

No. 17-6373

IN THE SUPREME COURT OF THE UNITED STATES

BRETT J. WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the rule of automatic reversal in Holloway v. Arkansas, 435 U.S. 475 (1978), applies where a defendant objects to an asserted conflict of interest but the asserted conflict does not involve counsel's joint representation of co-defendants.

2. Whether the Sixth Amendment required the district court, after an initial valid waiver of the right to counsel before trial, to readmonish petitioner of his right to counsel before sentencing.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-6373

BRETT J. WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 859 F.3d 843.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2017. A petition for rehearing was denied on July 18, 2017. The petition for a writ of certiorari was filed on October 16, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

3
STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of three counts of attempting to entice and coerce a minor to engage in sexually explicit conduct for the purpose of filming such conduct, in violation of 18 U.S.C. 2251(a); and three counts of attempting to entice and coerce a minor to engage in sexual activity, in violation of 18 U.S.C. 2242(b). Judgment 1-2. He was sentenced to a life term of imprisonment, to be followed by a life term of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-39a.

1. Petitioner, who was at least 34 years old at the time, met a 13-year-old girl, S.R., on a teenage dating website while he was masquerading as a teenager. Presentence Investigation Report (PSR) 3, ¶ 6. He coerced S.R. into performing various sexual acts over Skype, some of which he copied to his computer. PSR ¶¶ 8-13, 21. He also extorted her to perform sexual acts with her dog by threatening to publish prior videos of her performing other sexual acts. PSR ¶ 12. Petitioner engaged in similar conduct with other young teenage girls, see, e.g., PSR ¶¶ 29, 31-37, and he admitted to contacting hundreds of girls online, PSR ¶ 30.

A grand jury returned a six-count superseding indictment charging petitioner with three counts of attempting to entice and coerce a minor to engage in sexually explicit conduct for the

purpose of filming such conduct, in violation of 18 U.S.C. 2251(a); and three counts of attempting to entice and coerce a minor to engage in sexual activity, in violation of 18 U.S.C. 2242(b). Indictment 1-3.

2. The district court appointed a federal public defender to represent petitioner. Pet. App. 3a. Seven weeks before the scheduled trial date, the court granted that counsel's motion to withdraw and continued the trial. Ibid. It appointed Robin Fowler, a local private attorney, to represent petitioner. Ibid.

In February 2014, three months before the rescheduled trial, Fowler filed a motion to withdraw because of a "total breakdown of communication between counsel and [petitioner]." Pet. App. 3a (citation omitted). In a hearing on the motion, Fowler explained that petitioner had developed a "complete lack of trust now in communications" from Fowler. 2 ROA 8. Fowler further advised the court that he had told petitioner that Fowler and the prosecutor had been married at one time and that they had a child together. Pet. App. 3a. Fowler believed that this relationship was "not an ethical dispute or an ethical problem and things like that happen a lot in smaller towns but I still make it clear. I don't know if that adds to [petitioner's distrust] or not." Id. at 3a-4a (citation omitted).

The court denied the motion to withdraw, finding that the request was untimely because of the impending trial. Pet. App.

4a. It further found that Fowler had not shown a total breakdown in communications, that any disagreement appeared to be "strategic," and that petitioner had "substantially and unreasonably contribut[ed]" to any breakdown in communication. Ibid. (citation and internal quotation marks omitted).

Less than two weeks before trial, petitioner filed a pro se motion for new counsel. Pet. App. 4a. After a hearing, the district court denied petitioner's request for substantially the same reasons it had denied Fowler's withdrawal motion. Ibid. The court, however, granted petitioner's motion to reschedule the trial. See ibid.

About two weeks before the new trial date, petitioner filed a letter with the court complaining about his relationship with counsel. Pet. App. 4a. In the letter, he "for the first time[] raised Mr. Fowler's relationship with the prosecutor as a potential conflict of interest in his case." Ibid. The letter also stated that petitioner had filed criminal charges against Fowler and was likely to file civil claims. Id. at 5a. It then "added complaints about the district court's impartiality." Ibid.

