

No. _____

IN THE
Supreme Court of the United States

BRIDGETTE LENET JACKSON,

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

Petitioner, Bridgette Jackson, months before her trial, filed through her appointed counsel an application seeking a hearing for appointment of new counsel. As part of the application, counsel represented that “Ms. Jackson has expressed dissatisfaction with appointed counsel,” and that she had requested that counsel request a hearing to determine whether new counsel should be appointed. The district court denied a hearing without explanation, only placing a handwritten note on the order which stated, “Denied. Present counsel is competent.” On appeal, the Ninth Circuit found no abuse of discretion based on its belief that failure to conduct a hearing is not “by itself” an abuse of discretion, and because defense counsel did not detail specific facts about the conflict when he filed the motion requesting a hearing on defendant’s request. That decision appears to be in conflict with decisions of this Court and every circuit to have addressed the issue—which hold that a court must probe why a defendant wants a new lawyer—and which do not appear to require defense counsel to detail the defendant’s concerns before a hearing is required, as the Ninth Circuit held here. Thus, the question presented is:

May a trial court summarily deny a request for appointment of new counsel filed by counsel at the request of a defendant without conducting an inquiry into why the defendant wants a new lawyer based on the fact that *counsel* did not allege any facts indicating the nature of the conflict, as the Ninth Circuit held here?

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bridgette Jackson, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but can be found online at 721 Fed. Appx. 631 (9th Cir. 2018). Pet. App. A5-A10 (Copy of slip opinion).

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on January 5, 2018. Ms. Jackson's petition for rehearing and for rehearing en banc was denied on March 15, 2018. Pet. App. A11 (Order denying rehearing). This

petition is filed within 90 days after that date pursuant to Sup. Ct. R. 13.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

No person shall * * * be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution provides:

In 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 defense.

STATEMENT OF THE CASE

Bridgette Jackson was convicted after trial of conspiring with others, including her aunt, to knowingly possessing fifteen or more unauthorized access devices, and aggravated identify theft, as part of a tax fraud scheme, and sentenced to a total of 60 months imprisonment. (ER 14-16).¹ Months before her trial, and just hours after the first superseding indictment was filed (ER 27), Ms. Jackson, through counsel, filed an application prepared by counsel seeking a hearing for appointment of new counsel. Pet. App. A1-A3. As part of the application, counsel represented that “Ms. Jackson has expressed dissatisfaction with appointed counsel,” and that she had requested that counsel request a hearing to address appointment of new counsel. Pet. App. A3. The court denied a hearing (and the request for substitute counsel) without explanation, only placing a handwritten note on the order which stated, “Denied. Present counsel is competent.” Pet. App. A4.²

¹ “ER” followed by a number refers to the applicable page in the Appellant’s Excerpts of Record previously filed in the Ninth Circuit. “GER” refers to the Government’s Excerpts of Record filed in the Ninth Circuit. “CR” refers to the Clerk’s record in the United States District Court for the Central District of California, and is followed by the applicable docket control number. “AOB” refers to Appellants Opening Brief filed in the Ninth Circuit, and “GAB” refers to the Government’s Answering Brief filed in that court.

² In his order denying bail pending appeal after trial, Judge Real again indicated that he had found that Jackson’s current counsel was competent, and that “[w]hile Ms. Jackson’s application may have been timely, it was not accompanied by any facts to suggest that there was a conflict in the slightest,” and that the court thus “had nothing to inquire into.” (ER 380). Although there is nothing in the record indicating Ms. Jackson had previously sought to delay her trial, and it plainly contradicted the court’s finding that Ms. Jackson’s application was timely, the court further indicated, “[i]t was clear to the Court then, as it is now, that Ms.

On appeal, Ms. Jackson argued, among other things, that her conviction must be reversed because the district court abused its discretion when it summarily denied her timely request for appointment of new counsel made months before trial without conducting the required inquiry regarding the conflict between her and her counsel. Indeed, the district court's only apparent basis for the denial was its belief that counsel was "competent," which courts have held is not a proper basis for denying appointment of new counsel.³ (AOB 15-20).

The Ninth Circuit concluded that the district court's denial of Ms. Jackson's request without conducting any hearing or inquiry into the conflict was not an abuse of discretion based on a prior decision of that court, *United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002), which stated that "the failure to conduct a hearing is not *by itself* an abuse of discretion." Pet. App. A6. The Ninth Circuit also indicated that "Jackson's request was not accompanied by any facts to suggest a

Jackson's demand for substitution of counsel was just another unreasonable request to delay her criminal trial." (ER 380).

