No. 22-464

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

SALEEM HAKIM,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the total deprivation of the Sixth Amendment right to counsel at all pretrial stages can be a structural error.

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INTRODUCTION

Respondent, Mr. Hakim, was unconstitutionally deprived of the assistance of counsel for four months, the *entire* pretrial period until a week before trial—a Sixth Amendment violation the Government concedes. Pet. 14 ("accept[ing]" a constitutional violation "[f]or purposes of further review"). In light of the total "deprivation of [Mr.] Hakim's right to counsel at all pretrial stages of the proceedings against him," the Eleventh Circuit concluded that the constitutional violation was "a structural error." App.28a–29a. That holding is correct, faithfully following decades of this Court's precedent. The holding is also consistent with Eleventh Circuit precedent and the decisions of other circuit courts. And the decision is fact-bound, applicable in only a narrow and rare circumstance.

The Government argues otherwise only by misstating the Eleventh Circuit's holding and advancing a contorted reading that is both facially wrong and artificially overbroad. The appellate court *three times* identified the narrow issue before it as whether the total deprivation of counsel at "*all* stages of the pretrial process" is structural error. App.27a (emphasis added); *see* App.1a, 9a, 28a–29a. But, to create an error and a circuit split, the Government rewrites the Eleventh Circuit's narrow holding into a "broad" and "inflexible" rule—one in which "*any* deprivation of the right to counsel" at *any* "critical pretrial proceedings *automatically* requires reversal." Pet. 8, 10 (emphasis added); *see id.* at 17. That is not what the Eleventh Circuit held and is most certainly not the rule in the Eleventh Circuit. As a result, the

Government's Petition chases ghosts: the question it purports to present is not at issue in this case.

Correctly reading the decision below eliminates all grounds for certiorari. The Government's claimed circuit split disappears. The Eleventh Circuit's decision aligns perfectly with this Court's structural-error precedent. And the issue becomes so fact-bound and one-off that whatever importance it might have vanishes. But even on the Government's incorrect reading of the Eleventh Circuit's decision, this case is not worthy of review and is riddled with vehicle problems. The Government concedes away fundamental issues, and the question presented is not outcome determinative.

Accordingly, this Court should deny certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to … have the Assistance of Counsel for his defence.

STATEMENT

This case is about the unconstitutional deprivation of counsel in *all* the critical pretrial stages of the criminal proceedings against Mr. Hakim.

1. The Sixth Amendment violation originated at Mr. Hakim's initial appearance and arraignment. Dkt. 13 at 3–7. There, after Mr. Hakim expressed a desire to represent himself, the magistrate judge attempted to engage him in the colloquy required by *Faretta v. California*, 422 U.S. 806 (1975). When that failed, the judge administered a "*Faretta*-like

monologue" approved by the Eleventh Circuit for uncooperative defendants. *See United States v. Garey*, 540 F.3d 1253, 1268 (11th Cir. 2008) (en banc). To ensure that any waiver of the constitutional right to counsel is knowing and voluntary, this *Faretta*-like monologue requires the court to inform the defendant of "the challenges he is likely to confront as a pro se litigant" and "the penalties he faces if convicted." *Id.* at 1267.

In administering this monologue, however, the magistrate judge misinformed Mr. Hakim of "the penalties he face[d] if convicted." *Id.* The Government charged Mr. Hakim with three misdemeanor counts of failure to file a tax return (26 U.S.C. § 7203), carrying a maximum sentence of three years. App.18a. But the magistrate judge twice told Mr. Hakim that he faced a maximum sentence of only 12 months. App.3a ("[I]t is a criminal case, a Class A misdemeanor, meaning that it's punishable by a potential term of imprisonment by up to one year."); *id.* ("[T]his is again a Class A misdemeanor, so we're not talking about a felony involving imprisonment beyond one year."); *see* Dkt. 13 at 9, 13.

The Government failed to correct these material misstatements and added a misstatement of its own. It stated that, "[f]or an individual, the maximum fine is $25,000," *id.* at 9, whereas the actual maximum was $75,000 ($25,00 per count, 26 U.S.C. § 7203).

After being misinformed about his possible sentence, Mr. Hakim said he would waive his right to counsel, and the magistrate judge accepted Mr. Hakim's waiver. But the material misstatements rendered Mr. Hakim's waiver unknowing and

involuntary and thus invalid—a point the Government now concedes. App.26a; *see* Pet. 14. The magistrate judge announced that he would enter a plea of not guilty on behalf of uncounseled Mr. Hakim. Dkt. 13 at 24; Dkt. 8.

2. The resulting unconstitutional deprivation of counsel extended through the entire pretrial process.

First, Mr. Hakim was unconstitutionally deprived of counsel for motions practice, which included several motions to dismiss (Dkts. 14, 17, 18) and oppositions to the Government's motions in limine (Dkt. 32). Mr. Hakim "filed and argued [these] motions without a lawyer's assistance." Dkt. 21 at 4 n.2.

Second, the constitutional violation continued to an early pretrial conference, at which those motions were argued and the parties made decisions about trial, including whether to have expert witnesses. Dkt. 20.

