No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice entitles the defendant to automatic reversal of his conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 399 F.3d 924. The opinion of the court of appeals in a related case, reversing the district court's imposition of sanctions against respondent's counsel of choice, is reported at 403 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. A petition for rehearing was denied on May 19, 2005 (Pet. App. 21a). On August 2, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 16, 2005, and the petition was filed on that date. The petition for a writ of certiorari was granted on January 6, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Eastern District of Missouri on one count of conspiring to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846. He was sentenced to 292 months of imprisonment. The court of appeals reversed, holding that the district court erred in denying the applications for admission *pro hac vice* of respondent's chosen attorney, thereby denying respondent of his Sixth Amendment right to be represented by counsel of choice. The court of appeals further held that the district court's error required automatic reversal of respondent's conviction, without regard to whether respondent received a fair trial when he was represented by his remaining chosen counsel. Pet. App. 1a-20a.

1. On January 7, 2003, a grand jury sitting in the Eastern District of Missouri charged respondent with conspiring to distribute more than 100 kilograms of marijuana. Respondent was arrested after he provided approximately

$10,000 hidden in an oatmeal box to pay drug couriers. Officers later uncovered from respondent's residence more than $100,000 secreted behind a baseboard in the kitchen. 3 Tr. 43-45, 66.

Respondent's family hired Texas attorney John Fahle to represent respondent. Fahle thereafter appeared on respondent's behalf at the arraignment and detention hearing. Shortly after he was arraigned, respondent called California attorney Joseph Low to discuss the possibility of Low's either assisting Fahle or replacing him. Respondent had learned of Low's reputation as a trial attorney from the defendants in another drug conspiracy case in the same district. After meeting with Low at the jail in Farmington, Missouri, respondent retained him. Pet. App. 2a.

On March 4, 2003, both Fahle and Low attended an evidentiary hearing on behalf of respondent. Although Low had not yet entered an appearance, the Magistrate Judge accepted Low's provisional entry with the understanding that Low would file a motion for admission to the United States District Court for the Eastern District of Missouri *pro hac vice*. The Magistrate Judge subsequently rescinded Low's provisional entry when Low violated the district court's rule restricting cross-examination of a witness to one lawyer. Pet. App. 2a-3a.

One week later, respondent informed Fahle that he wanted Low to be his sole attorney. On March 17, 2003, Low filed an application for admission *pro hac vice*. The district court denied Low's application the following day. Low filed a second application for admission *pro hac vice* on April 14, 2003. That application was also denied. Respondent then filed a petition for a writ of mandamus in the court of appeals, seeking to compel the district court to admit Low. The court of appeals denied that petition on May 12, 2003. Pet. App. 3a.

On April 25, 2003, Fahle moved to withdraw as counsel for respondent and to continue respondent's trial. The district court granted both motions and ordered respondent to retain new counsel by May 5, 2003.[1] On advice from Low, respondent retained local attorney Karl Dickhaus. Subsequently, on June 3, 2003, the district court issued an order explaining why it had denied Low's motions for admission *pro hac vice*. Pet. App. 3a-4a. The court indicated that, in another case before it, Low had "contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting." *Id.* at 4a (quoting district court's June 3, 2003, order).

On July 7, 2003, respondent's trial commenced. That day, the district court denied Low's third motion for admission *pro hac vice* and Dickhaus's request that Low be permitted to sit at counsel table. The district court restricted Low to the public section of the courtroom and forbade contact between Low and Dickhaus during trial proceedings. Respondent was unable to meet with Low until the district court, upon learning that Low had been prevented from visiting respondent at the jail, ordered that jail visits by Low be permitted. On July 11, 2003, the jury found respondent guilty on the sole conspiracy count. Pet. App. 5a.

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[1] Fahle also moved for sanctions against Low, contending that Low had violated Missouri's rules of professional conduct by communicating with respondent without Fahle's permission. Pet. App. 3a-4a. The district court granted Fahle's motion for sanctions on August 23, 2003, more than a month after respondent was convicted of the drug trafficking charge. *Id.* at 5a. The court of appeals reversed the district court's order granting sanctions against Low. *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low).

2. The court of appeals reversed based on respondent's inability to have Low represent him at trial. Pet. App. 1a-20a. The court of appeals addressed "only the primary argument raised by [respondent] challenging the district court's denial of admission pro hac vice to the attorney he selected to represent him in the criminal proceeding." *Id.* at 6a. The court initially observed that "[a] non-indigent criminal defendant's Sixth Amendment rights encompass the right to be represented by the attorney selected by the defendant." *Ibid.* At the same time, the court of appeals explained that the right to counsel of choice "is not absolute," *id.* at 7a, but rather must be "carefully balance[d] * * * against the court's interest in the orderly administration of justice." *Ibid.* (internal quotation marks omitted).

