Whelan voiced his lack of objection to being substituted and offered that the entirety of sentencing evidence was ready to be handed over to new counsel. He told the court that Dr. Ganesh would be better served by having her proposed retained counsel. Both proposed attorneys repeatedly informed the magistrate that they would meet the deadlines and be ready and present for sentencing on the scheduled date, August 28, 2018. Additionally, Mr. Whelan's breakdown in communication with Dr. Ganesh was explained to the magistrate.

Citing the dissenting opinion in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), which suggested that a defendant should be required to show an adverse effect on the quality of assistance from current counsel in a substitution proceeding, the magistrate required Dr. Ganesh, Mr. Whelan and Mr. Schamel to demonstrate an adverse effect in keeping current counsel. The magistrate acknowledged that doing so ran contrary to this Court's holding of the *Gonzalez-Lopez* majority.

The magistrate denied substitution of retained counsel upon unlawful conclusion that Dr. Ganesh would not be adversely affected by keeping Mr. Whelan. Ignoring the holding of the *Gonzalez-Lopez* majority that adverse effects need not be demonstrated to obtain retained counsel, the magistrate focused on some ill-perceived concept of "fairness" in keeping current counsel.

Notwithstanding counsels' repeated assurances of being ready for sentencing, the magistrate narrated at length its skepticism over counsels' ability to be prepared, concluding that counsel had stated they would be unprepared for sentencing on time. Nothing in the record supports that.

4. The Ninth Circuit's Decision on Direct Appeal

Dr. Ganesh argued on direct appeal that the district court denied her Sixth Amendment right to retained counsel and her Sixth Amendment Right to conflict-free counsel. The Panel of the Ninth Circuit Court of Appeals addressed the denial of counsel prior to trial by stating:

> Ganesh made this request less than a week before trial was scheduled to commence. She was represented at the time by appointed counsel she had originally chosen and retained, and the lawyer she wanted substituted told the court that she was not prepared to "substitute in at this point in time." The court asked current and proposed substitute counsel about the reasons for the change in counsel, instructed Ganesh to consult with her counsel and family, and gave Ganesh an opportunity to address the court.

U.S. v. Belcher, 857 Fed. Appx. 390, 393 (9th Cir. 2021); App. 1 at 8.

The Ninth Circuit Panel addressed the denial of substitution prior to sentencing by stating:

> Ganesh made another motion for substitution of counsel about three weeks before the start of sentencing, which had already been delayed by over a month. The two lawyers she wanted to be substituted refused to commit to the established sentencing schedule. And although the court repeatedly asked for an explanation of why keeping her current counsel would be unfair, it received only vague answers in response.

Id.

The Circuit's panel memorandum is an inaccurate reflection of the facts and it disregard's the Circuit's own precedent.

Dr. Ganesh filed a Petition for Rehearing En Banc and, in the Alternative, for Panel Rehearing. An *amicus* brief in support of rehearing was also filed by the Nevada Attorneys for Criminal Justice, the ACLU Nevada, India Community Center of Silicon Valley Northern California, Senior Advocates Group of the Supreme Court of India, Doctors of Courage, Eugene G. Iredale, William A. Cohan, Joseph H Low IV, Michael J. Kenney and Amin Ebrahimi – each individual *amici* has an area of expertise in the realm of criminal justice and the right to counsel of one's choosing. For example, Mr. Iredale and Mr. Low are the subjects of this Court's opinions in *Wheat v. United States*, 486 U.S. 153 (1988), and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), respectively, which are Sixth Amendment right to counsel cases.

The Ninth Circuit summarily denied rehearing.

IX. REASONS FOR GRANTING THE WRIT

The Sixth Amendment right to the assistance of counsel attaches to criminal proceedings. *Rothgery v. Gillespie*, 554 U.S. 191, 194 (2008). The Sixth Amendment to the United States Constitution guarantees to all criminal defendants the right to

the effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 688 (1984), the right to counsel of one's choice, *Wheat v. United States*, 486 U.S. 153 (1988), and the right to conflict-free counsel, *Wood v. Georgia,* 486 U.S. 261, 271-72 (1981). As the right to assistance of counsel is intended as a tool and not a tether, a state may not "compel a defendant to accept a lawyer [she] does not want." *Faretta v. California*, 422 U.S. 806, 833 (1975). .

