No. 05-352

IN THE

Supreme Court of the United States

United States of America,
Petitioner,

v.

Cuauhtemoc Gonzalez-Lopez,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a district court's erroneous denial of a criminal defendant's Sixth Amendment right to be represented by counsel of choice requires automatic reversal of his conviction.

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BRIEF FOR THE RESPONDENT

Respondent Cuauhtemoc Gonzalez-Lopez respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

From its earliest origins, the right to assistance of counsel has been understood to preclude the government from unjustifiably refusing to allow the accused to be represented by the counsel of his choice. And in the rare instances when trial judges have transgressed this constraint, appellate courts on direct review consistently have held that these errors require reversal and new trials. The question in this case is whether this Court should dramatically alter this landscape and accept the government's argument – never before adopted by any court – that criminal defendants erroneously denied the ability to be represented by their chosen and retained counsel may not obtain a new trial unless they proceed to trial with an incompetent lawyer or one who the defendant can show was otherwise so inept that he failed to pursue a "strategy that would have created a reasonable probability that * * * the result of the proceeding would have been different." Petr. Br. 16 (internal quotation omitted).

1. *The Underlying Criminal Prosecution.* This case arises from an alleged drug conspiracy. In December 2002, DEA agents arrested several individuals, including Jorge Guillen, who were transporting several hundred pounds of marijuana. On that very night, Guillen agreed to cooperate with the government. At the DEA's urging, Guillen phoned respondent on a recorded line, supposedly to set up a payment related to the drugs.

In response to Guillen's call, respondent appeared at an arranged meeting place – a mini-mart – and gave Guillen about ten thousand dollars. After the meeting, federal agents stopped respondent's vehicle, but found no drugs either on respondent, in his car, or in a subsequent search of his

apartment. Trial Tr. Vol. III, 167:2, July 9, 2003. Nonetheless, on January 7, 2003, federal prosecutors in the Eastern District of Missouri charged respondent with conspiring to distribute marijuana.

When respondent's family learned that he had been arrested, a family member retained John Fahle, a Texas attorney who had never met respondent, to represent him. Fahle appeared at respondent's arraignment hearing the day after his arrest. Pet. App. 2a. But Fahle never met with respondent at the detention facility in which he was held, and Fahle's office did not even accept respondent's telephone calls from the facility. Mot. Hearing Tr. 26:3-27:20, June 20, 2003.

As respondent became increasingly despondent concerning Fahle's services, he learned about another attorney: Joseph Low. Low, who is licensed in California, is a seasoned criminal defense lawyer and a Senior Instructor at Gerry Spence's Trial Lawyers College. He has received several national awards for excellence in the courtroom, including Trial Advocate of the Year from the American Board of Trial Advocates. See The Law Offices of Joseph H. Low, IV, Curriculum Vitae, http://www.aggressivecriminal defenselawyers.com/resume.html (last visited Mar. 25, 2006). As evidenced by his website, Low prides himself on his aggressive approach to criminal defense work and has built his practice around fighting "oppression by federal and state government." See, *e.g.*, Christine Hanley, *Ex-Cop Alleges Abuse by O.C. Police Agencies*, L.A. Times, Apr. 5, 2003, at 6; Charles F. Bostwick, *Search Suit Ends in Deal, Local Deputy Involved in Case*, Daily News of L.A., Dec. 5, 2002, at AV1.

Respondent was particularly interested in Low because, unlike many co-defendants charged in the alleged conspiracy, respondent maintained his innocence and wanted to defend himself vigorously. Respondent knew that Low recently had represented a defendant in another drug conspiracy case

before the same judge presiding over respondent's case. See Pet. App. 2a. In that case, *United States* v. *Serrano, et al.*, No. 4:01CR450-JCH (E.D. Mo.), Low had replaced as counsel for one of the defendants a CJA (Criminal Justice Act) panel lawyer who practiced regularly in front of the court. After just two days of trial, during which Low vigorously attacked the government's investigation and version of events, Low persuaded the government to offer a particularly favorable plea deal. Although Low's client, Jose Serrano, faced "a sentence of up to life in prison," *Law and Order Column*, St. Louis Dispatch, Jan. 9, 2003, at B2, Low secured for him a sentence of 156 months.

Respondent telephoned Low, and Low promptly flew to Missouri and met with him. Ten days later, respondent hired Low to defend him. Pet. App. 2a. On February 18, 2003, Low informed Fahle that he, too, was representing respondent in the case. See Memorandum and Order, *United States* v. *Gonzalez Lopez*, at 5 (E.D. Mo. Aug. 26, 2003) (Dist. Ct. docket number 303).

About two weeks later, Fahle and Low attended a suppression hearing before a magistrate. The magistrate initially accepted Low's provisional entry on respondent's behalf and allowed him to participate in the hearing on Low's assurance that he soon would file a motion for admission pro hac vice. But while Fahle was cross-examining a government agent about having erased the taped phone call between Guillen and respondent, the magistrate rescinded this provisional entry, allegedly because Low began passing notes to Fahle. Pet. App. 3a. The magistrate claimed, without any explanation, that this everyday practice between co-counsel violated the court's rule against two attorneys cross-examining a witness.

Soon thereafter, respondent informed Fahle that he wanted Low to be his sole attorney and asked Fahle to withdraw from the case. Pet. App. 3a.

2. *The District Court Denies Low Admission Pro Hac Vice.* Within the week, Low filed a motion with the district court for pro hac vice admission. He also contacted a local attorney he knew named Karl Dickhaus and asked him to serve as local counsel. Dickhaus is primarily a consumer protection attorney specializing in prosecuting "junk fax" law claims under the federal Telephone Consumer Protection Act. See Junk Fax Attorney Reference, http://www.junkfax.org/fax/basic_info/attorneys.htm (last visited Mar. 25, 2006). Dickhaus had little experience relevant to respondent's case, Pet. App. 5a; in fact, when Low called him, he had never tried a federal criminal case. Low nevertheless chose him to serve as local counsel because Low was confident his application for admission pro hac vice ultimately would be granted. And federal courts in Missouri, as is typical elsewhere, encourage attorneys appearing pro hac vice from distant locations to affiliate with local counsel, who can be available for unscheduled hearings and to help with filings.[1] Low and Dickhaus agreed that Dickhaus's role would be limited to such nonsubstantive tasks.

The district court, however, denied Low's pro hac vice motion without explanation. A month later, the district court

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[1] Some federal courts in Missouri have specific local rules encouraging this practice or allowing judges to require local counsel. See W.D. Mo. Local Rule 83.5(k) ("[T]he judge to whom the action is assigned may, in his or her discretion, require the attorney to retain a local attorney, who is a member in good standing of this Bar, who can be available for unscheduled meetings and hearings."); E.D. Mo. Bankr. Local Rule 2090-1(B)(2) ("The Court encourages visiting attorneys admitted pro hac vice to affiliate with local counsel."). The United States District Court for the Eastern District of Missouri does not have a specific rule to this effect, but its judges have the same preference for local counsel. See, *e.g.*, *United States* v. *Lopez*, 343 F. Supp. 2d 824, 837 (E.D. Mo. 2004) (noting that defendant whose attorney was appearing pro hac vice from Florida was "required to retain local counsel").

denied a second such motion, again without explanation. Pet. App. 3a. Following these denials, Low filed an application for a writ of mandamus in the Eighth Circuit seeking to compel the district court to grant him pro hac vice status, but that application was dismissed. Low then applied for general admission to the Eastern District of Missouri. *Ibid.*

Meanwhile, Fahle withdrew from respondent's case, and the district court indicated that it would permit a continuance only if another attorney entered an appearance on respondent's behalf within two weeks. Accordingly, Dickhaus entered his appearance. Pet. App. 4a. But that was only a temporary fix; the trial date continued to approach, and the court continued to hold Low's motion for admission to the local bar without taking any action. Dickhaus grew increasingly concerned that Low's status would not be resolved before the trial and moved for another continuance. The district court, however, denied the motion. Resp. C.A. Br. 12.

Shortly before the trial, the district court made clear that it would not permit Low to represent respondent and gave its first explanation for denying Low's pro hac vice application. The court asserted that there were "allegations of ethical improprieties" in the *Serrano* case, including "contact[ing] a criminal defendant with preexisting legal representation" in violation of Missouri Rule 4-4.2. Pet. App. 4a.

On the first day of respondent's trial, Dickhaus asked that Low at least be allowed to sit at counsel table and assist him during the proceedings. J.A. 20. The district court denied the plea and relegated Low to the audience section of the courtroom, forbidding respondent and Dickhaus from all contact with Low during the trial. Pet. App. 5a. The district court even placed a United States Marshal between respondent and Low during the trial. The court prevented respondent from meeting with Low in the mornings, during lunch or other breaks, or after the trial concluded for the day. The U.S. Marshals also refused to let Low visit respondent at

the detention facility in the evenings because Low was "not an attorney of record in this case." J.A. 21; Pet. App. 5a. Only on the last night of the trial was respondent permitted to meet with Low. Pet. App. 5a

3. *Respondent's Trial.* The government's theory of the case was that respondent owned the marijuana it had caught Jorge Guillen with, and that respondent had appeared at the mini-mart to give Guillen money to pay him and his brothers for transporting it. See J.A. 23-24 (government's opening argument). Guillen, therefore, was the prosecution's star witness. He testified on direct examination that he convinced respondent to meet him at the mini-mart in order to deliver money needed for the drug deal. *Id.* at 31-32. Although the government recorded this critical phone conversation, police officers repeated their testimony from the earlier suppression hearing that they had mistakenly erased the tape before making any copies. Trial Tr. Vol. III, 19:14-25, July 9, 2003. The government's case thus turned to a large extent upon Guillen's testimony, and upon his credibility in general.

Dickhaus argued in respondent's defense that the government had insufficient evidence to convict. Respondent, he asserted, "was just a blind mule" who "may or may not have even known" he was delivering money related to some illegal activity. J.A. 25 (opening argument). Yet in the face of Guillen's testimony that respondent's involvement was far more substantial and far clearer, the most Dickhaus told the jury was that no one could know for sure whether respondent knew what he was doing when he gave money to Guillen at the mini-mart that night. And Dickhaus was unable to impeach Guillen's testimony in any other significant way. At the close of the cross-examination, Guillen testified without contradiction that he had lied only once in his life, with respect to an insurance issue wholly unrelated to this case. See *id.* at 34-35, 39.