Third, Mr. Hakim remained without counsel when the Government tried to engage in plea-bargaining discussions—"a critical phase of litigation for purposes of the Sixth Amendment." *Missouri v. Frye*, 566 U.S. 134, 141 (2012). The Government confirmed that it made a plea offer to Mr. Hakim, but that he did not respond. Dkt. 81 at 12–13. When advised by the district court of the possible benefits of pleading guilty, however, Mr. Hakim stated that he "would like to seek counsel and decide … that I should enter a plea or something," adding that he wished to seek advice from a non-lawyer. *Id.* at 21–22; *see id.* at 10 ("I would like the opportunity to seek counsel of my own choosing."). But the district court denied Mr.

Hakim's request for a continuance to seek that advice. Dkt. 37.

Fourth, the now-conceded constitutional violation continued at another pretrial conference, during which the court made decisions that affected the trial, such as ruling on the Government's motions in limine. *Id.* At this conference, standby counsel explained that Mr. Hakim had "not taken any" assistance and had "basically zero communication" with him. Dkt. 81 at 9–10. The court agreed that Mr. Hakim "does not understand what the trial will be," *id.* at 10, but forged ahead toward trial.

Fifth, for months of discovery and trial preparation, Mr. Hakim was unconstitutionally uncounseled. The Government provided discovery material, but Mr. Hakim "stated that he ha[d] not reviewed it." Dkt. 21 at 29. The court nevertheless certified the case as ready for trial. *Id.*; *see* Dkt. 25. Mr. Hakim did not file a trial brief or proposed jury questions, even though the Government did. *E.g.*, Dkt. 42. And he admitted that he did not have enough time "to mount an effective defense." Dkt. 81 at 21.

Sixth, just days before trial began, the court held a change-of-plea hearing—when Mr. Hakim attempted to plead guilty while deprived of the assistance of counsel. *See* Dkts. 48, 51. In writing, Mr. Hakim notified the court that he would like to plead guilty in order to reduce his sentence under Sentencing Guideline 3E1.1 (acceptance of responsibility). Dkt. 45 at 3. At the change-of-plea hearing, Mr. Hakim confirmed that he had not discussed his change of plea with any counsel, and that his desire to plead guilty was not based on a plea

agreement. Dkt. 82 at 4. But the district court ultimately declined to accept Mr. Hakim's guilty plea based on Mr. Hakim's apparent belief that he would not go to jail if he pleaded guilty. *Id.* at 23–26, 34. After the court's ruling, Mr. Hakim again asked for "the opportunity" to call "two law firms that [he had] been looking at" to provide "counsel of [his] own choosing," but the court refused to postpone trial, which was set to begin two business days later. *Id.* at 37.

3. Mr. Hakim's trial began the next week—with Mr. Hakim still without counsel. Dkt. 52. Following voir dire, Mr. Hakim requested that the public defender, who had been serving as standby counsel, be appointed as his counsel. App.8a; *see* Dkt. 52. The district court granted a one-week continuance so that standby counsel could prepare for trial. It then selected a second jury and held a two-day trial. App.8a–9a. The jury found Mr. Hakim guilty on all three counts, and the district court imposed a sentence of 21 months' imprisonment followed by one year of supervised release. App.9a; Dkt. 95 at 2–3.

4. On appeal, the Eleventh Circuit (Pryor, C.J.) vacated Mr. Hakim's convictions. App.29a.

At the Eleventh Circuit, the parties extensively briefed and argued the Government's sole question presented before that court: "Whether the [trial] court properly determined that defendant's waiver of his right to counsel was voluntary, knowing, and intelligent." Appellee's Br. 1, No. 19-11970 (11th Cir. Dec. 9, 2020). The Eleventh Circuit held that the trial court had erred and that Mr. Hakim had not knowingly and voluntarily waived his right. App.26a.

Accordingly, Mr. Hakim was unconstitutionally deprived of counsel "during the pretrial process." App.1a–2a. This holding is *not* challenged by the Government here. The lack of a knowing-and-voluntary waiver and the existence of a constitutional violation must be assumed.

The Eleventh Circuit then held that, in light of all the motions, discovery, plea-bargain negotiations, and proceedings that had occurred in the pretrial process, the deprivation of Mr. Hakim's right to counsel on the facts presented required vacatur, without any requirement that Mr. Hakim show prejudice. The court explained that this Court's decision in "*White v. Maryland* establishe[d] that a plea hearing is a critical stage, and that '[a court] do[es] not stop to determine whether prejudice resulted' because '[o]nly the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.'" App.28a (quoting 373 U.S. 59, 60 (1963)). It noted that, on the facts of this case, Mr. Hakim was deprived of counsel not just at a plea hearing but also at "all pretrial stages of the proceedings against him," including "his arraignment … at which a plea was entered"; "the period during which the government extended to him 'a plea offer'"; and other hearings at which he attempted to plead guilty. App.27a–29a. The court also cited its own precedent (App.28a), which holds that an invalid waiver of the right to counsel can be structural error when the defendant is left without counsel at trial. *See, e.g.*, *United States v. Stanley*, 739 F.3d 633, 644 (11th Cir. 2014). In short, the court held that "the deprivation of [Mr.] Hakim's right to counsel at all pretrial stages of the proceedings against him

was a structural error" requiring automatic vacatur. App.29a.

