No. _____

In the

Supreme Court of the United States

CHRISTOPHER BURNELL, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for a Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

What standard governs a criminal defendant's motion to substitute retained with court-appointed counsel?

Statement of Related Proceedings

- *United States v. Christopher Burnell*,
  - Case No. 17-CR-278-MWF (C.D. Cal.)

- *United States v. Christopher Burnell*,
  - 2024 WL 4371123 (9th Cir. Oct. 2, 2024)

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

Christopher Burnell petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I. OPINIONS BELOW

The opinion of the court of appeals is unpublished, but available at 2024 WL 4371123 (9th Cir. Oct. 2, 2024). (App. 1a.) The ruling of the district court is unreported, and was rendered orally. (App. 13a (transcript of oral colloquy re request for substitution of counsel, *United States v. Burnell*, no. 17-CR-278-MWF (C.D. Cal. Aug. 30, 2022).)[1]

II. JURISDICTION

The judgment of the court of appeals was entered on October 2, 2024. (App. 1a.) Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] Citations to "App." are to the appendix to this petition. Citations to "Supp. App." are to the under-seal supplemental appendix.

III. CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitutes states, in relevant part:

"[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United State Constitution states, in relevant part:

"nor shall any State deprive any person of life, liberty, or property, without due process of law"

IV. INTRODUCTION

This Court should grant certiorari to resolve a deep and fundamental split among the Circuits as to the standard governing a criminal defendant's motion to discharge retained counsel and substitute counsel appointed by the court. Under this Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), motions to discharge retained counsel in favor of appointed counsel implicate a separate and distinct right from motions to substitute one court-appointed counsel for another: whereas a request to substitute one court-appointed lawyer with another implicates only the right to

effective representation (not to any particular lawyer), a request to fire *retained* counsel implicates the defendant's Sixth Amendment right to counsel of choice, which is not dependent on the adequacy or inadequacy of counsel's performance.

For this reason, several circuits—the Ninth Circuit here, as well as the Fourth and Eleventh—hold that a defendant need not show denial of effective representation to discharge retained counsel; the only question is whether substitution would occasion delay or interfere with the court's calendar, and the litigant's reasons for dissatisfaction with retained counsel are irrelevant. Other Circuits, however—the First, Second, Sixth, and Tenth—apply the same three-factor test to motions to substitute retained counsel in favor of appointed counsel as they do to motions to substitute one court-appointed counsel for another, requiring the defendant to show a breakdown in the attorney-client relationship amounting to ineffective assistance. And still a third group—the Fifth and Seventh Circuits—applies a multi-factor balancing test that considers counsel's performance and the defendant's reasons for dissatisfaction, but does not require a total breakdown in the attorney-client relationship or constitutionally-ineffective assistance.

The Court should resolve this disagreement. Criminal defendants' right to counsel of choice is fundamental and—under *Gonzalez-Lopez*—a structural right that impacts the entire framework within which the case proceeds. Choice of counsel can have significant and unknowable effects on every aspect of the representation, including "strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument" as well as "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.

Absent clarification, criminal defendants in different jurisdictions will possess dramatically differing rights impacting all of these litigation events, with their ability to choose counsel subject to fluctuating considerations depending on geography. And review is all the more appropriate because the standard applied for substitution of retained counsel in this case—the Ninth Circuit's—paradoxically affords criminal defendants who can hire counsel even *less* latitude to substitute such counsel than they would have under the (nominally

more demanding) three-factor test applied to motions to switch court-appointed attorneys. By eliminating any inquiry into counsel's performance, the defendant's reasons for substitution, or the adequacy of the court's inquiry, the Fourth, Ninth and Eleventh Circuits give judges near-total leeway to deny substitution of retained counsel based on a finding of delay alone. *Gonzalez-Lopez* demands a more nuanced and holistic inquiry, and this Court should grant certiorari to clarify and announce the correct test.

V. STATEMENT OF THE CASE

Christopher Burnell pled guilty to twelve counts of wire fraud, stemming from an alleged fraudulent investment scheme. The pled-to counts were alleged in the indictment to encompass $557,000 worth of wire transfers. (App. 105a-106a.) Burnell retained counsel and pleaded guilty to those counts. He was never told during the plea colloquy that his sentencing Guidelines range could be increased based on additional amounts of money, from additional victims. To the contrary, the prosecutor and district court expressly suggested the opposite: the prosecutor described the factual basis of Burnell's plea as limited to "certain people identified in the indictment," (App. 15a), and the district

court told Burnell that any allegations "not included in that factual basis" could be disputed at sentencing. (App. 82a.)