After Dickhaus concluded his defense, which consisted of only one testifying witness (an expert on law enforcement

procedures), the jury found respondent guilty of the sole count of the indictment. Pet. App. 5a. The district court sentenced him to 292 months in prison.

4. *Sanctions Proceedings*. In response to a motion Fahle filed the day he had withdrawn from respondent's case, the district court held a hearing to determine whether to sanction Low for violating Missouri Rule 4-4.2 by contacting respondent (allegedly the same conduct at issue in *Serrano*). Despite acknowledging that the government was "not a movant" in the proceeding – and without any advance warning to Low or Dickhaus – the federal prosecutor in respondent's case appeared at the sanctions hearing to offer evidence against Low. Mot. Hearing Tr. 45:2, 167:6-11, June 20, 2003. Noting that the government "ha[d] an interest," *id.* at 45:7, the district court allowed the prosecutor to call witnesses regarding Low's actions in *Serrano*.[2] The district court granted Fahle's motion for sanctions against Low for supposedly improperly contacting respondent while Fahle was representing him. The court also reaffirmed its repeated denials of Low's pro hac vice applications in respondent's case, relying heavily on allegations regarding the *Serrano* case that the government presented at the sanctions hearing. Pet. App. 4a-6a, 9a-10a.

5. *Eighth Circuit Proceedings.* The Eighth Circuit reversed the sanctions against Low and vacated respondent's conviction. In a decision not challenged here, Petr. Br. 6 n.2, the court of appeals first held that the district court had misinterpreted Missouri Rule 4-4.2 with respect to Low's actions in *Serrano* and here. Low's actions, the court of appeals concluded, were entirely proper, because he did not represent any other relevant clients when he met with Serrano and respondent. *United States* v. *Gonzalez-Lopez*, 403 F.3d 558, 566 (CA8 2005); see also Pet. App. 11a-12a.

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[2] At the sanctions hearing, the government directly examined two witnesses, provided an affidavit of a third witness regarding alleged improprieties, and cross-examined Low.

Having found that the district court had absolutely no justification for denying Low's pro hac vice motion, the court of appeals held that the district court had violated the Sixth Amendment by denying respondent the assistance of the counsel of his choice. Recognizing that "[l]awyers are not fungible" and that "the right to privately retain counsel of choice derives from a defendant's right to determine the type of defense he wishes to present," Pet. App. 6a (citations omitted), the Eighth Circuit joined "nearly all the circuit courts to address this issue" and determined that an unjustified denial of counsel of choice constitutes a "structural error" under *Arizona* v. *Fulminante*, 499 U.S. 279, 306-10 (1991). Pet. App. 15a, 17a. Accordingly, under this Court's precedents, the violation "results in automatic reversal of the conviction." *Id.* at 16a.

6. *Remand Proceedings.* After the Eighth Circuit issued its mandate, the parties began preparing for the new trial – this time with Low representing respondent. On May 26, 2005, Low deposed Jorge Guillen, whom the INS was set to deport. Under intense questioning from Low, Guillen admitted under oath that he had lied numerous times during respondent's trial about respondent's involvement in the conspiracy. See App. 3a-4a. Guillen also acknowledged a more general problem with veracity. See *id.* at 1a ("You know, I'm [a] liar. I mean I'm not going to say no."). In addition to admitting outright lies, Low's questioning revealed that the meeting and monetary exchange at the mini-mart was not to finance a drug deal – the critical claim Guillen had made at trial – but was instead a response to Guillen's fabricated plea for money to help his sick daughter. See *id.* at 1a-3a.

Shortly after Low's deposition of Guillen, the government filed a petition for certiorari in this Court and convinced the district court to stay the remand proceedings pending this Court's disposition. The petition for certiorari was granted on January 6, 2006. 126 S. Ct. 979 (2006).

SUMMARY OF ARGUMENT

I. A trial court's unjustified refusal to allow a defendant to retain and be represented by the counsel of his choice violates the Sixth Amendment, without regard to whether the unjustified refusal has a demonstrable effect on the verdict in the defendant's case.

A. The historical core of the right to counsel is the right to counsel of choice. Well-known trials before the Framing drilled into American colonists the importance of allowing defendants to select and be represented by their chosen attorneys. Consequently, state constitutions and customary practice prevented courts from interfering with defendants' ability to be represented by qualified counsel. This understanding carried over into the Sixth Amendment. Before the Assistance of Counsel Clause guaranteed anything else, it guaranteed defendants the right to be represented by their retained lawyers, provided courts had no legitimate reason to preclude such representation. Congress echoed this view in contemporaneous legislation, and state and federal appellate decisions during the nineteenth and early twentieth centuries confirmed that this right was understood to exist on its own terms, apart from any ability to demonstrate that its denial affected the verdict in a particular case.

B. This Court's contemporary Sixth Amendment jurisprudence is consistent with this historical perspective. This Court's decisions recognize that protecting a defendant's ability to proceed through the retained counsel of his choice protects values beyond simply ensuring an objectively accurate trial. The right interposes a vital check on governmental abuse; respects defendants' autonomy and dignity; and ensures that criminal trials appear fair to the public. To be sure, the right to counsel of choice also is designed to make certain that an adequate adversary process occurs; thus, when a defendant's choice of counsel would undermine the integrity of the trial or poses a risk of providing ineffective assistance, courts can override that

choice. But when, as here, there is no countervailing interest in protecting the adversary process and the trial court erroneously impinges upon the other values the Assistance of Counsel Clause protects, a constitutional violation necessarily occurs. Otherwise, the government could disqualify legitimate, retained counsel with impunity – and could even force non-indigent defendants to accept particular counsel against their wishes – so long as an objectively "fair" trial ensued. Although the government suggests this never would occur because judges will act in "good faith" with respect to chosen counsel, Petr. Br. 30, such assurances are not good enough when it comes to liberties the Framers made a point to enshrine in the Sixth Amendment.

C. Practical considerations also weigh heavily against this Court's accepting the government's novel proposal to re-conceptualize the right to counsel of choice. The proposal would dramatically shift the incentives faced by prosecutors, courts, and defendants alike. With respect to prosecutors, the effective removal of any cost to making a disqualification motion – since retrial would be required only in the rare case when the defendant could show that substitute counsel was essentially ineffective – would create an incentive for overzealous prosecutors to seek the removal of particularly effective defense counsel, and these motions will place burdens on both the courts and defendants. With respect to courts, the government's proposed rule would deflect attention from the constitutionally recognized interests of defendants in proceeding with their chosen counsel and toward a wholly hypothetical inquiry into whether substitute counsel would provide effective assistance. And with respect to defendants, the proposal would create a series of perverse incentives that would force them to choose between preserving and vindicating their right to their counsel of choice on the one hand and seeking the best outcome possible with substituted counsel on the other.

What is more, the government's proposal would create a new and unwieldy kind of habeas litigation. Defendants

seeking to vindicate their right to counsel of choice would have no choice but to file collateral causes of action in order to prove prejudice at evidentiary hearings involving trials-within-trials. And all this to solve a problem that simply does not exist. It currently is exceedingly rare for trial courts erroneously to disqualify defendants' chosen counsel, and the government has failed to point to a single actual case in which a defendant received a windfall on appeal by virtue of the lower courts' longstanding automatic reversal rule.

II. The Eighth Circuit correctly held that the trial court's error here entitles respondent to a new trial.

A. This Court repeatedly has held that "structural errors" require automatic reversal of a defendant's conviction. A denial of the right to counsel of choice is a structural error for two independent reasons. First, the right protects interests of personal autonomy and dignity that go beyond merely ensuring the "correct" trial outcome. Second, a defendant's selection of a particular attorney permeates an entire trial – indeed, an entire defense. A defendant's attorney is his alter ego in negotiating with prosecutors and presenting his case in court, and the attorney makes innumerable tactical and stylistic decisions that affect the defendant's fate. Accordingly, it is impossible to isolate and assess the effect of a trial court's erroneous denial of counsel of choice.

B. Even if the denial of counsel of choice were not structural error, the error in this case calls the outcome sufficiently into question to warrant a new trial. When a court commits a nonstructural constitutional error, the government can avoid a new trial only by proving on appeal that the error was harmless beyond a reasonable doubt. The government plainly cannot carry that burden here. Respondent's preferred counsel was far more experienced and skilled than his substitute counsel, and proceedings on remand from the Eighth Circuit's decision below confirm that the preferred counsel would have been able to call the government's case into question in ways the substitute counsel did not.

Indeed, even if defendants had to demonstrate some level of prejudice to obtain redress from erroneous denials of counsel of choice, such prejudice would be present here. Respondent's chosen attorney would have pursued a different trial strategy than his substitute counsel did. Instead of simply arguing that there was insufficient evidence to support conviction, as substitute counsel did, the chosen attorney would have offered a totally innocent explanation for respondent's actions. Through cross-examination of Jorge Guillen, the government's star witness who testified he set up the critical payment of supposed drug money, his counsel of choice would have shown that Guillen in fact convinced respondent to meet him to give him money to help his sick daughter. This strategy of arguing actual innocence would have had a reasonable probability of success.

ARGUMENT

I. A Trial Court's Unjustified Refusal To Allow A Defendant To Be Represented By Counsel Of His Choice Violates The Sixth Amendment, Irrespective Of Any Demonstrable Prejudice.

The government's argument that a trial court may refuse to allow a criminal defendant to be represented by retained counsel of his choice so long as the overall adversary process is not objectively and demonstrably impaired ignores the history, purpose, and practical operation of the Sixth Amendment's Assistance of Counsel Clause.

A. The Right To Counsel Of Choice Lies At The Historical Core Of The Sixth Amendment's Guarantee Of The "Assistance of Counsel."

Although the government characterizes the right "to select and be represented by one's preferred attorney," *Wheat* v. *United States*, 486 U.S. 153, 159 (1988), as a "qualified" or "subordinate" right, Petr. Br. 8-9, this right actually forms the

historical core of the Assistance of Counsel Clause. Lessons learned under oppressive kings and colonial governors left the Framers with a keen appreciation for the need to protect criminal defendants from the power of the government. Their solution was to provide not "merely that a defense shall be made for the accused," *Faretta* v. *California*, 422 U.S. 806, 819 (1975), but that the defendant shall have the right to decide whether to defend himself through counsel and, if so, which counsel. And *this right* – as opposed to modern spin-offs such as the right to "effective" or conflict-free assistance of counsel – always has been defined and enforced for its own sake, irrespective of any objectively demonstrable prejudice arising from any particular violation.