Judge Grant dissented on grounds entirely unrelated to the issue presented here. App.30a–43a. She took no position on the structural-error question, but instead addressed an antecedent question that the Government has now conceded—whether Mr. Hakim had preserved his Sixth Amendment claim (and thus whether de novo or plain-error review was required to resolve the constitutional claim).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT WARRANT REVIEW.

The Eleventh Circuit correctly and consistently with all other circuits held that when a defendant is deprived of the right to counsel "at *all* pretrial stages of the proceedings against him"—including "his arraignment … at which a plea was entered," "the period during which the government extended to him 'a plea offer,'" and other hearings at which he attempted to plead guilty—the resulting Sixth Amendment violation can be structural error. App.27a–29a (emphasis added). That narrow, fact-bound holding does not depart from the decisions of any other circuit court and aligns with decades of this Court's precedent, making it unworthy of this Court's review.

Apparently unhappy with that reality, the Government advances an incorrect and unfair reading of the Eleventh Circuit's opinion in an attempt to manufacture error and a split. Ignoring the actual language of the decision, the Government claims that the Eleventh Circuit adopted a "broad" and "inflexible"

rule—that *any* "pretrial deprivation of counsel is structural error," Pet. 10, 17, 23; *see id.* at (I)—and then points to supposed conflict arising from the Government-invented rule. But no conflict can exist, because the purported broad and inflexible rule from which the Government argues is illusory; it is not the court's holding. The Government never grapples, moreover, with the Eleventh Circuit's actual, narrow decision.

A. The Government Misreads the Eleventh Circuit's Holding and Precedent.

At the outset, the Government's Petition is not faithful to the Eleventh Circuit's decision.

1. Contrary to the Government's claim (Pet. 8), the Eleventh Circuit did not hold—and has no general rule—that "a district court's acceptance of an invalid waiver of counsel at a pretrial stage categorically constitutes structural error." Writing for the majority, Chief Judge Pryor repeatedly defined the court's holding narrowly: structural error was compelled by the fact that Mr. Hakim's invalid waiver of counsel lasted for "the entire pretrial phase of the proceedings against him" and encompassed "all pretrial stages of the proceedings," including all critical stages such as the plea-bargaining and plea-hearing stages. App.9a, 27a–29a. The court did not adopt a "broad" and "inflexible" rule that "*any* deprivation of the right to counsel" at *any* "critical pretrial proceedings *automatically* requires reversal." Pet. 8, 10 (emphasis added); *see id.* at 17. Rather, the court held that the deprivation of counsel in this case lasted for "*all* pretrial stages," including all critical stages. App.28a–29a (emphasis added) (citing, *e.g.*, *White*,

373 U.S. at 60 (plea hearing)). And that is exactly how the Eleventh Circuit's decision is being interpreted by third parties. *See* 14 *Mertens Law of Fed. Income Tax'n* § 50:135 (Sept. 2022 update) (explaining the relevant holding from this decision: "Deprivation of the assistance of counsel at all stages of the pretrial process as a result [of] the invalid waiver was a structural error.").

2. Even if the decision below could be read more broadly (and it cannot), any overly broad language would be non-binding dicta that no future court would have to follow. A *holding* is limited to "a point necessarily decided," which depends on the facts. B. Garner et al., *The Law of Judicial Precedent* § 4, at 44 (2016). The facts here were a deprivation of counsel through the entire pretrial process and all of its critical stages—not at just *any* "pretrial stage," Pet. 8. Thus, even if the Eleventh Circuit's decision could be (wrongly) read to apply structural-error analysis to *any* deprivation of counsel at *any* pretrial stage, lower courts and future Eleventh Circuit panels would not be bound by this purported rule because it would be dicta, not compelled by the facts. And a "decision can hold nothing beyond the facts of that case." *Fresh Results, LLC v. ASF Holland, B.V.*, 921 F.3d 1043, 1049 (11th Cir. 2019) (Pryor, C.J.).

For this reason, even if the Government's reading were plausible (and it is not), the Court's review would not be warranted. It is equally plausible to read the decision as narrow and fact-bound. Thus, other courts and the Eleventh Circuit, itself, might interpret the decision below narrowly and fact-bound going forward. Only time, and further percolation, will tell. There is no need for this Court's involvement *now*.

3. In all events, the Eleventh Circuit's larger body of precedent forecloses the Government's broad interpretation and further disproves the need for this Court's involvement.

The Eleventh Circuit's approach to constitutional error is clear. To it, this Court has effectively "dr[iven] home th[e] point" that "harmless error analysis is the rule, not the exception," and that "the general rule [is] that a constitutional error does not automatically require reversal of a conviction." *E.g.*, *United States v. Roy*, 855 F.3d 1133, 1143 (11th Cir. 2017) (en banc). The Eleventh Circuit thus applies harmless error "broadly" and "to all types of constitutional errors," including Sixth Amendment violations. *Id.* It "rarely treat[s] an error as structural." *United States v. Margarita Garcia*, 906 F.3d 1255, 1264 (11th Cir. 2018).