The district court construed the letter as another motion for new counsel. Pet. App. 5a. At a third hearing, petitioner, "when given the opportunity to speak on the record," did not raise "the issue of Mr. Fowler's relationship with the prosecutor as a potential conflict of interest in the case." Ibid. Instead, he

discussed disagreements over witnesses and evidence. See 2 ROA 181-182. The district court again denied the motion, noting that petitioner had continued to substantially and unreasonably contribute to any communication problems by insisting that Fowler raise potentially frivolous issues. Pet. App. 5a-6a.

3. Two days before trial, petitioner filed a pro se motion to relieve counsel and proceed pro se. The district court initially denied the motion, concluding that it was "a procedural ploy to obtain new counsel." Pet. App. 6a (citation omitted). On the morning of jury selection, petitioner renewed the request to proceed pro se. Ibid. In an extensive colloquy, the court "carefully reviewed the charges and statutory penalties with [petitioner], and strongly cautioned him against proceeding pro se." Ibid.; see 2 ROA 191-222. It also reviewed the penalties that petitioner would face if convicted. 2 ROA 215-216. Petitioner nevertheless insisted on proceeding pro se, and the court granted his motion. Pet. App. 6a. The court appointed Fowler as standby counsel, 2 ROA 224, and explained that if petitioner changed his mind mid-trial and no longer wished to represent himself, the court would reappoint Fowler as full counsel, id. at 219.

Petitioner represented himself at the trial and sentencing, with Fowler serving as standby counsel. Pet. App. 6a; see 2 ROA 224, 231. The jury found petitioner guilty on all counts. Pet.

App. 6a. The district court sentenced him to 30 years of imprisonment on the Section 2251(a) counts and life imprisonment on the 2242(b) counts, to run concurrently. Judgment 3. The court also imposed a life term of supervised release. Id. at 4.

4. The court of appeals affirmed. Pet. App. 1a-39a. As relevant here, petitioner contended that the district court had erred in failing to examine whether Fowler “had a conflict of interest stemming from his on-going co-parenting relationship” with, and prior marriage to, the prosecutor. Id. at 7a. He also contended that the district court had erred in failing to readmonish him about his right to counsel prior to sentencing. Id. at 35a n.9. The court of appeals rejected both contentions, among others that petitioner no longer pursues. Id. at 39a.

a. On petitioner’s conflict-of-interest claim, the court of appeals first surveyed this Court’s decisions regarding the right to counsel and conflicts of interest, including Holloway v. Arkansas, 435 U.S. 475 (1978), Cuyler v. Sullivan, 446 U.S. 335 (1980), and Mickens v. Taylor, 535 U.S. 162 (2002). Pet. App. 8a-16a. The court reasoned that, under those decisions, conflicts arising from the representation of multiple defendants should be treated differently than conflicts arising from other circumstances. Id. at 13a-16a. In the multiple-representation context, “if the defendant objects to the alleged conflict prior to trial, prejudice is presumed if the trial court failed to

inquire into the nature and scope of the conflict and required the defendant to proceed with the same attorney,” and “reversal is automatic.” Id. at 12a (citing Holloway, 435 U.S. at 484). “But if the defendant does not object to the alleged conflict at trial, he must demonstrate on appeal that an actual conflict adversely affected his representation.” Ibid. If he succeeds, prejudice is presumed, see Sullivan, 446 U.S. at 348-349; if he does not, “traditional” review under Strickland v. Washington, 466 U.S. 668 (1984), applies. Pet. App. 12a-13a.

The court of appeals explained, however, that, “Holloway’s duty to inquire (and automatic reversal if the trial court fails to inquire)” does not apply “outside the multiple representation context.” Pet. App. 13a; see id. at 14a. The court found that Mickens had made clear that Holloway’s automatic-reversal rule “flows from the ‘disabling conflict’ of joint representation, not from a universal understanding that every potential conflict is created equally.” Id. at 19a (quoting 3 Wayne R. LaFare, et. al, Criminal Procedure § 11.9(b), at 1043 (4th ed. 2015)). The court observed that Mickens “refer[ed] to several alleged conflicts that the circuit courts had resolved” under Sullivan’s adverse-effect requirement and “hint[ed]” that “Strickland was likely the more appropriate standard.” Id. at 15a (citing Mickens, 535 U.S. at 174-175). And the court further observed that “[o]ne of those conflicts was, notably, defense counsel’s ‘romantic entanglement

with the prosecutor.'" Ibid. (quoting Mickens, 535 U.S. at 174). The court reasoned that, "since the Mickens Court questioned whether [Sullivan] was even the appropriate means of reviewing these alleged conflicts -- as opposed to the more difficult Strickland standard -- Holloway's automatic reversal rule was certainly inapplicable to these non-multiple representation conflicts." Id. at 15a-16a.

