No. 22-464

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SALEEM HAKIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statute, and rule:

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Respondent makes little attempt to defend the court of appeals' actual holding in this case: that denial of counsel at *any* critical pretrial stage is structural error no matter whether the defendant has irretrievably lost any rights or defenses. Instead, almost the entire brief in opposition is devoted to recharacterizing the court's holding as merely "recogniz[ing] 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." Br. in Opp. 13; see *id.* at 9-25. That recharacterization is inaccurate. And even if it were accurate, the case would still warrant this Court's review.

A. The Court Of Appeals Held That Error At Any Pretrial Stage Is Structural Error

Nowhere did the court of appeals acknowledge a "general application of harmless-error analysis" or an-

nounce a "narrow, fact-bound exception" applicable only to the denial of counsel during every critical stage of the pretrial proceeding. Br. in Opp. 13. To the contrary, the court made clear that such an error at a single critical stage requires reversal.

1. The court of appeals began its three-paragraph structural-error section by explaining that "[b]ecause [respondent's] purported waiver of his Sixth Amendment right was invalid, we must decide whether [respondent] was deprived of 'the assistance of counsel during *any* critical stage of the criminal justice process.'" Pet. App. 27a (emphasis added; brackets and citation omitted). The court then emphasized that the right "applies to *certain steps* before trial," and that "[c]ritical stages *include* arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Ibid.* (emphases added; citations omitted).

The court of appeals' analysis in the next paragraph accordingly focused only on a subset of the proceedings, viewing a denial of counsel at any of the identified critical stages to be independently sufficient to justify reversal. Although the court stated that respondent was denied the right to counsel "at all stages of the pretrial process," it did so simply to establish that the denial "*included* his arraignment before the magistrate judge at which a plea was entered in his behalf; it *included* the period during which the government extended to him 'a plea offer'; and it *included* another hearing at which he attempted 'to enter a change of plea' based on a decision at which he arrived 'on his own,' without help from his standby counsel." Pet. App. 27a-28a (emphases added; brackets omitted). The court emphasized that "*both* the initial arraignment and the hearing at which [respond-

ent] attempted (without success) to plead guilty" were critical because each had resulted in uncounseled pleas. *Id.* at 28a (emphasis added).

In the final paragraph, the court of appeals declared that "[t]he constitutional error was structural." Pet. App. 28a. The entirety of the support for that conclusion (sans citations) was as follows:

> *White v. Maryland* establishes both that a plea hearing is a critical stage, and that "we do not stop to determine whether prejudice resulted" because "only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." *And our precedents hold that "if the Government cannot meet its burden to prove a valid waiver, the defendant need not show prejudice to obtain a reversal."* [Citations.] It follows that the deprivation of [respondent's] right to counsel at all pretrial stages of the proceedings against him was a structural error. "The fact that the evidence against [respondent] was overwhelming plays no part in the analysis, because the denial of a right to counsel cannot be harmless error."

Id. at 28a-29a (emphasis added; brackets and citations omitted). Just like in the preceding paragraph, the court's stated view that counsel was denied "at all pretrial stages" was relevant only because it meant that at least one critical stage—here, at least one plea-entry stage—was "included," *id.* at 27a.

To the extent that any doubt remained, the three parenthetical quotations included in the citations attached to the italicized sentence eliminates it:

- "Because a trial court's acceptance of an invalid waiver of the Sixth Amendment right to counsel

is not subject to harmless error analysis, we do not inquire into whether a different result would have obtained had Appellant been represented by counsel at trial." Pet. App. 28a (citation omitted).

- "The importance of ensuring that a waiver is made knowingly, intelligently, and voluntarily is underscored by the fact that a violation of the right to counsel is not subject to harmless error analysis." *Ibid.* (brackets and citation omitted).
- "The nature of the right to defend pro se renders the traditional harmless error doctrine peculiarly inapposite." *Ibid.* (citation omitted).