1. Under English common law in the eighteenth century, only those charged with misdemeanors had a right to be represented by counsel at trial. See William M. Beaney, *The Right to Counsel in American Courts* 8-9 (1955). Parliament extended the right in 1695 to representation of those charged with treason. Treason Act of 1695, 7 & 8 Will. 3, c. 3, § 1 (Eng.). In the wake of this change, English courts began to allow limited representation in some felony trials, but the decision to do so remained completely within the discretion of the court and could not be demanded as a right. See Beaney, *supra*, at 9-11. However, two famous trials during the pre-Founding period – each of which was well-known to the Framers – highlighted the importance of choice of counsel as a means of protecting both a defendant's liberty and the public perception of fairness.

The first was the trial of the Seven Bishops in 1688. Seven leading bishops of England presented King James II with a petition announcing their refusal to follow the King's order that his Declaration of Indulgence be read at Sunday services in all churches throughout the kingdom. When the petition was publicized and nearly every church failed to comply with the order, the King resolved to prosecute the bishops for seditious libel and imprisoned them in the Tower of London. See 2 Lord Macaulay, *The History of England*

from the Accession of James II, at 990-1008 (Charles H. Firth ed., 1914).

With so much at stake, the Bishops retained an impressive team of lawyers to defend them. The Bishops chose their counsel with deliberate care. For example, they selected the junior counsel on the advice of friends who knew of his expertise in historical and constitutional questions and of his excellent reputation with the King's Bench. See Macaulay, *supra*, at 1022. One lawyer whom the Bishops sought to retain, Sir Creswell Levinz, was afraid of attracting the wrath of the King and initially refused their retainer. *Id.* at 1021-22. But so strong was the prevailing ethos regarding the right to counsel of choice that when the bar learned of Levinz's refusal, it quickly made clear to Levinz that the Bishops' choice was to be respected: "it [was] intimated to him by the whole body of attorneys who employed him that, if he declined this brief, he should never have another." *Id.* at 1022. Levinz's hesitation may even have prevented his restoration to the bench after the Glorious Revolution. *Id.* at 1022 n.1. Even though the Bishops had retained an army of other eminent lawyers, and even though Levinz may have had good cause to turn down the case, the bar united to protect the fundamental right of criminal defendants to choose counsel. No one suggested that the Bishops would have been just as well off with other equally distinguished lawyers; their choice had independent significance.

The second noteworthy trial took place in the American colonies. John Peter Zenger was tried before the Supreme Court of New York in 1735 for publishing a newspaper frequently critical of the governor. See generally James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (Stanley N. Katz ed., 1972). Zenger engaged James Alexander and William Smith, prominent attorneys with experience defending against Governor Cosby's assertions of unlimited executive power. *Id.* at 4-5, 18. Alexander and Smith immediately challenged the commissions of two of the Supreme Court justices on several

grounds, insinuating that the justices were the governor's henchmen. *Id.* at 20. The Chief Justice, who had been recently elevated by the governor and whose commission was one of the two challenged, responded by disbarring Smith and Alexander. *Id.* at 4, 20. He likely resorted to this extraordinary punishment as a way to deprive Zenger of competent counsel, as Smith and Alexander were seen as the best of the small group of lawyers practicing in New York. *Id.* at 21. Indeed, the disbarment order had the marks of the governor, who sought to control both the bench and bar as a means to muzzle opposition. See Eben Moglen, *Considering* Zenger*: Partisan Politics and the Legal Profession in Provincial New York*, 94 Colum. L. Rev. 1495, 1515-16, 1519 (1994).

When Zenger then petitioned for appointed counsel, the court selected the "effective and well-trained" John Chambers. Moglen, *supra*, at 1519. Chambers was "a competent lawyer." Alexander, *supra*, at 21. Had he ultimately tried the case, Chambers would surely have met modern standards of effectiveness. See *id.* at 148. But he was also "a governor's man." *Id.* at 21; see also Moglen, *supra*, at 1516-17. And Zenger needed much more than minimally effective counsel because the contemporary law of seditious libel was squarely against him. Alexander, *supra*, at 23. Luckily for him, his friends engaged Andrew Hamilton, an out-of-state lawyer with an excellent reputation. *Id.* at 22. By sheer eloquence, and by following Alexander's original strategy, Hamilton convinced the jury to return a nullifying verdict, thereby dealing the governor's tyrannical power a severe blow. See *id.* at 23-26, 139; Moglen, *supra*, at 1518.

2. It was against this backdrop of governmental interference with counsel of choice that the new states legislated and constitutionalized the right to counsel after independence. Following the Declaration of Independence, nearly every former colony adopted provisions protecting a

criminal defendant's right to counsel.[3] The early constitutions of several of the states demonstrate the personal nature of the right to retain counsel of choice, as the founders perceived it: the constitutions of Pennsylvania (1776), Vermont (1777), Massachusetts (1780), and Delaware (1792) each provided that in all criminal prosecutions a defendant has the right to be heard by "*his* counsel." Beaney, *supra*, at 20-21 (emphasis added).[4] Within two generations, the General Court of Virginia clarified the meaning of the right when it held that in a criminal trial a minor possessed the same right as any adult to appear "by attorney of his *own selection*," and thus that a trial court had erred in appointing a guardian to defend the minor. *Word* v. *Commonwealth*, 30 Va. (3 Leigh) 743, 759 (1827) (emphasis added). The appellate court made no inquiry into the effectiveness of the guardian, or into whether the minor had suffered any demonstrable prejudice. The trial court's interference with the minor's right to control his own defense itself violated his common-law right. See *id.* at 748-49 (argument of amicus curiae on behalf of the minor).

The right to counsel, thus protected by the states, was among the rights the people demanded during ratification of the federal Constitution. Beaney, *supra*, at 22-23. The Sixth Amendment's "Assistance of Counsel" Clause responded to that cry. The thrust of the Clause was to guarantee the right to have defendants' chosen attorneys appear on their behalf.

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[3] See Beaney, *supra*, at 18-21. Prior to the Revolution, a few colonies recognized by statute or practice a right to counsel more generous than that of England. *Id.* at 16-18. As early as 1660, Rhode Island enacted a statute guaranteeing "the lawful privilege of any man that is indicted, *to procure* an attornye to plead any poynt of law that may make for the clearing of his innocencye." *Id.* at 17-18 (emphasis added).

[4] See Pa. Const. of 1776, Declaration of Rights, IX; Vt. Const. of 1777, ch. I, par. X; Mass. Const. of 1780, pt. I, art. XII; Del. Const. of 1792, art. I, § 7.

Once the lawyer appeared, there was no real question that the counsel would be able to "[a]ssist[]" in the defense. U.S. Const. amend VI.

Indeed, just one day before Congress proposed the Bill of Rights, President Washington signed the Judiciary Act of 1789, which provided in Section 35: "[I]n all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."[5] Mindful of the Zenger trial, Congress acted to secure criminal defendants' right to choose representation by any counsel admitted to practice before the federal courts, reflecting its views of the Sixth Amendment's guarantee.

3. State and federal courts repeatedly have reaffirmed that the original understanding of the Sixth Amendment and parallel state constitutional provisions was to guarantee defendants' right to obtain counsel of choice, irrespective of any prejudice that would result from denying that choice. In *Delk* v. *State*, 100 Ga. 61 (1896), for example, two codefendants, Tom Delk and Taylor Delk, were tried for murder. Although the trial court appointed a lawyer for each defendant, Taylor sought a continuance to allow counsel he had retained to appear. The trial court denied the request and forced both defendants to trial with their appointed lawyers. Both defendants were convicted and appealed, asserting violations of the right to counsel. The Georgia Supreme Court easily disposed of Tom's appeal, holding that his appointed attorney had ably represented him. *Delk* v. *State*, 99 Ga. 667, 669-71 (1896). But the same court took a different view of Taylor's appeal, holding that its state bill of rights provision that

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[5] See Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789). The provision has remained on the books continuously since then, and is currently codified at 28 U.S.C. 1654 (2005).

> "every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel," confers upon every person indicted for crime a most valuable and important constitutional right, and *entitles him to be defended by counsel of his own selection whenever he is able and willing to employ an attorney and uses reasonable diligence to obtain his services*. No [such] person * * * should be deprived of his right to be represented by counsel chosen by himself, or forced to trial with the assistance only of counsel appointed for him by the court.

Delk, 100 Ga. at 61 (emphasis added). The court thus reversed Taylor's conviction. *Ibid.* Unlike Tom's appeal, it made no inquiry into the effectiveness of Taylor's appointed counsel or into whether the trial would have gone differently had Taylor's retained counsel represented him.

Other state courts issued similar opinions over the years. The Supreme Court of Wisconsin observed that a defendant "may have [for his defense] whatever counsel he chooses to retain," *Baker* v. *State*, 56 N.W. 1088, 1089 (1893), while the Court of Appeals of Maryland noted in 1914 that "[i]t is, of course, the right of one accused of crime to be represented by counsel of his own selection," *McCleary* v. *State*, 89 A. 1100, 1103 (1914). In 1933, the New York Court of Appeals held that both the federal and New York Constitutions protect a defendant's "right to defend in person or by counsel of his own choosing," and consequently that the court had no authority to assign counsel to a defendant who retained his own. *People* v. *Price*, 187 N.E. 298, 299 (1933). The Appellate Division a few years later reversed a conviction where the trial judge refused to reasonably accommodate the schedule of the defendant's chosen counsel, and then appointed counsel after the defendant refused to retain another. *People* v. *Gordon*, 30 N.Y.S.2d 625 (1941). Emphasizing the "invasion of the substantial rights of the accused to appear by counsel of his own choosing," the court

made no inquiry into the effectiveness of the appointed counsel. *Id.* at 628.

