

23-6283
No.

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
SUPREME COURT OF THE UNITED STATES

STACY ANTHONY MITCHELL,

PETITIONER,

v.

Supreme Court, U.S.
RECEIVED

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STATE OF ARKANSAS

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

This is to certify that I have had a copy of the Petitioner's Application to Proceed In Forma Pauperis on this date, December 12, 2023, served via personal service on counsel for Respondent at the following address:

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Dated: December 12, 2023

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

v.

CASE NO. 04CR-19-368

STACY MITCHELL

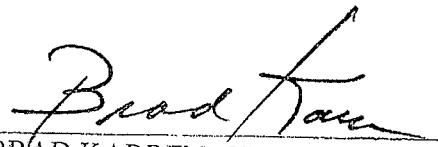
DEFENDANT

ORDER DECLARING DEFENDANT INDIGENT FOR PURPOSES OF APPEAL AND
APPOINTING COUNSEL

ON THIS DAY Defendant came before this Court, by and through his attorneys, the James Law Firm, to be heard on the Motion to Declare Defendant Indigent for Purposes of Appeal and for the James Law Firm to be Appointed. Upon a finding of good cause, this Court makes the following order:

1. Defendant Stacy Mitchell is declared indigent for the purposes of appeal in this matter, and the James Law Firm is hereby appointed to represent Defendant on appeal.

IT IS SO ORDERED.



BRAD KARREN, CIRCUIT JUDGE

6-21-21

DATE

Approved by:

/s/ Alex A Morphis
WILLIAM O. "BILL" JAMES, JR. (94108)
ALEX A. MORPHIS (2019116)

Respectfully submitted,

/s/ William O. "Bill" James, Jr.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a trial court's denial of an indigent criminal defendant's choice of privately retained counsel, who is ready, willing, and able to proceed to trial without delay, violate the Sixth Amendment's guarantee of the right to counsel of one's choice?

STATEMENT OF RELATED PROCEEDINGS

Benton County Circuit Court, Arkansas:

State v. Mitchell, No. 04CR-19-368 (Jun. 7, 2021)
(Conviction and sentence)

Court of Appeals of Arkansas, Division One:

Mitchell v. State, CR-22-21 (Oct. 26, 2022)
(Affirming judgment)
Mitchell v. State, CR-22-21 (Dec. 7, 2022)
(Rehearing denied)

The Supreme Court of Arkansas:

Mitchell v. State, No. CR-22-21 (Jun. 8, 2023)
(Affirming judgment of the Circuit court; Court of Appeals Opinion vacated)
Mitchell v. State, No. CR-22-21 (Sep. 14, 2023)
(Rehearing denied)

TABLE OF CONTENTS

QUESTION PRESENTED	i
STATEMENT OF RELATED PROCEEDINGS	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
I. PETITION FOR A WRIT OF CERTIORARI	1
II. OPINIONS BELOW	1
III. JURISDICTION.....	2
IV. CONSTITUTIONAL PROVISIONS INVOLVED	
.....	2
V. STATEMENT OF THE CASE.....	3
A. Introduction.....	3
B. The April 15 Hearing	4
C. The May 4 Hearing	6
D. The May 10 Hearing	7
E. The Trial and Direct Appeal.....	8
VI. REASONS FOR GRANTING THE WRIT	8
A. To avoid erroneous deprivations of the right to the counsel of one's choice, the Court should clarify that an indigent defendant who manages to retain private counsel, has a Sixth Amendment right to choice-of-counsel, notwithstanding his or her indigency.	8
VII. CONCLUSION AND PRAYER FOR RELIEF .	11

TABLE OF AUTHORITIES

CASES

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991)-----	10
<i>Caplin & Drysdale, Chartered, v. United States</i> 491 U.S. 617, 624-625 (1989)-----	3, 8, 9
<i>Mitchell v. State</i> , 2022 Ark. App. 424, 653 S.W.3d 550-----	1
<i>Mitchell v. State</i> , 2023 Ark. 101, 668 S.W.3d 483 -----	2, 7, 8, 9
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 148 (2006)-----	3, 8, 9, 10
<i>Wheat v. United States</i> , 486 U.S. 153, 159 (1988) -----	3, 8

STATUTES

28 U.S.C. § 1257(a) -----	2
---------------------------	---

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND XI-----	2, 3, 7, 8, 10
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MISCELLANEOUS

