No. 24-6495

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Vs.

BILLY JOE TAYLOR

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

PETITION FOR WRIT OF CERTIORARI

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October 18, 2024

QUESTION PRESENTED

This Honorable Court has decided that the erroneous denial of Counsel of Choice violates the Sixth Amendment, **United States v. Gonzalez-Lopez,** 548 U.S. 140, 126 S.Ct. 2557, 165 L. Ed. 2d 409 (2006). Indeed the Gonzalez-Lopez Court found that such a denial affected the very "framework within which the trial proceeds or indeed on whether it proceeds at all." The Court held that "A trial Court's erroneous deprivation of a criminal defendant's choice of Counsel entitles him to reversal of his Conviction." Consistent with that conclusion the 5th Circuit in **United Sates v. Sanchez-Guerrero,** 546 F. 3d. 328 (5th Cir. 2008). And the 7th Circuit in **United States v. Smith,** 618 F. 3d 657 (7th Cir. 2010), relying on **Gonzalez-Lopez** precedent, concluded that a guilty plea does not waive the defendants' right to challenge the Sixth Amendment Violation. They conclude that "defendants guilty plea did not waive his claim that he was denied his Sixth Amendment right of choice of Counsel." Ironically the 8th Circuit is the same Circuit from which the **Gonzalez-Lopez** opinion originated, it has now in the instant case created both, a Circuit split and intra circuit split with its ruling in the case at BAR.

The question is:

Whether a defendant who is erroneously denied his Counsel of Choice in Violation of the Sixth Amendment, which is structural error, waives his right to claim he was denied this right by pleading guilty under the advice of the Counsel forced upon him?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the 8th Circut appears at: **APENDIX A** to the petition and is unpublished.

JURISDICTION

On **July 31st, 2024,** the United States Court of Appeals decide my case in appeal No.: **23-2482.** Petitioner was never properly served this opinion. The time to petition for a rehearing en Banc has passed. The jurisdiction of this Court is invoked under **28 U.S.C. §1254(1).**

STATEMENT OF THE CASE

Petitioner, Billy Taylor, was charged by criminal complaint with one count of healthcare fraud on or around **May 25, 2021.** On or around **November 2nd, 2021** the petitioner was indicted with 16 counts of heathcare fraud and 1 count of money laundering. For purposes of representing Mr. Taylor at the arraignment only, a firm previously on retainer by the petitioner in a civil matter, represented the defendant. The defendant retained the firm of Attorney Joshua Lowther in Atlanta Georgia. Upon the defendant learning of an actual conflict of interest with the Attorney Lowther the defendant ultimately terminated Attorney Lowthers firm and filed a Pro-Se Motion to Release his frozen but untainted assets for purposes of retaining Counsel. A hearing was ordered and the magistrate judge, without conducting a Faretta hearing, ruled on the Pro-Se Motion. The Magistrate denied the motion and appointed Attorney Kenneth Osborne to represent the defendant. Mr. Taylor pleaded unsuccessfully with the newly appointed attorney to file an objection and protect his Sixth Amendment rights that had just been violated by the Magistrate Judge. Taylor then hired, through his family, not one but three well qualified attorneys to prepare for trial. The local Counsel his family hired filed a Motion to Substitute. Appointed Attorney Kenneth Osborne then called the Court Ex parte. He did not inform the prosecutor or his very own client. He complained about the newly retained Counsel having a show cause order in front of a different judge. An order that ended sans admonition.

Appointed Counsel damaged the defendant as a hearing was held on the motion to substitute and the substitution was denied by the District judge erroneously. Mr. Taylor then suffered his second Sixth Amendment violation.

Again Taylor pleaded unsuccessfully with appointed Counsel to protect his rights by filing something with the Court and again appointed Counsel refused. Succumbing to his wounds Taylor followed the advice of the conflicted appointed Counsel and plead guilty. Mr. Taylor was sentenced to 180 months. He timely appealed. Burdened yet again with the same appointed Counsel. Mr. Taylor petitioned and was granted the ability to represent himself on appeal. On appeal Taylor challenged the two Sixth Amendment violations that occurred. Taylor did not challenge his plea as unknowing and involuntary as the facts to establish that were outside of the record. On **July 31st, 2024** in an unpublished opinion the 8th Circuit denied the defendant relief. The 8th Circuit ruled that because the defendant entered a guilty plea, he waived his right to challenge the Sixth Amendment violations that occurred. The Court went on to say "nor could he challenge his plea as knowing and voluntary because he didn't raise the issue in his opening brief," this case comes down to a simple question. Can a defendant challenge, on direct appeal, the erroneous deprivation of Counsel of choice if his appointed Counsel convinces him to enter a guilty plea?