The court of appeals found it "clear from the record in this case [that] the district court denied [Low's] application for pro hac vice admission because the court believed Low violated [Missouri Rule of Professional Conduct 4-4.2] when Low communicated with the represented defendants in [*United States* v. *Serrano, et al.*, No. 4:01CR450-JCH (E.D. Mo.)] without obtaining permission from the attorneys who represented them at the time." Pet. App. 11a. As it explained in its companion decision, see *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low), the court of appeals determined that the district court's interpretation of that Missouri Rule of Professional Conduct was "not correct," because the rule forbade contact only when the attorney was representing another party in the matter. Pet. App. 11a.[2] In particular, the court of ap-

[2] The court of appeals noted that "[t]here is no suggestion in the [district court's] order that Low was representing any other party in the case when he communicated with the [*Serrano*] defendants." Pet. App. 10a. In fact, during the time at issue, Low did represent one of the defendants in the *Serrano* case. See Gov't Pet. for Panel Reh'g 3-4.

peals reasoned, "the district court's interpretation of Rule 4-4.2 would unjustifiably prevent parties in a litigation from consulting with other attorneys to obtain alternative advice, hire additional counsel, or hire different counsel." *Id.* at 12a.

The court of appeals acknowledged that "an attorney's past ethical violations may affect the administration of justice within the court and therefore outweigh the Sixth Amendment presumption in favor of the defendant's counsel of choice." Pet. App. 13a. The court of appeals, however, found it "clear from the record [that respondent's] Sixth Amendment right played no part in the district court's decision to deny Low pro hac vice admission." *Ibid.* The court therefore concluded that "the district court erred in denying Low's application for admission pro hac vice." *Ibid.*

Next, the court of appeals held that the error "results in automatic reversal of the conviction." Pet. App. 16a. The court acknowledged that "most constitutional errors in criminal trials do not require automatic reversal of the conviction," *id.* at 13a (citing *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999)), and that *Neder* had narrowed the exceptions to only "a limited class of constitutional errors" that "are so intrinsically harmful as to require automatic reversal * * * without regard to their effect on the outcome," *id.* at 14a (quoting *Neder*, 527 U.S. at 7). The court of appeals further observed that this Court "has not decided whether harmless error review applies to the denial of the Sixth Amendment right to be represented by the attorney chosen by the defendant." *Id.* at 15a. The court nevertheless sided with "the majority of circuit courts" (*id.* at 16a) that held, before

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The government nevertheless does not challenge in this Court the court of appeals' ruling that the district court's refusal to admit Low *pro hac vice* was unjustified.

Neder, that "a criminal defendant who is denied the Sixth Amendment right to be represented by his chosen attorney does not have to demonstrate prejudice to obtain the reversal of the conviction." *Id.* at 15a-16a (citing cases).

The court of appeals reasoned that "the denial of the right to counsel of choice clearly belongs in the class of fundamental constitutional errors which reflect a defect in the framework of the trial mechanism and 'defy analysis by harmless-error standards.'" Pet. App. 17a (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991) (citation omitted)). The court first explained that, unlike "trial error[s]" that are properly subject to harmless-error review, *id.* at 16a, the denial of counsel of choice, "[l]ike the denial of the right to self-representation and the denial of the right to counsel, * * * infects the entire trial process," *id.* at 18a (internal quotation marks omitted), such that it cannot be "quantitatively assessed in the context of other evidence presented," *id.* at 16a (internal quotation marks omitted). The court carried the analogy to the right of self-representation one step further, explaining that the denial of either right can "never be harmless," because both rights "reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id.* at 18a-19a (quoting *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984)).

Finally, the court of appeals concluded that "[r]equiring a criminal defendant to demonstrate prejudice from the denial of the right to be represented by his chosen counsel would essentially require the defendant to demonstrate [that] the attorney who represented him at trial rendered deficient assistance." Pet. App. 19a-20a. That, the court added, "would effectively obliterate the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, * * * by collapsing th[at] right * * * into the

right to receive effective assistance of counsel at trial." *Id.* at 20a (internal quotation marks omitted). Accordingly, the court of appeals vacated respondent's conviction and remanded for a new trial. *Ibid*.

SUMMARY OF ARGUMENT

A. A defendant who claims that he was improperly deprived of counsel of choice must establish prejudice in order to overturn his conviction. This Court has held that the Sixth Amendment protects a non-indigent defendant's right to select the counsel who will represent him in a criminal case, but has also stated that the right is "circumscribed in a number of important respects." *Wheat* v. *United States*, 486 U.S. 153, 159 (1988). A defendant cannot retain an attorney he cannot afford. Nor can a defendant insist on representation by a non-lawyer or by a lawyer who has an actual conflict of interest or a serious potential for such a conflict. Those limitations reflect that the core purpose of the right to counsel is to ensure a fair trial through adversary testing of the government's case, and that goal can readily be achieved without according the defendant an absolute right to select his counsel.

B. Consistent with the subordinate nature of the right to counsel of choice, a defendant who was erroneously denied representation by his first-choice attorney should not obtain automatic reversal. The general Sixth Amendment rule is that infringements of the counsel right require a showing of prejudice for a defendant to obtain relief. Most notably, this Court has made clear that the absolute right to the effective assistance of counsel requires proof of both deficient performance *and* prejudice to justify relief. *Strickland* v. *Washington*, 466 U.S. 668 (1984). That is because, absent a probable effect on the outcome, the purpose of the Counsel guarantee is not infringed. If a defendant

who is deprived of the absolute right to a competent attorney must show prejudice to win relief, a defendant who is deprived of the qualified right to counsel of choice must similarly show prejudice.

