No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL GRADY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit's decision to uphold the disqualification of Petitioner's counsel of choice despite Petitioner's willingness to knowingly and intelligently waive any potential conflict of interest (1) deprived him of his constitutional right to representation by counsel of choice, (2) created a circuit split by applying standards conflicting with those employed by other Circuits examining potential conflicts of interest, and (3) allowed the Eighth Circuit to supplant its own reasoning for the district court's and thereby eliminate the abuse of discretion standard in cases involving disqualification of counsel of choice.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is Michael Grady.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

Eighth Circuit Court of Appeals:

United States v. Grady, Case No. 22-2415, United States Court of Appeals for the Eighth Circuit. Judgment entered December 19, 2023. *United States v. Grady,* 88 F.4th 1246, 1253 (8th Cir. 2023), *reh'g denied* Feb. 9, 2024, 2024 WL 507496.

United States v. Dillon, Case No. 22-2447, United States Court of Appeals for the Eighth Circuit (*cons.*).

United States District Court for the Eastern District of Missouri:

United States v. Grady, No. 4:15-cr-00404-HEA-29. Judgement and conviction entered June 23, 2022.

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JURISDICTION

The judgment of the court of appeals was entered on December 19, 2023. Petitioner's petition for rehearing *en banc* was denied on Feb. 9, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution prohibits any person from being deprived of his or her liberty without due process of law:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial 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 defense."

STATEMENT

One of the most fundamental rights in a criminal trial is the right to assistance of counsel. Part and parcel of this fundamental Sixth Amendment right is that a defendant have "a fair opportunity to secure counsel of his own choice." *Luis v. United States*, 578 U.S. 5, 11

(2016)(quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932)). District courts "must recognize a presumption in favor of petitioner's counsel of choice" that can be overcome only by "a demonstration of actual conflict" or "a showing of a *serious potential* for conflict." *Wheat v. United States*, 486 U.S. 153, 164 (1988).

The opinion of the Eighth Circuit in this case should be vacated because Petitioner was denied his right to counsel of choice for mere speculative potential conflicts that did not have a *serious potential* to manifest. The district court speculated that Petitioner's counsel of choice may have learned of confidential information from his prior attempts to represent a co-defendant that would create an unfair advantage for Petitioner at a trial where the co-defendant was now a cooperating witness, but the uncontradicted evidence in the record established that no such information was ever conveyed to the attorney. The other basis for disqualification order was the government's assertion that the attorney would be called as a witness to testify about legal payments he received from the codefendant, but the government was forced to correct the record in the district court to indicate that the attorney would not be called as a witness, before the case ever went to trial. Therefore, the district court's reasoning was necessarily erroneous. There was no serious potential for conflict and the district court's disqualification order thus deprived Petitioner of his Constitutional right to representation by counsel of choice.

The Eighth Circuit's opinion ignored the district court's stated reasons for disqualifying counsel and instead created its own, unsupported bases to justify the disqualification, which did not find their origin in either the record or the district court's reasoning. This is a dangerous precedent that serves to permit disqualification of a criminal defendant's counsel of choice based on speculation and apparent whims rather than evidence in the record. The Eighth Circuit did not follow its own procedures in evaluating the district court's reasoning and instead employed its

own reasoning in the place of what was explicitly said by the district court. In doing so, it deprecated the protections of the Sixth Amendment and provided the foundation for dangerous precedent that would allow courts to deny counsel of choice for purely speculative conflicts of interests that are not at all present in the record.

Intervention of this Court is urgently needed to avoid this dangerous and unconstitutional procedure from permeating the Courts and undermining the rights of the accused.

FACTUAL BACKGROUND

Petitioner Michael Grady was convicted of (1) conspiracy to distribute and possession with intent to distribute cocaine and heroin, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), (2) attempted obstruction of justice, in violation of 18 U.S.C. § 1512(c)(2), and (3) conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i), (h). Grady was sentenced to 226 months' imprisonment. Among the issues he challenged on appeal was the district court's denial of his motion to substitute counsel of his choice. The Eighth Circuit denied his appeal on December 19, 2023, and denied a timely Petition for Rehearing on Feb. 9, 2024.