Specifically, the Eleventh Circuit applies the harmless-error rule to "pretrial deprivation[s] of counsel," unless a "fine-grained analysis" of the facts of a particular case compels structural error. *Contra* Pet. 17. The court has applied harmless error at many stages in the pretrial process, such as denial of counsel "at a preliminary hearing." *Hammonds v. Newsome*, 816 F.2d 611, 613 (11th Cir. 1987) (per curiam); *see, e.g.*, *Thomas v. Kemp*, 796 F.2d 1322, 1326–27 (11th Cir. 1986) (relying heavily on *Coleman v. Alabama*, 399 U.S. 1 (1970), cited by the Petition at 12, 13, 14, 16, and 17). Indeed, the Eleventh Circuit uses harmless-error analysis even for pretrial Sixth Amendment violations that occur at a "critical stage." *E.g.*, *Delguidice v. Singletary*, 84 F.3d 1359, 1361–64 (11th Cir. 1996) (citing *Satterwhite v. Texas*, 486 U.S. 249 (1988), cited by the Petition at 10, 12, 13, 14, 16,

17, and 20); *accord United States v. Truley*, No. 21-14352, 2022 WL 16848489, at *3–4 & n.4 (11th Cir. Nov. 10, 2022) (per curiam) (holding, after the decision below, that a constitutional violation at a pretrial hearing to withdraw a guilty plea was subject to harmless-error review). And it eschews any categorical rule that a "fail[ure] to conduct an inquiry under *Faretta*" is always structural error, even at trial itself. *Blanco v. Singletary*, 943 F.2d 1477, 1497 (11th Cir. 1991). *Contra* Pet. 17.

The decision below did not change any of these background rules because it implicated none. Instead, the court engaged in the "fine-grained analysis" (Pet. 17) the Government advocates. And the Eleventh Circuit respected this Court's admonition that "there is an exception or two" to the general, harmless-error rule, *Roy*, 855 F.3d at 1144 (en banc)—for example, where the defendant is deprived of counsel at a pretrial plea hearing, *White*, 373 U.S. at 60; or is denied the right to self-representation under *Faretta*, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); or is entirely deprived of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *see also, e.g.*, *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (denial of counsel on appeal). Indeed, this Court has recognized all sorts of Sixth Amendment violations as structural errors. *See, e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) ("counsel's admission of a client's guilt over the client's express objection"); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–51 (2006) (denial of counsel of choice); *see also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was

either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (collecting cases)); *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (similar).

Thus, contrary to the Government's insistence, the Eleventh Circuit did not, with this decision, create a "categorical" rule that "pretrial deprivation of counsel is structural error." Pet. 23. It recognized a narrow, fact-bound exception to its general application of harmless-error analysis where, as here, there is a complete pretrial deprivation through all critical pretrial stages.

The Eleventh Circuit *could not* have created a categorical rule because, as the Government acknowledged in its en banc petition, doing so would have required it to overrule decades of Eleventh Circuit precedent holding that a pretrial deprivation of the right to counsel is subject to harmless-error review. *See* U.S. En Banc Pet. 14, No. 19-11970 (11th Cir. June 6, 2022) (citing, *e.g.*, *Hammonds*, 816 F.2d at 613); *see also supra* at 11–12. Because the Eleventh Circuit is not prone to silently overrule decades of its precedent, the larger body of Eleventh Circuit precedent is further proof that the Government is overreading the decision below. At the very least, the Eleventh Circuit's strong precedent on harmless error, including in the pretrial context, militates the need for this Court's review, because the earlier decisions will control any later conflicting precedent. *See United States v. Nunez*, 1 F.4th 976, 991 (11th Cir. 2021) (Pryor, C.J.); *see also The Law of Judicial Precedent* § 36, at 303–05.

The general harmless-error rule—including for pretrial Sixth Amendment violations—thus remains alive and well in the Eleventh Circuit. There is no need for this Court "to ensure that structural error continues to be a very limited and highly exceptional category." Pet. 21 (internal quotation marks omitted). It already is.

* * *

The upshot is that this case does not implicate the question presented in the Government's Petition. The Eleventh Circuit did not hold that an erroneous pretrial deprivation of counsel "categorically constitutes structural error." Pet. (I). Its holding and its precedents generally are far different and narrower. To the extent this Court is inclined to take up the Government's question presented, it should await a case that actually presents it.

B. Properly Read, the Decision Below Does Not Split From Any Other Circuit.

Accurately reading the decision below eliminates the Government's asserted split. None of the Government's cited cases held that the deprivation of the right to counsel "at all pretrial stages of the proceedings" was subject to harmless-error review. App.29a.