The court of appeals thus concluded that, outside the multiple-representation context, "the duty to inquire exists only if the trial court has a substantial basis to believe an actual conflict exists." Pet. App. 16a. The court also determined that "the automatic reversal rule is inapplicable to the conflict alleged here." Id. at 19a. "[E]ven if the [district] court fails to inquire into an actual conflict," the court explained, "on appellate review, the court will consider the facts and circumstances of the case under the commands of Strickland." Id. at 20a. The court acknowledged that other circuits had applied the more lenient standard of Sullivan to conflicts other than those arising from multiple representation. Id. at 15a n.3. But it found the choice of standards to be "immaterial" in this case because petitioner's conflict-of-interest claim did not satisfy even the more lenient Sullivan standard. Id. at 19a; see id. at 21a (concluding that petitioner "has failed to meet his burden under [Sullivan]").

The court of appeals observed that petitioner "failed to allege any instances suggesting that Mr. Fowler's representation was compromised due to his relationship with the prosecutor." Pet. App. 20a. The court pointed out that "Fowler himself made the court aware of his relationship with [the prosecutor], and specifically stated that it was not a conflict." Ibid. The court also noted that petitioner "failed to raise the alleged conflict of interest issue until months later," ibid., and "[e]ven then, when given the opportunity to state his concerns on the record, [he] cited a litany of complaints against Mr. Fowler, but never mentioned Mr. Fowler's alleged personal conflict of interest," id. at 21a. The court thus determined that it could not "fault the district court for failing to inquire further when neither the defendant nor his counsel (who wanted out of the case) thought it was important enough to raise in front of the court." Ibid.

b. The court of appeals also rejected petitioner's contention that "the district court erred in allowing him to represent himself during his trial and sentencing." Pet. App. 31a. The court found that the district court had "conducted a thorough Farreta inquiry," see Faretta v. California, 422 U.S. 806 (1975), that "ensur[ed]" that petitioner's waiver of counsel was knowing and intelligent, Pet. App. 34a. The court of appeals then rejected in a footnote petitioner's claim that "another Faretta hearing should have been conducted prior to his sentencing," noting

that circuit precedent had found such a rule “unworkable.” Pet. App. 35a n.9 (quoting United States v. Vann, 776 F.3d 746, 764, cert. denied, 136 S. Ct. 434 (2015)).

ARGUMENT

1. Petitioner first contends (Pet. 13-17) that because he alleged a conflict of interest before trial and because the district court did not undertake a full inquiry into the allegations, Holloway v. Arkansas, 435 U.S. 475 (1978), requires automatic reversal of his convictions. The court of appeals correctly rejected that contention, and its decision regarding Holloway’s application does not conflict with any decision of this Court or of another court of appeals. To the extent disagreement exists among the courts of appeals on the precise standard of review applicable to conflict-of-interest claims outside the multiple-representation context, this case is not an appropriate vehicle for resolving such disagreement, because the court of appeals concluded that petitioner’s claim failed even under the most lenient standard that courts have applied. Accordingly, further review is not warranted.

a. In general, a defendant alleging that he was denied the effective assistance of counsel in violation of the Sixth Amendment must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 694

(1984). The Court has recognized an exception to that general rule for certain conflicts of interest. In Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court held that where a defendant can show that a conflict of interest arising from his counsel's representation of multiple defendants accused of the same crime adversely affected counsel's performance, reversal is required -- even absent a showing of a probable effect on the outcome of the trial. See id. at 349-350.