Federal courts quickly followed suit as their jurisdiction over criminal matters grew. In *Powell* v. *Alabama*, this Court reversed the convictions of three of the Scottsboro Boys because the trial court's failure to allow them an opportunity to secure counsel of their own choice denied them due process, independent of the court's additional failure to appoint effective counsel for them. 287 U.S. 45, 52-53 (1932). This Court explained in plain terms: "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Id.* at 53. This Court reiterated the importance of the right to choose counsel two decades later in *Chandler* v. *Fretag* when it reversed the conviction of a defendant denied a continuance to obtain a lawyer, observing that the defendant's "right to be heard through his own counsel was unqualified." 348 U.S. 3, 9 (1954).

In between these decisions, the Third Circuit relied on *Powell* to reverse the conviction of defendants whose chosen out-of-state counsel was improperly denied admission pro hac vice. *United States* v. *Bergamo*, 154 F.2d 31, 34 (CA3 1946). Although the case was "clearcut and simple" and the local counsel conducted it "with skill and competence," *id.* at 33, the Third Circuit nonetheless ordered a new trial because "[t]o hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." *Id.* at 35.

4. Even where Congress and the states had provided for counsel to be *appointed*, the defendant's choice historically was afforded great respect, further demonstrating that the right to assistance of counsel is about more than simply ensuring that some lawyer appear on the defendant's behalf. In Section 29 of the Federal Crimes Act of 1790, Congress provided that "the court before whom [any person indicted of treason or other capital offenses] shall be tried, or some judge

thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person *such counsel*, not exceeding two, *as such person shall desire*."[6] It was the practice of federal courts under this provision to appoint counsel chosen by the defendant. For example, in the famous second treason trial of John Fries (which became the subject of one of the articles of impeachment against Justice Samuel Chase in 1805), "the same persons who had conducted [Fries's] defence at his former trial, were again *at his request* assigned by the court as his counsel." *Case of Fries*, 9 F. Cas. 924, 936 (Cir. Ct. D. Pa. 1800) (Note 1, giving Justice Chase's answer to the first article of impeachment against him) (emphasis added). In a case near the close of the nineteenth century, this Court noted that a specific attorney "was assigned to [the defendant] as counsel upon his own request, and in accordance with [the Federal Crimes Act of 1790]," and that the defendant never requested the court to *assign* to him the other attorney that he claimed on appeal to have wanted. *Andersen* v. *Treat*, 172 U.S. 24, 29, 31 (1898).

Many states had similar statues and practices. South Carolina in 1731 and New Jersey in 1795 passed statutes with language very similar to the appointment provision of the Federal Crimes Act. See Beaney, *supra*, at 17, 20. More recently, on remand from this Court's landmark decision in

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[6] Act of Apr. 30, 1790, ch.9, § 29, 1 Stat. 112, 118 (1790) (emphasis added). This provision was reenacted as Rev. Stat. § 1034 (1873), and persisted well into the twentieth century, see 18 U.S.C. 563 (1940); *Bute* v. *Illinois*, 333 U.S. 640, 660 & n.16 (1948). The phrase "such counsel" indicates a degree of control in the selection of appointed counsel beyond mere number, as the act's language was clearly borrowed from the English Treason Act of 1695, which used virtually identical language to grant to those accused of treason the right to have appointed "such and so many Counsel, not exceeding Two, as the Person or Persons shall desire." 7 & 8 Will. 3, c. 3, § 1.

Gideon v. *Wainwright*, 372 U.S. 335 (1963), the trial court deferred to Gideon's preferences in appointing him counsel. Abe Fortas enlisted a prominent trial lawyer to represent Gideon on remand, and the prosecutor suggested that a public defender be appointed to assist in the defense. Yet Gideon asked for a particular local attorney instead. The trial judge quickly appointed the local attorney and rejected the other suggestions. Anthony Lewis, *Gideon's Trumpet* 237-38 (Vintage Books 1989). That the trial judge deferred to Gideon's choice shows the continued vitality of the original understanding that the assistance of counsel involved a defendant's choice and not simply the presence of some attorney at his trial.

B. Modern Legal Developments Have Not Altered The Basic Rule That A Trial Court Violates A Defendant's Right To Counsel Of Choice At The Moment It Erroneously Refuses To Allow A Defendant's Retained Counsel To Represent Him.

This Court's modern jurisprudence confirms that the right to counsel of choice does not depend on a defendant's ability to demonstrate a tangible adverse effect on the adversarial process. The right exists on its own terms and furthers goals above and apart from ensuring an objectively defined fair trial. To be sure, modern jurisprudence has clarified that the right to counsel of choice is not absolute and that the general right of assistance of counsel includes a right to "effective" assistance. But neither of these developments permits courts to deny defendants the ability to be represented by retained counsel of choice for no legitimate reason. Put another way, neither of these developments means that defendants improperly denied their requests to be represented by a particular retained counsel of choice must demonstrate some level of prejudice to make out a constitutional violation.

1. The Right To Counsel Of Choice Protects Interests Distinct From Merely Guaranteeing An Adversarial Process.

The right to counsel of choice serves three main functions, each of which has vitality independent of merely ensuring an objectively fair trial.

a. First and foremost, a defendant's counsel of choice is one of two entities (along with the jury) that the Constitution interposes in criminal cases between the accused and the government. The presence of these entities ensures that the people themselves have some say in whether the government may deprive individuals of their physical liberty. This Court has held, for example, that trial courts may not interfere with juries by "directing the jury to come forward with * * * a [guilty] verdict." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). Juries, rather, must be allowed to perform their role as "circuitbreaker[s] in the State's machinery of justice." *Blakely* v. *Washington*, 542 U.S. 296, 306-07 (2004).

By the same token, forbidding the government from unjustifiably interfering with a defendant's ability to choose and retain an attorney ensures that the government may not exercise any form of supervisory veto over "the type of defense [the defendant] wishes to mount." *United States* v. *Laura*, 607 F.2d 52, 56 (CA3 1979). Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 646 (1989) (Blackmun, J., dissenting) (counsel of choice ensures "equality between the Government and those it chooses to prosecute"). It also ensures that the government may not cause a defendant to question the "trust between attorney and client that is necessary for the attorney to be a truly effective advocate." *Caplin & Drysdale*, 491 U.S. at 645 (Blackmun, J., dissenting). Once the government, at its whim, could disqualify a defendant's chosen attorney, a defendant would be bound to be suspicious of any lawyer whom the government allowed to stay in a case.

b. A related "primary purpose" of the Sixth Amendment right to counsel of choice "is to grant a criminal defendant effective control over the conduct of his defense" as a means of respecting the constitutional values of individual dignity, autonomy, and free will. *Wheat*, 486 U.S. at 165-66 (Marshall, J., dissenting); see also *McKaskle* v. *Wiggins*, 465 U.S. 168, 176-77 (1975) (noting the importance of affirming "the dignity and autonomy of the accused"). Defending oneself against criminal charges is a traumatic and deeply personal endeavor. It involves innumerable choices about how to vindicate one's interests. Defendants therefore must be allowed to select the attorney who will help them make those choices, so long as defendants' selections fall within accepted limits. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez* v. *Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring).

It is, after all, the accused "who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-20. So just as the government may not unjustifiably interfere with a defendant's right to represent himself, the federal courts of appeals have held that it may not unjustifiably interfere with his free choice of counsel. See, *e.g.*, *United States* v. *Panzardi Alvarez*, 816 F.2d 813, 818 (CA1 1987) ("Obtaining reversal for violation of [the right to counsel of choice] does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceedings." (citation omitted)); *Wilson* v. *Mintzes*, 761 F.2d 275, 279 (CA6 1985) ("[R]ecognition of the right [to counsel of choice] also reflects constitutional protection of the accused's free choice independent of these [fairness] concerns."); *United States* v. *Curcio*, 694 F.2d. 14, 25 (CA2 1982) (Friendly, J.) ("[T]he defendants' choice is to be honored out of respect for them as free and rational beings,

responsible for their own fates"), disapproved on other grounds in *Flanagan* v. *United States*, 465 U.S. 259, 263 n.2 (1984). If a trial court does so, the court violates the Sixth Amendment regardless of whether an objective observer would believe the court's actions undermined the adversarial process.

The case of Euel Lee illustrates why this is so. See *In re Ades*, 6 F. Supp. 467 (D. Md. 1934). Lee was a black man whom the State of Maryland had charged with robbing and murdering a white family. *Id.* at 469-70. Lee was nearly lynched several times. *Id.* at 471. The International Labor Defense commissioned a young lawyer named Bernard Ades to defend Lee. *Id.* at 470. Ades shared his client's "not commonly held" belief that "it is difficult for a colored person charged with a major crime against a white person to get a fair and impartial trial." *Id.* at 470, 474. Accordingly, Ades sought removal of the case from the prejudiced officials and public of the Eastern Shore and demanded that blacks be included in the jury. *Id.* at 471. Meanwhile, the trial court appointed F. Leonard Wailes, a "leading lawyer of the state," to jointly represent Lee. *Ibid.* Wailes disagreed with both of Ades' arguments, and tried to have him removed as counsel. *Id.* at 472. Lee and Ades ultimately resisted this gambit and continued to seek a change of venue and nondiscriminatory jury selection, neither of which his establishment-appointed counsel had thought worthwhile or prudent. *Id.* at 473-74. Although an appellate court likely would not have ruled that precluding Ades from representing Lee would have constituted ineffective assistance, Ades's arguments ultimately prevailed and secured Lee's rights.

c. Finally, the right to counsel of choice serves an important institutional role: When the government unjustifiably interferes with the accused's retained counsel, the government "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (plurality opinion). "[J]ustice

must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); see also *United States* v. *Olano*, 507 U.S. 725, 736 (1993) (reaffirming the need to correct error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" (citation omitted)). Accordingly, *Wheat* itself recognized that a defendant's choice of counsel implicates the judicial system's interest in ensuring that criminal trials are conducted "just[ly]" and in a manner that "appear[s] fair to all." 486 U.S. at 160. These values are harmed whenever a court, for no legitimate reason, bars a defendant's chosen counsel from appearing on his behalf. Under these rare and extreme circumstances, it is not only the defendant who is led to "believe that the law contrives against him," *Faretta*, 422 U.S. at 834; the public also naturally doubts whether an ensuing conviction is legitimate and impartial. When, as here, the prosecution itself plays a role in blocking the defendant's chosen counsel, see *supra*, at 7, this public harm is only exacerbated.

2. None Of The Sixth Amendment Doctrines That Look More Generally To The Adversarial Process Suggests That In The Context Of This Case Any Showing Of Prejudice Should Be Required To Make Out A Constitutional Violation.