1. The Government first insists that the "decision below cannot be reconciled with the decision of the Fourth Circuit in *United States v. Owen*, 407 F.3d 222 (2005), *cert. denied*, 546 U.S. 1098 (2006)." Pet. 18. But the two decisions are easily reconciled. In *Owen*, the defendant was deprived of counsel for a discrete stage of the pretrial process. He had counsel for the bulk of the pretrial proceedings; counsel filed pretrial

motions on his behalf; and counsel had months to negotiate a plea bargain and prepare for trial. 407 F.3d at 224, 229. Here, Mr. Hakim was deprived of counsel "at all pretrial stages of the proceedings against him." App.29a. The first violation, in *Owen*, can be subject to the harmless-error rule without sweeping in the second. Indeed, those two rules coexist in the Eleventh Circuit itself, which has applied "harmless error analysis" to discrete denials of counsel, even at "critical stages," as in *Owen* (*see, e.g.*, *Delguidice*, 84 F.3d at 1361–64; *Hammonds*, 816 F.2d at 613), and has applied the structural-error exception to the denial of counsel at *all* pretrial stages as here (App.29a).

Owen's harmless-error analysis is also *dicta*: It arose only after the court held that the defendant had "effectively waived any right to counsel" and thus "cannot now complain of a constitutional violation." 407 F.3d at 226. Under Fourth Circuit precedent, therefore, a future Fourth Circuit panel would be free to disagree with *Owen*'s harmless-error analysis, even if that reasoning is couched as an "alternative holding." *Sam's Club v. NLRB*, 173 F.3d 233, 246 n.13 (4th Cir. 1999).

Given these differences—different-in-kind pretrial deprivations (one discrete and the other complete), and different waivers (one valid and the other not)—it is just not true that "had respondent's claim of error arisen in the Fourth Circuit, it would have been amenable to harmless-error review." Pet. 19.

2. None of the other cases the Government cites toward the end of its Petition, which apply harmless

error in discrete "critical" pretrial stages, creates a split. *See* Pet. 19–20. To the contrary, "[t]he Supreme Court, [the Eleventh Circuit], and other circuits have used harmless error analysis for absence of counsel during pretrial critical stages." *Vines v. United States*, 28 F.3d 1123, 1142 (11th Cir. 1994) (Birch, J., dissenting on separate grounds); *see also People v. Murphy*, 750 N.W.2d 582, 586 (Mich. 2008) (Markman, J., concurring) (collecting cases that "every federal circuit court of appeals" holds that "an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error"). And indeed, the en banc Eleventh Circuit has expressly adopted the Governments' cases' reasoning.

As the Government's string-cite treatment of these cases should suggest, none of them is on point. They stand only for what the Government admits is a "broad[er]" proposition—namely, that "an erroneous pretrial denial of the right to counsel" is not *always* structural error. Pet. 19. But again, that unremarkable rule obtains everywhere, including in the Eleventh Circuit. *See, e.g.*, *Roy*, 855 F.3d at 1188 (en banc) ("counsel's brief absence" even from trial does not constitute structural error); *Hammonds*, 816 F.2d at 613 (pretrial deprivation of counsel at a "critical stage in the proceedings" does not constitute structural error). And because of the different facts of this case, nothing in the decision below changed, or even *could* change, this uniform and general harmless-error rule. *Supra* at 13.

Perhaps the best evidence of the lack of a split is that the en banc Eleventh Circuit expressly adopted one of the Government's supposedly contrary cases—the Eighth Circuit's in *Sweeney v. United States*, 766

F.3d 857 (2014)—calling it "the best reasoned out-of-circuit decision" on the Government's cited harmless-error point. *Roy*, 855 F.3d at 1155 (en banc).

Examining the rest of the Government's string-cited cases more closely only bolsters this conclusion. In many, the court held there was a valid waiver or otherwise not a constitutional violation.* And even when there was a Sixth Amendment violation, in no case did the deprivation of counsel last for "all pretrial stages of the proceedings." App.29a; *see, e.g.*, *United States v. Gutierrez-Arias*, 299 F. App'x 593, 595 (7th Cir. 2008) (counsel absent from only two pretrial hearings focused on how defendant would obtain counsel; everything else happened with counsel); *Ditch v. Grace*, 479 F.3d 249, 255–56 (3d Cir. 2007) (following this Court's well-established precedent—and citing precedent from the Eleventh Circuit—in holding "that the ultimate admission of evidence of an identification made at a pretrial proceeding without counsel is subject to a harmless error standard"); *McClinton v. United States*, 817 A.2d 844, 859 (D.C. 2003) (defendant "was represented by counsel during the pretrial proceedings" and had "functional[] counsel" at all times).

Far from conflicting with the decision in this case, the Government's cases thus actually align with it. Uniformly across the country, courts hold that a *partial* pretrial deprivation of the right to counsel may not be structural error, *see, e.g.*, *Hammonds*, 816 F.2d

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* *See, e.g.*, *Eyman v. Alford*, 448 F.2d 306, 312 (9th Cir. 1969); *Haier v. United States*, 357 F.2d 336, 337 (10th Cir. 1966); *U.S. ex rel. Cooper v. Reincke*, 333 F.2d 608 (2d Cir. 1964); *Underwood v. Bomar*, 335 F.2d 783, 787 (6th Cir. 1964).

at 613, but the *complete* deprivation at all critical pretrial stages may be, App.29a; *accord Roy*, 855 F.3d at 1145 (en banc) (stressing that the structural-error rule applies rarely, and only upon complete deprivation of counsel). The Government's attempt to manufacture a split thus fails.