³ Ms. Jackson also argued that a new trial was required because the district court precluded the defendant from questioning witnesses and eliciting any evidence regarding the lack of thoroughness of the police investigation. (AOB 21-25). The district court held that questions regarding the investigation were not "relevant" and would not permit Ms. Jackson to cross-examine witnesses regarding the investigation or to call any of the law enforcement witnesses on direct as part of the defense case even though such a conclusion is at odds with decisions of the Supreme Court and this Court which make clear that challenging the police investigation is a legitimate, relevant, and useful trial tactic for criminal defendants. (*Id.*).

conflict with her counsel,” which it determined proved fatal to her claim.⁴ Pet. App. A6. The Ninth Circuit noted that “two days prior to making the request, Jackson filed a stipulation to continue the trial date, in which she stated that she had carefully discussed the stipulation with counsel and also that she wanted to ensure continuity of counsel.” Pet. App. A6. What the decision fails to mention is that it was actually the *government* that prepared and filed the stipulation and that the continuance was requested, in part, because defense counsel had not yet reviewed all of the discovery, had several other cases he was dealing with, had vacation plans, had not yet conducted an independent investigation, had not conducted the legal research necessary to prepare pre-trial motions, and needed to confer with the defendant about the case—all legitimate reasons why the defendant would want appointment of new counsel. (GER 11-12). Thus, Ms. Jackson had been left with a choice of either agreeing to the continuance or proceeding to trial with an unprepared lawyer.

⁴ The court cited *United States v. Cassel*, 408 F.3d 622, 637-38 (9th Cir. 2005), for this proposition, but a review of that decision indicates that the facts surrounding the purported conflict were detailed at an in-court hearing in which the court was permitted to probe why defendant wanted new counsel, not raised in a pleading necessary to justify a hearing.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. Thus, a “trial court’s summary denial of a defendant’s motion for new counsel without further inquiry violate[s] the Sixth Amendment.” *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (quoting *Hudson v. Rushen*, 686 F.2d 826, 829 (9th Cir. 1982)). And “it is well established and clear that the Sixth Amendment requires on the record an appropriate inquiry into the grounds for such a motion, and that the matter be resolved on the merits before the case goes forward.” *Id.* (citing *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)).

Indeed, this Court has explained that “all Circuits agree [that] courts cannot properly resolve substitution [of counsel] motions without probing why a defendant wants a new lawyer.” *Martel v. Clair*, 565 U.S. 648, 664 (2012) (citing *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990) (“It is hornbook law that ‘[w]hen an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court clearly has a responsibility to determine the reasons for defendant’s dissatisfaction” (quoting 2 W. LaFare & J. Israel, *Criminal Procedure* § 11.4, p. 36 (1984))). This Court explained that “an on-the-record inquiry into the defendant’s allegations ‘permit[s] meaningful appellate review’ of a trial court’s exercise of discretion.” *Id.* (quoting *United States v. Taylor*, 487 U.S. 326, 336-37 (1988)). *Cf. Wood v. Georgia*,

450 U.S. 261, 272 (1981) (holding that mere possibility of a conflict of interest triggers duty to inquire).

To be sure, there are limited situations in which an on-the-record inquiry might not be required. For example, in *Iles*, the decision cited by this Court in *Martel*, the Sixth Circuit explained that to justify a hearing, a defendant must, at a minimum, try to fire her counsel or make a request for substitution of counsel: “We think it clear that at a minimum ‘the defendant must show his hand.’” *Iles*, 906 F.2d at 1131 (quoting *Brown v. United States*, 264 F.2d 363, 366 (D.C. Cir. 1959) (quoting *United States v. Mitchell*, 137 F.2d 1006, 1010 (2d Cir. 1943) (defendant failed adequately to disclose his wish to continue without counsel)), and citing *Moreno v. Estelle*, 717 F.2d 171, 175 (5th Cir. 1983) (“we cannot infer both a waiver of counsel and a demand by the defendant to represent himself from the general statements of dissatisfaction with counsel contained in this record”). *See also id.* at 1131-32 (citing *Cheek v. United States*, 858 F.2d 1330, 1334 & n.5 (8th Cir. 1988) (the defendant failed to put the trial court on notice that he was dissatisfied with his attorney and therefore was not denied his Sixth Amendment right to retain counsel of his choice); *Birt v. Montgomery*, 725 F.2d 587, 594-95 n.15 (11th Cir. 1984) (en banc) (trial court had no duty to inquire where defendant never asked for a new attorney)).

But when a district court is put on notice that a defendant “[i]s dissatisfied with counsel and wishe[s] to have him removed or to have new counsel,” the district court has a duty to inquire. *Id.* And that’s what happened here. Pet. App. A1-A3.

