

24-6774

NO. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

MAR - 2 2025

OFFICE OF THE CLERK

ALBERTO E. RIVERA, PETITIONER,

v.

DAN CROMWELL, RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can law enforcement officials refuse to honor a defendant's request for the presence of their retained counsel at a "critical stage," without a countervailing interest, and not run afoul of the Sixth Amendment's right to counsel of choice as long as they provide substitute counsel?
2. Is it time for this Court to revisit the issue regarding substitute counsel that was left open in Wade where law enforcement officials have used this point to circumvent a defendant's right to the presence of their retained counsel at "critical stages"?
3. Is it time to modify the precedent regarding offense-specificity where there are factually related charged and uncharged offenses that are so inextricably intertwined that the Sixth Amendment right to counsel must prevail?

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OPINIONS BELOW

The Seventh Circuit order denying Request For Certificate Of Appealability is unreported (Case No. 24-1736). The Decision and Order of the District Court is also unreported and can be found at 2024 WL 1344847 and set forth in Petition Appendix A & B respectively.

STATEMENT OF JURISDICTION

The Seventh Circuit order denying Request For Certificate Of Appealability was entered on December 10, 2024. The 90-day period for filing a petition for certiorari ended on March 10, 2025. This petition was filed prior to this date. The Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

The District Court had jurisdiction pursuant to 28 U.S.C. §2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that, "[i]n 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."

U.S. Const. Amend 6

An element of this right for a defendant who does not require appointed counsel is to choose who will represent him.

STATEMENT OF THE CASE

On April 16, 2015, the State filed a Criminal Complaint charging Rivera with being a felon in possession of a firearm and an arrest warrant issued. The Complaint described an incident on April 8, 2015, when Henry Hodges had been shot and killed and B.J. was shot and wounded. By the time the Criminal Complaint was filed, Rivera had found out from his parole officer that he was wanted for questioning.

Rivera hired Attorney Robert LeBell to represent him on the felon in possession of a firearm charge and Attorney LeBell, among other things, made arrangements for Rivera to turn himself in. However, Rivera decided not to turn himself in and was eventually arrested on August 20, 2015. When arrested, and later when police sought to question him, Rivera asked for "his" attorney, Attorney Robert LeBell. On August 26, 2015, Rivera made his initial appearance on the firearm charge. Bail was

set at \$25,000 cash.

Later that same day, Rivera was taken for a live lineup procedure for B.J. to identify the shooter. Rivera again asked that Attorney LeBell be contacted and present for the lineup. Rivera was poised to resist participating in the lineup unless Attorney LeBell be contacted and present. However, law enforcement officials refused to contact Attorney LeBell, instead telling Rivera, "there's your attorney" while pointing to a woman Rivera did not know. Rivera stated that this woman was not his attorney and again requested Attorney LeBell's presence.

Once it became apparent that the law enforcement officials were not going to honor his request, and that he could either cooperate or physically resist, Rivera reluctantly cooperated with the lineup all the while continuing to request Attorney LeBell's presence. B.J. who had already been shown a single photo of Rivera (with the name "Alberto" on it) picked Rivera out of the lineup.

On September 3, 2015, Rivera appeared for his preliminary hearing with Attorney Joseph Kennedy, who had been sent by Attorney LeBell. On that same date, however, the State filed an information charging Rivera with more charges including first degree intentional homicide. Rivera waived the prelim-

inary hearing.

On September 14, 2015, Rivera appeared with Attorney LeBell who confirmed that he had been retained for the felon in possession charge and more time would be needed to see if Rivera could retain him for those more serious charges. The motion was granted and Rivera eventually hired other private counsel.

On June 10, 2017, Rivera's trial began. Rivera's defense was that he knew Hodges and the individuals that shot him but he did not play any role in his death. The State introduced the testimony of B.J. who identified Rivera as the person she believed to be the shooter. Rivera testified in his own defense and the State introduced other acts evidence which consisted of Rivera's 1997 conviction for homicide. On June 13, 2017, Rivera was found guilty on all counts. On October 18, 2017, Rivera was sentenced to Life imprisonment without the possibility of parole.