C. Properly Read, the Decision Below Aligns with this Court's Precedent.

This Court has likewise never held nor even suggested that the complete deprivation of counsel at all critical pretrial stages, including plea hearings and plea bargaining, must be harmless error. To the contrary, this Court's precedent confirms the correctness of the decision below.

1. In the Government's best harmless-error case—*Coleman v. Alabama*, 399 U.S. 1, 8–10 (1970)—the defendants were not deprived of counsel "at all pretrial stages of the proceedings" as here, App.29a. Instead, they were deprived of counsel only at a *pre-indictment* "preliminary hearing," *Coleman*, 399 U.S. at 3, which was "not a required step" in the prosecution; at which no pleas were taken; and during which no substantive rights were at issue. *Id.* at 8–9. And on those facts—a discrete rather than complete denial of counsel before trial, for one rather than all pretrial stages—the Eleventh Circuit also applies "harmless error analysis." *Hammonds*, 816 F.2d at 613. But nothing about those facts extends to the facts here—where the deprivation lasts not just for a single preliminary hearing, but for "all pretrial stages of the proceedings." App.29a; *see* Pet. 10 (arguing for a "case-by-case" analysis).

The Government also relies on a smattering of other cases in which "the absence of counsel" at a discrete part of the pretrial process—such as a "pretrial psychiatric examination"—"was not a structural error" because the only real risk was that *trial evidence* would be "obtained" when the defendant was "outside the presence of counsel." Pet. 12–13 (citing *Satterwhite*, 486 U.S. at 257–58); *see, e.g.*, *Moore v. Illinois*, 434 U.S. 220, 232 (1977); *Milton v. Wainwright*, 407 U.S. 371, 372–73 (1972); *United States v. Wade*, 388 U.S. 218, 219–20, 235, 242 (1967); *Gilbert v. California*, 388 U.S. 263, 273–74 (1967). Again, though, in all of these "trial error" cases, unlike here, the defendant had counsel for the remainder of the pretrial process, with the problem measurable by evidence at trial. And again, the Eleventh Circuit carefully follows this rule, too, which is not at issue here. *See, e.g.*, *Delguidice*, 84 F.3d at 1361–64 (applying harmless-error analysis to admission of psychologist's testimony that was obtained when the defendant was deprived of counsel during a "critical stage" before trial).

This Court has never faced the situation here—where a defendant was deprived of the right to counsel "at all pretrial stages of the proceedings." App.28a–29a. Once the court's holding below is properly characterized, therefore, the claimed conflict with this Court's authority disappears. And to say the least, the decision below does not "contravene[] … this Court's precedents." Pet. 17.

2. This Court's precedents in fact show that the decision below, properly read, is correct. On the facts of this case, when the defendant was deprived of the right to counsel "at all pretrial stages of the

proceedings against him"—including "his arraignment … at which a plea was entered"; "the period during which the government extended to him 'a plea offer'"; and other hearings at which he attempted to plead guilty—the resulting Sixth Amendment violation is structural error. App.27a–29a; *see, e.g.*, *White*, 373 U.S. at 60 (deprivation of the right to counsel at pretrial hearing in which defendant "entered a plea" was structural); *accord Hamilton v. Alabama*, 368 U.S. 52, 54–55 (1961) (similar); *Penson*, 488 U.S. at 88 (denial of counsel on appeal is structural error); *see also infra* at 28–29.

This case is an example of the "class of constitutional error[s]" that "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds," or indeed "whether it proceeds at all." *Gonzalez-Lopez*, 548 U.S. at 148–50 (internal quotation marks and alterations omitted) (collecting cases and listing the "denial of counsel" as such an error). When a defendant lacks counsel's "guiding hand" at all pretrial stages, *Powell v. Alabama*, 287 U.S. 45, 69 (1932), there is no telling the prejudice that could result. *See White*, 373 U.S. at 60. "It is impossible to know what different choices the [appointed] counsel would have made"—different strategies, investigations, plea bargains, and more—"and then to quantify the impact of those different choices on the outcome of the proceedings." *Gonzalez-Lopez*, 548 U.S. at 150. The "myriad aspects of representation," from the earliest pretrial stages on, mean that "the erroneous denial of counsel" for all pretrial proceedings "bears directly on the framework within which the trial proceeds—or indeed on

whether it proceeds at all." *Id.* (citation and internal quotation marks omitted).

This conclusion is particularly true for plea bargains. For better or worse, "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Frye*, 566 U.S. at 143. When a defendant is entirely deprived of the right to counsel for all pretrial proceedings, as here, that "will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." *Gonzalez-Lopez*, 548 U.S. at 150. "Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id.* That rule thus does not apply.

The unconstitutional deprivation of counsel at all pretrial stages also fits not just one, but all "three broad rationales" for structural error. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

One, erroneously depriving a defendant of counsel for all pretrial stages "always results in fundamental unfairness." *Id.* If the Government could deny counsel through all those stages, as here, and simply spring counsel on a defendant as voir dire begins, the "well settled" rule that the Sixth Amendment applies

before trial would have little meaning, and the resulting trial could not be fair. *Frye*, 566 U.S. at 140; *see Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972).