On February 3, 2017, attorney Beau B. Brindley originally filed a motion to substitute as counsel for Petitioner Michael Grady. Cert.Appx. 42. Previously, Brindley had attempted to represent Grady's co-defendant, Derrick Terry. However, due to Brindley's prior professional working relationship with Grady, who had referred Terry to Brindley for representation, Magistrate Judge Baker found that there was an unwaivable conflict of interest and ultimately prevented Brindley from representing Terry. Cert.Appx. 43. Due to the prior conflict found regarding Terry, Magistrate Baker later conducted an inquiry into a potential conflict of interest pertaining to Grady's desire to have Brindley represent him. Grady, after being fully informed by

the Magistrate of the nature of the potential conflict, executed and signed a knowing and voluntary waiver of any potential conflict of interest. Cert.Appx. 43. Nonetheless, Magistrate Baker denied the motion to substitute counsel, finding a serious potential for conflict that could not be ameliorated by waiver. Cert.Appx. 44.

On December 12, 2020, Grady filed a renewed motion to substitute Brindley to represent him in this case after the previously-cited potential conflict (Grady's position as a codefendant to another client represented by Brindley on another case, *U.S. v. Burris* (MOED 17 CR 95)) was abated (when Grady was dismissed as a defendant in that case). Cert.Appx. 33. As it was now known that Terry was a cooperating witness against Grady, Grady proposed that a solution to ameliorate any potential conflict was to obtain separate conflict-free counsel to prepare and conduct any necessary cross-examination of Terry. Cert.Appx. 22.

In this renewed motion, Attorney Brindley further noted that, while he had previously filed a motion seeking leave to represent Terry in this matter before the trial court, no privileged information that would be in any way useful to Grady was ever conveyed from Terry to Brindley. Cert.Appx. 21. The motion to substitute counsel for Terry had been met with immediate opposition by the government and the magistrate went so far as to order that Brindley and attorneys associated with his office have no contact with Terry while the conflict of interest issue was being litigated. Dist.Ct.Doc. 667. Due to this order, and due to the uncertain nature of the motion for leave to represent Terry even before that order, Brindley had very little contact with Terry and extremely limited discussions about the case. See Dist.Ct.Doc. 900 at 7-8 (Brindley testimony from Grady conflict hearing). Thus, Brindley did not have the types of conversations with Terry that would provide him with privileged information relevant to the defense of Grady.

The government's response in opposition to Grady's renewed motion to substitute focused on Magistrate Baker's earlier denial of the original motion and the fact that Brindley had informed the court that he had not returned the "substantial retainer" that Terry had paid him, arguing that this was an indication that useful privileged information must have been conveyed that would render the proposal of having outside counsel cross-examine Terry insufficient. R Dist.Ct.Doc. 2899.

In Grady's reply, Brindley reiterated that no such privileged communication was conveyed to him from Terry due to the limited nature of the attempted representation brought on by the conflict inquiry, and contended that the retainer fee paid by Terry was more than consumed by the substantial litigation of the conflict issue (a matter of law) with regard to the motion to substitute as Terry's counsel. Dist.Ct.Doc. 2912.

Over Grady's objection, the district court granted the government's request to file a sur-reply. Dist.Ct.Doc. 2923, 2936, 2929. In its sur-reply, the government raised for the first time the contention that Brindley could be a witness against Grady at his trial, to discuss payments that were made to Brindley for his previous attempted representation of Terry. Dist.Ct.Doc. 2935. Grady filed a sur-reply in which Brindley indicated he would have no admissible information to provide that could be relevant to Grady's case. Dist.Ct.Doc. 2939.

The district court denied Grady's renewed motion to substitute without a hearing on January 13, 2021. Dist.Ct.Doc. 2943. The district court based its opinion in substantial part on the previous findings of Magistrate Baker in denying Grady's initial motion, citing lengthy passages of that order. Cert.Appx. 34-35. The district court ultimately found:

> Judge Baker found a serious potential for conflict in this case. Brindley's protestations to the contrary do not alleviate Judge Baker's or this Court's concerns. All involved in any criminal trial must diligently protect the integrity of the judicial system.

> An outsider looking at the proceedings thus far may query why Brindley so strenuously seeks to continue representation of Defendant Grady, when Judge Baker observed a potential conflict in this case with his desire to represent two other defendants associated with Defendant Grady.
>
> Moreover, the Court has appointed counsel to represent Defendant Grady in the soon approaching trial. The matter is set for trial in March. The case involves numerous defendants; some defendants may testify in the case, and there is a need to resolve this case in the most expeditious manner as possible in light of the COVID-19 pandemic. Substitution of Brindley may hinder the orderly administration of this case.
>
> Although Defendant Grady argues that there is no conflict, based on the record and facts before the Court, the Court is unpersuaded that substitution is appropriate with respect to this defendant in this case at this time. While Defendant Grady questions the Government's late disclosure that Brindley may be called as a witness, the Court cannot say that the Government has misrepresented that it may call him as a witness. Indeed, the decision of whether to call witnesses and the time when that decision is made is within the trial strategy of trial counsel. Defendant Grady's suppositions are unpersuasive.