There is no basis for saying that a trial is inherently unfair if a defendant is deprived of his counsel of first choice, and thus no basis for presuming prejudice. To the contrary, such a defendant may, and probably will, be represented by equally adept, second-choice counsel, who is equivalently faithful to his client's strategic preferences. In that situation, the trial surely cannot be regarded as inherently flawed.

To the extent that *Wheat* means that the denial of counsel of choice may entitle a defendant to a reversal even when substitute counsel rendered effective assistance, a defendant making a claim under *Wheat* should be relieved of showing that his second-choice counsel performed deficiently. But he should still be required to show that counsel of choice would have performed differently, and that his representation therefore would have led to a reasonable probability of a different outcome. Such a showing would not be unduly onerous for a defendant, yet would properly protect criminal convictions against reversals where there is no reason to believe the outcome would have been different if the defendant had been represented by counsel of choice.

C. The court of appeals' conclusion that denials of counsel of choice require automatic reversal is fundamentally flawed. The right to counsel of choice cannot be compared to those few rights that this Court has treated as mandating automatic reversal, such as the right to an unbiased judge or the complete denial of counsel. Those infringements preclude a criminal trial from reliably determining

guilt. Proceeding to trial with second-choice counsel does not have that effect.

The court of appeals believed that automatic reversal is in order because, like the right to self-representation, the right to counsel of choice protects individual autonomy interests, without regard to the fairness of the proceeding. But the analogy to the right of self-representation does not hold. A defendant's unique right to speak to the court and the jury in his own voice honors his desire to be free from *any* representation. The right is respected even though it usually harms the defense—making clear that it reflects autonomy concerns above trial-fairness interests. The right to counsel of choice, in contrast, expresses only a desire for a particular representative. A defendant who is denied counsel of first choice may still be permitted to choose second-choice counsel. Any infringement of autonomy concerns is thus far less weighty than when self-representation is denied.

Finally, the court of appeals erroneously reasoned that if courts do not automatically reverse convictions when a defendant is denied counsel of choice, it would collapse the right recognized in *Wheat* into the right to effective assistance. Even if a defendant could not obtain reversal when he received effective representation from substitute counsel, it would not eviscerate *Wheat*. Trial courts would still be obligated to respect a defendant's choice of counsel (absent countervailing reasons), and they could be expected to do so in good faith. But, as discussed above, to the extent that *Wheat* is read to relieve a defendant of the need to show deficient performance by substitute counsel, a requirement to show prejudice would avoid the anomalous windfall of automatic reversal when a defendant was represented by a competent, second-choice attorney who did not

employ a materially different strategy from that which the first-choice counsel would have adopted.

ARGUMENT

THE DENIAL OF THE QUALIFIED RIGHT TO BE REPRESENTED BY COUNSEL OF CHOICE DOES NOT WARRANT AUTOMATIC REVERSAL

This Court has made clear that a defendant seeking reversal for an infringement of the right to counsel must ordinarily establish prejudice to the outcome. Absent that showing, the Sixth Amendment is not violated. There is no basis for making an exception to that rule for denial of the qualified right to counsel of choice. A defendant denied the right of first-choice counsel can, and most likely will, receive a fair trial when he proceeds to trial with his second- or third-choice counsel. If the defendant maintains that he was denied a fair trial as a result of the unjustified refusal to allow representation by counsel of choice, he should be required to adduce proof of prejudice.

A. The Right To Counsel Of Choice Is Qualified

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. "This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The Sixth Amendment thus encompasses a non-indigent defendant's right to select counsel who will represent him in a criminal prosecution. *Wheat* v. *United States*, 486 U.S. 153, 159 (1988). The right to counsel of choice protects "a defendant's right to determine the type of defense he wishes to present" when a defendant chooses to be rep-

resented by counsel. *United States* v. *Mendoza-Salgado*, 964 F.2d 993, 1014 (10th Cir. 1992).

The Court's decisions establish, however, that the right to counsel of choice lies at the periphery of the Sixth Amendment, not at its core. As the text of the Amendment itself suggests, the "core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U.S. 300, 309 (1973); accord *United States* v. *Gouveia*, 467 U.S. 180 (1984); *United States* v. *Cronic*, 466 U.S. 648, 654 (1984); *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). This Court accordingly explained in *Wheat* that, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." 486 U.S. at 159; see also *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel.").

The right to counsel of one's choice is thus "circumscribed in several important respects." *Wheat*, 486 U.S. at 159. As an initial matter, "a defendant may not insist on representation by an attorney he cannot afford." *Ibid.* The Sixth Amendment "guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624 (1989). As respondent observes, "[b]ecause the vast majority of federal defendants are unable to afford privately retained

counsel, and thus are represented by appointed counsel, the right at issue in this case is entirely irrelevant to most criminal cases." Br. in Opp. 13 (citation omitted).

The right to counsel of choice also can be trumped by concerns about, *inter alia*, the fairness of the trial and the administration of justice. *Wheat*, 486 U.S. at 159-164. A criminal defendant who desires representation has no right to choose an advocate who is not a lawyer or who has an "actual conflict" of interest or "a serious potential for [one]." *Id.* at 164. Trial courts are accordingly given wide latitude to deny a defendant his first choice counsel when consistent "with the ethical and orderly administration of justice." *United States* v. *Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986).