DIDI SALLINGS, EXECUTIVE DIRECTOR, ARKANSAS PUBLIC DEFENDER COMMISSION, AGENCY COMMENTARY (2013)-----	10
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RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI

I. PETITION FOR A WRIT OF CERTIORARI

The petitioner, Stacy Mitchell, an inmate currently incarcerated at the Pine Bluff Unit in Pine Bluff, Arkansas, respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

II. OPINIONS BELOW

The decision by the Arkansas Court of Appeals denying Mr. Mitchell's direct appeal is reported as follows: *Mitchell v. State*, 2022 Ark. App. 424, 653 S.W.3d 550. The Arkansas Court of Appeals affirmed on October 26, 2022, and it denied Mitchell's petition for rehearing on December 7, 2022. App. A18.

The Arkansas Supreme Court granted Mitchell's petition for review on January 26, 2023. The Arkansas Supreme Court affirmed on June 8, 2023, and its decision is reported as follows: *Mitchell v. State*, 2023 Ark. 101, 668 S.W.3d 483. The Arkansas Supreme Court denied Mitchell's petition on September 14, 2023.

III. JURISDICTION

The Supreme Court of Arkansas denied Mitchell's petition for rehearing on September 13, 2023. App. A32. This Court has jurisdiction under 28 U.S.C. § 1257(a).

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"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."

V. STATEMENT OF THE CASE

A. Introduction

Twenty-five years ago, the Court clarified that “a [criminal] defendant may not insist on representation by an attorney he cannot afford. . .” *Wheat v. United States*, 486 U.S. 153, 159 (1988). As time has passed, the Court has continued to hold that “the Sixth Amendment guarantees a defendant the right to be represented by [a]. . .qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.” *Caplin & Drysdale, Chartered, v. United States*, 491 U.S. 617, 624-625 (1989); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (“[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.”) (emphasis added).

Stacy Mitchell was, and remains, indigent. As the case below developed, however, Mitchell realized his appointed counsel was “not the attorney for [him].” App. A67. Instead of requesting the trial court to appoint new counsel, Mitchell worked diligently to retain a private attorney. By the time trial was about two months away, he hired William “Bill” James and Alex Morphis, both of the James Law Firm in Little Rock, Arkansas.

Mitchell’s private counsel entered their appearances, filed several pretrial motions, including a motion for the substitution of counsel, and informed the trial court that they were prepared to proceed without delay. App. A34. Nevertheless, the trial court summarily and arbitrarily denied Mitchell’s motion to substitute counsel, thereby forcing the public defender to remain on the case. When Mitchell attempted to explain why he preferred private counsel, the trial court threatened to revoke his pretrial release and incarcerate him. App. A40.

B. The April 15 Hearing

After Mitchell's private counsel entered their appearances on the record, Mr. Morphis appeared at a virtual pretrial hearing held on April 15, 2021. At this time, the trial court had not granted Mitchell's motion to substitute counsel. Therefore, the public defender appeared, as well. During the hearing, the following exchange occurred regarding Mitchell's choice of counsel:

MR. HALL (public defender): [Mr. Mitchell] has hired the Bill James Law Firm[,] and they've filed—

THE COURT: Well, that's fine.

MR. HALL: —several motions.

THE COURT: He can hire—he can hire whoever he wants. I don't see an order in the file anywhere that granted the motion substitute counsel. Am I mistaken, Mr. Hall?

MR. HALL: There was no order, Your Honor, filed.

THE COURT: Thank you. He can file a motion asking the Court to change counsel. The problem is I have a jury trial set for May the 4th and I'm not going to change counsel at this late in the game. So[,] defense motion—

MR. HALL: Yes, Your Honor.

THE COURT: Defense motion to substitute counsel is denied. App. A39.

Immediately after the court denied the motion to substitute counsel, private counsel and Mitchell began asking the trial judge to reconsider its decision. However, Mitchell's attempt to exercise his right to choice-of-counsel was summarily rejected, and worse, greeted with the threat of incarceration.

MR. MORPHIS (private counsel): Your Honor, we can be prepared to move forward on May 4th.