A defendant who does not require appointed counsel has a Sixth Amendment right to choose who will represent her. *Wheat,* 486 U.S. at 159. The right to counsel of one's choice is a distinct right from that of effective counsel: the former "is the right to a particular lawyer regardless of comparative effectiveness," with the latter being the right to a lawyer upon which "a baseline requirement of competence" is imposed. *Gonzales-Lopez*, 548 U.S. at 147-48.

As the effectiveness of counsel is separate from the right to counsel of one's choice, an erroneous deprivation of counsel of choice is presumed prejudicial and deemed structural error because it "pervades the entire trial." *Id.* at 150. Deprivation of the right is complete when the defendant is erroneously prevented from being represented by the lawyer of his choice. *Id.* at 148.

When confronted with a motion to substitute counsel, trial courts must take "adequate steps" in making their decisions. *Wheat,* 486 U.S. at 160. As the right to counsel of choice is not absolute, a defendant may not "insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation." *Gonzales-Lopez*, 548 U.S. at 152 (citing *Wheat*, 486 U.S.

at 159-60). Further, the Sixth Amendment right does not attach to counsel who do not qualify to appear under court rules. *Id.*

This Court has "recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar." *Id.* (citing *Wheat*, 486 U.S. at 163-64 and *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)). *See also Luis v. United States*, 578 U.S. ___, ___, 136 S.Ct. 1083, 194 L.Ed.2d 256, 272 (2016)(right to counsel of choice may be denied based upon conflict, ineligibility under court rules, or fairness concerns).

Trial courts may also deny substitution of counsel without violating the Sixth Amendment when continuances stemming from such appointments might unduly burden the courts' calendars. *Morris*, 461 U.S. at 11. However, "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Id.* at 11-12 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

As the right to counsel of choice does not attach for defendants who require appointed counsel, *Gonzalez-Lopez*, 548 U.S. at 151, this Court has recognized three steps for trial courts to follow to protect Sixth Amendment rights when considering motions for substitution of counsel: "the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client." *Martel v. Clair*, 565 U.S. 648, 661-63 (2012).

In light of the above, the Court is requested to consider the following:

A.

The Constitutional Requirement That Trial Courts Conduct Conflict Inquiries When Considering Motions to Substitute Appointed Counsel with Retained Counsel Has Not Been, But Should Be, Settled By The Court

This Court has identified two separate standards for reviewing trial court denials of motions to substitute counsel: one for retained counsel, *Gonzalez-Lopez*, 548 U.S. at 152, and one for appointed counsel, *Martel,* 565 U.S. at 661-63.

The Court has yet to address the appropriate standard for reviewing the denial of a motion to substitute current counsel with retained counsel where the motion is proffered due to a real and present conflict with current counsel. Dr. Ganesh submits that to protect a defendant's Sixth Amendment rights, a district court should not deny substitutions due to calendaring issues under *Gonzalez-Lopez* without first inquiring whether a conflict exists which would violate the Sixth Amendment were the substitution denied.

Dr. Ganesh initially sought to substitute her appointed counsel with retained counsel months prior to trial, prior to any timeliness concerns. The magistrate denied the motion, allowing the conflict between attorney and client to burgeon irreconcilably. Seeing where the conflict was going, Dr. Ganesh instructed her counsel to file another motion for substitution a week before trial was to begin.

The magistrate did not permit Dr. Ganesh's to discuss her conflict and denied the motion on the basis that substituting counsel would delay the trial.

Dr. Ganesh submits that the Sixth Amendment does not abide the denial of retained counsel where there exists a conflict with one's counsel. *See Cuyler v.*

Sullivan, 446 U.S. 335, 349 (1980)(conflicted counsel is ineffective assistance of counsel). Dr. Ganesh proffers that, when entertaining a motion to substitute appointed counsel with retained counsel, a trial court must inquire into any conflict regarding a defendant's current counsel prior to denying such a motion due to calendar delays alone. This requirement for a conflict inquiry should especially apply where, as here, a trial court has previously denied a motion for substitution premised upon conflict with the same attorney.