The right to assistance of counsel, of course, is not absolute. A court may reject chosen counsel in order to *protect* overriding interests in a fair, adversarial process. A court also may reject claims of "ineffective assistance" when there is no evidence of prejudice to adversarial process. But, contrary to the government's argument, neither of these doctrines dictates that a trial court may reject a defendant's retained and legitimate counsel so long as no objectively demonstrable harm to the accuracy of the verdict occurs.

a. A trial court's ability to ensure that a defendant's choice of counsel is legitimate and nondisruptive does not grant it a concomitant power to reject legitimate counsel for

mistaken or illegitimate reasons. Courts may limit representation to those who are attorneys and who are eligible to practice in the jurisdiction. In order to protect the efficiency or integrity of the judicial process, courts also may refuse repeated, unreasonable, or abusive requests for continuances even if this prevents a defendant from proceeding with his chosen counsel. See *Ungar* v. *Sarafite*, 376 U.S. 575, 588-89 (1964). Courts may also reject conflicted counsel in order to promote the fairness of a trial, the ethical standards of the legal profession, and the appearance of propriety.

This Court addressed this last constellation of concerns in *Wheat*. There, a defendant had sought to be represented by an attorney who was already engaged by co-defendants and potential witnesses, presenting a serious risk of a conflict of interest. 486 U.S. at 155-56, 163-64. Although this Court recognized the defendant's presumptive right to be represented by his preferred attorney, *id.* at 160, it concluded that the trial court acted within its discretion in forbidding the attorney from representing the defendant. This Court explained that the defendant's interest in choosing his counsel had to give way to the "institutional interest in the rendition of just verdicts," – the interest of "[f]ederal courts * * * in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all." *Ibid.*

But when, as here, there are no such countervailing interests, the Sixth Amendment entitles a defendant to be represented by his chosen attorney. Once a defendant selects a proper attorney, his right to counsel of choice attaches. If the trial court erroneously denies the choice, it is not necessary to wait and see how the trial progresses to know whether the court has violated the Constitution.

Put another way, the government's references to *Wheat* and related cases confuse the circumstances under which the right to counsel of choice may properly be overcome with the

appropriate remedy when it is improperly denied. The Sixth Amendment contains a series of rights designed to ensure that a defendant receives a fair and adversarial trial, such as the right to know the charges against him, to confrontation, and to compulsion of witnesses, see *Faretta*, 422 U.S. at 818, as well as the right to have counsel present at all critical stages, see *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). Many of these rights are subject to limitations when that is necessary to allow the adversarial process to run efficiently and fairly. See, *e.g.*, *Perry* v. *Leeke*, 488 U.S. 272 (1989) (allowing courts to deny access to counsel during recess between direct examination and cross-examination in order to further the truth-seeking function of trial); *Taylor* v. *Illinois*, 484 U.S. 400, 414-15 (1988) (allowing courts to limit compulsory process as a sanction in order to preserve the "integrity of the adversary process"); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986) (allowing courts to limit cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"). Yet none of these rights requires a defendant who has been *improperly* prevented from taking certain action to show prejudice in order to make out a constitutional violation. The same logic holds here.

Reduced to its essence, the government's argument is a familiar one: that the constitutional right at issue exists to ensure a "fair trial," so that if the defendant received a fair trial, the right cannot have been violated. Petr. Br. 13. But even putting aside that the right to counsel of choice serves constitutional interests above and apart from merely ensuring a fair trial, see *supra*, at 21-25; *infra*, at 39-41, the government's argument "abstracts from the right to its purposes and then eliminates the right." *Maryland* v. *Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting). The whole point of including the Assistance of Counsel Clause in the Constitution was to single out the right to counsel of choice as one of the select few to which defendants are entitled without

having to make any specific showing of need. Saying that the right is not violated unless the defendant will suffer (or has suffered) prejudice "is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford* v. *Washington*, 541 U.S. 36, 62 (2004).

Indeed, if the government were correct that the right to counsel of choice is not violated unless a defendant can make a sufficient showing of prejudice to the adversarial process, Petr. Br. 16, nothing would limit that rule to scenarios in which the defendant went to trial with his "second choice" counsel. The same rule would apply when, as apparently happened here, the defendant's lack of additional resources required him go to trial simply with local counsel who was never intended to be the lawyer standing before the jury at trial; or when a defendant went to trial with a lawyer who was demonstrably something other than second-best. A court could even force a defendant to go to trial with *the court's* preferred lawyer so long as that lawyer was by some measure supposedly just as good as the one the defendant wished to retain. If all that matters is whether the adversarial process is objectively undermined, the identity and source of the defendant's ultimate attorney are irrelevant.

The government tries to stem the import of this logic by saying that, even under its proposed prejudice rule, "[t]he District Court must recognize a presumption in favor of [defendants'] counsel of choice," *Wheat*, 486 U.S. at 164, and that the district court will screen defendants' selection of counsel "conscientiously and in good faith." Petr. Br. 30. "The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people." *Crawford*, 541 U.S. at 67. Indeed, John Peter Zenger would find little comfort in the government's assurance, nor would any colonist with memory of "the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all

bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." Charles Warren, *A History of the American Bar* 7 (1911). The only way to make sense of the "presumption" in *Wheat* is to recognize that the Sixth Amendment requires courts to accept a defendant's chosen counsel unless there is a legitimate reason for precluding the representation.

b. Nor does the modern recognition of a right to "effective" assistance of counsel make the right to counsel of choice dependent on whether trials turn out to be sufficiently adversarial in nature. The right to effective assistance is an implied right, emanating from an overall purpose of the Sixth Amendment, whereas the right to counsel of choice is the core concept protected by the Assistance of Counsel Clause. See, *e.g.*, Note, *Legislation: The Right to the Benefit of Counsel Under the Federal Constitution*, 42 Colum. L. Rev. 271, 272, 282 (1942) (concluding that "[o]ne of the *most important* aspects of the right to counsel is the opportunity to obtain counsel of one's own choice," while observing that "[t]he right to counsel has *begun* to mean the right to have effective assistance of counsel" (emphasis added)).

To be sure, in the decades since *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (construing the Assistance of Counsel Clause and the Due Process Clause to require appointment of counsel for the vast majority of criminal defendants who cannot afford retained counsel) – and especially since this Court's decisions in *McMann* v. *Richardson*, 397 U.S. 759 (1970), and *Strickland* v. *Washington*, 467 U.S. 1267 (1984) (construing the Sixth Amendment to require effective assistance) – claims of ineffective assistance by appointed counsel have dominated right-to-counsel litigation. This may explain the government's assertion that effectiveness is the "fundamental" right protected by the Assistance of Counsel Clause. Petr. Br. 14. But it does not make the assertion true. The right to counsel of choice always has formed the foundation of the Assistance of Counsel Clause, and no

amount of litigation concerning other aspects of the Clause can change that.

Indeed, the government's proposal that a defendant should have to prove that his substitute counsel was "ineffective" under *Strickland* to establish a violation of his right to counsel of choice, see Petr. Br. 14, would collapse the historic right of counsel of choice into the modern right to effective assistance. Not only would this turn the Sixth Amendment utterly inside-out; it also, as the Seventh Circuit has observed, "would have the practical effect of eliminating relief in all cases when the defendant loses his preferred lawyer, and thus of making *Wheat* a dead letter." *Rodriguez* v. *Chandler*, 382 F.3d 670, 675-76 (2004), cert. denied, 543 U.S. 1156 (2005). To make the point concrete, a court could arbitrarily refuse to allow a defendant to be represented by a modern-day Clarence Darrow, and so long as the defendant's substitute counsel were not constitutionally incompetent, the court would not violate the Constitution. Cf. Petr. Br. 16.

C. Practical Considerations Require Treating Unjustified Denials Of Counsel Of Choice As Complete Constitutional Violations.

The government's proposed re-conception of the right to counsel of choice falters not only in theory, but also in practice. A rule requiring defendants to prove prejudice in order to establish a violation of the constitutional right to counsel of choice would be nearly impossible for trial courts to administer and extremely costly and inefficient for appellate courts to police. Furthermore, the government's rule would instigate more disqualification litigation in order to solve a problem that simply does not exist: namely, defendants being denied their counsel of choice and then getting *better* counsel instead and obtaining outstanding results.

1. As an initial matter, the government's proposed rule is incompatible with the reality that trial courts must make decisions concerning a defendant's right to proceed with

counsel of choice at the threshold of the case. As a result, the prejudice standard creates a series of bizarre incentives that no constitutional rule should encourage. First, any rule that permits unjustified denials of a defendant's chosen counsel unless the defendant can show prejudice after the fact will unduly encourage attorney disqualification motions. Knowing that a denial of counsel of choice will result in reversal only if the defendant can persuade an appellate court, at the very least, that his substitute lawyer "pursued a different defense strategy that would have created a reasonable probability that * * * the result of the proceeding would have been different," Petr. Br. 15-16 (quotation omitted), overzealous prosecutors may be tempted to initiate disqualification proceedings in the hopes of removing particularly effective defense lawyers. See *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 436 (1985) (expressing "concern about [the] 'tactical use of disqualification motions' to harass opposing counsel" (citation omitted)).

Although this Court in *Wheat* shelved the possibility of prosecutors "manufactur[ing]" attorney conflicts of interest, 486 U.S. at 163, the government's proposal here raises far more acutely the possibility of abusive disqualification motions. Instead of having to manufacture a conflict of interest, the government would now be free to advance *any* reason – *e.g.*, a supposed breach of an ethical rule – to remove defense counsel from a case, and still remain insulated from an appellate rebuke. In fact, under the government's conception of the right to counsel of choice, even a disqualification on the grounds that the defendant's counsel "parts his hair on the right" would not alone amount to a constitutional violation or entitle the defendant to any remedy. *United States* v. *Santos*, 201 F.3d 953, 960 (CA7 2000). This Court should not backhandedly encourage such baseless objections to defendants' chosen counsel.