Here, counsel filed a motion on defendant's behalf in which it stated that "Ms. Jackson seeks to change her counsel from [the federal public defender] to counsel from the Indigent Defense Panel." Pet. App. A1. Counsel's declaration also indicated that "Ms. Jackson has expressed dissatisfaction with appointed counsel," and that she had requested that counsel "submit to the Court this request for a hearing to determine whether counsel from the Indigent Defense Panel should be appointed to represent her in all future proceedings." Pet. App. A3. At that point, the district court had a duty to inquire into the purported conflict.

Yet the Ninth Circuit here concluded that an additional step was required—something no other court appears to require in these circumstances—that the motion for substitute counsel state facts detailing the purported conflict. Pet. App. A6. What the Ninth Circuit never explains is how that's supposed to work. For example, if the request for new counsel is because there's been a total breakdown in communications between the defendant and her counsel, how is counsel supposed to detail the defendant's specific concerns which may not have been communicated to him?⁵

Rather, the Ninth Circuit here relied on a single line in *United States v. Smith*, 282 F.3d 758, 764 (9th Cir. 2002), in which that court agreed that caselaw "favors an inquiry when a party seeks substitute counsel," but allowed that "under

⁵ Indeed, this is why courts require that when conducting an inquiry into a request for new counsel, the district court "should question the attorney or defendant 'privately and in depth.'" *United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2000) (quoting *United States v. Moore*, 159 F.3d 1154, 1160 (9th Cir. 1998)); *Cassel*, 408 F.3d at 637.

certain circumstances,” the failure to conduct a hearing “is not *by itself* an abuse of discretion.” Pet. App. A6. But those very limited “certain circumstances” identified there were limited to where “[the defendant’s] own description of the problem *and the judge’s own observations* provide[] a sufficient basis for reaching an informed decision.” *Smith*, 282 F.3d at 764 (quoting *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986) (emphasis added)).⁶

Indeed, in *Smith*, “[t]he court had personally observed [defense counsel] at trial and must have concluded that his legal work on behalf of Smith was not ineffective [and] the court had already entertained two previous substitution motions alleging ‘lack of meaningful communication,’ and was thoroughly familiar with Smith’s ‘lack of communication’ argument.” *Id.* at 765. By contrast, here, the district court had not made any observations of Jackson and her counsel and thus did *not* have “sufficient basis” for reaching a decision on the substitution of counsel motion.

Here, that was *no* inquiry of any sort conducted by the district court and there was nothing that allowed for the district court to formulate a sufficient basis

⁶ Not mentioned by the Ninth Circuit in its decision is that the district court here—unlike in *Smith*—had made no observations of Ms. Jackson or her interactions with defense counsel because Jackson had not yet appeared before Judge Real when he summarily denied the request for new counsel without any inquiry. Judge Real saw Ms. Jackson and her counsel for the first time at a status conference held on December 1, 2015—three weeks after he had denied Ms. Jackson’s request without any hearing or other inquiry. (CR 63; ER 385-388).

for reaching an informed decision as to the need for appointment of new counsel without holding a hearing.⁷

And although no additional facts were presented by Ms. Jackson’s counsel detailing the purported conflict, there were ample facts in the record suggesting why there was a conflict: the continuance stipulation made clear that Jackson’s attorney was entirely unprepared for trial at the time of the continuance request. (GER 11-12). He had not completed review of discovery in Ms. Jackson’s case. (GER 11). He was focused on multiple other cases and vacation plans and was not prepared for trial in this case. (GER 11). He had not yet conferred with Ms. Jackson. (GER 11). He had not conducted investigation in this case. (GER 11). And he had not conducted legal research or prepared any pre-trial motions. (GER 11).

The Ninth Circuit’s decision here—adding the additional requirement that counsel detail a defendant’s purported conflicts with counsel before the defendant is entitled to a hearing, or at least an inquiry, into the purported conflict justifying appointment of new counsel—is at odds with multiple decisions of this Court and of

⁷ Notably absent from the Ninth Circuit’s decision is the district court’s *actual* stated reason for denying even a hearing on the conflict: that it believed Ms. Jackson’s counsel was “competent.” (ER 1, 380). But the fact that counsel may be competent is *not* a lawful basis for denying a hearing and is itself a basis for reversing a conviction. *See, e.g., United States v. D’Amore*, 56 F.3d 1202, 1206 (9th Cir. 1995) (“[A] court may not deny a substitution motion simply because the court thinks current counsel’s representation is adequate.”), *overruled on other grounds by United States v. Garrett*, 179 F.3d 1143 (9th Cir. 1999); *United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2000) (“focus[ing] exclusively on the attorney’s competence and refus[ing] to consider the relationship between [defendant] and his attorney is an ‘improper’ basis for denying a request to substitute counsel”).

the lower circuits and impermissibly interferes with a defendant's Sixth Amendment right to counsel. This Court should grant Ms. Jackson's petition for a writ of certiorari to address this serious issue.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: June 12, 2018

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