The distinguishable rights to counsel of choice and conflict-free counsel may not be pitted against each other, but the magistrate's decision has done just that, to-wit: in considering calendar management per *Gonzalez-Lopez* while simultaneously declining to inquire into conflict per *Martel*, the magistrate's decision required Dr. Ganesh to proceed to trial with a conflicted appointed lawyer instead of the conflict-free counsel she had retained.

This Court has yet to address this unique circumstance. The Ninth Circuit has discussed similar situations in which "a defendant seeks to replace appointed with retained counsel," *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010), concluding that in such cases "an additional constitutional right is at stake," *id.* The court opined that "such motions have never been governed by the three-part extent-of-conflict of analysis applicable to defendants seeking new court-appointed counsel," *id.,* but instead are to be granted as long as the substitution would not "cause significant delay or inefficiency," *id.*

The Ninth Circuit's *exception* to this rule, however, urges Dr. Ganesh's position: "Conflict between the defendant and [her] attorney enters the analysis only if the court is required to balance the defendant's reason for requesting substitution against the scheduling demands of the court." *Id.* at 980 (citing *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1380 (9th Cir. 1991), *overruled on other grounds by Bailey v. United States*, 516 U.S. 137 (1995)). In such cases, the Ninth Circuit requires trial courts to shift the analysis from fairness and calendar delays under *Gonzales-Lopez* to timeliness, adequacy of the court's inquiry, and the degree of conflict under *Martel. Torres-Rodriguez*, 930 F.2d at 1380. Of note, longstanding Ninth Circuit precedent requires inquiries into the reasons for a substitution motion regardless of whether counsel is appointed or retained. *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1476 (9th Cir. 1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000).

"Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay." *Daniels v. Woodford*, 428 F.3d 1181, 1200 (9th Cir. 2005). *See also United States v. Brumer*, 528 F.3d 157, 161 (2nd Cir. 2008)("Although delay is generally a valid reason to deny a motion to substitute counsel, it is not necessarily valid where counsel is shown to be providing constitutionally ineffective representation"). The Sixth Circuit has determined that substitutions may not be denied in the name of calendar control alone without first inquiring into possible conflicts which would likely makes a last-minute continuance necessary. *United States v. Powell*, 847 F.3d 760, 780 (6th Cir.

2017). The protections of the Sixth Amendment would well be enforced were the Court to adopt the view of the Second, Sixth and Ninth Circuits.

The conflict between Dr. Ganesh and her counsel was good cause for another trial delay; however, the magistrate failed to inquire into the conflict, much less allow Dr. Ganesh to speak about it. Per Ninth Circuit law, a court's rejection of a defendant's invitation to discuss the conflict is reversible error. *Bland*, 20 F.3d at 1476 (citing *Hudson v. Rushen*, 686 F.2d 826, 831 (9th Cir. 1982)). This failure directly contrasted the trial court's duty to "question the attorney or defendant 'privately and in depth" concerning any conflict. *Daniels*, 428 F.3d at 1200 (quoting *United States v. Nguyen*, 262 F.3d 998, 1004 (9th Cir. 2001)).

The magistrate's denial based upon its own failure to permit an inquiry constituted an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' [which] violate[d] the right to the assistance of counsel." *Morris*, 461 U.S. at 11-12. *See also United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998)("If the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant]'s Sixth Amendment right to effective assistance of counsel").

Therefore, the magistrate should have conducted an inquiry into the nature and extent of the conflict between counsel and client prior to reaching a decision to deny Dr. Ganesh's motion to substitute appointed counsel with retained counsel upon the basis of trial delay. The failure to do so violated Dr. Ganesh's Sixth Amendment rights to conflict-free counsel and counsel of her choice.

Dr. Ganesh argued on appeal the magistrate's failure to make adequate inquiry into the nature of the conflict at the hearings on her substitution requests. Although the court of appeals mentioned the magistrate's discussions with counsel and its instructions to Dr. Ganesh to consult with her counsel, the order of affirmation is devoid of any dialogue concerning inquiry into the conflict, and rightly so, as the magistrate had declined to hear any of it. Likewise, the Ninth Circuit makes no mention of the fact this pre-trial substitution motion was actually the second such motion tendered because of Dr. Ganesh's conflict with the same attorney. App. 1 at 8.