As mentioned at length Supra the defendant lays out the Circuit split and intra-circuit split on this issue.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Whether this Courts ruling in **Tollett v. Henderson,** 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L. Ed. 2d 2235 (1973) was overturned by this Courts Subsequent ruling in **United States v. Gonzalez-Lopez,** 548 U.S. 140, 126 S.CT. 2557 (2006). The following issue has created both a Circuit split and an apparent intra-Circuit split. That issue being, when a defendant is erroneously denied his retained counsel of choice and forced to proceed with Court appointed Counsel, who ultimatelly convinces the defendant to plead guilty, waives his right to seek relief on direct appeal for the Sixth Amendment Violation that occurred. A violation that affected the very "framework" within which the case proceeds. The two Circuits to have previously directly answered this question, prior to the instant case, are the 5th Circuit in **United States v. Sanchez-Guerrero,** 546 F. 3d; (5th Cir. 2008) LEXIS 21826 and the 7th Circuit in **United States v. Smith,** 618 F. 3d. 657; 2010 U.S. App LEXIS 17256 (7th Cir. 2006). Both, relying on **Gonzalez-Lopez,** concluded that the defendants guilty plea did not waive their right to challenge the violation of his 6th Amendment right to Counsel of choice.

The 8th Circuit, in the instant case, has created a circuit split and an apparent intra-circuit contradiction of **Gonzalez-Lopez** in the case at bar. Ruling that the defendant, by entering an unconditional guilty plea, has waived his right to challenge the Sixth Amendment violation that occurred. The defendants, who are erroneously precluded from their retained chosen advocate and forced to proceed with appointed Counsel, are helpless if the appellate Court ruling in the case at bar is allowed to stand. The prior **Gonzalez-Lopez** decision is upended when a District Court can force a defendant into appointed Counsel affecting the "framework" of the process.

Even the dissent in the **Gonzalez-Lopez** Court opined that the erroneous deprivation, in their view, should trigger a harmless error review. The dissent goes so far as to say that they would not require the defendant to show ineffectiveness within the meaning of **Strickland v. Washington**, rather an "identifiable difference" in the quality of representation between the disqualified Counsel and the appointed Counsel. Neither the majority or dissent envisioned a situation whereby a defendant loses his ability to challenge altogether. They only disagreed under which standard of review should be used. The defendant, in the case at bar, was given no choice to challenge under either standard and as such the Court should intervene to resolve this issue.

THE GONZALEZ-LOPEZ COURT

This Court foresaw this problem when it ruled in **Gonzalez-Lopez**. The Court opined:

> "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error' Id., at 282, 113 S.Ct. 2078, 124 L. Ed. 2d 282... 'and the choice of attorney affects whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides intead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,' **Fulminate**, Supra, at 310, 111 S.Ct. 1246, 113 L. Ed. 2d 302, or indeed on whether it proceeds at all...' 'Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all."

The **Gonzalez-Lopez** Court understood that different attorneys will pursue different strategies. The government acknowledged in **Gonzalez-Lopez** that "the deprivation of choice of Counsel pervades the entire trial." The dissent in the **Gonzalez-Lopez** Court posits:

> "Because the Sixth Amenment focuses on the quality of the assistance that counsel of choice would have provided, I would hold that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received. This would not require a defendant to show that the second-choice attorney was Constitutionally ineffective within the meaning of **Strickland v. Washington.**"

Thus even the dissent would require appellate courts to delve into the merits to see if a defendant was erroneously deprived of his Counsel of his choice. Then employ a less stringent standard than the **Strickland** test to consider if the deprivation merits relief. Inarguably, both the majority and dissent acknowledge that the erroneous deprivation of counsel of choice triggers a review under at least some standard instead of summary dismissal if the defendant pled guilty after the violation occurred.

The defendant, in the instant case, was denied the ability to reach even the issue of whether the District Court erroneously denied his Sixth Amendment right to Counsel of choice. The appellate Court, in an unpublished one page opinion, summarily affirmed his conviction and sentence citing **Tollett v. Henderson** with no mention of the 8th Circuits very own ruling in **Gonzalez-Lopez.** The Court instead cites its inapposite ruling in the case of **United States v. Dewberry,** 936 F. 3d 803; 2019 U.S.App LEXIS 25774 (8th Cir. 2019). A case in which the defendant was denied his right to proceed Pro-Se. Notably one of the judges on that Case was also on the case at issue here. In the dissent in the **Dewberry** case, the Honorable Judge Kelly opines that:

> "In my view, the record makes clear that the District Court violated Dewberry's right to Self-representation when it appointed Counsel to represent him. The presence of that structural error may have rendered Dewberry's guilty plea involuntary, but because the current record is not fully developed on the second issue, I would not decide it on direct appeal."

Judge Kelly further states;

> "This is the sort of issue that is often better deferred to post-conviction proceedings under **28 U.S.C. §2255**, as it usually involves facts outside the original record but Dewberry is not barred from challenging the validity of his guilty plea nor raising a claim of ineffective assistance of counsel in a post conviction proceeding.