Those quotations make clear that the court deemed the deprivation of counsel during any critical pretrial stage to be structural error, irrespective of whether any rights or defenses were irretrievably lost.

2. Respondent's own citations of Eleventh Circuit precedent (Br. in Opp. 11-12) do not support his cramped reading of the decision below. Most of the cited cases involve a claim of trial, not pretrial, error. See *United States* v. *Margarita Garcia*, 906 F.3d 1255, 1260 (2018), cert. denied, 139 S. Ct. 2027 (2019); *United States* v. *Roy*, 855 F.3d 1133, 1135 (2017) (en banc), cert. denied, 138 S. Ct. 1279 (2018); *Delguidice* v. *Singletary*, 84 F.3d 1359, 1361-1364 (1996) (per curiam); *Blanco* v. *Singletary*, 943 F.2d 1477, 1497 (1991), cert. denied, 504 U.S. 943, and 504 U.S. 946 (1992). Another involves not the deprivation of counsel, but the defendant's own absence while his attorney argued a motion. *United States* v. *Truley*, No. 21-14352, 2022 WL 16848489, at *3-*4 & n.4 (Nov. 10, 2022) (per curiam).

The remaining two are state habeas cases involving claims that counsel was denied during a preliminary

hearing at which trial witnesses testified. See *Hammonds* v. *Newsome*, 816 F.2d 611, 613 (11th Cir. 1987) (per curiam); *Thomas* v. *Kemp*, 796 F.2d 1322, 1327 (11th Cir.), cert. denied, 479 U.S. 996 (1986). The government identified them in seeking rehearing en banc, see U.S. C.A. En Banc Pet. i, 14, but the full court of appeals apparently did not view those collateral-review decisions to be inconsistent with the panel's focus on an arraignment and a change-of-plea hearing as independently sufficient bases for finding structural error on direct appeal. Indeed, in federal court, a defendant charged by indictment or information, as respondent was, would generally have no right to a preliminary hearing at all. See 18 U.S.C. 3060(e); Fed. R. Crim. P. 5.1(a)(2)-(4); see also Information 1-2.

3. Finally, the holding below cannot be cabined to situations in which erroneous self-representation persists throughout the entire pretrial process, because this case itself does not present that fact pattern. As the court of appeals observed (Pet. App. 8a), standby counsel was activated a week before the jury was selected. That was enough time for counsel, already familiar with the case, to file motions—and counsel in fact did file a motion in limine on respondent's behalf. See D. Ct. Doc. 58 (Dec. 7, 2018). The court thus could not have adopted an all-pretrial-stages rule here.

B. The Lower Court's Rule Of Automatic Reversal Is An Erroneous Outlier

Respondent does not seriously dispute that an "any pretrial stage" rule of structural error constitutes an erroneous outlier from decisions in other circuits. And even if respondent could succeed in recharacterizing the court of appeals' decision as having adopted an "all

pretrial stages" rule, such a rule would be unsound and unprecedented.

1. An all-pretrial-stages rule is incorrect

An all-pretrial-stages rule would itself conflict with this Court's precedents. Respondent does not dispute that the Court's "general rule" of reversing based on constitutional error only when it has prejudiced the defendant, *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991), applies to claims alleging a deprivation of counsel in violation of the Sixth Amendment, *e.g.*, *Satterwhite* v. *Texas*, 486 U.S. 249, 257-258 (1988). See Pet. 8-14; Br. in Opp. 18-23. But respondent would fashion a new exception to that rule that would deem the erroneous "deprivation of counsel at all critical pretrial stages" to be structural error. Br. in Opp. 18. Such an exception would be unfounded.

a. As the government has explained (Pet. 10-14), the Court has found the deprivation of counsel, including the erroneous grant of self-representation, at a critical pretrial stage to be structural error only where rights or defenses are irretrievably lost at that stage. See, *e.g.*, *Satterwhite*, 486 U.S. at 256 (rejecting structural error and distinguishing cases in which "defenses not asserted were irretrievably lost"). Respondent provides no sound basis to conclude that this Court's holdings would have been different had the defendants been nonprejudicially denied counsel at multiple pretrial stages. The inquiry turns not on the number of stages, but on what transpired at each stage. Multiple stages at which no rights or defenses are irretrievably lost provide no greater support for a categorical structural-error rule than one such stage does.