The order of affirmance pays even less homage to the magistrate's denial of the pre-sentencing motion for substitution, doing disservice to the constitutional issue by repeating the fallacy of counsels' alleged refusal to commit to the schedule, in direct contradiction of the attorneys' assurances on the record that they would be ready.

Had the Ninth Circuit's review included an adequate inquiry into the conflict which necessitated the repeated requests for substitution in the first place, it would have determined that the trial court erred in denying the motions due to calendaring issues alone. Having failed to conduct this inquiry, the Ninth Circuit renders nugatory this Court's instructions that courts have a duty to look into even the *possibility* of conflicts of interest which may impact a defendant's Sixth Amendment right to counsel. *Wood*, 450 U.S. at 272.

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B.

The Question of What Makes a Trial Court's Conflict Inquiry Constitutionally "Adequate" to Protect Criminal Defendants' Sixth Amendment Rights to Counsel, Has Not Been, But Should Be, Settled By The Court

In reviewing a district court's decision on a motion for substitution of counsel, a court of appeals is to consider, among other things, "the *adequacy* of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client." *Martel*, 565 U.S. at 661-63 (emphasis added).

While this Court has not set forth criteria for determining the adequacy of a conflict inquiry in substitution of counsel proceedings, the circuits generally agree that the Sixth Amendment demands much more than the minimal attention given to Dr. Ganesh's substitution motions.

Courts are obligated to conduct a thorough inquiry into the basis of the defendant's dissatisfaction with counsel. *United States v. Blackledge*, 751 F.3d 188, 194 (4th Cir. 2014). "Even when the trial judge suspects that a defendant's contentions are disingenuous, and motives impure, a thorough and searching inquiry is required." *McMahon v. Fulcomer*, 821 F.2d 934, 942 (3rd Cir. 1987). Perfunctory exchanges do not suffice, *United States v. Senke*, 986 F.3d 300, 321 (3rd Cir. 2021)(concurring in part and dissenting in part). It is important that both counsel and client be heard, and the trial court may not proceed without ensuring any communication issues are first resolved. *Id.* at 311-12.

Courts may not rely solely upon an attorney's competence, as a competent attorney can provide an inadequate defense where there is a breakdown in communication with his client. *Blackledge*, 751 F.3d at 194. *See also United States v. Adelzo-Gonzales*, 268 F.3d 772, 778 (9th Cir 2001)(an inquiry is inadequate which focuses on counsel's competency and ability to provide adequate representation in the future). A total lack of communication is not necessary, rather, courts must examine the extent to which the breakdown prevents the ability to conduct an adequate defense. *United States v. Smith*, 640 F.3d 580, 588 (4th Cir. 2011). The court must determine whether the defendant has a "justification for losing faith in [her] attorney." *United States v. Dunbar*, 718 F.3d 1268, 1277 (10th Cir. 2013).

"Where a conflict appears serious and the existing information available to the court is limited, 'probing and specific questions' indeed may be required," *United States v. Fields*, 483 F.3d 313, 352 (5th Cir. 2007)(quoting Wayne R. LaFave, et al., 3 CRIMINAL PROCEDURE § 11.9(b) (3d ed. 2000)). "[I]n most circumstances, a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." *Adelzo-Gonzalez*, 268 F.3d at 777. "[R]epeated inquiry is preferred." *United States v. Vargas*, 316 F.3d 1163, 1166 (10th Cir. 2003).

> A district court should engage in an inquiry sufficient to explore and understand the defendant's concerns about the inadequacy of counsel. Such an inquiry might involve repeating and, if necessary, rephrasing questions; but the fundamental requirement is that the district court's inquiry uncover the nature of the defendant's concerns.

Id.

The Sixth Circuit has found inquiries to be adequate which involve "multiple lengthy discussions with both [the defendant] and [his attorney] that span many transcript pages regarding their alleged conflicts." *United States v. Vasquez*, 560 F.3d 461, 467 (6th Cir. 2009).

All in all, courts must give sufficient consideration to defendants' doubts about counsel's diligence and may not dismiss the matter in conclusory fashion. *United States v. Volpentesta,* 727 F.3d 666, 673 (7th Cir. 2013). "The inquiry must be adequate to create a sufficient basis for reaching an informed decision," *United States v. Mendez-Sanchez,* 563 F.3d 935, 942 (9th Cir. 2009), with "many questions targeted toward understanding the crux of the disagreement between [the defendant] and [her] attorneys," *id.* at 943.