Cert.Appx. 39-40.

The district court did not address Grady's proposal of having additional counsel (at his own expense) prepare and conduct any necessary cross-examination of Terry. The court did not address multiple key components of Grady's argument and did not make a record sufficient to support the position that denying his right to be represented by his counsel of choice was anything other than an abuse of discretion.

The district court explicitly relied on the government's argument that Brindley was a potential witness in Grady's trial, without conducting any sort of inquiry into the plausibility of that scenario or whether there was even a good faith argument in support of calling him as a witness. Shortly after the court issued its ruling, the government filed a sealed sur-reply "to clarify the record." Dist.Ct.Doc. 2954. In this filing, the government stated that, despite its earlier

characterization of Brindley as a "potential witness" in Grady's trial, it "has no intention of calling Brindley as a witness against Defendant Grady," and did not "intend to represent that it would call Brindley as a witness."

Despite the district court citing this potential witness issue as its very final word on the motion, indicating that it gave the matter some significant weight, the court did not alter or amend its decision following the government's correction. The court continued to preclude Brindley from representing Grady and did not hold any evidentiary hearing to address the applicability or reliability of the factors it concluded were sufficient to override Grady's right to be represented by his counsel of choice.

On appeal, the Eighth Circuit found that the district court did not abuse its discretion in denying the motion to substitute counsel. The Eighth Circuit found:

> Evidence at trial suggested that Brindley accepted money that was proceeds of a drug trafficking organization. It appeared, therefore, that Brindley's loyalties were divided: his plan was to defend Grady at trial, yet he also needed to protect himself from accusations that might, at a minimum, affect his license to practice law.

Cert.Appx. 22. The Eighth Circuit further cited a concern that Brindley's "role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination." *Id.* (citing *United States v. Locascio*, 6 F.3d 924, 933 (2d Cir. 1993)).

With regard to Grady's suggested remedy of employing independent counsel to conduct any cross-examination of Terry, the Eighth Circuit found:

> [W]e are skeptical that his proposed solution would truly alleviate all effects of the serious potential conflict. Indeed, given the potential conflict with Terry, the

> Government's primary cooperating witness, multiple phases of the trial could be impacted, not simply cross-examination. … Brindley would likely have had to factor Terry's anticipated testimony into the overall defense, and it is implausible that he could have walled himself off from all trial strategy involving Terry.

Cert.Appx. 23 (internal citation and quotation omitted).

REASONS FOR GRANTING REVIEW

"Given the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust, ... the Court has held that the Sixth Amendment grants a defendant 'a fair opportunity to secure counsel of his own choice." *Luis*, 578 U.S. at 11 (quoting *Powell*, 287 U.S. at 53). "The right to select counsel of one's choice ... has been regarded as the root meaning of the constitutional guarantee" of the Sixth Amendment. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006). "Where the right to be assisted by counsel of one's choice is wrongly denied ... [d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Id*. at 148. District courts "must recognize a presumption in favor of petitioner's counsel of choice" that can be overcome only by "a demonstration of actual conflict" or "a showing of a *serious potential* for conflict." *Wheat v. United States*, 486 U.S. 153, 164 (1988).

The Eighth Circuit's decision in this case ignored this precedent and in doing so was both internally inconsistent and inconsistent with not only authoritative decisions from other Circuits, but also its own precedent. The Eighth Circuit begins by noting that it is applying a "deferential, abuse-of-discretion standard on review of a district court's denial of a substitution motion

because of a conflict of interest." Cert.Appx. 20 (citing *Wheat v. United States*, 486 U.S. 153, 163-64 (1988)).

However, the bases that the Eighth Circuit used to uphold the district court's decision were not bases that the district court even considered or articulated when reaching it. "The function of the appellate court is not to make an initial decision but simply to review the action of the trial court." *Booker v. Special Sch. Dist. No. 1, Minneapolis, Minn.*, 585 F.2d 347, 353 (8th Cir. 1978). Under the abuse of discretion standard of review, the Circuit Court must not substitute its own weighing of the evidence for that of the decision-maker. *Gerhardt v. Liberty Life Assur. Co. of Boston*, 736 F.3d 777, 780 (8th Cir. 2013). Yet, that is precisely what was done by the Eighth Circuit in this case.

"An abuse of discretion occurs where the district court fails to consider an important factor, gives significant weight to an irrelevant or improper factor, or commits a clear error of judgment in weighing those factors. *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 802 (8th Cir. 2005).