B. A Defendant Who Is Denied His Counsel Of Choice Must Show An Adverse Effect On His Right To A Fair Trial

"[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658; *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002). For that reason, as the Court explained in *Wheat*, "in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'" 486 U.S. at 159 (quoting *Cronic*, 466 U.S. at 657 n.21). This Court's decisions thus make clear that a criminal defendant alleging a Sixth Amendment violation generally must establish that the alleged error deprived him of a fair trial. There is no reason to depart from that principle when the Sixth Amendment claim is that a defendant was unjustifiably denied his right to counsel of choice.

1. The Sixth Amendment is not violated absent an adverse effect on the trial process

In *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), this Court held that a criminal defendant alleging that his counsel provided ineffective assistance must establish not only that "counsel's performance was deficient," but also that counsel's "deficient performance prejudiced the defense." The Court explained that "[u]nless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Ibid.*

Strickland's requirement that a defendant demonstrate prejudice to establish a Sixth Amendment violation implemented the basic principle that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658; see also *Morrison*, 449 U.S. at 365 ("The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense."). Thus, "defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation." *Mickens*, 535 U.S. at 166.

If a defendant alleging a violation of the fundamental Sixth Amendment right to effective assistance of counsel must establish that his counsel's deficient performance had a "probable effect upon the trial's outcome," *Mickens*, 535 U.S. at 166; see *Strickland*, 466 U.S. at 693-694, then a defendant alleging a denial of the subsidiary right to counsel of choice must also show some effect on the reliability of his trial in order to establish a violation of the Sixth Amendment. All violations of the Sixth Amendment must be

linked to the purpose of that right, *i.e.*, to "ensure a fair trial." *Strickland*, 466 U.S. at 686. A trial court's unjustified refusal to allow representation by choice of counsel—thereby leaving the defendant with representation by second-choice counsel—does not complete a violation of the Sixth Amendment without further proof of an adverse effect on the defendant's right to receive a fair trial.

2. A defendant has the burden to show prejudice from the denial of the right to counsel of choice

It is difficult to say that a trial is "unfair" when an accused is represented by his second-choice counsel, that counsel performs effectively, and the government's case has been tested by "partisan advocacy," thereby serving "the ultimate objective [of the Sixth Amendment] that the guilty be convicted and the innocent go free." *Cronic*, 466 U.S. at 655 (citation omitted). In those instances in which counsel of choice is improperly denied, with the result that the defendant proceeded to trial with his second-choice counsel, requiring proof of *that* counsel's ineffectiveness would be consistent with this Court's recognition that the Sixth Amendment right to the assistance of counsel "has been accorded[] * * * not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens*, 535 U.S. at 166 (internal quotation marks and citation omitted).

To the extent that *Wheat* is read as requiring a different showing of deficiency than is required in a typical ineffectiveness case, it would not justify dispensing with *any* showing of prejudice. Even if *Wheat* is read to relieve a defendant of the burden to show that his substitute counsel rendered deficient performance under the first prong of the *Strickland* test, it would still make sense to require the defendant to show that his counsel of choice would have

pursued a different defense strategy that would have created a "reasonable probability that * * * the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under that approach, a defendant may prove prejudice even though the lawyer who represented the defendant at trial rendered effective assistance. For instance, if substitute counsel "is inexperienced, or lacks some specialized knowledge that the defendant's original choice of lawyer had, it may be possible to show that even though his representation of the defendant was not ineffective it was substantially less likely to achieve acquittal." *United States* v. *Santos*, 201 F.3d 953, 960 (7th Cir. 2000). While such an inquiry would have to be carried out with due regard for the always counterfactual and often speculative nature of determinations about how counsel of choice would have in fact conducted the defense, a defendant who can make a sufficiently concrete showing of prejudice could prevail.

A requirement of prejudice not only would respect this Court's "general rule that remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. It would also avoid the oddity of the court of appeals' automatic reversal rule, which gives a preferred status to the *qualified* right to counsel of choice over the *absolute* right to the effective assistance of counsel. The court of appeals decision would require automatic reversal if the defendant's first-choice counsel were improperly disqualified but substitute counsel, were, in fact, a modern-day Clarence Darrow. It would also require automatic reversal if a defendant's second-choice counsel had obtained an acquittal on 19 counts in a 20-count indictment, but could not avoid a conviction on the twentieth count, despite a spirited and professionally admirable fight against an overwhelming government case. Automatic reversal would similarly be required

when the defendant was precluded from retaining one lawyer from a high-powered criminal defense firm but the defendant nonetheless retained several other more experienced members from the same firm. Those anomalies reveal that an automatic reversal rule cannot be reconciled with the principle that the Sixth Amendment's essential aim is to guarantee the defendant a fair trial.