Although Sullivan involved the simultaneous representation of co-defendants, some courts of appeals have applied its adverse-effect standard to other kinds of conflicts of interest, including defense counsel's "romantic 'entanglement' with the prosecutor." Mickens v. Taylor, 535 U.S. 162, 174-175 (2002) (citing Summerlin v. Stewart, 267 F.3d 926, 935-941 (9th Cir. 2001)). But this Court has not endorsed that extension. To the contrary, it stated in Mickens that Sullivan had relied on the "high probability of prejudice" that inheres in multiple-representation conflicts, and it reserved the question whether Sullivan's more lenient standard should be extended beyond that context. Id. at 175-176.

b. Petitioner does not argue that either Strickland's prejudice standard or Sullivan's adverse-effect standard is satisfied here. Instead, relying on Holloway, petitioner contends (Pet. 13-17) that the conflict asserted in this case should lead to automatic reversal because he raised the conflict prior to trial

and because the district court did not conduct an adequate inquiry. Petitioner's reliance on Holloway is misplaced.

Holloway, like Sullivan, involved the simultaneous representation of multiple co-defendants. Unlike in Sullivan, however, defense counsel in Holloway had objected before trial that he could not adequately represent the divergent interests of three co-defendants. 435 U.S. at 477-478. Without inquiry, the trial court had denied counsel's motion for the appointment of separate counsel. Ibid. This Court deferred to counsel's judgment that he was laboring under a conflict of interest, id. at 485-486, and presumed that the conflict was prejudicial because of the inherent risks of multiple representation and the difficulty in measuring the harm flowing from such a conflict, id. at 489-490.

Holloway does not apply here. As this Court has explained, Holloway "creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." Mickens, 535 U.S. at 168. In all other circumstances, a defendant must demonstrate prejudice under Strickland, or at least an adverse effect on performance under Sullivan, to obtain relief. And in this case, the asserted conflict (Pet. 8-9) does not arise from the simultaneous representation of co-defendants, but from defense counsel's prior marriage to (and child with) the prosecutor. Accordingly, the court of appeals correctly rejected

petitioner's reliance on Holloway. See Pet. App. 16a-17a (citing post-Mickens cases from the First, Seventh, and Eighth Circuits holding that Holloway's automatic-reversal rule does not apply outside the multiple-representation context); see also McFarland v. Yukins, 356 F.3d 688, 701-702 (6th Cir. 2004) (noting that Holloway's automatic-reversal rule applies where defense counsel represents co-defendants in the same proceeding).

Petitioner errs in suggesting (Pet. 4) that Wood v. Georgia, 450 U.S. 261 (1981), expands Holloway to this context. In Wood, the Court remanded for the lower courts to investigate "a possible due process violation" that occurred when two defendants were represented at a probation-revocation hearing by an attorney that their employer paid. 450 U.S. at 264-266. As the Court later explained in Mickens, supra, Wood remanded because "the possibility that counsel was actively representing the conflicting interests of employer and defendants was sufficiently apparent" on the record "to impose upon the court a duty to inquire further." Mickens, 535 U.S. at 169 (citation and internal quotation marks omitted). Wood, however, did not establish an automatic-reversal rule whenever a trial court fails to inquire into an asserted conflict of interest.

The reasoning of Mickens itself makes that clear. After the defendant in Mickens was tried and convicted, he learned that one of his attorneys had represented the victim of his crime in a

different matter. 535 U.S. at 164. Based on that discovery, he filed a federal habeas petition alleging that the attorney had a conflict of interest, that the trial court failed to conduct an inquiry into the conflict, and that automatic reversal was thus required. Id. at 165, 170-171. The Court rejected his claim. Id. at 171-172. It explained that, outside the multiple-representation context, where a trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must show, at a minimum, that the conflict adversely affected his counsel's performance. Id. at 171-175. The Court explained that a rule of automatic reversal would "make[] little policy sense" because a "trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." Id. at 172-173.

Mickens' reasoning controls this case. In order to establish a Sixth Amendment violation, petitioner was required to show, at a minimum, that his attorney's alleged conflict of interest adversely affected defense counsel's performance. Because petitioner does not contend (and has not shown) that counsel's asserted conflict of interest adversely affected his performance, the court of appeals did not err in rejecting petitioner's conflict-of-interest claim. See Pet. App. 20a

(explaining that petitioner “has failed to allege any instances suggesting that Mr. Fowler’s representation was compromised due to his relationship with the prosecutor”).

c. Petitioner asserts (Pet. 13-16) that the courts of appeals are divided on the reach of Holloway. That is incorrect.