Here, the Eighth Circuit did not evaluate the district court's exercise of its discretion, but instead made *de novo* factual findings that had no bearing whatsoever on the decision reached by the district court or the exercise of its discretion.

First, the Eighth Circuit concluded that because Attorney Brindley had accepted money to attempt to represent Co-Defendant Terry that was proceeds of a drug trafficking organization, Brindley's loyalties were divided due to the need "to protect himself from accusations that might, at a minimum, affect his license to practice law." Cert.Appx. 22.

Nowhere in the district court was such a concern ever raised in the slightest. There was never even a suggestion that Brindley would have been aware that the funds provided by Grady on behalf of Terry were drug proceeds until this statement in the Eighth Circuit's Opinion. This completely unsubstantiated conclusion by the Eighth Circuit was not one that contributed to the district court's decision. It was not one that was supported by the record. It is not one that has any relevance whatsoever on the question of whether the district court abused its discretion in disqualifying Brindley from representing Grady.[1]

The Eighth Circuit's concern that Brindley's "role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination," *Id.* (citing *United States v. Locascio*, 6 F.3d 924, 933 (2d Cir. 1993)), was similarly misplaced. This unsupported assumption was again not one that factored into the district court's decision at all. Instead, the district court premised its disqualification decision on the idea that it believed the Government accurately represented that it might call Brindley as a witness at trial. Cert.Appx. 40. This conclusion by the district court was demonstrated to be a clearly erroneous assessment of the evidence when the government indicated to the district court that it did not in fact intend to call Brindley as a trial witness. Yet, the Eighth Circuit wholly failed to address the fact that the actual fact-findings that served as the basis for the district court's decision were erroneous, and instead made new fact-findings of its own, which the district court never considered in any way. Given

[1] This statement by the Eighth Circuit is also a very troubling one from a policy perspective. The implication is that any time an accused drug dealer hires a criminal defense attorney to represent him in court, the government need only allege that the money used to retain the attorney might be proceeds of drug dealing activity in order to (at a minimum) disqualify the attorney and deprive the defendant of representation of his counsel of choice. This is an unjust, and unavoidable, consequence of the Eighth Circuit's reasoning.

that the only evidence in the record on the subject demonstrated that Brindley did not have any actual relevant first-hand knowledge of the events in question to impart to the jury, the Eighth Circuit's finding to the contrary was also unsupported by the record, but it is not a finding it should have been making in the first place. Doing so eliminated the abuse of discretion standard altogether and replaced it with the independent reasoning of the Circuit Court, which was not at all utilized by the district court.

In sum, the Eighth Circuit erred in failing to follow the proper procedure for determining whether the district court abused its discretion, instead making alternative findings of fact to support the conclusion that was reached by the district court. This was not the Eighth Circuit's role.

The Eighth Circuit's rejection of the suggested procedure of obtaining independent counsel to cross examine Terry in order to protect against any potential conflict of interest manifesting, was also infirm, and stands in stark contrast to conclusions made by the circuit courts of appeal, including the Eighth Circuit itself. *United States v. Agosto*, 675 F.2d 965, 974 (8th Cir. 1982) (finding "no reason to reject [the defendant's] proposal to employ a backup counsel as a satisfactory resolution of the conflict"); *United States v. Jeffers,* 520 F.2d 1256, 1266 (7th Cir.1975) ("there is nothing in the record suggesting any reason why [conflicted defense counsel] could not have made an offer to have some other lawyer retained for this limited purpose [of conducting cross-examination]"); *United States v. Diozzi*, 807 F.2d 10 (1st Cir. 1986) (setting aside a jury verdict because the district court disqualified two defense attorneys who were potential witnesses even though a stipulation would have provided the same information as the live testimony of the attorneys; tactical advantage of forcing attorneys to appear as government witnesses rather than as defendants' counsel did not justify infringing on

right to counsel); *Rodriguez v. Chandler*, 382 F.3d 670, 673 (7th Cir. 2004) (District court erred by ignoring the disqualified attorney's offer to allow unconflicted co-counsel to conduct the cross-examination of a witness counsel had previously represented). The Eighth Circuit's reasoning that the use of independent counsel to cross-examine Terry would be insufficient is directly contradictory to each of these cases in multiple circuits, including its own.