3. A presumption of prejudice is not warranted

There is no basis for concluding that the denial of the right to counsel of choice qualifies as an exceptional Sixth Amendment error where prejudice is presumed. This Court has presumed prejudice only in narrowly defined Sixth Amendment contexts when necessary to ensure that the defendant received a fair trial. *Strickland*, 466 U.S. at 692. This Court has not required any showing of prejudice "where assistance of counsel has been denied entirely or during a critical stage of the proceeding," *Mickens*, 535 U.S. at 166, or where the government has interfered with counsel's ability to represent the defendant at a critical stage of the proceeding. *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); *Cronic*, 466 U.S. at 658-660; *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963).[3] Prejudice is also presumed when counsel

[3] Thus, the Court has found constitutional error without any showing of prejudice where the defendant was denied counsel at trial (*Johnson* v. *Zerbst*, 304 U.S. 458, 467-468 (1938)); at arraignment (*Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961)); or at a preliminary hearing (*White* v. *Maryland*, 373 U.S. 59, 60 (1963) (per curiam). The Court similarly has not required a showing of prejudice when the government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686 (citing *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring*

is forced to engage in joint representation of co-defendants over counsel's objection, unless the court determines that there is no conflict. *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). When "'circumstances of that magnitude'" have occurred, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166 (quoting *Cronic*, 466 U.S. at 659 n.26); *Strickland*, 466 U.S. at 692 ("Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."); accord *Bell* v. *Cone*, 535 U.S. 685, 695 (2002); *Cronic*, 466 U.S. at 658-659.

The Court has also applied a "limited[] presumption of prejudice" when counsel labors under an actual conflict of interest stemming from representation of multiple defendants but counsel makes no objection. *Strickland*, 466 U.S. at 692. In such an instance, prejudice is presumed only "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980)); *Mickens*, 535 U.S. at 168. As with other cases where prejudice is presumed, representation by counsel who is laboring under a conflict created by the representation of multiple defendants creates a high probability of prejudice that is difficult to prove. *Id.* at 175; *Strickland*, 466 U.S. at 692.

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v. *New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant)); see also *Cronic*, 466 U.S. at 660-661 (describing appointment of counsel on the day of capital trial in *Powell* v. *Alabama*, 287 U.S. 45 (1932)). The Court has also indicated that the constructive denial of counsel occurs if counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659.

The above considerations cannot be said of a trial court's erroneous refusal to permit the defendant to be represented by counsel of his first choice. Here, for example, respondent was not deprived of the right to be represented by counsel, but only the right to be represented by a particular out-of-state lawyer, Low. And although the trial court erroneously denied the *pro hac vice* motion of Low, the trial court permitted counsel picked by respondent's family to withdraw and respondent was permitted to retain attorney Dickhaus, who respondent selected upon the recommendation of Low. Those circumstances simply do not equate with the denial of counsel altogether.[4]

Nor is the denial of the right to counsel of choice one of those "situations in which the conviction will reasonably not be regarded as fundamentally fair" because the error is inherently prejudicial. *Mickens*, 535 U.S. at 167 n.1. Even assuming that "[a] defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*," *United States* v. *Walters*, 309 F.3d 589 (9th Cir. 2002) (internal quotation marks and citation omitted), cert. denied, 540 U.S. 846 (2003), it is hard to see why requiring a defendant to choose in-state counsel inherently

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[4] Respondent states (Br. in Opp. 8) that he "never chose" Dickhaus to represent him. In fact, in May 2003, respondent retained Dickhaus "as his local counsel to assist Mr. Low in the trial of this matter and to handle motion hearings, filings and other local responsibilities." Resp. C.A. Br. 15. Moreover, although the court repeatedly advised respondent before his trial in July 2003 that Low would not be admitted *pro hac vice*, respondent did not seek a continuance to retain another lawyer (in-state or out-of state) to replace Dickhaus. Pet. App. 3a-4a (describing revocation of Low's provisional entry on March 4, 2003, during evidentiary hearing and denial of *pro hac vice* application on March 18, 2003, and again in April 2003). Respondent has also informed the district court that he wants Dickhaus to assist Low in the event of a retrial. 09/01/05 Tr. 7.

prevents the defendant from receiving a fair trial. See, *e.g.*, *id.* at 593 (concluding that representation by in-state counsel during sentencing did not adversely affect outcome at sentencing). There is almost always going to be a pool of highly qualified lawyers available to step in as retained counsel if first-choice counsel is removed. The denial of counsel of choice is thus not so likely to have an adverse effect on the defense so as to render a prejudice inquiry unnecessary. Quite the contrary, the denial of counsel of choice could at times result in the defendant's receiving *more* effective representation. *Mickens*, 535 U.S. at 169 n.2 (characterizing the decision "to retain a particular lawyer" as "often uninformed") (quoting *Cuyler*, 446 U.S. at 344).

In this case, there is no inherent likelihood that the verdict was rendered unreliable by the mere fact that respondent was represented by counsel who was not his first choice. Respondent had the opportunity to retain other counsel, and he has not argued that his actual counsel rendered ineffective assistance at trial. Under those circumstances, there is no justification for presuming prejudice.[5]

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[5] The court of appeals observed that "nearly all the circuits to address this issue" have applied a rule of automatic reversal. Pet. App. 15a; accord Br. in Opp. 6. Those decisions, however, do not offer unqualified support for dispensing with a prejudice requirement. The Third Circuit has suggested that a prejudice inquiry "might" be proper if the denial of counsel of choice is "erroneous" but not "arbitrary." *United States* v. *Voigt*, 89 F.3d 1050, 1074, cert. denied, 519 U.S. 1047 (1996). The Ninth Circuit in *Walters*, *supra*, reviewed for harmlessness when the denial occurred at sentencing. Other courts have held that in denying a defendant's request to substitute counsel shortly before or during trial, courts may consider whether the defendant is represented by able counsel and whether the denial would prejudice the defense. *Mendoza-Salgado*, 964 F.2d at 1015; *Wilson* v. *Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985). If a trial court may consider the *absence* of prejudice in denying a defendant his preferred counsel, it makes no