2. By focusing on the potential prejudice of substitute counsel, the government's proposed rule also pushes judges to grant motions to disqualify counsel of choice. When

considering whether to disqualify a defendant's chosen counsel before trial, the judge "must carefully balance the defendant's right to be represented by the counsel of his choice against the court's interest in 'the orderly administration of justice.'" Pet. App. 7a (citations omitted). While performing this balancing, the judge should consider only the defendant's interest in retaining his chosen counsel against the lawyer's qualifications and the risk he will be ineffective or otherwise undermine the adversarial process. See *Wheat*, 486 U.S. at 164. However, because the thrust of the government's position emphasizes whether *substitute* counsel will be effective, the standard creates an incentive for judges to discount the defendant's interest in retaining his chosen counsel. If, as is typically the case, there is little risk that substitute counsel will be constitutionally incompetent,[7] the government's standard encourages the judge to disqualify chosen counsel because the substitute lawyer's performance will foreclose any constitutional violation from arising.[8]

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[7] Because the *Strickland* prejudice standard is difficult to prove, most substitute counsel will be found at least minimally effective under the government's approach, creating little risk for judges to err on the side of disqualifying defendants' chosen counsel.

[8] The rules under which judges may be asked to consider attorney disqualification motions or motions to appear pro hac vice may exacerbate this problem because they give judges so little guidance. In the present case, the local rule under which the district court denied Low's pro hac vice motions gave the judge unbounded discretion. The rule provides without any further substantive elaboration that:

> An attorney who is not regularly admitted to the bar of this Court, but who is a member in good standing of the bar of the highest court of any state or the District of Columbia, may be admitted pro hac vice for the limited purpose of appearing in a specific pending action.

The government's proposed rule also would place defendants such as respondent in an unfair predicament. If a defendant is confident that an appellate court will realize that the trial court erred in disqualifying his counsel of choice, the best way for him to obtain a new trial with his original counsel would be to hire an utterly incompetent substitute attorney for the instant trial. Only then could the defendant be assured that he could make out a constitutional violation and obtain a reversal on appeal. If, however, the defendant is more risk averse – and virtually all defendants will be – he may try to obtain the best possible substitute counsel and urge that counsel to follow the same basic strategy as his original counsel would have planned. Yet if the defendant is then convicted, he stands almost no chance of obtaining reversal on appeal even if the original lawyer would have pursued the strategy more expertly. The government has provided no reason for this Court to adopt a rule that puts defendants in such a bind and encourages them effectively to invite one error in order to allow them to seek a cure for another.

The government's proposed prejudice standard would place defendants interested in plea bargains in even worse positions. Many defendants, such as those who have been "overcharged" by the government, retain a particular lawyer for his skill in negotiating favorable deals with the government, either because of his tenacity or because of his established relationship with the prosecutor's office. For such a defendant whose retained counsel is wrongfully disqualified, the government's prejudice standard would create an unacceptable dilemma, for he would be unable to plead guilty with substitute counsel if he wishes to challenge the wrongful disqualification of his counsel of choice. Under the government's standard, a defendant who pleads guilty with substitute counsel would need to meet the requirements

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E.D. Mo. Local Rule 83-12.01(E). Thus, the rule never expressly requires the court to consider a defendant's Sixth Amendment interests at all in deciding whether to grant the motion.

set forth in *Hill* v. *Lockhart*, 474 U.S. 53 (1985), to prove prejudice from the denial of his counsel of choice. However, because the defendant hired his first counsel with the possibility of pleading in mind, he would be unable ever to prove that, but for substitute counsel, "he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. Even if the defendant would have gotten a substantially better plea agreement if he had proceeded to the bargaining table with his chosen counsel, he would not satisfy *Hill*'s standard. Thus, defendants who would have been willing to plead guilty to reduced charges would either be forced to go to trial with substitute counsel, in the hopes of eventually obtaining a new proceeding with counsel of choice, or they would be backed into forfeiting their constitutional right to counsel of choice and accepting a guilty plea negotiated by substitute counsel.

3. The government's position also would generate a new type of habeas litigation. In *Flanagan*, 465 U.S. at 260, this Court held that "a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable under 28 U.S.C. § 1291." Nor, under the government's conception of the right to counsel of choice, would such claims often be cognizable on direct appeal. If defendants would have to show prejudice related to trial strategy, they would have to produce new evidence outside the record of the trial that actually occurred. Accordingly, as the government acknowledges, Petr. Br. 23 n.6, requiring defendants to show prejudice will necessitate post-conviction evidentiary proceedings, thereby forcing defendants' claims of improper denial of counsel of choice into habeas litigation. This will require defendants to wait years for relief and will enlarge the already crowded habeas docket.

This resultant increase in habeas review is particularly startling because the government argues that requiring a rule of automatic reversal would lead to burdensome government expenditures from the costs of new trials. See Petr. Br. 31. But the cost to the government for a new trial may well be similar to that of an evidentiary hearing on federal habeas

review. According to the government's own data, the majority of criminal trials in federal district court in 2003 lasted for one day. U.S. Dep't of Justice: Office of Justice Programs, *Sourcebook of Criminal Justice Statistics 2003* 455-56 Tb. 5.42, *available at* sourcebook/ pdf/t542.pdf.[9] If an evidentiary hearing on federal habeas corpus would also last for a single day – an entirely plausible assumption, because the defendant would have to detail the differences between counsel, the changes in representation caused by the substitution of counsel, and the effects on the original outcome to a judge who did not preside over the original trial – then the government's argument that a new trial would pose a significant burden on the federal judicial system holds little weight.

Further, an evidentiary hearing on the denial of a convicted defendant's counsel of choice will present greater complications than those seen in *Strickland* inquiries. In ineffectiveness claims, the reviewing court compares the lawyer's performance with a baseline standard of objective reasonableness. See *Strickland*, 466 U.S. at 687-90. Under the government's conception of the right to counsel of choice, however, the habeas court would have to compare replacement counsel's performance, a known quantity, with a complete unknown – the planned strategy and performance of chosen counsel. The chosen attorney apparently would be forced to testify not only about the errors the substitute counsel committed, but also about his original philosophy of the case, his proposed defense strategy, and how he would have questioned witnesses. In addition, trial witnesses, who might claim Fifth Amendment privilege, would need to be deposed in an attempt to glean how they might have testified

[9] According to the Sourcebook, in 2003, there were 7,118 criminal trials in U.S. district courts across the country. Of these, 3,586 spanned one day, 1,196 trials lasted for two days, 860 for three days, and 1,221 for four to nine days. Only 255 trials lasted for ten or more days.

under the chosen counsel's strategy. The government would then need to determine, and demonstrate to the court, how it would have responded to the chosen lawyer's strategy and persuade the court that the outcome would nonetheless probably have been the same.[10] This series of complicated and entirely speculative inquiries and the trial-within-a-trial they would necessitate demonstrates the nearly impossible task given to reviewing courts under the government's proposed standard.

4. The final striking aspect of the government's proposed prejudice rule is that it is designed to solve a supposed problem that does not exist. It is exceedingly rare nowadays for a trial court, as here, to wrongly deny a defendant his right to proceed with counsel of choice, and it does not appear that any of the handful of modern defendants to suffer this kind of action have received windfalls at their trials. Requiring the government to re-try the occasional defendant who is improperly denied his counsel of choice is a modest burden, compared to the load those defendants might bear if forced to spend years in prison after being denied their right to present their defenses as they wanted.

All of this stands in stark contrast to *Strickland.* There, this Court explained that a prejudice rule was necessary because "the availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Strickland*, 466 U.S. at 690. In a world where ineffectiveness claims were easy to prove, nearly "all criminal trials resolved unfavorably to the defendant

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[10] And the process would create a perverse consequence: either the habeas hearing would have to be held *ex parte* or the government would learn, through the hearing, the entire strategy the defendant would use at retrial, thereby entitling itself to a form of discovery to which it is generally not entitled and that could well undermine the efficacy of the strategy at the second trial if one were ordered.

would increasingly come to be followed by a second trial" on the question of the first counsel's ineffective performance. *Ibid.* As a result, this Court worried that a defendant-friendly test for ineffective assistance would deter lawyers from representing criminal defendants. *Ibid.* In large part because of the weight of these concerns, the *Strickland* Court adopted a test that, while often asserted, has been extremely difficult for criminal defendants to satisfy.[11]

But while any convicted defendant can claim on appeal that his lawyer was ineffective, defendants can claim wrongful denials of counsel of choice only when (a) they retained counsel in the first place and (b) the trial court disqualified that chosen counsel. And even within this group, *Wheat*'s rule of deference means that most disqualifications will be upheld on appeal. 486 U.S. at 163. A Westlaw search produced only sixteen cases during the last fourteen months nationwide in which non-indigent defendants in federal court have even claimed a violation of their right to counsel of choice; only two, including respondent, succeeded.[12] Thus, the risk that defendants who are well represented and who fare well at trial will assert violations of their right to counsel of choice and prevail on such claims is entirely illusory. Some federal circuits have had automatic reversal rules for years,[13] yet the government is unable to cite a single actual

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[11] As has been widely noted, while there is a large amount of litigation in which defendants claim ineffective assistance of counsel, "very few of these cases result in reversal, and those few convictions that are reversed are subject to retrial." Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. Crim. L. & Criminology 242, 281 (1997).

[12] Respondent searched for all cases using the terms "right" and "counsel of choice" in the "All-Feds" database that were reported from Dec. 31, 2004, to Mar. 13, 2006. Respondent's search found 109 cases, and only sixteen were on point.

[13] See *United States* v. *Voigt*, 89 F.3d 1050, 1074 (CA3 1996), cert. denied, 519 U.S. 1047 (1996); *United States* v. *Childress*, 58

case in which a defendant has received a windfall on appeal. See Petr. Br. 16-17 (creating hypotheticals to show supposed "anomalies" produced under current law).

II. The Court Of Appeals Correctly Held That The Proper Remedy For The Trial Court's Sixth Amendment Violation In This Case Is A New Trial.

This Court has developed two categories of constitutional errors – trial errors and structural violations – the designation of which plays a significant role in the remedy available for redress. See *Arizona* v. *Fulminante*, 499 U.S. 279, 280 (1991). Trial errors, because they occur during the presentation of evidence, may be assessed for their effect on the fact-finder's determination of guilt. *Ibid*. Consequently, they are subject to harmless error review under *Chapman* v. *California*, 386 U.S. 18 (1967). See *Fulminante*, 499 U.S. at 280. Structural errors, on the other hand, constitute "defects in the constitution of the trial mechanism" that implicate the very heart of the trial itself. *Ibid.* Thus, they "defy analysis by harmless-error standards." *Ibid*.