REASON THIS COURT SHOULD GRANT CERTIORARI

A state court or a United States Court of Appeals has decided an important question of federal law that has not been but should be settled by this court, or has decided an important question in a way that conflicts with relevant decisions of this Court.

SUMMARY OF ARGUMENT

From the beginning of the cases discussing the Sixth Amendment right to counsel, there has been a tension between protecting the accused's Constitutional rights and allowing the authorities the leeway they need to investigate crimes. Unfortunately, that leeway has eroded the protections afforded by the Sixth Amendment. As the right to counsel took form, the majorities generally expanded the scope of the right to counsel to protect the accused. However, beginning in 1988, the focus of the Supreme Court switched from protecting the interests of the accused to facilitating the government's interest in investigating crimes through conversations with suspects culminating in Texas v. Cobb.

Since Cobb, law enforcement officials have weaponized the offense-specific component of the Court's decision. This includes charging defendants with lesser offenses arising out of the same incident as a means of circumventing the right to counsel, illiciting incriminating statements and other information regarding the uncharged offenses, and then charging defendants with those uncharged and often more serious offenses using the incriminating evidence against them that they circumvented the right to counsel to obtain.

Now is the time to strike a common sense balance that recognizes that there are some situations where the charged and uncharged offenses are so inextricably intertwined that the right to counsel must apply to both the charged and uncharged offenses. This case is a perfect example of a right to counsel abuse that the Sixth Amendment was designed to prevent.

ARGUMENT

I. +Wade+ does not grant law enforcement officials the authority to ignore a defendant's request for the presence of their retained counsel at a post-indictment lineup or provide substitute counsel without a countervailing interest.

A. The District Court misinterprets the law regarding the right to counsel of choice.

Rivera's Sixth Amendment right to counsel of choice was violated when law enforcement officials refused to honor his request for the presence of his retained counsel during a postindictment lineup. Instead, rather than honoring Rivera's request for the presence of his retained counsel, Attorney LeBell, law enforcement officials compelled Rivera to participate in the lineup with substitute counsel without explaining why Attorney LeBell's presence could not be honored.

On habeas review, the Wisconsin District Court adopted the conclusion of the Wisconsin Court of Appeals which is in consistent with the Sixth Amendment right to counsel and

Supreme Court precedent. The Wisconsin Court of Appeals concluded that because the jury convicted Rivera of the homicide charge, it obviously had no trouble concluding that he was also a felon in possession of a firearm. And as such, even if Rivera did have a right to his counsel of choice at the lineup, there was no prejudice because there was no probability of a different outcome.

The District Court concluded that this conclusion was reasonable and did not contravene any Supreme Court precedent. (Appendix B). The Wisconsin Court of Appeals and the District Court miss the mark. In United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), this Court rejected such a view by concluding that "[the Sixth Amendment right to counsel] 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." *Id.* at 146.

As such, any argument that a Sixth Amendment right to counsel of choice violation is not "complete" unless Rivera can show that substitute counsel was ineffective within the meaning of Strickland, 466 U.S. 668, 691-696, 104 S.Ct 1052 (1984), i.e., that substitute counsel's performance was deficient and the defendant was prejudiced by it, is wrong. The deprivation of the right was "complete" when Rivera was prevented from being represented by his retained counsel. In

Gonzalez-Lopez, this Court reasoned that "to argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." Id 548 U.S. at 176.

At issue here is not whether Rivera was found guilty or if the jury concluded that he was in possession of a firearm, but whether Rivera was entitled to the presence of his retained counsel at a critical stage (the postindictment lineup). The District Court did not answer this question head-on.

The District Court goes on to misinterpret this Court's ruling in Wade regarding substitute counsel at a postindictment lineup which has far reaching implications for all defendants. In response to Rivera's argument that the denial of his right to counsel of choice was a structural error, the District Court argued that because the Wade Court explicitly left open the question regarding whether the presence of substitute counsel might not suffice where notification and presence of a defendant's own counsel would result in prejudicial delay, and because the Court also reasoned that substitute counsel may eliminate the hazards that could arise with a lineup and a completely unrepresented defendant, Rivera cannot point to any Supreme Court precedent that was misapplied and thus he is

not entitled to habeas relief. (Appendix B).