Here, respondent does not identify any rights or defenses that he irretrievably lost while representing him-

self. The only motions in limine that were granted during that time, see Br. in Opp. 4, were pro forma ones on matters such as allowing summary witness testimony, demonstrative or visual aids, and the like. See D. Ct. Doc. 38, at 2-3 (Nov. 19, 2018); D. Ct. Doc. 31, at 2-14 (Oct. 23, 2018). The government's two more substantive motions, to limit the introduction of tax-defier material and to bar any narrative testimony by respondent, were denied. See *ibid.* And respondent's counsel, once taken off standby status, was able to engage in motions practice of his own. See D. Ct. Doc. 58.

Respondent also repeatedly emphasizes plea bargains, suggesting that the erroneous grant of self-representation "for all pretrial proceedings" could "'affect whether and on what terms the defendant'" strikes a plea deal. Br. in Opp. 21 (citation omitted); see *id.* at 4-5, 9, 18, 21. But in *Missouri* v. *Frye*, 566 U.S. 134 (2012), this Court declined to "define the duties of defense counsel" with respect to plea bargaining, instead holding only that "counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable." *Id.* at 145. Here, respondent does not allege that any formal offers were made that he did not receive.

b. The petition explains (Pet. 15-16) that none of the "three broad rationales" for structural error, *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017)—an interest other than preventing erroneous conviction, an impossibility of assessing prejudice, and an inherent effect on the fairness of a conviction—applies to an erroneous grant of pretrial self-representation where no rights or defenses are irretrievably lost. Respondent's contrary arguments (Br. in Opp. 21-22), including with respect to

cases in which a defendant is erroneously permitted to represent himself at "all pretrial stages," lack merit.

As to the first rationale, respondent attempts to categorize this case as one involving "the 'right to conduct one's own defense.'" Br. in Opp. 22 (brackets and citation omitted). But the actual error was erroneously *permitting* respondent to conduct his own defense, see Pet. App. 16a-26a, which implicates only the interest in the fairness of the ultimate outcome, see, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1, 7 (1970).

As to the second rationale, respondent suggests (Br. in Opp. 22) that it is impossible to know whether or how "counsel would have negotiated a plea" or "how a counseled defendant might have prepared differently." But respondent has failed to show a right to either counseled negotiation of a plea, see p. 7, *supra*, or more time for pretrial preparation than his standby counsel requested and received. And given that, had respondent been counseled, any ineffective-assistance claim (including with respect to plea agreements) would itself be subject to prejudice analysis, *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984), it would be particularly anomalous to elide that inquiry here.

As to the third rationale, respondent errs in contending that "depriving a defendant of counsel for all pretrial stages 'always results in fundamental unfairness'" because "the resulting trial could not be fair." Br. in Opp. 21-22 (citation omitted). Again, respondent was represented by former standby counsel throughout trial and for a week before trial as well, and has not identified anything about the trial that was "fundamentally" unfair. At least where the defendant has not irretrievably lost any rights or defenses, the pretrial denial of counsel

cannot be said to "always" result in fundamental unfairness at trial.

c. Respondent's all-pretrial-stages rule also would not be administrable. If the period of counseled representation before the trial in this case—which included motions practice—does not suffice to remove the structural-error label, it is unclear where any logically coherent line could be drawn. Respondent's rule would invite needless and abstruse litigation over the meaning of "all" instead of focusing attention on what this Court has said is relevant: whether the defendant irretrievably lost any rights or defenses. Perhaps for that reason, no court has adopted the rule respondent proposes. And if the court of appeals in this case actually had adopted that rule (as respondent mistakenly contends), it would only underscore the need for this Court's review.