4. The Seventh Circuit's "adverse effect" standard properly recognizes that automatic reversal is unwarranted, but places too little burden on the defendant to show prejudice

In rejecting a rule that the denial of counsel of choice results in automatic reversal, the Seventh Circuit has adopted an "adverse-effect" standard that requires a defendant to show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial," but not a difference so great as "to undermine confidence in the outcome." *Rodriguez* v. *Chandler*, 382 F.3d 670, 675 (2004), cert. denied, 125 S. Ct. 1303 (2005). The court of appeals described that rule as a "middle-ground" approach. Pet. App. 16a. Because that approach at least requires some showing of an adverse effect on the defense from the denial of counsel of choice, the Seventh Circuit's approach is far superior to the automatic reversal rule embraced by the decision below.

Yet there are compelling reasons to reject the Seventh Circuit's "adverse-effect" standard. First, the court in *Rodriguez* reasoned that "[l]osing the services of one's pre-

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sense to *presume* that prejudice accompanies every denial of first-choice counsel. Finally, the First Circuit has said that its previous decision in *United States* v. *Panzardi Alvarez*, 816 F.2d 813, 817 (1987), "predates much of the Supreme Court's recent reshaping of harmless error doctrine." *Young* v. *City of Providence*, 404 F.3d 4, 24 n.14 (2005) (declining to adopt a rule of automatic reversal in the civil context). The decisions cited by the court of appeals all pre-date *Mickens*, *supra*, and *Neder*, 527 U.S. at 8-9 (pp. 25-26, *infra)*, both of which emphasized that claims subject to an automatic reversal rule are the rare exception. See also *Fuller* v. *Diesslin*, 868 F.2d 604, 609 (3d Cir.) ("It is by no means clear * * * whether [the circuit's automatic reversal rule] survives *Strickland* or the burgeoning constitutional harmless error cases."), cert. denied, 493 U.S. 873 (1989).

ferred lawyer can be similar to receiving the services of a lawyer with a concealed conflict: in either situation trial counsel may well do just fine, but there may be hard-to-uncover shortcomings." 382 F.3d at 675. The Seventh Circuit thus believed that representation by a conflicted attorney "seems the closest match" to a denial of counsel of choice. *Ibid.* This Court in *Mickens*, 535 U.S. at 175, however, strongly suggested that dispensing with *Strickland's* prejudice inquiry in conflict cases is confined to those situations where counsel is conflicted by *multiple representation* of co-defendants because "[n]ot all attorney conflicts present comparable difficulties." If not all conflicts pose identical risks to adequacy of performance, there is surely no basis for equating constitutionally competent second-choice counsel with the most serious type of conflict of interest.

Second, a limited presumption of prejudice when a defendant is represented by a conflicted attorney may be appropriate only because of "the high probability of prejudice" and the "difficulty of proving that prejudice." *Mickens*, 535 U.S. at 175. As discussed, however, there is no basis for inferring a "high probability of prejudice" from the representation by second-choice counsel. Nor is respondent correct that it may be "impossible to discern after the fact" the impact on the trial resulting from different "strategic and tactical choices" that would have been taken by first-choice counsel and those taken by second-choice counsel. Br. in Opp. 17. District courts applying *Strickland* on collateral review of convictions routinely examine counsel's performance at trial and draw inferences about how superior performance of a particular function would have affected the jury's verdict. See *Massaro* v. *United States*, 538 U.S. 500, 505 (2003) (courts "may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient perfor-

mance" in order "to ascertain whether the alleged error was prejudicial"). An analogous inquiry could be made to determine the impact of any different tactics or strategies that first-choice counsel would have pursued.[6]

Like the case when a defendant claims that he was denied the effective assistance of counsel, a court reviewing a claim that a defendant was denied his first-choice counsel can assess the performance of the second-choice counsel and determine whether representation by the preferred counsel would have had "a probable effect upon the trial's outcome." *Mickens*, 535 U.S. at 166; *Strickland*, 466 U.S. at 693-694. That examination already has been undertaken by at least one lower court reviewing claims of a denial of the right to counsel of choice. See *Walters*, 309 F.3d at 593 (concluding that erroneous denial of *pro hac vice* motion of counsel for sentencing was harmless because the defendant "was well-represented at sentencing" and successfully obtained a reduction in sentence over that recommended by government).

The fact that defendants in many instances may be unable to show prejudice from representation by second-choice counsel does not mean that prejudice was likely present but hard to uncover. Rather, the far more natural inference to be drawn is that prejudice is likely absent be-

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[6] In *Massaro*, 538 U.S. at 505-506, this Court held that ineffective-assistance-of-counsel claims are more appropriately resolved on collateral review than on direct appeal so that a factual record may be developed for assessing counsel's performance and the issue of prejudice, and to avoid creating perverse incentives for counsel on direct appeal to claim that counsel was ineffective, regardless of the merits of the claim. Similar considerations justify a preference for litigating claims of improper denial of counsel of choice on collateral proceedings rather than on direct appeal, so that a record can be made on disqualified counsel's strategic plan and the probable impact on the trial.

cause defendants denied their first-choice counsel generally will have picked, as their second choice, counsel who faithfully carried out the defendant's desires and mounted a vigorous defense. Thus, it would be "odd to reserve the most drastic remedy for those situations where there has been no discernable injury or other impact." *Morrison*, 449 U.S. at 366 n.2; *Rodriguez*, 382 F.3d at 674 ("it would make little sense to say that the less harm a mistake causes the more readily the appellate court must set aside the judgment").