The problem with this opinion is that requiring the defendant to attack in a §2255 proceeding would require that the issue then become subject to the **Strickland** test. This would invoke an even higher standard than that proposed by either the majority or dissent in the **Gonzalez-Lopez** case. This renders **Gonzalez-Lopez** a dead letter. The defendant, in the instant case, did not directly challenge whether his guilty plea was knowing and voluntary because the record is all that can be relied on in a direct appeal proceeding. The defendant, in knowing that the issue as to the validity of his guilty plea itself was best suited for collateral attack, did not burden the Court with the issue in his opening brief as it was, by Eight Circuit precedent, not the proper vehicle to address the issue.

Even in Dewberry, the Court declined to decide whether the guilty plea was knowing and voluntary. Instead the Court focused on the only issue "addressed by the Court: whether Dewberry waived his right to self representation by pleading guilty." As mentioned infra, the case is inapposite. Although both cases are derived from the Sixth Amendment, the issue before this Court squarely falls in line with the **Smith** and **Sanchez-Guerrero** cases thus relying

on **Gonzalez-Lopez** and not Dewberry. The Dewberry Court cited **Gomez v. Berge,** 434 F. 3d 940, 942-943 (7th Cir. 2006). However in the defendants case at bar the 7th Circuit in **Smith** did not agree with **Gomez v. Berge.**

C I R C U I T S P L I T

This Court should grant certiorari to settle the confusion between its ruling in **Tollett v. Henderson** and **United States v. Gonzalez-Lopez.** Though the Dewberry case is inapposite, it was used to defeat the defendant in this case. The Dewberry case cites only the 7th Circuit case of **Gomez v. Berge.** However, even in the 7th Circuit, the issue at bar is decided in favor of the defendant by the 7th Circuit ruling in **United States v. Smith.** Arguably, the 7th Circuit ruling in **Gomez v. Berge,** which was issued on **January 12, 2006,** would possibly have been different four months later. On **April 18, 2006,** the Supreme Court ruled in the **Gonzalez-Lopez** case. Notably, this rationale can be confirmed by the 7th Circuit ruling in the **Smith** case as it lamented.

> "It is true that an unconditional guilty plea typically waives non-jurisdictional defects in the proceedings below, see **Tollett v. Henderson.,** the Supreme Court has recently held, however, that the erroneous deprivation of the right to Counsel of choice in violation of the 6th Amendment is a "Structural error" ... And relying on **Gonzalez-Lopez,** the 5th Circuit held that a defendant's guilty plea does not preclude him from challenging, on appeal, a denial of his rights to Counsel of Choice see **United States v. Sanchez-Guerrero,** we agree, ... defendants guilty plea does not amount to a waiver of his 6th Amendment choice of Counsel claim."

The 8th Circuit has now suspended its own logic in the **Gonzlez-Lopez** decision. This has caused the obvious circuit split as well as the intra circuit contradiction. Both **Dewberry** and **Gomez v. Berge** petitioned for a writ

to this Court and Cert was denied. Though inapposite, by granting Cert in this case, the Court could offer clarity on the issue and prevent the further deterioration of a defendants 6th Amendment protection.

This Court must intervene. Under this ruling the defendant cannot even collaterally attack the Court appointed Counsel who advised him to plea guilty. Courts are citing **Tollett v. Henderson** to defeat similarly situated defendants. This makes **Gonzalez-Lopez** a dead letter. If unwanted Counsel is forced on a defendant and can convince him to plead guilty, the defendant is thereby afforded no chance to attack the "structural" damage done. The **Gonzlez-Lopez** Court realized that the choice of attorney affects the very "framework" and it reasoned, that the erroneous deprivation of Counsel of choice was "unquantifiable." Now, in this case at bar, the defendant is damaged unquantifiably. This Court should grant Cert to stop other Courts from continuing to erroneously deny Counsel of choice in violation of the 6th Amendment. Forcing instead often less qualified appointed Counsel.

When **Gonzalez-Lopez** was decided, undoubtedly, stare decisis could have been given as a reason to defeat the defendant if he was denied his right prior to the **Gonzalez-Lopez** ruling. However, in the case at bar, stare decisis is turned on its head. Instead, eisegesis is utilized to essentially revert back to a flawed ruling. The **Gonzalez-Lopez** Court clarified that ruling. A fair reading of **Gonzalez-Lopez** sheds light on this issue. As in engineering, any building is doomed if it has structural defects. The same can and must be employed in our legal system to ensure adherence to the rule of law. If the District Court is allowed to erroneously deprive the defendant to his Counsel of his choice, and then Appellate Courts punish him for counseled decisions such as pleading guilty, he is afforded no chance for relief on Direct Appeal.

This leaves only collateral attack for ineffectiveness, thereby, erasing the logic in **Gonzalez-Lopez** and requiring the structural error to be again analyzed under harmless error review.

CONCLUSION

For the reasons discussed in this petition, the Court should grant Certiorari to give clarity to the future Courts and resolve the Circuit split. The Court should hold that the erroneous deprivation of Counsel of choice, in violation of the Sixth Amendment, is a structural error that can be asserted on direct appeal. The Court should also conclude that violation entitles the defendant to relief.

Respectfully Requested,

Dated: 11/22/2024

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