THE COURT: Here's the problem with that. If I change counsel right now[,] and there's some issue, it's an automatic Rule 37 [ineffective assistance] problem. So[,] I'm not changing counsel. We've got—

MR. MITCHELL: Your Honor—

THE COURT: We've got a jury trial set for May the 4th. Motion to substitute counsel is denied. Subsequently—

MR. MITCHELL: Your Honor, may I—

THE COURT: Stop. Stop. Motion to substitute counsel is denied. . .

MR. MITCHELL: May I have a moment of the court's time, please, sir?

THE COURT: Stop. If you interrupt me one more time, Mr. Mitchell, you'll be incarcerated[,] and you can try your case on May 4th while you're sitting in the Benton County Jail. Don't interrupt me again. App. A40.

C. The May 4 Hearing

Even though Mitchell's private attorneys did not request a continuance, and affirmatively stated they would be ready for trial on May 4, the trial court denied the motion to substitute counsel because it was too "late in the game." However, the trial court's insistence on judicial economy rings hollow, as it granted a continuance on the following jury trial date. At that hearing, private counsel was not present, and the following exchange regarding Mitchell's choice of counsel occurred:

THE COURT: Now, Mr. Hall, last time I believe Bill James'[s] office had filed a motion to substitute counsel, which I denied because we were too close to the jury trial date. I did not prohibit—and I want it to be clear—I did not prohibit either Bill James'[s] firm or another firm if they want to be as co-counsel. If they want to file their motion, I certainly will entertain that. But I just want to make clear on the record I wasn't prohibiting co-counsel, what I didn't want to do is change counsel this close to trial and create an issue.

MR. HALL: Yes, Your Honor. And so[,] I know there was [sic] subsequent conversations with the James Law Firm. I did speak with Mr. Morphis at the James Law Firm[,] and he indicated that they weren't going to be co-counsel.

THE COURT: All right, Mr. Mitchell. . . I do want you to understand I'm not prohibiting you, Mr. Mitchell, if you want co-counsel or you either want a change of counsel, I'll consider it, but the problem was at that late date[,] I didn't want to change counsel so close

to the trial date. So[,] if you still want to do that, I just want to make sure you understand I'm not prohibiting that. If you want that done, then please contact additional counsel to find out what you want to do. Okay?

MR. MITCHELL: Yes, sir. I will. App. A54.

D. The May 10 Hearing

Eight days before the scheduled trial, the court held another status hearing, where Mitchell's choice of counsel was again the topic of discussion. And once more, the trial court refused to thoughtfully consider Mitchell's right under the Sixth Amendment to the counsel of his choice.

MR. MITCHELL: . . . With all due respect to the court, me [*sic*] and my family[,] we have been talking. My wife talked [to] Sam Hall several times, on several occasions and she believed in her heart that he's not the attorney for me, and I also believe in my heart that he's not the attorney for me. And the last time we talked[,] you said you would take this on [*sic*] consideration. I'm humbly asking you to take this on [*sic*] consideration right now.

THE COURT: Well, Mr. Mitchell, there's been no motion filed by any other law firm asking to join as co-counsel or substitution of counsel. We've got trial here in eight days. So[,] I'm not going to change—I'm not going to change counsel at this point, Mr. Mitchell. I'm not going to do that. Mr. Hall has been in this court for years, eight years if I'm not mistaken. He's tried several jury trials in this court. App. A66-67.

E. The Trial and Direct Appeal

Through May 18-20, 2021, Mitchell was tried and ultimately convicted of two felony offenses in the Circuit Court of Benton County, Arkansas. He was sentenced to a term of years in the Arkansas Department of Corrections. Throughout the trial, he was represented by Sam Hall, his public defender. Following the conviction, the James Law Firm was appointed to represent Mitchell on appeal to the Arkansas Court of Appeals, where he argued that the trial court violated his right to choice-of-counsel under the Sixth Amendment. App. A18. The Arkansas Court of appeals unanimously affirmed the convictions. *Id.* Thereafter, Mitchell petitioned for rehearing, which the Court of Appeals denied. *Mitchell*, 2022 Ark. App. at 2, 485. Afterward, Mitchell petitioned for review in the Arkansas Supreme Court, which was granted. *Mitchell v. State*, 2023 Ark. at 6, 487. However, the Court affirmed the conviction and denied his petition for rehearing. App. A32

VI. REASONS FOR GRANTING THE WRIT

A. To avoid erroneous deprivations of the right to the counsel of one's choice, the Court should clarify that an indigent defendant who manages to retain private counsel has a Sixth Amendment right to choice-of-counsel, as appointed counsel is no longer necessary.