C. The Court Of Appeals Erred In Holding That An Erroneous Denial Of Counsel Of Choice Reflects A Defect In The Trial Mechanism And Defies Harmless-Error Analysis

The court of appeals held that the denial of counsel of choice implicates a defect in the "framework of the trial mechanism" and is not amenable to review for harmlessness. Pet. App. 17a-20a. That conclusion not only departs from normal Sixth Amendment principles requiring a defendant to show that the alleged infringement of the right to counsel prejudiced the outcome of the trial, as explained above. The reasoning of the court of appeals also is unsound on its own terms.

1. The qualified right to counsel of choice is not so fundamental to our system of justice that its impairment mandates automatic reversal

The Court has identified a narrow class of fundamental constitutional errors as being so intrinsically harmful that they require the reversal of a defendant's conviction without inquiry into whether the errors had an effect on the outcome of the case. The few errors found to rise to that level have been said to "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993), "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478

U.S. 570, 577 (1986), and affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds," *Fulminante*, 499 U.S. at 309, 310. In *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997), and *Neder*, 527 U.S. at 8, this Court listed six examples of such errors: (1) a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); (2) the complete denial of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); (3) the denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); (4) the denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); (5) racial discrimination in the selection of a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); and (6) the giving of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). As explained in *Neder*, such errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" 527 U.S. at 8-9 (quoting *Rose*, 478 U.S. at 577-578).

The court of appeals' conclusion that a denial of right to counsel of choice rises to that level is inconsistent with the nature of the right. The trial court's considerable leeway to limit a defendant's choice of counsel itself indicates that the right carries limited weight in protecting the integrity of the trial process. As Judge Posner has explained, "[t]hat a district judge has a broad discretion to extinguish the right to counsel of one's choice for reasons of calendar control suggests that this right, which in any event no indigent criminal defendant has, is, like the right to effective assistance of counsel (a right whose vindication requires proof of prejudice), not so fundamental as the rights protected by the rule of automatic reversal." *Santos*, 201 F.3d at 960 (citations omitted).

Judge Easterbrook has similarly noted the oddity of applying an automatic reversal rule when defendants who complain of incompetent counsel must show prejudice: "It is hard to see why violations of the qualified right to counsel of choice should lead to automatic reversal, when deprivation of the absolute right to a competent attorney leads to relief only if prejudice is demonstrable." *Rodriguez*, 382 F.3d at 674. "A defendant with an inept attorney is in a more precarious position than one with a competent lawyer who is the defendant's second or third choice." *Ibid.* It follows that a defendant who has been deprived of counsel of choice should not be relieved of any showing that the deprivation affected the outcome.

Similarly, "[u]nlike such defects as the complete deprivation of counsel or trial before a biased judge," the exclusion of a defendant's first-choice counsel "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. There is no inherent reason why second-choice counsel cannot put up just as a robust defense, and be just as faithful to his client's wishes, as first-choice (but disqualified) counsel would have been.

2. The court of appeals' reasoning is flawed

The court of appeals offered three justifications for its conclusion that the denial of the right to counsel of choice merits automatic reversal, none of which withstands scrutiny.

a. First, the court held that the district court's error could not be assessed for prejudice because it did not "take[] place during the presentation of evidence to the jury," Pet. App. 16a (internal quotation marks omitted) (citing *Neder*, *supra*), but rather "infect[ed] the entire trial process from beginning to end," *id.* at 18a (internal quota-

tion marks omitted). It is undoubtedly true that the deprivation of counsel of choice cannot be temporally confined to a particular moment during the trial, but the same is true of other, more fundamental Sixth Amendment claims to which the rule of automatic reversal does not apply. As discussed above, in *Strickland*, 466 U.S. at 693-694, this Court held that a defendant whose counsel performs deficiently—a problem that may pervade the entire trial—must establish that such performance prejudiced him.

Similarly, in *Mickens*, 535 U.S. at 172-175, this Court held that a defendant alleging that his counsel labored under a conflict of interest relating to a former client must show at the very least that the conflict adversely affected counsel's performance. *Cuyler*, 446 U.S. at 350 (defendant alleging that counsel who represented him and other co-defendants at separate trials and who did not object to the multiple representation must establish that the conflict had an adverse effect on counsel's performance). Thus, the mere fact that the denial of counsel of choice spans the entire trial is an insufficient basis for applying automatic reversal.

b. The court of appeals' second justification is no less contrary to this Court's Sixth Amendment jurisprudence. The court of appeals reasoned that the right to counsel of choice is akin to the right to self-representation, the wrongful denial of which is subject to automatic reversal. See *McKaskle*, 465 U.S. at 177 n.8. The court explained that "[b]oth rights 'reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'" Pet. App. 18a-19a (quoting *Flanagan*, 465 U.S. at 268). That analogy is flawed.[7]

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[7] The court of appeals' apparent reliance on *Flanagan* is also flawed. *Flanagan* did not state that the rights to self-representation and to

The Sixth Amendment "grants to the accused personally the right to make his defense," *Faretta* v. *California*, 422 U.S. 806, 819 (1975), in order to "affirm the dignity and autonomy of the accused," *McKaskle*, 465 U.S. at 176-177. It follows that the violation of the right to self-representation is subject to automatic reversal, because the harm to personal autonomy that the denial of the right accomplishes cannot be cured by a reliable jury verdict.