As it turned out, however, the government's allegations ballooned by millions of dollars at sentencing to include a bevy of additional victims and alleged losses nowhere mentioned in the Indictment. Whereas the Indictment had mentioned only $557,000 in fraudulent transactions, the government sought to hold Burnell responsible for a loss amount of approximately $7.5 million, based on alleged losses by over a dozen victims the Indictment never identified, and some of whose losses were never substantiated by evidence. (Supp. App. 11a-12a.)

All told, the presentence report's increased $7.5 million loss amount and expansive definition of victim harm added 10 levels to Burnell's offense level computation: four levels for the additional loss between $557,000 and $7.5 million, U.S.S.G. § 2B1.1(b)(1), four levels for substantial financial harm to five or more victims, § 2B1.1(b)(2)(B), and two levels for vulnerable victims, § 3A1.1(b)(1). (Supp. App. 10a-14a.) Without those ten levels, Burnell's Guidelines range would have been just 37-46 months; the additional ten levels increased it to 108-135 months.

The record does not show when Burnell learned of this expanded loss amount; at sentencing, his counsel never even said he had shown Burnell the Presentence Report. (App. 22a (counsel saying only, "I discussed it with [Burnell]," not that counsel had shown it to him).) Nor did counsel file any objections, position paper, or other written sentencing document on Burnell's behalf. He made no objection to the presentence report, its expansive Guideline calculations, or any of the facts or assertions it contained.

At sentencing Burnell moved to discharge his counsel, who was retained, and have the court appoint new counsel. Retained counsel told the court that Burnell believed counsel had "forced" and "cajoled" him into pleading guilty (App. 11a), while Burnell said he had not realized he "was pleading to $7.5 million" or "looking at 15 to 20 years in prison." (App. 11a-12a.) Burnell told the court that he "was told that I was open pleading to 13 counts in the Indictment, which I took responsibility for, of the $570,000 in the Indictment." (App. 12a.) He said "I never knew that other money" and "I never received that other money." (*Id.*) "I thought I did the open plea with the 13 counts, which I was taking responsibility [for]," Burnell said, "but for not for $7.2 million, or $10

million, or any of this other stuff that is going on." (App. 12a.) Counsel, for his part, told the court that communication with Burnell had broken down; he had not even been able to obtain the information needed to a sentencing position paper—something he had never failed to do in any other case. (App. 15a.)

Without inquiring into the specifics of Burnell's conflict with counsel, the court denied the substitution motion. First, the court determined that retained counsel had performed adequately so far. (App. 20a.) Second, it determined that granting the motion would "delay the sentencing." (App. 21a.) The court declined to elicit specific information from Burnell or counsel about the reasons why Burnell had waited so long to request substitution, or the nature of the conflict between them, saying "that really gets into all the nitty-gritty between the two of you." (App. 13a.)

The Ninth Circuit affirmed the denial of substitution, citing Circuit precedent that a financially-qualified defendant's request to replace retained with court-appointed counsel must be granted "unless a contrary result is compelled by purposes inherent in the fair, efficient and orderly administration of justice." (App. 2a) (cleaned up). The

district court acted within its discretion in denying substitution, the panel held, because "substitution at such a late stage would have inevitably caused significant delay and required victims to reschedule travel," and the record suggested that the district court believed Burnell was using the motion as a delay tactic. (App.2a.) The panel did not evaluate the adequacy of the district court's inquiry into Burnell's reasons for taking so long to move for substitution. Nor did it fault the district court for refusing to inquire into the "nitty gritty" details of the breakdown in Burnell's and counsel's relationship. Delay, to the panel, constituted sufficient reason alone—without any further inquiry—to deny Burnell' request to discharge retained counsel and have new counsel appointed.

VI. REASONS FOR GRANTING THE WRIT

A. The Circuits are Divided as to What Standard Governs Motions to Discharge Retained Counsel and Have New Counsel Appointed by the Court

1. This Court held in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) that a criminal defendant's right to choose, hire, and discharge *retained* counsel implicates a separate and distinct right from the right to effective representation at the heart of the right to *appointed* counsel. A defendant with court-appointed counsel does not

have the right to choose any particular attorney; his or her right is only to the effective assistance of counsel generally. *Id.* at 144 (all defendants have the right to effective counsel, but the right to choose one' counsel is limited to defendants who "do not require appointed counsel.") But a defendant who retains counsel enjoys the Sixth Amendment right to counsel of choice, which does not depend on the quality of representation. "'Deprivation of the right [to choice of counsel] is "complete"' this Court explained, "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. And its denial constitutes structural error; it is not susceptible to review for harmlessness. *Id.* at 150.