In *Gonzalez-Lopez*, the Court summarized its previous holdings in *Wheat* and *Caplin & Drysdale*, noting that “[t]he right to counsel of choice does not extend to defendants who *require* counsel to be appointed for them.” *Gonzalez-Lopez*, 548 U.S. at 148 (emphasis added). Originally, Mitchell required appointed counsel. However, as soon as he retained private counsel, that requirement ceased to exist. The Arkansas Supreme Court’s holding ignores this fact. *See*

Mitchell, 2023 Ark. at 9, 489 (“Because Mitchell was (and remains) indigent, he was not entitled to the counsel of his choice, and the circuit court’s denial of his motion to substitute counsel was not an abuse of discretion.”).

It is true that Mitchell was, and remains, indigent. This has no impact on the fact that on April 15, 2021, he had managed to retain private counsel, and the record clearly demonstrates that Mitchell preferred to be represented by private counsel. At that time, appointed counsel was no longer “required,” given that he had retained an attorney to represent him. *Gonzalez-Lopez*, 548 U.S. at 148; *Caplin & Drysdale, Chartered v. United States*, 491 U.S. at 624-625. As a result, when the trial court flatly denied Mitchell’s request for the counsel of his choice, and threatened to incarcerate him for expressing that opinion, it committed a gross structural error that warrants summary reversal.

In affirming the convictions, the Supreme Court of Arkansas placed great weight on the trial court’s purported consideration of “many relevant factors,” which took place “over the course of multiple hearings,” in making its decision on the motion to substitute counsel. *Mitchell*, 2023 Ark. at 7, 488. The record on appeal plainly demonstrates that on April 15, 2021, the trial court entirely failed to consider a variety of relevant factors. Rather, it arbitrarily insisted that it was too “late in the game” to substitute counsel, just before it continued the jury trial a few days later. The only other factor considered by the circuit court was irrelevant: a “vague concern” about an “automatic” ineffective assistance of counsel claim. *Id.* at 13, 491 (J. BAKER, dissenting).

Not only is the decision in *Mitchell* rooted in facts not in the record, but it also patently contradicts and misconstrues this Court’s holding in *Gonzalez-Lopez*. 548 U.S. at 148 (“a deprivation of the right [to choice of counsel] is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants. . .” For this

reason, a choice-of-counsel violation is a structural error that defies harmless-error standards. *Id.* (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). Accordingly, when the Arkansas Supreme Court examined the trial court's denial of Mitchell's right to counsel under the totality of the circumstances, it plainly ignored *Gonzalez-Lopez*, which holds that this sort of error occurs in a vacuum—not over time. As Justice Karen Baker explained, “[a]ny analysis of whether Mitchell's Sixth Amendment rights were violated necessarily cannot extend beyond the moment that the circuit court entered an order denying his motion to substitute counsel.” *Mitchell*, 2023 Ark. at 12, 491.

Apart from ignoring the structural error, the Arkansas Supreme Court stretched this Court's precedents beyond reason. This Court has never held that once a criminal defendant is declared indigent, he or she forfeits the right to choice-of-counsel indefinitely. Rather, the Court has implicitly held the opposite. *Caplin & Drysdale, Chartered*, 491 U.S. at 624-625 (“[t]he Sixth Amendment guarantees a defendant the right to be represented by [a]. . .qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant *even though he is without funds.*” (emphasis added)).

The “haphazard diminish[ment]” of the right to choice of counsel in Arkansas will have a profound negative impact on criminal defendants across the state. *Mitchell*, 2023 Ark. 101 at 15, 493. Approximately 90% of the persons prosecuted in Arkansas are represented by public defenders or appointed counsel. DIDI SALLINGS, EXECUTIVE DIRECTOR, ARKANSAS PUBLIC DEFENDER COMMISSION, AGENCY COMMENTARY, 347 (2013). Presumably, hundreds, if not thousands, of those defendants are actively saving, or searching for third-party funds, to retain private counsel. Like Stacy Mitchell, however, those defendants have been stripped of their right to choice of counsel simply by virtue of their poverty.

VII. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Court should grant Stacy Mitchell's petition for a writ of certiorari to review the judgment of the Supreme Court of Arkansas.

Date Signed: Respectfully submitted,

December 12, 2023

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APPENDIX