Petitioner identifies (Pet. 16) only one court of appeals, the Ninth Circuit, that in his view “would have automatically reversed because the trial court failed to inquire into the nature of the conflict.” But the Ninth Circuit decisions that petitioner cites do not adopt a rule of automatic reversal. See ibid. (citing Earp v. Ornoski, 431 F.3d 1158 (9th Cir. 2005), cert. denied, 547 U.S. 1159 (2006), and Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007)). In Earp, the Ninth Circuit observed only that it had previously “expanded the scope of the Sullivan exception” -- i.e., the rule that a defendant claiming a conflict of interest need prove only an adverse effect on his attorney’s performance -- beyond multiple-representation cases. 431 F.3d at 1185. It did not endorse an expansion of Holloway’s automatic-reversal rule to circumstances like those here. And in Daniels, the Ninth Circuit granted relief only after finding that the defendant had satisfied a three-part test, 428 F.3d at 1197-1201, including demonstrating a “serious conflict” between the defendant and his trial counsel, id. at 1199. That

case, like Earp, did not involve an application of Holloway's automatic-reversal rule.

The other court of appeals decisions on which petitioner relies (Pet. 13-15) involve a disagreement over whether the usual Strickland standard or the more lenient Sullivan standard applies to conflicts of interest outside the multiple-representation context. But to the extent that petitioner seeks this Court's review to resolve that disagreement (Pet. 13), this case is not an appropriate vehicle for such review. The court of appeals itself described the circuits as divided over the issue, Pet. App. 15a n.3, but found the issue to be "immaterial" here, id. at 20a. Although the court correctly concluded that a showing of Strickland prejudice is required, id. at 15a-16a, it found that petitioner's claim failed even under Sullivan's "lesser" adverse-effect standard, id. at 20a.

Petitioner does not dispute that he made no showing that the alleged conflict had an adverse effect on his attorney's performance, see Pet. App. 20a-21a, and that he asserted only that he was entitled to automatic reversal. Because no court of appeals has adopted the automatic-reversal rule that petitioner advocates, this case does not present any issue on which the circuits are divided.

2. Petitioner next contends (Pet. 18-25) that, even though he validly waived his right to counsel before trial, the district

court was required to readmonish him of his right to counsel before sentencing. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Accordingly, this Court's review is not warranted.

a. The Sixth Amendment allows a criminal defendant to waive his right to counsel and represent himself. See Faretta v. California, 422 U.S. 806, 818-821, 834-835 (1975). But "[w]hen an accused manages his own defense, he relinquishes * * * many of the traditional benefits associated with the right to counsel." Id. at 835. Thus, "in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits." Ibid. (citation and internal quotation marks omitted). The "defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation"; "he should," however, "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Ibid. (citation and internal quotation marks omitted).

Applying Faretta here, the court of appeals stated that "[t]he tried-and-true method for determining that a waiver was knowing and intelligent is to conduct a * * * thorough and comprehensive formal inquiry of the defendant on the record to demonstrate that

the defendant is aware of the nature of the charges, the range of allowable punishments and possible defenses, and is fully informed of the risks of proceeding pro se.” Pet. App. 32a (citation and internal quotation marks omitted). And it determined that the district court had conducted a “thorough Faretta inquiry” before trial. Id. at 34a; see 2 ROA 191-222. That inquiry “ensur[ed] that [petitioner] understood that representing himself would require him to conduct every phase of the trial.” Pet. App. 34a. The district court “confirmed that [petitioner] had read the indictment and understood the charges against him and the possible penalties he faced.” Ibid. It also “warned” him of the difficulties of proceeding pro se, cautioning him that it was “a grave and severe mistake.” Ibid. (citation omitted). Furthermore, “prior to opening statements, the trial judge reiterated many of the court’s warnings and conducted a colloquy with [petitioner] to ensure that he remembered his previous conversation with the court, had thought about it, and that his opinion had not changed.” Ibid. In light of that record, the court of appeals correctly determined that petitioner “voluntarily waived his right to counsel,” ibid., and petitioner does not argue otherwise.