But *Gonzalez-Lopez* cautioned that the right to choice of counsel is not absolute; a trial court possesses "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *Id.* at 152 (cleaned up). Courts therefore retain the ability, under *Gonzalez-Lopez*, to balance defendants' right to choice of counsel—and to choose to discharge retained counsel—against the danger of delaying the proceedings and other competing demands.

2. Since *Gonzalez-Lopez* the Circuits have starkly diverged on how to apply its balancing test. One group of Circuits, including the First, Second, Sixth, and Tenth, applies the same standard for motions to discharge retained counsel and have counsel appointed as for motions to substitute one appointed counsel with another. These circuits weigh three factors: (1) the timeliness of the substitution motion; (2) the adequacy of the district court's inquiry into the reasons for the substitution motion, and (3) the extent of the conflict between the defendant and counsel.[2]

Despite *Gonzalez-Lopez*'s holding that the right to counsel of choice does not depend on quality of representation, these Circuits require a sufficiently extreme breakdown in the attorney-client relationship as to "result[] in a total lack of communication preventing an adequate defense." *Hsu*, 669 F.3d at 123 (cleaned up); *see also*

[2] *See United States v. Almonte-Nunez*, 963 F.3d 58, 65 (1st Cir. 2020); *United States v. Diaz-Rodriguez*, 745 F.3d 586, 590 n.5 (1st Cir. 2014); *United States v. Hsu*, 669 F.3d 112, 122-23 (2nd Cir. 2012); *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008); *United States v. Vindel-Montoya*, 280 F. App'x 795, 798 (10th Cir. 2008) (addressing request to discharge appointed counsel and retain new counsel); *United States v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004).

Benitez, 521 F.3d at 632 (same). The First Circuit justified this approach in *Mota-Santana* by explaining that, while "a defendant is not ordinarily dependent on the court's permission to replace retained counsel," where such a defendant seeks to have new counsel appointed by the court "the two actions merge" and the same standard—including assessing the extent of the attorney-client conflict and the adequacy of representation—applies to both. *Mota-Santana*, 391 F.3d at 47.

A second group of Circuits, the Fifth and Seventh, require a similar balancing test, but—critically—do *not* require defendants seeking to discharge retained counsel to show a breakdown so severe as to preclude an adequate defense. The Seventh Circuit, for instance, has distinguished the standard for discharge of appointed counsel from that governing discharge of retained counsel, holding that "even if a breakdown in communication is not so severe as to implicate the right to counsel, it may still provide a reasonable justification for a substitution of retained counsel and a continuance." *Carlson v. Jess*, 526 F.3d 1018, 1027 (7th Cir. 2008). But disagreement between a defendant and retained counsel is still a relevant consideration in these Circuits, as "a significant dispute about strategy may implicate a defendant's

right to counsel of choice." *Id*; *see also United States v. Sellers*, 645 F.3d 830, 838-39 (7th Cir. 2011) (reversing district court's denial of substitution of retained counsel, and reasoning that the district court should have weighed the "deteriorated" state of attorney-client communication against considerations of delay); *United State v. Jones*, 733 F.3d 574, 587 (5th Cir. 2013) (holding that district courts must "balance [the defendant's] right to counsel of choice against the needs of fairness and the demands of its calendar," then affirming denial of substitution after considering numerous factors but without requiring a complete breakdown in attorney-client communication).

A third group of Circuits—including the Ninth Circuit (at issue here) as well as the Fourth and Eleventh—have eliminated the need for courts confronted with motions to discharge retained counsel to consider quality of representation, the defendant's reasons for dissatisfaction with counsel, or the adequacy of the trial court's inquiry into those reasons. Instead, these Circuits permit denial of substitution to be based on considerations of delay alone. So long as the district court holds that delay would result from allowing substitution, no inquiry

into counsel's preparedness or quality, or the nature of the breakdown, is necessary.

The Ninth Circuit took that approach in this case as well as in *United State v. Rivera-Corona*, 618 F.3d 976 (9th Cir. 2010). *Rivera-Corona* held that "a defendant who can afford to hire counsel may have the counsel of his choice unless a contrary result is compelled by purposes inherent in the fair, efficient, and orderly administration of justice." *Id.* (cleaned up). A defendant's request to discharge retained counsel and have new counsel appointed must be granted unless it "would cause significant delay or inefficiency or run afoul of . . . other considerations." *Id.* That is the same standard applied by the panel in this case. (App. 2a) ("When a defendant seeks to replace retained counsel with appointed counsel, and the defendant is financially qualified, the request must be granted unless a contrary result is compelled by purposes inherent in the fair, efficient and orderly administration of justice.") (cleaned up).