The court may not ask open-ended questions and place upon the defendant the onus of articulating counsel's inability to provide competent representation. *Adelzo-Gonzales*, 268 F.3d at 777. Where the court's inquiry reveals "clear indications of serious discord and friction," it must make a "meaningful attempt to probe more deeply into the nature" of the problem. *Id.* at 778.

During the pre-trial hearing on Dr. Ganesh's second motion to substitute counsel, the magistrate (1) listened to proposed counsel, (2) denied the motion, (3) instructed Dr. Ganesh to choose between proceeding with conflicted counsel or self-representation, and (4) instructed her to sit down and talk it out with counsel in the hope of avoiding a self-representation hearing. The magistrate assured Dr. Ganesh that counsel was competent, and her best choice for the job. In approving this, the

Ninth Circuit overlooked its own rule that it does not matter that "the court thinks current counsel is doing and adequate job." *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1992), *overruled on other grounds by United States v. Garrett*, 179 F.3d 1143 (9th Cir. 1999).

The Ninth Circuit's order of affirmance failed to address the serious deficiencies within the magistrate's inquiry into the conflict of interest with counsel. The Panel followed *none* of the guidance from the circuit court cases above – including its own. Instead, the court placed the onus on Ganesh to explain "what further inquiry should have been made," App. 1 at 8.

The Panel's decision contrasted its own circuit authority which found a conflict inquiry to be inadequate where a trial court permitted only general statements from the defendant and counsel, and encouraged them to "bury the hatchet, sit down and establish a working relationship." *Moore*, 159 F.3d at 1160.

This Court should define the "adequacy" required of *Gonzalez-Lopez* and set forth criteria by which circuit courts are to review the adequacy of trial court conflict inquiries where the Sixth Amendment rights to counsel is at stake. Dr. Ganesh submits that the combination of requirements within the circuit decisions above would ensure adequate conflict inquiries; however, no individual circuit insists on the totality of these protections. Accordingly, this Court should answer the Ninth Circuit's question: "what further inquiry should have been made" to protect Dr. Ganesh's constitutional rights? App. 1 at 8.

C.

Whether The Sixth Amendment Allows the "Needs of Fairness" Factor On Motions to Substitute Retained Counsel of Choice To Include a Lack of An Adverse Effect Upon the Defendant Has Not Been, But Should Be, Settled By The Court

In denying the pre-sentencing motion to substitute counsel with retained counsel of choice, the magistrate applied the two-factor test within *Gonzalez-Lopez*, 548 U.S. at 152, which includes "balancing the right to counsel of choice against the needs of fairness," *id.* (citing *Wheat*, 486 U.S. at 163-64).

Specifically, the magistrate concluded that it was fair to deny Dr. Ganesh's retained counsel because no adverse effect would disadvantage her in proceeding to sentencing with appointed counsel. Dr. Ganesh submits that the "needs for fairness" language within *Gonzalez-Lopez* is meant to *protect* a defendant's Sixth Amendment right to counsel of choice, and is not intended to provide trial courts a means to deny the right to counsel by conjuring some perceived fairness which might be found in denying the right.

This Court held in *Wheat* that the fairness which circumscribes the right to choose one's own counsel relates to representation by persons not members of the bar, attorneys whom the defendant cannot afford or declines to represent the defendant, or conflicted counsel. *Id.* 486 U.S. at 159. The *Gonzalez-Lopez* Court added to this list counsel who do not qualify under court rules. *Id.*, 548 U.S. at 152.

This interest in "fairness" clearly serves to protect the defendant against unqualified or constitutionally inadequate counsel, and nothing more. *See e.g.,*

United States v. Morrison, 449 U.S. 361, 364 (1981)(fairness in criminal proceedings is concerned with counsel's assistance in the adversarial process).