Two, while this unfairness should be easy to see, the practical "effects of the error are simply too hard to measure." *Weaver*, 137 S. Ct. at 1908. The inquiry would necessarily be speculative, involving impossible-to-answer questions such as whether counsel would have negotiated a plea, how effective counsel would have been in doing so, whether a counseled defendant would have taken it, and other questions unrelated to plea bargaining, such as how a counseled defendant might have prepared differently for trial. *See Gonzalez-Lopez*, 548 U.S. at 150.

Three, the right at issue is not solely "designed to protect the defendant from erroneous conviction but instead [also] protects some other interest." *Weaver*, 137 S. Ct. at 1908. The specific right at issue here—relating to the "right to conduct [one's] own defense" but being misinformed about the risks, *id.*—ensures that the defendant may properly exercise his self-representation right. *See* App.28a. And it protects the same kind of interest as the Sixth Amendment right to counsel-of-choice—"not that a trial be fair, but that a particular guarantee of fairness be provided," here, that the accused have a reasonable opportunity to consult with counsel including to determine whether to go to trial at all. *Gonzalez-Lopez*, 548 U.S. at 146; *see id.* at 150.

The Government asserts otherwise (Pet. 16) only because it defines the "right" at issue too broadly—as the same as "*Coleman*, *Satterwhite*, and the other[] [cases]" in which "the evil caused by a Sixth

Amendment violation *is limited to the erroneous admission of particular evidence at trial*." *Satterwhite*, 486 U.S. at 257 (emphasis added); *accord Hammonds*, 816 F.2d at 613. The evil here had nothing to do with any "trial error." It was structural.

The Government also insists that a defendant unfairly deprived of counsel all the way to trial can still "receive[] an undisputedly fair and constitutionally sound trial while represented by counsel." Pet. 16. But "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Frye*, 566 U.S. at 143–44. The Sixth Amendment guarantees not a fair trial generally, but that "a particular guarantee of fairness be provided"—starting in the pretrial process. *Gonzalez-Lopez*, 548 U.S. at 146.

D. Properly Read, the Decision Below Is Not Sufficiently Important To Justify Review.

Finally, once the Eleventh Circuit's holding is properly characterized, the issue presented is very narrow and not important enough to warrant review.

The decision below will not spawn the negative consequences the Government asserts. The Government claims that the Eleventh Circuit's decision "can lead to unjust windfalls and senseless results." Pet. 21. But the Government's argument begs the question: if structural error applies, reversal is not unjust; it is compelled by this Court's precedents and the Constitution.

In any event, the Eleventh Circuit's holding in depends on a constitutional violation that will almost

never, if ever, recur—it is like "a rare plant that blooms every decade or so." *McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting). It took a "freakish confluence of factors" for the violation to arise in this case. *Id.* at 1512. Mr. Hakim had to request to represent himself in his unique way. The judge then had to affirmatively (and repeatedly) misstate the maximum punishment so as to give rise to what the Government concedes—for purposes of this case at this Court only—was an involuntary and unknowing waiver of counsel. Pet. 21. The Government also had to fail to correct the trial court's error. And then the resulting constitutional violation had to last for *all* pretrial stages, including plea hearings and plea bargaining, but not all of trial (where all would agree the error would be structural).

Changing any one of these steps could have changed the outcome. And they are all easy to change. Take the root of this constitutional violation—the judge's inaccurate statement about the punishment Mr. Hakim faced. Fixing that is as easy as reading from a sheet of paper. The Eleventh Circuit has established, for use with uncooperative defendants, a "*Faretta*-like monologue" under which a district court need only inform the defendant of "the challenges he is likely to confront as a pro se litigant" and "the penalties he faces if convicted." *Garey*, 540 F.3d at 1267–68. The Government has no response; a script can eliminate the constitutional violation here—and with it any "unjust windfalls and senseless results." Pet. 21.

Nor, for similar reasons, does this case raise any concerns that "obstreperous or contumacious defendants" might "muddy the record such that a

decision either way on a request to waive counsel could plausibly be attacked on appeal without having to consider prejudice." *Id.* at 22–23. That concern speaks directly to a merits question not presented in this case: whether a valid waiver was made at all. On the issue of whether a waiver was knowing, the Eleventh Circuit has again developed the unchallenged, easily followed protocol, which the court here failed to follow and which solves for the Government's fear. The issue of structural error applies to uncooperative and cooperative defendants alike, and this Court should not grant review to address indirectly an issue concerning how to identify constitutional violations when the Government has declined to press any such issue.

II. EVEN THE GOVERNMENT'S MISFRAMED QUESTION PRESENTED DOES NOT WARRANT REVIEW.

While the question presented in the Government's Petition is not implicated here, even if it were, it would not warrant this Court's review for five reasons.