At first blush, *Rivera-Corona*'s retained-counsel substitution test might appear to give wider latitude to defendants seeking to discharge retained counsel in favor of appointed counsel than to defendants

seeking to substitute one appointed counsel for another: after all, under *Rivera-Corona*'s test defendants with retained counsel are entitled to substitution unless denial is "compelled" by countervailing interests. In practice, however, *Rivera-Corona*'s standard puts defendants with retained counsel at a relative disadvantage by allowing trial courts to deny substitution based *solely* on delay, while eliminating consideration of countervailing factors that will often favor the defendant's substitution request—such as the adequacy of the trial court's inquiry into the attorney-client conflict, the nature and extent of that conflict, the reasons for the delay, and counsel's performance. By deeming "significant delay or inefficiency" alone sufficient to defeat a retained-counsel substitute motion, the Ninth Circuit eliminates the need for courts to consider the delay's underlying causes.[3]

[3] The concurrence in this case reads *Rivera-Corona* differently, believing it *does* allow for consideration of the defendant's reasons for seeking substitution of retained counsel if the substitution would delay court proceedings. The concurrence describes *Rivera-Corona* as having held that "when a request to replace retained counsel with appointed counsel implicates 'the scheduling demands of the court,' the district court must consider the traditional factors for assessing 'the defendant's reason for requesting substitution' and weigh those against the court's scheduling concerns.'" (App. 7a) (cleaned up) (quoting *Rivera-Corona*, 618 F.3d at 980). In other words, the concurrence appears to read *Rivera-Corona* as importing the three-factor test for substitution of one

court-appointed counsel for another back into the standard for substitution of *retained* with appointed counsel, in cases where the requested substitution would cause delay. But *Rivera-Corona* does not so hold; indeed, *Rivera-Corona* called "extent-of-conflict review . . . *inappropriate*" in the retained-counsel context. *Rivera-Corona*, 618 F.3d at 981 (emphasis added). The portion of *Rivera-Corona* on which the concurrence relies was not purporting to set forth the standard for discharging retained counsel in favor of appointed counsel; rather, it was discussing prior Ninth Circuit law addressing the situation where a defendant seeks to discharge appointed counsel and retain new counsel. In discussing that situation, the Court said substitution must be permitted for "any reason or no reason" unless the substitution "would cause significant delay or inefficiency or run afoul of . . . other considerations," and that "[c]onflict between the defendant and his attorney enters the analysis only if the court is required to balance the defendant's reason for requesting substitution against the scheduling demands of the court." *Rivera-Corona*, 618 F.3d at 980. But it never said that the court *is*, in fact, required to balance the defendant's reasons against scheduling demands where discharge of retained counsel is sought. Rather, its reference to such balancing appears merely to state the rule that applies where a defendant seeks to substitute one court-appointed attorney for another, to distinguish that rule from the rule applicable to discharge of retained counsel. It is in the substitution-of-appointed-counsel context that the three-factor test already requires the court "to balance the defendant's reason for requesting substitution against [its] scheduling demands." *Rivera-Corona* nowhere states that a defendant's reasons for requesting substitution must be considered where a request to discharge retained counsel and obtain appointed counsel would cause delay. Certainly the panel did not apply any such rule here; it merely held that the trial court properly denied substitution of retained counsel because it would have "caused significant delay" and inconvenience, while making no mention of Mr. Burnell's reasons for the request. (App. 2a.)

The panel in this case took precisely that tack. It affirmed the district court's denial of Burnell's motion to discharge his retained counsel because the district court could have determined that substitution "would have inevitably caused significant delay and required victims to reschedule travel." (App. 2a.) It made no mention of the adequacy of the district court's inquiry into the conflict between Burnell and his counsel, or the trial court's refusal to inquire into the "nitty gritty" facts of that conflict. (App. 13a.) The panel also wholly disregarded the district court's failure to inquire into the reasons why Burnell delayed his substitution request until sentencing, or the validity of Burnell's allegation that his retained counsel had deceived him into pleading guilty. Instead, the panel treated delay itself as dispositive and alone sufficient to justify denying substitution.