Yes, this Court left open the question regarding substitute counsel. However, the open question in Wade is better described as a qualification where this Court rightly recognized that there are some situations when contacting a defendant's retained counsel may result in prejudicial delay and in those situations, a defendant's right to counsel is not infringed upon by the provision of substitute counsel.

However, that is not the case here. There was no countervailing interest that prevented law enforcement officials from contacting Attorney LeBell. They acted arbitrarily and in doing so ran afoul of Supreme Court precedent.

The District Court runs afoul of Wade where it ignores the countervailing interest component and the overall thrust of Wade. The implication is that law enforcement officials can provide substitute counsel for a represented defendant at a critical stage without a reason. Such a view undercuts the historical core of the Assistance of Counsel Clause which, before it guaranteed anything else, it guaranteed an accused the right to be represented by the attorney of his choice.

This begs the question, can law enforcement officials refuse to honor a defendant's request for the presence of his retained counsel at a postindictment lineup without a reason?

In three pivotal cases this Court decided that the right to counsel extended to a postindictment lineup. Those cases are, Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967); U.S. v. Wade, 388 U.S. 218, 87 S.Ct. 1926 (1967); and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967).

In those cases, this Court, among other things, ruled that the admission of in-court identifications without first determining that they were not tainted by the illegal lineup but were independently arrived at was constitutional error. This Court also ruled that an accused was denied his Sixth Amendment right to counsel when law enforcement officials conducted a lineup without notice to and in the absence of counsel.

This Court's decision in Wade is the focus here because it is this ruling that the District Court misinterprets. In Wade, this Court concluded that a postindictment lineup was a critical stage of the prosecution at which the defendant was as much entitled to counsel as he would be at trial.

The Court's reasoning was that critical confrontations of the accused by the prosecution at pretrial proceedings where the results could settle the accused's fate and reduce the trial itself to a mere formality. Therefore, the presence of counsel at those critical confrontations are to ensure

that an accused's interests are protected.

So, the answer to that previous question is no. Wade does not permit law enforcement officials to deny a defendant's request for the presence of his retained counsel or provide substitute counsel without a reason. To do so would be akin to the trial court arbitrarily changing a defendant's counsel at his trial.

Rivera's postindictment lineup was on par with the trial itself and because that was the case, Rivera was entitled to Attorney LeBell's presence. Any argument to the contrary ignores cases such as Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct55 (1932) where this Court concluded that where the right to counsel is conceded, a defendant should be afforded an opportunity to secure the counsel of his choice.

The District Court overlooks Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477 (1985) where this Court declared that once the right to counsel attaches and been asserted, the State must honor it. This Court went even further stating, "[t]he Sixth Amendment...imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance." Id at 171.

In this case, the District Court didn't miss the mark by a little, that Court missed the mark by a lot when

it concluded that Rivera was not entitled to habeas relief. This Court should reject the District Court's conclusion that because Rivera had substitute counsel at the postindictment lineup, the Constitutional command was met. This Court should do so because it already rejected such a view in Strickland, 466 U.S. at 685. More is required than the mere presence of someone who happens to be a lawyer alongside an accused. The Constitutional command is satisfied when an accused has access to the knowledge and skill of an attorney which allows a defendant to fully meet the prosecution's case.

Law enforcement officials denied Rivera this access to the knowledge and skill of his retained counsel. The officials were aware of Rivera's right to counsel which is why they brought substitute counsel. However, once Rivera invoked his right to have Attorney LeBell present, they were obligated to honor that request unless they had a countervailing reason which they did not.

II. The denial of Rivera's right to counsel of choice is a structural error requiring this Court to vacate his conviction on all counts.

A. Rivera's conviction on all counts should be vacated.

Because the denial of Rivera's right to counsel of choice is a structural error, his conviction should be vacated.

"Structural errors involve errors in the trial mechanism" so serious that "a criminal trial cannot be relied upon to serve its function as a vehicle for the determination of guilt or innocence." Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246 (1991). Such errors are not amenable to harmless error review and will always result in reversal if properly preserved for appeal. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S.Ct. 2078 (1993).