As the First, Third, Sixth, Ninth, Tenth, and D.C. Circuits – along with the Eighth Circuit below – all have held without dissent, an unjustified denial of counsel of choice constitutes structural error.[14] But even if it did not, respondent still would be entitled to a new trial because of the deleterious

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F.3d 693, 736 (CADC 1995), cert. denied, 516 U.S. 1098 (1996); *Bland* v. *Cal. Dep't of Corrs.*, 20 F.3d 1469, 1478 (CA9 1994), cert. denied, 513 U.S. 947 (1994), overruled on other grounds by *Schell* v. *Witek*, 218 F.3d 1017 (CA9 2000); *United States* v. *Mendoza-Salgado*, 964 F.2d 993, 1015-16 (CA10 1992); *Panzardi Alvarez*, 816 F.2d at 818; *Mintzes*, 761 F.2d at 285-86.

[14] See Pet. App. 16a; *Voigt*, 89 F.3d at 1074; *Childress*, 58 F.3d at 736; *Bland*, 20 F.3d at 1478; *Mendoza-Salgado*, 964 F.2d at 1015-16; *Panzardi Alvarez*, 816 F.2d at 818; *Wilson*, 761 F.2d at 285-86.

effect that the error here had on his ability to advance his best possible defense.

A. An Unjustified Denial Of Counsel Of Choice Is Structural Error.

Within the category of structural errors, there are two primary types of constitutional violations. First, as this Court explained in *Faretta* v. *California*, 422 U.S. 806 (1975), constitutional violations that implicate values that go beyond ensuring a "correct" trial outcome, such as the right to self-representation, may be considered structural errors. Second, there are some errors that are so fundamental to the course of the entire trial that their effects pervade the whole proceeding, making any attempt to isolate and assess the effects of these errors nearly impossible. See *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999). The erroneous denial of retained counsel of choice satisfies each of these tests. It is a structural error requiring automatic reversal because it implicates values of personal autonomy that reach beyond ensuring "proper" trial outcomes. In addition, because the choice of counsel pervades the entire proceeding, a wrongful denial of counsel of choice is structural error because its effects cannot be distilled from the proceedings as a whole.

1. The right to counsel of choice implicates essential interests of personal autonomy and freedom of choice that go beyond pursuit of the "correct" verdict. This Court has explained that the Sixth Amendment "grants to the accused personally the right to make his defense." *Faretta*, 422 U.S. at 819. This acknowledgement comports with the reality of a criminal trial, where the defendant's own life and liberty are at stake. See *id.* at 819-20. It also accords with the more fundamental notion that respect for the individual and his ability to make choices affecting his own destiny is "the lifeblood of the law." *Id*. at 834 (quoting *Illinois* v. *Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

Because of this need to respect personal autonomy, this Court has held that denying a defendant's right to self-

representation constitutes structural error. The right to self-representation reflects a profound judgment about the value of individual dignity and free will. Even if an appellate court believes that proceeding pro se would have undermined a defendant's chances of acquittal, it must reverse any conviction obtained in violation of this right, in order to "protect [these] important values that are unrelated to the truth-seeking function of the trial." *Fulminante*, 499 U.S. at 295 (quoting *Rose* v. *Clark*, 478 U.S. 570, 587 (1986)). See also *McKaskle*, 465 U.S. at 176-77; *Faretta*, 422 U.S. at 834.

A defendant's right to counsel of choice reflects the same values and should receive the same treatment. Just as the defendant's wish to conduct his defense personally through self-representation must be honored, so too must a defendant's decision to hire a particular lawyer who is willing to represent him. Such respect for personal autonomy has no lesser weight when the individual chooses an advocate to be his voice in the courtroom than when he chooses to speak for himself. This is especially so when, as here, a defendant declines to testify at trial – making his attorney his *only* voice in the courtroom.

This case provides a particularly vivid example of the need to respect a defendant's free choice concerning the way he wishes to present himself to the court and the jury. Even putting aside for the moment the differences in skill levels and strategy between Low and Dickhaus, the two attorneys embodied drastically different defense choices. Low was an out-of-town attorney with no significant local relationships. His *modus operandi* is to attack the government and to seek effective resolution through the force of his litigation tactics. Dickhaus, on the other hand, was a local lawyer who had relationships with the judge and the prosecuting attorneys. His method of representing respondent was bound to be more tentative and conciliatory. The point is not to say which attorney's approach is better in the abstract, for it is impossible to say. The point is that respondent should have been allowed to choose which approach he thought would

best suit him. In denying that right, the district court affronted respondent's dignity and his dominion over the nature of his defense.

2. The right to counsel of choice also merits treatment as structural error because its effects pervade the entire criminal proceeding, making any harmless-error review an unacceptably speculative exercise. The defendant's initial selection of counsel is immeasurably important because it largely determines the course of the proceedings, from the nature of the attorney-client relationship to the decision whether to seek or accept a guilty plea; to the defense theory of the case; to the style of presentation to the fact-finder; and finally, to the skill with which the government's case is tested. Accordingly, while the government intimates that representing a criminal defendant is a color-by-numbers exercise that almost any effective lawyer will do the same way, the reality is that "lawyers are not fungible, and often 'the most important decision a defendant makes in shaping his defense is his selection of an attorney.'" *Mendoza-Salgado*, 964 F.2d at 1014-15 (citations omitted). See also Brief *Amicus Curiae* of the National Association of Criminal Defense Lawyers in Support of Respondent (detailing the wide range of stages at which attorneys' approaches will differ).

The choice of counsel affects the whole course of the trial in large part because of the unique nature of the attorney-client relationship. When a defendant chooses a lawyer, his counsel becomes his "alter ego." George C. Thomas, *History's Lesson for the Right to Counsel*, 2004 U. Ill. L. Rev. 543, 555. And from the first moments of representation, "an attorney's duty is to take professional care for the conduct of the case, after consulting with his client." *Jones* v. *Barnes*, 463 U.S. 745, 753 (1983). See also *Florida* v. *Nixon*, 543 U.S. 175, 190-91 (2004) (confirming that the lawyer has great latitude in choosing the best defense strategy); *Taylor* v. *Illinois*, 484 U.S. at 418 (stating that "the lawyer has – and must have – full authority to manage the conduct of the

trial"). By infusing his right to make his own defense in the person of his lawyer, a defendant places his fate and future in the hands of his attorney.

The practical implications that flow from the nature of the attorney-client relationship permeate the trial. One of the most obvious manifestations is the language used in our criminal courtrooms, where those present "often [refer] to what counsel does as if the defendant had done it personally." Thomas, *supra*, at 559. The court refers to the lawyer's words as the client's own precisely because the lawyer is primarily responsible for tactical decisions and the presentation of evidence at trial. "[T]he adversary process could not function effectively if every tactical decision required client approval." *Taylor* v. *Illinois*, 484 U.S. at 418. The jury also often comes to equate defendants with their counsel, basing its views concerning the defendant's credibility and character on its assessment of his attorney.[15]

A criminal trial, like a play, is a form of public performance at which a story is presented, and shaping that performance is an "art," not a science. *Strickland*, 466 U.S. at 689. A trial attorney functions like a director, molding the proceeding in innumerable ways, some immediately apparent and some not. If one imagines all of the ways that a specific director affects the way a given Shakespearean tragedy can be presented, one can begin to appreciate the ways in which a choice of attorney infiltrates every aspect of a trial. In a Shakespearean play, a director will inherit a basic narrative but will choose to emphasize some themes and downplay others; to highlight some scenes and to omit others; and to give the play a certain persona. A particular criminal attorney

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[15] For a discussion of a similar effect in the jury's perception of the prosecution's case, see Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 Yale L.J. 1050, 1079 (2006) (arguing that a jury's assessment of the prosecution's success in proving guilt beyond a reasonable doubt depends in part on its trust for the prosecutors).

likewise will emphasize certain themes and not others; will call certain witnesses and not others; and will strike a certain personal tone. And that is just the beginning: the manner in which the attorney tells the client's story "become[s] a psychological filter – the evidence introduced at trial passes through it." Jeffery P. Robinson, *Opening Statements Become Opening Stories*, The Champion, Mar. 2006, at 18.

Furthermore, just as in the context of a play, it is often impossible to decide objectively whether certain choices were "better" than potential alternate routes. There is a "wide range of reasonable professional assistance" that an attorney can deliver in any given proceeding. *Strickland*, 466 U.S. at 688; *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2003) (noting the "broad range of legitimate defense strategy" for closing argument). Even with the benefits of hindsight, it is foolhardy to think one could unwind a criminal prosecution and predict whether it would have progressed towards a different result with a different attorney at the helm. A defendant's initial choice of counsel "infects the entire trial process," *Neder*, 527 U.S. at 8 (citations omitted) – even the pretrial process – and cannot be separated from the trial itself.

This conclusion is reinforced by the Court's decision in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), which requires automatic reversal when a trial court forces codefendants to accept joint representation despite objecting at the outset that the representation would create a conflict. *Id.* at 488; see also *Mickens* v. *Taylor*, 535 U.S. at 168. Such cases, like this one, also involve judges affirmatively interfering with a defendant's right to make an important threshold decision – in those cases, whether to pursue a coordinated or conflicting defense vis-à-vis his codefendants. "To determine the precise degree of prejudice sustained" when a court denies a defendant his choice to pursue a conflicting defense "is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Holloway*, 435 U.S. at 488

(quoting *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942)). A rule here, as there, requiring a defendant to prove that such a denial "prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." *Id.* at 490.

B. Even If Denial Of A Criminal Defendant's Sixth Amendment Right To Counsel of Choice Is Not Structural Error, The Error In This Case Still Requires Reversal.

The simple fact is that no matter how this Court assesses or characterizes the trial court's error, respondent is entitled to a new trial.