The Fourth and Eleventh Circuits have similarly treated delay as dispositive. In *Hyatt v. Branker*, 569 F.3d 162, 173 (4th Cir. 2009), a habeas corpus case involving a challenge to a capital murder conviction, the Fourth Circuit declined to disturb the trial court's denial of the defendant's motion to discharge his appointed counsel and retain counsel, reasoning that the trial court "reasonably believed that

granting Hyatt's motion would necessitate delay." And in *United States v. Jimenez-Antunez*, 820 F.3d 1267 (11th Cir. 2016), the Eleventh Circuit held that "delay[of] court proceedings" itself justifies denying a motion to substitute retained counsel. *Id.* at 1272. Echoing *Rivera-Corona*, *Jimenez-Antunez* held that a trial judge may "deny a motion to substitute retained counsel if it will interfere with the fair, orderly, and effective administration of the courts." *Id.*

3. Overall, then, the Circuits present three options: applying a three-factor test that considers delay, extent of the conflict and adequacy of the court's inquiry, but requires a profound breakdown in the attorney-client relationship that precludes adequate representation (First, Second, Sixth, and Tenth Circuits), balancing all relevant concerns without requiring such a profound breakdown in the attorney-client relationship (Fifth and Seventh Circuits), and permitting district courts to deny substitution of retained counsel based on delay alone, without considering the extent of the conflict or the adequacy of the trial court's inquiry (Fourth, Ninth, and Eleventh Circuits).

B. This Court Should Grant Certiorari to Resolve the Conflict

Certiorari is needed to resolve the Circuits' disagreement on the relevant standard. The right to choose one's counsel is inherent in the Sixth Amendment, and so impactful on court proceedings that this Court in *Gonzalez-Lopez* deemed its denial to be structural error. Yet criminal defendants are currently subject to dramatically different legal requirements for substitution of retained counsel depending on the circuit in which they are prosecuted. Defendants in the Fifth and Seventh Circuits can choose to discharge retained counsel if the balance of considerations supports it, even despite some delay and without any need to show counsel is failing to provide an adequate defense. Defendants in the First, Second, Sixth, and Tenth Circuits must show such inadequacy. And defendants in the Fourth, Ninth, and Eleventh Circuits can be prevented from substituting counsel, apparently regardless of the reasons for the request, where such denial would result in delay. It is inequitable to deny criminal defendants in this last group of Circuits the same level of freedom to choose their counsel as defendants prosecuted elsewhere.

C. The Ninth Circuit's Rule is Wrong and Deprived Burnell of his Sixth Amendment Right to Choice of Counsel

This Court should also grant certiorari to clarify that the Fourth, Ninth, and Eleventh Circuits' approach is wrong, and the Fifth and Seventh Circuits' is right. The Fourth, Ninth, and Eleventh Circuits' privileging of delay as sufficient to override defendants' reasons for requesting new counsel contravenes *Gonzalez-Lopez*'s directive to balance multiple factors. *Gonzalez-Lopez*, 548 U.S. at 152 (courts should "balance[e] the right to counsel of choice against the needs of fairness, and against the demands of its calendar.") Requiring an attorney-client conflict so extensive as to preclude effective representation—as the First, Second, Sixth and Tenth Circuit do—also contravenes *Gonzalez-Lopez*, which held the Sixth Amendment deprivation is "complete" when choice of counsel is infringed, "regardless of the quality of the representation [the defendant] received." *Id.* at 148.

A standard that considers factors beyond the bare fact of delay, without requiring the defendant to show constitutionally inadequate representation, will fulfill *Gonzalez-Lopez*'s requirement to consider all relevant circumstances, while promoting uniformity in the law and facilitating appellate review. The Fourth, Ninth, and Eleventh Circuits'

approach permits district courts to issue perfunctory, delay-based denials of substitution while failing to probe the extent of the damage to the attorney-client relationship: a factor bearing on fairness. The Ninth Circuit's narrow focus on delay also ignores the circumstances occasioning that delay, which will often include lack of attorney-client communication. Such reasons should provide powerful justification for substituting in a new attorney under *Gonzalez-Lopez*. Requiring at least some inquiry into these circumstances will provide a more substantive and complete record for the appellate court, by encouraging district courts to explain the balance of factors that they believe justifies granting or denying substitution. This will promote certainty and predictability, and—ultimately—encourage litigants to make timelier and better-supported substitution requests.

As this Court held in *Gonzalez-Lopez*, '[t]he Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 U.S. at 146. Requiring courts to consider the full panoply of circumstances prompting a litigant's desire to switch counsel will promote that right,

and ensure it is not routinely circumvented based on generic, unexplored concerns about delay that can be invoked in almost any case.

VII. CONCLUSION

For the foregoing reasons, Burnell respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: December 6, 2024

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