The District Court makes two arguments as to why Rivera is not entitled to relief: (1) if Rivera is entitled to relief it would only apply to the felon in possession charge because that is the only charge for which the right to counsel had attached; and (2) the Wisconsin Court of Appeal's decision is doubly deferential because Rivera's claim is based on ineffective assistance of counsel. (Appendix B)

Addressing the second argument first, it only follows that if structural errors will always result in reversal if properly preserved for appeal and Rivera's right to counsel claim is a structural error but neither trial nor appellate counsel preserved the issue for appeal then they were ineffective.

This is especially true in light of Gonzalez-Lopez, where this Court explicitly held that a denial of counsel

of choice is not subject to harmless error analysis because of the difficulty in assessing the effect of the error in light of the many variables involved in representation. *Id.* 548 U.S. at 140.

As it relates to the first argument that Rivera's right to counsel claim only applied to the felon in possession charge because the right to counsel is offense specific. The District Court makes this argument even though it did not reverse Rivera's conviction on that count which they should have.

There is no dispute that the right to counsel of choice was designed to make certain that an adequate adversarial process occurs. Upon the filing of formal charges, the prosecutorial phase begins and the system becomes fully adversarial and a defendant's fate, to a significant extent is placed in the hands of defense counsel.

Rivera is entitled to the reversal of his conviction on all counts because the felon in possession charge is inextricably intertwined with the more serious uncharged offenses and law enforcement officials only charged the felon in possession charge as a means of circumventing Rivera's right to counsel.

B. Law enforcement officials held off charging Rivera with the more serious charges as a means of knowingly exploiting an opportunity to confront Rivera without his counsel being present.

Counsel's presence, in and of itself, does little for the defendant, likewise, deprivation of counsel, in and of itself, causes the defendant no cognizable harm. The value of defense counsel is only realized in court, upon the final disposition of the case. Until that point, the presence or absence of counsel throughout the process has had no real world consequences for the defendant. For example, a defendant who is interrogated in the absence of counsel only realizes the cost of that deprivation, at least in any sense in which the Sixth Amendment is concerned, is at trial.

This comes to form here. Rivera was charged with being a felon in possession of a firearm. However, that violation occurred in the context of an attempted armed robbery and abduction where Henry Hodges was killed and his girlfriend B.J. was shot but survived. Notably, the Criminal Complaint goes beyond describing Rivera as a felon with a gun. In the Criminal Complaint B.J. identified Rivera as the shooter.

More specifically, the Criminal Complaint explains that during the investigation into the shootings, a detective from the West Allis Police Department interviewed members of Hodges' family about whether they knew anyone named Alberto. Hodges'

nephew provided a Facebook picture of Alberto; he was identified there as Alberto Ortiz. Hodges' nephew also told detectives where Alberto lived, which was the same apartment building that B.J. had identified as the building where she and Hodges had driven to meet Alberto on the night of the shooting.

Using the department's databases, the detective determined that Alberto Ortiz was Rivera. Another detective from the West Allis Police Department showed the Facebook picture to B.J. who stated with "100%" certainty that he was the person who had shot her and Hodges. However, Rivera was not initially charged with those shooting offenses.

The decision not to charge Rivera was strategic even though he was the only known suspect and the surviving victim had identified him as the shooter. In light of this Court's ruling in Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335 (2001), law enforcement officials have exploited the offense-specific loophole that allows them to encroach on defendants' right to counsel by delaying more serious charges that arise out of the same incident as an end run around counsel.

In Maine v. Moulton, this Court concluded that a knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of

the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. And the Sixth Amendment is violated when the State obtains incriminating evidence by knowingly circumventing an accused's right to have his counsel present in a critical confrontation between an accused and a witness or State agent.

In Rivera's case, the law enforcement officials ran into two problems, Rivera had already invoked his Fifth Amendment right and was represented by retained counsel. As such, they could not approach Rivera without counsel which is why they brought substitute counsel from the Public Defender.