There are several critical distinctions, however, between the right to self-representation, *i.e.*, to be represented by *no* counsel at all, and the right to be represented by one's particular first-choice lawyer when the defendant makes the threshold decision to be represented by counsel. The right to *self*-representation has a direct and unique link to autonomy that the choice of which lawyer will represent an individual cannot match. Moreover, the right to self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant," and thus necessarily reflects the primacy of autonomy over fairness. *McKaskle*, 465 U.S. at 177 n.8. By contrast, the right to counsel of choice does not stand above procedural fairness concerns. This Court has emphasized that very distinction, pointing out that "[o]ur holding in *Faretta* * * *, that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel." *Wheat*, 486 U.S. at 159 n.3. To the contrary, concerns about procedural fairness and the effective administration of justice restrict a non-indigent

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counsel of choice are analogous. The quoted language came from a portion of the Court's opinion in which it *assumed* the two rights were analogous for the purpose of *rejecting* the petitioners' argument that interlocutory review of their pre-trial challenge to the disqualification of their chosen counsel was available. See 465 U.S. at 267-269.

defendant's choice of counsel in significant respects. See pp. 12-13, *supra*. In that respect, respondent's autonomy interests are far weaker than that of a defendant electing self-representation.

The differences in the two rights are also confirmed by the different sources of the rights and correspondingly distinct nature of any infringement. The right to self-representation derives not from the Assistance of Counsel Clause of the Sixth Amendment as such, but more broadly from this country's history, the structure of the Sixth Amendment *as a whole*, and notions of respect for individual autonomy. *Faretta*, 422 U.S. at 812-834; accord *Martinez* v. *Court of Appeal*, 528 U.S. 152, 156 (2000). Based on those principles, "a State may [not] constitutionally hale a person into its criminal courts and there *force a lawyer upon him*." *Faretta*, 422 U.S. at 807 (emphasis added). Thus, the defendant's "specific rights to make *his* voice heard * * * form the core of a defendant's right of self-representation." *McKaskle*, 465 U.S. at 177 (emphasis added).

A defendant who is denied his right to self-representation is in a critically different position from a defendant who wishes to have counsel speak on his behalf and who in fact selects his own counsel (albeit not his first choice) to represent him. In this case, for example, respondent was not deprived of the right to choose whether to be represented by counsel; the only deprivation at issue was the right to be represented by his first-choice counsel. Because respondent was represented by counsel selected by himself rather than the State, any deprivation of autonomy is not nearly as significant as in the case of a defendant who wishes to represent himself but is nonetheless forced to be represented by counsel who is generally selected by the court.

In short, a defendant denied the right to counsel of choice suffers a significantly weaker deprivation of choice,

autonomy, and the right to control one's defense. The differences are even more extreme in the case of a defendant who wishes to retain *a team* of counsel but the court arbitrarily refuses to permit representation by one member of the team. Cf. *United States* v. *Voigt*, 89 F.3d 1050, 1071 (3d Cir.) (defendant claimed court arbitrarily disqualified third attorney sought to be added to defense team but court found no abuse of discretion), cert. denied, 519 U.S. 1047 (1996). Autonomy concerns in the counsel-of-choice context thus should receive minimal weight in determining whether an erroneous deprivation should automatically invalidate a conviction.

c. The court of appeals finally reasoned that a rule of automatic reversal is necessary to prevent "collapsing the right to counsel of choice into the right to receive effective assistance of counsel," and thereby "obliterat[ing] the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, a right the Supreme Court recognized in *Wheat*." Pet. App. 20a (internal quotation marks omitted). That is incorrect. The right to counsel of choice would not be "obliterated" even if a defendant could not obtain relief on appeal without establishing that substitute counsel was ineffective. Trial courts would still be under a Sixth Amendment obligation to apply a "presumption in favor of [a defendant's] counsel of choice," *Wheat*, 486 U.S. at 164, and those courts could be expected to carry out that responsibility conscientiously and in good faith. Cf. *Mickens*, 535 U.S. at 173 (rejecting automatic reversal as a sanction "to induce * * * trial judges to follow the law" on conflicts of interest).

In any event, separate protection can be afforded to a defendant who is improperly denied counsel of choice without imposing the extreme remedy of automatic reversal. As discussed, such a defendant could be afforded relief without

showing that counsel's performance fell below an objective standard of reasonableness under the first prong of *Strickland*, where the defendant can nevertheless show that "there is a reasonable probability" that but for the denial, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under that requirement, a defendant who is represented by competent second-choice counsel may attempt to show that the absence of his preferred counsel resulted in prejudice. See pp. 15-16, *supra*. Such a rule would bring the denial of the right to counsel of choice in line with the remainder of this Court's Sixth Amendment jurisprudence and would not impose unjustified costs on victims, witnesses, courts, and the public that result from the reversal of a criminal conviction. *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted.

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