1. This Court has held that for "all" constitutional errors that are not structural, "reviewing courts must apply * * * harmless-error analysis." *Neder*, 527 U.S. at 7 (citations omitted). Accordingly, if this Court were to conclude that erroneously denying the right to counsel of choice is not structural error, the proper standard for analyzing such denials would be the harmless-error test of *Chapman* v. *California*, 386 U.S. 18 (1967).[16] Such an analysis would acknowledge

[16] *Chapman* supplies the default standard of harmless error review for a wide variety of distinct constitutional errors, including those implicating the Sixth Amendment. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (applying harmless error analysis to violations of Fourth Amendment right against unreasonable searches and seizures); *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968) (same); *Brown* v. *United States*, 411 U.S. 223, 231-32 (1973) (applying *Chapman* to violations of the Sixth Amendment right against admission of out-of-court statements of non-testifying co-defendants); *Harrington* v. *California*, 395 U.S. 250, 254 (1969) (same); *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972) (applying *Chapman* to violations of the Sixth Amendment right against interrogation without counsel after the right to counsel has attached); *Van Arsdall*, 475 U.S. at 684 (applying *Chapman* to violation of the Sixth Amendment right to cross examine witnesses for bias); *Fulminante*, 499 U.S. at 295 (applying *Chapman* to

the constitutional nature of the error but would easily address the few hypotheticals that the government conjures up to argue that an automatic reversal rule is unfair. See Petr. Br. 16-17. In unlikely scenarios such as a defendant retaining as substitute counsel a highly skilled attorney from the same high-powered firm as his first choice, the government could presumably show that "the guilty verdict actually rendered in th[e] trial was surely unattributable to the error." *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993).

Respondent's inability to be represented at trial by Low, however, was not harmless under the *Chapman* standard. In order for a reviewing court to find a constitutional error harmless, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. The logic underlying the *Chapman* standard dates back to "the original common-law harmless-error rule" and carries no less force today than it did then: when faced with constitutional error, the "burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Ibid.*

The government cannot carry this burden here. The quality of respondent's defense counsel was critical because the government's case was circumstantial. There was no direct evidence indisputably tying respondent to the alleged conspiracy. The government never found any drugs in respondent's possession. Nor was the prosecution able to present anything respondent ever said that suggested he knowingly paid Guillen money for transporting drugs. And respondent did not take the stand at trial.

Yet the district court's actions caused respondent to proceed to trial with far less able counsel than he had chosen.

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coerced confessions); see also Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1176-78 (1995).

The trial record, which is all that ordinarily will be available on direct appeal, shows that respondent's chosen attorney was more experienced and skillful than his substitute counsel. Low has a long and successful record of criminal defense work. Only months before respondent retained him, he had obtained an excellent result in a drug conspiracy case in the same court in which respondent was tried. See Pet. App. 2a; *supra*, at 2-3. Dickhaus, by contrast, is a consumer protection attorney who specializes in "junk fax" litigation. Dickhaus had never tried a federal criminal case, and had no intention of trying this one. Yet that is what the district court effectively required; the court even prevented Low from sitting at counsel table or meeting with respondent in other ways during trial. See Pet. App. 5a; J.A. 20-22. One can hardly say, beyond a reasonable doubt, on this record that erroneously disqualifying Low from representing respondent did not affect the verdict.

Comparing Dickhaus's cross-examination of the prosecution's key witness, Jorge Guillen, during respondent's trial and Low's later cross-examination of the same witness during remand proceedings confirms the dramatic difference that respondent's chosen attorney would have had here. Guillen's testimony and credibility were critical at trial because he claimed that respondent met him at the mini-mart in order to deliver money to pay for transporting drugs. J.A. 31-33; Trial Tr. Vol. III 19:14-25, July 9, 2003. Dickhaus was unable to shake Guillen from this story. J.A. 38-40. Yet under Low's aggressive questioning in the deposition on remand, Guillen admitted that he was generally untrustworthy, App. 1a ("You know, I'm [a] liar. I'm mean I'm not going to say no."), and that he had lied regarding respondent's involvement in the conspiracy. App. 3a-4a. The truth, Guillen now said, was that he induced respondent to meet him at the mini-mart by saying he needed money to obtain medical care for his sick daughter. *Ibid.* A jury that heard this admission might well not have convicted respondent.

2. Even if the "adverse effect" standard the Seventh Circuit adopted in the habeas context in *Rodriguez* v. *Chandler*, 382 F.3d 670 (CA7 2004), or some other requirement that respondent prove prejudice were somehow applicable here, this Court would still be required to affirm the judgment below.

To obtain a new trial under the *Rodriguez* test – which, it must be recalled, the Seventh Circuit applied only in a habeas proceeding where *Chapman*'s harmless error standard is not the default test – a defendant must show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial." 382 F.3d at 675. But "[t]he difference does not have to be great enough to undermine confidence in the outcome" of the case; it is "enough to show that the defendant's representation suffered a setback from the disqualification." *Ibid.*

That standard is clearly satisfied here. At trial, Dickhaus was unable to impeach Guillen's testimony on cross-examination. J.A. 38-40. At one point, in fact, after the government objected to Dickhaus's attempt at impeachment, the court twice admonished Dickhaus to "[r]ead" the Federal Rules of Evidence after Dickhaus admitted, "I don't quite understand the objection or the scope of the objection." *Id.* at 36-37. In contrast, Low was able to severely discredit Guillen's testimony regarding respondent's connection to the conspiracy and his general character for truthfulness. See, *e.g.*, App. 1a, 3a-4a. This difference alone is "enough to show that the defendant's representation suffered a setback from the disqualification," and that Low would have advanced "a line of defense that [Dickhaus] was unable to sustain on his own." *Rodriguez*, 382 F.3d at 675.

The same result would follow even under the government's proposed rule that the defendant show that "his counsel of choice would have pursued a different defense strategy that would have created a 'reasonable probability that

* * * the proceeding would have been different.'" Petr. Br. 15-16 (quoting *Strickland*, 466 U.S. at 694). Low would have pursued a fundamentally different trial strategy than the one Dickhaus employed. Dickhaus premised respondent's defense on the notion that the government had insufficient evidence to convict. He argued simply that "no one" could know with certainty why respondent appeared at a convenience store and gave Guillen money. J.A. 25. Because of the fortuity of this case's remand proceedings, however, we know now that Low would have endeavored to prove respondent's actual innocence. He would have been able to force Guillen to admit on cross-examination that respondent delivered the money to him in response to his fabricated plea to help a sick relative. See App. 2a-4a. There can be little doubt, therefore, that Dickhaus's defense was "substantially less likely to achieve acquittal." Petr. Br. 16 (quotation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Excerpts from the Deposition of Jorge Guillen Taken on Behalf of the Plaintiff in *United States* v. *Cuauhtemoc Gonzalez-Lopez,* Cause No. 4:03CR00055JCH (E.D. Mo., May 25 and 26, 2005).

* * * * *

[p. 102, line 13]

MR. LOW: What's my question?

MR. GUILLEN: If I'm lying more to the United States government or the police department. You know, I'm liar. I mean I'm not going to say no.

MR. LOW: You are a liar, aren't you?

MR. GUILLEN: I told you, in the past I would lie.

* * * * *

[p. 301, line 20]

MR. LOW: But then you tell him you need—you know, you tell him the reason why you haven't done it yet is because your daughter's sick and in the hospital, right?

MR. GUILLEN: Yes, sir.

MR. LOW: And that's why you need the money, for your daughter, right?

MR. GUILLEN: Yes, sir.

MR. LOW: So you can pay her hospital bills, right?

MR. GUILLEN: Yes, sir.

MR. LOW: No doubt about it, right?

MR. GUILLEN: Yes.

MR. LOW: So the real reason that Tomas came out and met you was to give you money so her—because he could help your daughter out with her medical bills; isn't that true?

MR. GUILLEN: I was tell him that I need money for that and to pay the guys for the drugs.

MR. LOW: Oh. So you also needed money to pay for the guys; is that true?

MR. GUILLEN: Yeah, that's true.

MR. LOW: Oh, okay. I don't understand something. You just told him you haven't finished the job, right?

MR. GUILLEN: Yes.

MR. LOW: But every single time before, you never got paid before you finished the job; isn't that true?

MR. GUILLEN: I was tell Tomas that Dewayne, he don't want me to take the drugs out of the house.

MR. LOW: What's my question?

MR. GUILLEN: Yeah, they never pay me before I finish it.

MR. LOW: So now you're going to call up the big boss for the first time late in the evening, or actually very early in the morning, and tell the big boss, guess what, I ain't finished the job yet, but you need to pay me anyway. Is that what you want us to believe?

MR. GUILLEN: That's what he believed.

MR. LOW: Answer the question. Is that what you want us to believe?

MR. GUILLEN: No, but, you know, I was tell him that.

MR. LOW: The truth of the matter is you simply got him to believe that you needed money to help your daughter out; isn't that right?

MR. GUILLEN: But I was tell him too the same time that I need to pay that guy, to Dewayne, because he had the job and he needs some money.

MR. LOW: Sure. And you got him to believe that you needed money so you could pay for your daughter in the hospital; isn't that right?

MR. GUILLEN: Yeah, yeah.

MR. LOW: And you knew that would work because you knew Tomas was Hispanic and your friend, right?

MR. GUILLEN: Yes, sir.

MR. LOW: And you knew that if you told him about your family and how important they were to you and that you needed help, that he'd come out and give you some money for that; isn't that right?

MS. BECKER: Objection to the form.

MR. LOW: That's true isn't it?

MR. GUILLEN: Yes, sir.

MR. LOW: And so he agreed to meet you and give you some money; is that right?

MR. GUILLEN: Yeah.

MR. LOW: And you went out to meet him, right?

MR. GUILLEN: Yes.

* * * * *

[p. 348, line 1]

MR. LOW: Isn't it true that you just came up with that story about making a trip to Maryland Heights to Tomas's house to deliver drugs? You just made that up in February of '03; isn't that true?

MR. GUILLEN: Yeah, that's true.

MR. LOW: It's true, isn't it?

MR. GUILLEN: Yeah.

MR. LOW: And then—you know what? That's all I have. Nothing further.

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[p. 350, line 1]

MR. LOW: I'll ask one more time, anticipating a future objection on the last question. Isn't it true you've lied to us on several occasions today about your testimony?

MS. BECKER: Objection to the form of the question, assumes facts not in evidence, argumentative.

MR. GUILLEN: I was telling you it was not my intention.

MR. LOW: What's my question?

MS. BECKER: Objection, asked and answered.

MR. GUILLEN: If I was liar.

MR. LOW: And it's true that you've lied to us several times today, isn't it?

MS. BECKER: Objection, asked and answered.

MR. GUILLEN: Yes, sir.

MR. LOW: Nothing further.