As such, this case brings to the fore the concerns Justice Breyer expressed in his dissent in Cobb. The Justice explained that "[t]he majorities rule permits law enforcement officials to question those charged with a crime without first approaching counsel through the simple device of asking about any other related crime not actually charged in the indictment." Cobb, 592 U.S. at 182.

In this case, law enforcement officials not only approached Rivera without first contacting his retained counsel, they brought substitute counsel as a means of circumventing his retained counsel altogether because they could not approach Rivera without counsel since he had invoked his Fifth Amendment right. However, this action ran afoul of Wade because a

postindictment lineup is a critical stage at which a defendant is entitled to his counsel similar to at trial.

The law enforcement officials got caught with their hand in the cookie jar. They were attempting to exploit the loophole created by Cobb but ran into Rivera who had invoked his Fifth and Sixth Amendment and rather than honoring those they plowed ahead in direct violation of those rights.

Justice Breyer rightly noted that the only thing that would prevent law enforcement officials from exploiting a defendant's right to counsel short of charging every offense that may rise from any given action, is to create a standard that recognizes that some charges are so inextricably intertwined that the right to counsel must attach while also acknowledging that there are legitimate cases that law enforcement officials have a duty to investigate.

The situation in Rivera's case exposes the weakness of this Court's ruling in Cobb. Is it permissible for B.J. to identify Rivera as the shooter and that identification not impact the felon in possession charge which the right to counsel had attached?

More importantly, does the investigation of the uncharged offenses trump Rivera's right to counsel on the charged offense to the point where law enforcement officials can

ignore the Sixth Amendment right to counsel once it's invoked?

The decision in Cobb has swung the scale too far in the State's favor where the Sixth Amendment ceases to have his force. Rivera invoked both his Fifth and Sixth Amendments yet law enforcement officials still forced him to participate at a critical stage of the prosecution without his retained counsel without giving a reason and the Courts are defending such actions even though it runs counter to the right.

Rivera is entitled to have his conviction vacated not only on the felon in possession count but the other counts as well because the decision not to charge Rivera with all the charges at once were an attempt to circumvent the right to counsel and an intentional creation of such an opportunity.

CONCLUSION

There remains a need for a coherent understanding of the Sixth Amendment exclusionary rule where Cobb undercuts the protections afforded by the Sixth Amendment. In Moulton and Brewer v. Williams this Court vacated the convictions of those defendant's on the grounds that the crimes were so inextricably connected that the right to counsel had to apply and the Court should do the same here.

Law enforcement officials should not be allowed to make

an end run around counsel. This Court should also not allow the admission of B.J.'s in-court identification without first determining that it was not tainted by the illegal lineup. Then, this Court cannot allow B.J.'s lineup identification to be used against Rivera on the felon in possession charge because his right to counsel of choice on that count was violated.

Rivera asks this Court to vacate his conviction and remand this case to the lower court's for a new trial or whatever remedy this Court sees fit.

Respectfully submitted this 2nd day of March, 2025.


Alberto E. Rivera

VERIFICATION

I, Alberto E. Rivera, do hereby certify under the penalty of perjury that all of the foregoing is true and correct.


Alberto E. Rivera

CERTIFICATE OF MAILING

I, Alberto E. Rivera, do hereby certify that on Sunday, March 2, 2025, I placed this Petition for writ of certiorari into the institution prison mail box.

The envelope was properly addressed and postage was prepaid. This notice is to invoke the prison mailbox rule.

March 2, 2025.

A handwritten signature in black ink, appearing to read 'Alberto E. Rivera', written in a cursive style.

Alberto E. Rivera

Alberto E. Rivera # 264965
Wisconsin Secure Program Facility
1101 Morrison Drive
Boscobel, Wisconsin 53805

Clerk
UNITED STATES SUPREME COURT
On First St. NE
Washington, DC 20543-0001

March 2, 2025

Dear Clerk,

Enclosed please find the Petitioner's Petition For Writ of
Certiorari in this Court. Also find the enclosed affidavit
of indigency and request to proceed in forma paupris.

A handwritten signature in black ink, appearing to read 'Alberto Rivera', with a stylized, cursive script.

Alberto Rivera