A potential conflict of interest is almost always waivable as a matter of law. *See United States v. Edelmann*, 458 F.3d 791 (8th Cir. 2006) ("If the conflict is only a potential conflict—"such that a rational defendant could knowingly and intelligently desire the conflicted lawyer's representation"—the court should obtain from the defendant a valid waiver of his right to a non-conflicted lawyer"). For a district court to reject a waiver, the conflict must be both sufficiently likely to occur and sufficiently serious. A conflict is sufficiently serious only when "no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation." *Edelmann*, 458 F.3d 791. The potential conflict in this case was therefore legally waivable.

The case law clearly favors allowing Grady to be the person who balances his right to conflict free counsel against his right to counsel of choice. *United States v. Perez*, 325 F.3d 115 (2d Cir. 2003) ("Where the right to counsel of choice conflicts with the right to an attorney of undivided loyalty, the choice as to which right is to take precedence must generally be left to the defendant and not be dictated by the government."). Even where a potential or actual conflict of interest actually obtains, disqualification is not automatic. *United States v. Turner*, 594 F.3d 946, 948, 951 (7th Cir. 2010). The district court must bear in mind that "disqualification of defense counsel should be a measure of last resort, and 'the government bears a heavy burden of establishing that disqualification is justified.'" *United States v. Gearhart*, 576 F.3d 459 (7th Cir. 2009) (*quoting United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986)). "[C]ourts will not

'assume too paternalistic an attitude in protecting the defendant from himself,' and although the defendant's choice of counsel 'may sometimes seem woefully foolish' to the court, the choice remains his. *United States v. Curcio*, 694 F.2d 14, 25 (2d Cir. 1982).

Here, the district court gave no deference whatsoever to Grady's wishes to waive the conflict, and the Eighth Circuit's opinion wrongfully upheld that procedure, in contravention of the entire body of caselaw on the issue. Grady should have been permitted to waive the potential conflict and obtain standby counsel to conduct cross-examination of Terry if necessary.

In *United States v Ziegenhagen* 890 F2d 937 (7th Cir. 1989) the defense attorney participated in a prosecutorial capacity at sentencing on two of the defendant's prior convictions, which enhanced the defendant's sentence. The Court found an actual conflict of interest. However, rather than reversing the conviction, the appellate court remanded for an evidentiary hearing to determine whether the defendant, in knowing about the conflict, and not bringing it to the district court's attention, waived the conflict. Thus, even this actual conflict was deemed waivable as a matter of law by the Court of Appeals.

In *United States v Saccoccia* 58 F3d 754 (1st Cir. 1995), defense counsel was indicted in Australia on charges that he criminally conspired on a related matter with the defendant whom he represented. The Appellate court found it dispositive that the defendant knowingly and voluntarily provided a written waiver acknowledging that he had been fully advised of the risks. Even that completely non-speculative conflict was waivable.

In *United States v White,* 706 F2d 506 (5th Cir. 1983) the Fifth Circuit reversed the defendant's escape conviction based on a conflict of interest where the defense counsel was implicated in the defendant's escape. The Fifth Circuit noted that the trial court had taken

inadequate steps to assure that defendant's waiver of conflict was knowing and voluntary. Had the waiver been properly taken, even this substantial actual conflict was waivable.

Nothing about the facts of this case renders the potential, speculative conflict here unwaivable when the above-described conflicts were explicitly waivable. The Eighth Circuit's finding to the contrary was not supported by the record and was arrived at by a misapplication of the law. The Eighth Circuit's decision was a deviation from established Circuit precedent, and markedly conflicts with how other Circuits have handled analogous factual scenarios. Whether the use of independent counsel to cross examine a witness previously represented by counsel for the defendant can alleviate a potential conflict of interest is a critical legal question. Every Circuit noted above has answered that question in the affirmative. The Eighth Circuit's opinion in *Grady* takes a contradictory position. That is a vital split from circuit precedent that puts in serious jeopardy the principle that the right to counsel of choice should be given great deference. Furthermore, the willingness of the Eighth Circuit to base its decision on its own reasoning about speculative conflicts that was not utilized by the district court or relied on at all in the disqualification order under review is an even more dangerous precedent. It allows Circuit Courts of Appeal to generate their own bases for disqualification and supplant them for the district court's, thereby eliminating the abuse of discretion standard altogether on the critical issue of a defendant's Sixth Amendment right to counsel of choice. That cannot be a precedent that is allowed to stand.

Conclusion

Because the Eighth Circuit's decision conflicts with controlling Supreme Court law, creates a circuit split, and generates a dangerous precedent that endangers the right to counsel of choice, Petitioner respectfully prays that the Court will grant his Petition for Certiorari.

Respectfully Submitted,

Michael Grady

May 8, 2024
DATE

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