Petitioner contends (Pet. 18-25), however, that a second Faretta hearing was necessary before sentencing. That contention is incorrect. As petitioner acknowledges (Pet. 21), this Court has never required automatic readmonition. Readmonition is

generally unnecessary because the sufficiency of a proper Faretta inquiry to ensure the validity of the waiver of counsel also ensures that continued self-representation in subsequent proceedings is likewise knowing and intelligent. Although petitioner suggests (ibid.) that this Court granted review of that question in Marshall v. Rodgers, 569 U.S. 58 (2013) (per curiam), that case presented a different issue. In Marshall, the Court held that a state appellate court did not violate clearly established law, as determined by the Supreme Court, 28 U.S.C. 2254(d)(1), in ruling that “after a defendant’s valid waiver of counsel, a trial judge has discretion to deny the defendant’s later request for reappointment of counsel.” 569 U.S. at 61. Unlike Marshall, this case does not involve a pro se defendant’s request for reappointment of counsel. It involves only the asserted need for readmonition.

b. Petitioner suggests (Pet. 18) that the courts of appeals disagree about whether, despite an initial valid waiver, “there are ever intervening circumstances that would constitutionally require a trial court to readmonish a pro se defendant of the right to counsel.” No such conflict exists.

The courts of appeals agree that, absent a substantial change in circumstances, “[a] properly conducted Faretta colloquy need not be renewed in subsequent proceedings.” United States v. Hantzis, 625 F.3d 575, 580–581 (9th Cir. 2010) (describing that

court's jurisprudence as "harmonious with that of the other federal circuits that have considered the issue to date"), cert. denied, 563 U.S. 952 (2011); see id. at 581 n.2 (citing United States v. McBride, 362 F.3d 360, 367 (6th Cir. 2004); United States v. Unger, 915 F.2d 759, 762 (1st Cir. 1990), cert. denied, 498 U.S. 1104 (1991); United States v. Fazzini, 871 F.2d 635, 643 (7th Cir.), cert. denied, 493 U.S. 982 (1989); Panagos v. United States, 324 F.2d 764, 765 (10th Cir. 1963); Davis v. United States, 226 F.2d 834, 840 (8th Cir. 1955), cert. denied, 351 U.S. 912 (1956)); see also United States v. Clark, 774 F.3d 1108, 1112-1113 (7th Cir. 2014). Indeed, "no federal appellate court has held that renewed Faretta warnings are required at each subsequent court proceeding." Hantzis, 625 F.3d at 581. Thus, the courts of appeals agree that a valid waiver remains in effect at subsequent proceedings, including sentencing, at least "in the absence of an explicit revocation by the defendant or a change of circumstances that would suggest that the district court should make a renewed inquiry of the defendant." McBride, 363 F.3d at 367 (waiver extended to sentencing); see Fazzini, 871 F.2d at 643-644 (same); Unger, 915 F.2d at 762 (same).

Petitioner contends (Pet. 18-19) that four circuits, including the court of appeals here, have adopted a rule that readmonition is never required, even if a substantial change in circumstances has occurred. None of the decisions that petitioner

relies on have embraced such a rule. Instead, petitioner cites cases in which the courts found that readmonition was not required under the particular circumstances at issue. See United States v. Modena, 302 F.3d 626, 631 (6th Cir. 2002) (finding that readmonition was not required “solely because the defendant at one point had second thoughts about representing himself”), cert. denied, 537 U.S. 1145 (2003); Davis, 226 F.2d at 840 (finding that readmonition was not required at sentencing held four days after waiver because “nothing happened in the meantime” such as “an unreasonable lapse of time, newly discovered evidence which might require or justify advice of counsel, new charges brought, a request from the defendant, or similar circumstances”); United States v. Washington, 341 F.2d 277, 286 (3d Cir.) (citing Davis and stating that “we do not think it amiss to point out that it has been held that waiver of counsel at the time of arraignment is an implied waiver of that assistance during the sentencing proceeding”), cert. denied, 382 U.S. 933 (1965). Because none of those decisions endorses a bright-line rule that readmonition is never required, they accord with the decisions petitioner cites (Pet. 20-21) from the Seventh and Ninth Circuits, which likewise recognize only that a substantial change in circumstances can require readmonition of the right to counsel after a valid waiver. See Clark, 774 F.3d at 1112-1113; Hantzis, 625 F.3d at 580-581.