2. The court of appeals' decision is at odds with decisions of other appellate courts

As the petition makes clear (Pet. 17-20), the decision below is at odds with decisions of other appellate courts, including *United States* v. *Owen*, 407 F.3d 222 (4th Cir. 2005), cert. denied, 546 U.S. 1098 (2006), and *McClinton* v. *United States*, 817 A.2d 844 (D.C. 2003), cert. denied, 540 U.S. 1185 (2004).

Respondent attempts (Br. in Opp. 14-15) to distinguish *Owen* on the ground that the defendant there "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." But *Owen* expressly stated that an unconstitutional pretrial denial of counsel is "not 'structural error' and is subject to harmless-error analysis" when, as in that case, a defendant "merely enter[s] a plea of not

guilty and assert[s] his right to a jury trial" without "irrevocably waiv[ing] any defenses or mak[ing] any irreversible admissions of guilt." 407 F.3d at 227. The decision below, in contrast, deemed erroneous self-representation at a proceeding involving the entry of such a plea to be structural error. See Pet. App. 27a-28a.

As to *McClinton*, respondent states that it did not involve "the deprivation of counsel * * * for 'all pretrial stages'" and characterizes it as a case in which the defendant "had 'functional counsel' at all times." Br. in Opp. 17 (brackets and citations omitted). But the defendant there was erroneously granted self-representation *during* trial, and the "functional counsel" the court referred to was his standby counsel during that period. This is an *a fortiori* case, given that the erroneous grant of self-representation—likewise with standby counsel—occurred before, not during, trial.

C. This Court's Review Is Warranted

As the petition demonstrates (Pet. 20-23), the question presented is important and recurring; this Court often grants review to address expansions of the structural-error rule; and the concerns are amplified in cases, like this one, involving the push-and-pull of the reciprocal constitutional rights to counsel and of self-representation. Respondent offers no sound reason why this Court should decline review.

1. Respondent claims that the constitutional violation in this case resulted from a "'freakish confluence of factors'" and "will almost never, if ever recur." Br. in Opp. 23-24 (citation omitted); see *id.* at 27. But even irrespective of the broader implications of the rationale of the decision below, the error here—resulting from the magistrate judge's inadvertent use of the singular

rather than the plural, see 8/1/18 Tr. 8-9—reflects the sort of imprecision in speech that is bound to occur with some frequency, given the sheer number of criminal proceedings that district and magistrate judges oversee every day.

Respondent's suggestion (Br. in Opp. 24) that judges can avoid such errors by woodenly "reading from a sheet of paper" is unrealistic and unsound. It may be difficult or impossible to stick to the script when an uncooperative defendant repeatedly makes nonsensical assertions, as is common in "sovereign citizen" cases like this one. And respondent's stick-to-the-script approach would discourage judges from taking account of the particular defendants before them and attempting to explain matters in a personalized way. Nor does respondent have any solution for the significant and needless practical problems that would result (see Pet. 22-23) from finding structural error in both the erroneous denial and (as the decision below holds) the erroneous grant of self-representation.

2. Respondent suggests (Br. in Opp. 26) that this case is an unsuitable vehicle for further review because the government is not pressing the arguments that there was no constitutional error to begin with and that even if there were, plain-error (rather than harmless-error) review applies. But the elimination of those fact-bound issues from the case makes this a cleaner, and thus better, vehicle for further review.

Contrary to respondent's suggestion (Br. in Opp. 26-27), the nature of the uncontested error is clear: the improper grant of self-representation during a critical stage (or even multiple critical stages) of the pretrial process. This Court's case-specific approach to such commonplace errors, under which reviewing courts look

to whether the defendant irretrievably lost any rights or defenses, has a solid legal basis, a longstanding pedigree, and the general adherence of the lower courts. The Court should grant review and harmonize that analytically sound and practical approach across all of the federal circuits.

Respectfully submitted.

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