Had the magistrate found any of the adverse factors of *Wheat* or *Gonzalez-Lopez* to exist, there would presently be no question before the Court; however, the magistrate's finding of "fairness" in the *lack* of any such adverse factors, or for reasons outside of them, is at odds with *Wheat* and *Gonzalez-Lopez.*

The Ninth Circuit's analysis of the pre-sentencing motion does not identify the standard it relied upon and fails to address the "fairness" element of the magistrate's decision altogether. It has therefore left open an important constitutional question as to the "fairness" which is to be considered in a motion for substitution with retained counsel as contemplated by *Wheat* and *Gonzalez-Lopez.* App. 1 at 8.

D.

Whether The Sixth Amendment Permits Trial Courts To Disregard the Unequivocal and Uncontradicted Assurances of Readiness From Retained Counsel When Entertaining Motions to Substitute Counsel Has Not Been, But Should Be, Settled By The Court

In denying the pre-sentencing motion to substitute counsel with retained counsel of choice, the magistrate applied the two-factor test discussed by *Gonzalez-Lopez,* 548 U.S. at 152, including the demands of the calendar factor, *id.* (citing *Morris,* 461 U.S. at 11-12).

Specifically, the magistrate denied Dr. Ganesh's retained counsel because, notwithstanding retained counsels' unequivocal assurance they would be ready to proceed to sentencing on schedule, the magistrate believed additional delays *might* be sought due to its skepticism over counsels' ability to be prepared on time.

The *Morris* Court held that trial courts may deny substitution of counsel in the interests of their calendars; however, they may not deny substitution upon unreasonable and arbitrary insistence for expeditiousness when provided a "justifiable request for delay." *Id.*, 461 U.S. 11-12 (citing *Ungar*, 376 U.S. at 589).

Here, Dr. Ganesh's retained counsel unequivocally informed the magistrate they would be ready on the date calendared for sentencing. Detailing its skepticism and disbelief that counsel could be ready on time, the magistrate denied the motion on the basis that counsel declared they would not be ready. In an analogous situation, the *Morris* Court reflected that, "[i]n the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and 'ready' for trial .... it would have been remarkable had the trial court *not* accepted counsel's assurances." *Id.* at 12 (emphasis added).

A decision based upon speculation about counsel's performance is "unguided by the adversary process," *Penson v. Ohio*, 488 U.S. 75, 87 (1988), and it is inappropriate for a court to speculate over an attorney's motivation when performing its duty, *Burger v. Kemp*, 483 U.S. 776, 785 (1987). The magistrate's conclusion that counsel said they would *not* be ready due to the court's incredulity over their promise that they *would* be ready arbitrarily violated Dr. Ganesh's rights to counsel, *Morris,* 461 U.S. at 11, and avoided Ninth Circuit law which requires retained counsel to be allowed to appear on the eve of trial when counsel asserts their preparedness to proceed, *Lillie*, 989 F.2d at 1056.

The Ninth Circuit's analysis of the pre-sentencing motion for substitution fails to identify the standard relied upon and fails altogether to acknowledge the magistrate's denial of substitution notwithstanding counsel's assurances of being prepared. Glaringly, the Panel fails to address the magistrate's erroneous finding that counsel had declared they would not be ready, coupled with the magistrate's unsupported basis for disbelieving counsels' assurances . App. 1 at 8.

Morris addressed the substitution of an appointed counsel with another appointed counsel, concluding that the arbitrary denials of substitution violated the defendant's Sixth Amendment right to counsel. The Court should address whether *Morris*' "unreasoning and arbitrary" standard likewise applies to trial court substitution denials of appointed counsel with retained counsel, as well as.

Likewise, the Court should address whether a court's decision which contradicts counsel's assertions of preparedness as a means to deny the motion is "unreasonable and arbitrary." Dr. Ganesh's right to counsel of choice was denied by the magistrate's arbitrary "'insistence in the face of a justifiable request for delay.'" *Id.* at 11-12 (quoting *Ungar*, 376 U.S. at 589).

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X. CONCLUSION

For the foregoing reasons, Dr. Ganesh respectfully requests that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Dated this 28th day of October, 2021.

Respectfully submitted,

LISA A. RASMUSSEN
Counsel of Record
THE LAW OFFICES OF KRISTINA WILDEVELD & ASSOCIATES
550 E. Charleston Blvd., Suite A
Las Vegas, Nevada 89104
Tel: (702)222-0007
Fax: (702)222-0001
E-Mail: lisa@veldlaw.com

Counsel for Petitioner