Petitioner similarly errs in contending (Pet. 23-24) that the decision below declared a bright-line rule that readmonition is never required. The court of appeals simply stated, in a brief footnote, that petitioner "claim[ed] that another Faretta hearing should have been conducted prior to his sentencing," and that it had already "rejected that argument in United States v. Vann, 776 F.3d 746 (10th Cir. 2015)." Pet. App. 35a n.9. In Vann, the court had rejected a defendant's argument that he did not knowingly waive his right to counsel at sentencing where, after a thorough Faretta colloquy was conducted before trial and the defendant proceeded with counsel at trial, a more abbreviated colloquy was conducted before sentencing. See 766 F.3d at 764. The court had reasoned in Vann that a rule "that requires a separate hearing of equal depth each time the option of proceeding pro se arises" is "unworkable." Ibid. It found that the district court had correctly assessed "the totality of the circumstances * * * in concluding that Vann's waiver was knowing and intelligent." Ibid. The court's citation of Vann here thus appears to reflect only its determination that requiring readmonition in the circumstances of this case would be tantamount to adopting the "unworkable" per se rule it had already rejected, a rule that petitioner specifically disavows (Pet. 22). The court did not adopt a rule that readmonition is never required, even if there are substantially changed circumstances.

c. Petitioner failed to show that any substantial change in circumstances that might have warranted readmonition occurred here.

Petitioner decided to proceed pro se because he did not want to be represented by his appointed counsel, Robin Fowler. See Pet. App. 3a-6a. Although a defendant has a right to appointed counsel if he cannot afford to hire his own counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963), an indigent defendant has no right to counsel of his choosing, see Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989); see also Wheat v. United States, 486 U.S. 153, 159 (1988) (noting that “a defendant may not insist on representation by an attorney he cannot afford”); United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (similar). Thus, if a defendant is provided with competent, conflict-free counsel, and cannot obtain another attorney more to his liking, the defendant may either accept the government-provided lawyer or waive the right to counsel and proceed pro se. Here, petitioner was appointed competent, conflict-free counsel.¹ See Pet. App. 32a-34a.

¹ Although petitioner seeks this Court’s review as to whether his counsel had a conflict of interest, see Pet. 13-17, his claim that the district court should have readmonished him of his right to counsel prior to sentencing is independent of that claim and assumes that his counsel was conflict-free.

Petitioner contends (Pet. 25) that readmonition was required because his sentencing occurred "almost one full year after the waiver," he had filed a motion for acquittal "protesting that his earlier waiver of counsel was involuntary," and at sentencing he "protested that substitute counsel had not been appointed." As an initial matter, he did not properly preserve that particular substantial-change-in-circumstances argument below. See Pet. C.A. Br. 45-46 (arguing that Faretta hearing is required at each critical stage); Pet. C.A. Reply Br. 8 (mentioning for the first time the asserted "substantial changes in circumstance"); see also White v. Chafin, 862 F.3d 1065, 1067 (10th Cir. 2017) (noting that issues raised by an appellant for the first time in a reply brief are waived). In any event, none of the factors that petitioner identifies demonstrates a substantial change in circumstances.

The passage of almost a year's time does not on its own establish a substantial change in the circumstances that led petitioner to waive counsel and proceed pro se. Petitioner's post-waiver assertion that he had "involuntar[ily]" waived counsel simply reasserted the arguments he had made before trial that the court should have appointed counsel other than Fowler. See 1 ROA 364. And petitioner's "protest" at sentencing reflected the same grievance. See 2 ROA 300. Although he complained that the court had refused to appoint substitute counsel, he did not request to be represented by counsel at sentencing, and Fowler was present as

standby counsel. See id. at 231, 300. In those circumstances, the district court was not required to conduct a new Faretta colloquy. See Fazzini, 871 F.2d at 643-644 (determining that sentencing court did not err in forgoing "a new inquiry" into defendant's desire for counsel because purported desire "was just a continuation of his attempts before trial to obtain the appointment of a fifth counsel" and because standby counsel was available).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

SANGITA K. RAO
Attorney

FEBRUARY 2018