First, at most, the Government has identified an intra-circuit conflict that the Eleventh Circuit should resolve. The Eleventh Circuit has definitively, for decades, held that denials of the right to counsel for discrete pretrial stages, even if "critical," are subject to harmless-error review. *Supra* at 11–14; *see, e.g.*, *Hammonds*, 816 F.2d at 613 (following *Coleman*); *Delguidice*, 84 F.3d at 1361–64 (following *Satterwhite*); *see also Vines*, 28 F.3d at 1142 (Birch, J., dissenting) (collecting Eleventh Circuit cases holding that harmless error can apply to the "absence of counsel during pretrial critical stages"). If the Government

were correct that the panel in this case deviated from that rule, the panel would have misapplied the Eleventh Circuit's longstanding and binding precedent—and the Government would be asking this Court to correct a one-off, intra-circuit error. *Contra* S. Ct. R. 10; S. Shapiro et al., *Supreme Court Practice* §§ 4.17, 5.12(C)(3) (11th ed. 2019).

Second, this case is a bad vehicle because the Government's concessions would interfere with this Court's review of the Government's question presented. The Government concedes that plain-error review does not apply and that there was a Sixth Amendment violation, which were the two primary contentions below. Thus, the Court has no ability to frame (or question) the constitutional violation or to consider the issue raised in Judge Grant's dissent (App.30a–43a) regarding plain-error review. The Government's concessions would fundamentally limit the Court's analysis and preclude the Court from considering issues that could obviate the question presented.

This vehicle issue is problematic because "the distinctive character of th[e] constitutional violation" would be difficult to define in light of the Government's concession. *See Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., concurring in part and dissenting in part). And "the ability to identify readily the scope of a constitutional error … is essential before a court can properly invoke a harmless error analysis." *U.S. ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017 (7th Cir. 1988). For example, the Court would have to determine whether structural or harmless error applied without considering whether the district court's failure to

inform Mr. Hakim of the maximum sentence established the Sixth Amendment violation, or whether the violation turned on an affirmative misstatement of the penalty. App.18a. It would have no opportunity to define which pretrial stages were "critical" or to determine whether "*Faretta* Error" requires special consideration. *See* Pet. 22 (acknowledging constitutional violations related to *Faretta* have been held structural in some contexts); *see also* App.28a (citing cases involving invalid waivers in the *Faretta* context). These aspects of the constitutional violation could be relevant to the Court's analysis, but the Government's concessions put them out of the Court's reach.

Third, whatever the question presented, it is not a frequently recurring one. The Government's key cases are over 50 years old. *See* Pet. 10–12 (surveying, *e.g.*, *Hamilton* (1961), *White* (1963), and *Coleman* (1970)). But the Government claims that a "split" first arose with this case, in 2022. Courts have for decades performed the "fine-grained analysis" the Government desires, Pet. 17, and there has not been a conflict of authority.

Fourth, the Court's answer to the Government's question presented would not be outcome determinative. This Court could hold that "a defendant's erroneous pretrial self-representation [does *not*] categorically constitute[] structural error," Pet. (I), and Mr. Hakim could still prevail. Erroneous pretrial denial of counsel might not *categorically* constitute structural error, as the Government argues. But it could constitute structural error *on these facts*—where Mr. Hakim was deprived of the "right to counsel at *all* pretrial stages of the proceedings

against him," including during plea bargaining and hearings at which pleas were taken. Pet. 28a–29a (emphasis added); *see supra* at 19–23.

In addition, even if harmless-error analysis applied, Mr. Hakim could still demonstrate prejudice; he raised prejudice below, but the Eleventh Circuit did not resolve the issue. *See* Appellant's Br. 48–52, No. 19-11970 (11th Cir. Oct. 9, 2020). For example, counsel could have negotiated and obtained a favorable plea agreement that would have been accepted by Mr. Hakim; a plea offer was even made, but uncounseled Mr. Hakim did not respond. *See* Dkt. 47 at 12:25–13:2; Dkt. 82 at 4:1–5, 4:24–25. In addition, without counsel, Mr. Hakim said he did not contest the facts against him, Dkt. 82 at 35:2–8—a concession that diminished the likelihood of further favorable plea offers and tied appointed counsel's hands in seeking a plea agreement. And, by the time counsel was appointed, the Government had already expended considerable resources, making favorable plea negotiations unlikely.

Finally, to the extent the Eleventh Circuit held that denial of counsel at critical pretrial stages in which a plea is taken is structural error, its holding would be correct. When a defendant is deprived of the right to counsel during a critical pretrial stage in which he "entered a plea," courts "do not stop to determine whether prejudice resulted," even when the defendant later has counsel. *White*, 373 U.S. at 60. That is what this Court held in *Hamilton*, 368 U.S. at 54–55, and made clear again in *White* after some lower courts had tried to confine *Hamilton* to cases in which uncounseled pleas result in "[a]vailable defenses" being "irretrievably lost"—the

Government's argument here (Pet. 11). *See White*, 373 U.S. at 60 (applying structural error even though defenses were not "irretrievably lost," *White v. State*, 177 A.2d 877, 881 (Md. 1962)). This Court has never overruled *White*. Nor does the Government ask the Court to do so in this case. As a result, the Eleventh Circuit's decision was correct even if, as the Government urges, this Court focuses only on the individual pretrial stages in which Mr. Hakim was deprived counsel. App.28a–29a.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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Respectfully submitted,

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