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The Replacements: Conflicting Standards for Obtaining New Counsel Under the Sixth Amendment

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THE REPLACEMENTS: CONFLICTING STANDARDS FOR OBTAINING NEW COUNSEL UNDER THE SIXTH AMENDMENT

SHARON FINEGAN*

ABSTRACT

In 2006, the Supreme Court handed down a decision in *United States v. Gonzalez-Lopez* emphasizing the importance of a defendant's right to counsel of choice under the Sixth Amendment and holding a denial of this right constitutes structural error, requiring automatic reversal. Following that decision, several federal circuit courts and state appellate courts have questioned how to apply this right to circumstances where the right to choice of counsel and the right to appointed counsel overlap. When a defendant seeks to replace retained counsel for appointed counsel, should the standard governing his motion fall under the right to choice of counsel? Or should such the motion fall within the purview of the right to appointed counsel? Despite the fact that defendants have sought to replace retained counsel with appointed counsel for decades, the Supreme Court has never established a clear standard to apply under these circumstances. Because of this lack of guidance, lower courts have split on the standard to apply in these circumstances.

As recently as April 2016, the Eleventh Circuit held that the right to choice of counsel standard should govern and that a defendant need not show any cause to support his request to substitute retained counsel. In so holding, the Eleventh Circuit rejected the First Circuit's standard that a defendant must demonstrate good cause to succeed in a motion to substitute retained counsel for appointed counsel.

In order to resolve the conflicting standards employed by the lower courts, a clear rule needs to be established to both protect the defendant's right to counsel of choice and preserve judicial efficiency and fairness to all participants in the trial process. By adopting the Eleventh and Ninth Circuit standard that a defendant need not demonstrate good cause in order to replace his retained attorney, the Court would provide a clear rule that would protect the defendant's constitutional right to counsel of choice. At the same time, the defendant's right to choice of counsel should be considered a rebuttable presumption. The Court should allow the presumption in favor of counsel of choice to be overcome by a trial court's factual findings that a motion to substitute would lead to delays that would cause unfairness or perceived unfairness, or would unduly inconvenience participants in the trial process. By establishing this rebuttable presumption, the Court would provide clear guidance to lower courts struggling to ensure efficiency while at the same time protecting a defendant's constitutional right to counsel of choice.

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I. INTRODUCTION

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹ The right of a defendant to be represented by counsel is fundamental to the American system of justice.² In the U.S. adversarial system, the State and the defendant are engaged in a contest to determine the defendant’s guilt. However, the power of the State far outweighs that of an individual defendant.³ In order to ensure a fair and just result, procedural rules limit the evidence that can be introduced and attempt to level the playing field.⁴ Unfortunately, the vast majority of defendants are incapable of understanding, let alone enforcing, these procedural

¹ U.S. CONST. amend. VI.

² Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 35 (1991) (“The rights delineated in the amendment are meant to equalize the balance of power in the criminal process by granting the defendant an indispensable shield against the natural advantage the prosecution enjoys in a criminal trial.”); Patrick S. Metzger, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 168 (2012) (“[T]hose who founded this country held the right to counsel in the highest of reverence.”).

³ Briggs J. Matheson, *The Sixth Amendment Twilight Zone: First-Tier Review and the Right to Counsel*, 3 BRIT. J. AM. LEGAL STUD. 441, 446 (2014); see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting the “vast sums of money” spent by states to prosecute criminal defendants, requiring the appointment of counsel to ensure that defendants can “stand[] equal before the law”).

⁴ Matheson, *supra* note 3, at 446.

rules.⁵ Thus, to ensure the fairness of the system, it is crucial that defendants have counsel to adequately protect their rights.⁶

The broad language of the Sixth Amendment has been interpreted to encompass several fundamental rights involving a criminal defendant's right to an attorney.⁷ These rights include the right to effective counsel, the right to an appointed counsel when the defendant is indigent, and the right to choice of counsel.⁸ The latter two rights have generally been addressed independently.⁹ Issues that arise with the right to choice of counsel are governed by different standards than issues that arise regarding an indigent defendant's right to appointed counsel.¹⁰ Yet, under certain circumstances, these two rights can intertwine and, indeed, conflict.

Imagine a criminal case that is about to go to trial. The defendant has been represented by retained counsel throughout the pretrial process but, prior to the start of trial, seeks to substitute his retained attorney for a court-appointed attorney. This request could be the result of a breakdown in communications between the retained attorney and her client, a conflict of interest, a lack of financial resources, or simply a desire to delay the start of trial. At this point, the trial judge must balance the defendant's right to counsel of choice with both his right to appointed counsel and the need for fair and efficient administration of justice.¹¹ There are well-established rules governing the standard applicable to indigent defendants seeking to replace their appointed counsel with new appointed counsel.¹² Likewise, the Supreme Court has established standards to apply when a defendant seeks to replace his retained

⁵ *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (explaining that the Sixth Amendment “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel”).

⁶ *Id.* at 463 (“The ‘right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.’”) (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

⁷ *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010).

⁸ *Id.*

⁹ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006) (noting that to combine analysis of the two rights would “confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed”).

¹⁰ *United States v. Brown*, 785 F.3d 1337, 1343-44 (9th Cir. 2015).

¹¹ *See, e.g., Com. v. Dunne*, 474 N.E.2d 538, 541-42 (Mass. 1985) (“When the defendant seeks a continuance to substitute counsel at or near the time of trial, the judge must balance the defendant's right to choose his counsel with the interests of the court, the public, the victim, and the witnesses. There is no easy, mechanical test that the judge can apply in balancing these interests.”) (internal citations omitted).

¹² *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973) (“Although an indigent criminal defendant has a right to be represented by counsel, he does not have a right to be represented by a particular lawyer, or to demand a different appointed lawyer except for good cause.”).

counsel with newly retained counsel.¹³ However, the Court has yet to provide clear guidance on a standard to apply to a motion to substitute counsel when a defendant seeks to replace retained counsel with appointed counsel.

Because of this lack of guidance, lower courts have struggled to determine which standards apply in granting the defendant's right to substitute counsel.¹⁴ Some courts emphasize the constitutional significance of the defendant's right to counsel of choice and place little burden on the defendant to show why he wishes to substitute counsel.¹⁵ Other courts have required defendants to show good cause as to why the retained counsel should be substituted.¹⁶ Still, other courts have dealt with this challenge by focusing on the discretion trial judges have in granting continuances and use that discretion to limit a defendant's ability to substitute counsel.¹⁷

This Article will examine the conflict regarding the standard applicable to choice of counsel and the merits of the various ways courts address the rights conferred by the Sixth Amendment. The Article first addresses the different rights established by the Sixth Amendment right to counsel. The Article then examines the various court rulings that have addressed this conflict. Finally, the Article analyzes these standards and provides a procedure that would resolve these conflicting lines of authority while preserving the defendant's Sixth Amendment rights to ensure fairness and efficiency in the trial process.

II. RIGHTS AFFORDED UNDER THE SIXTH AMENDMENT RIGHT TO COUNSEL

One criminal procedure scholar has noted, "[T]here appears to be but a single Sixth Amendment right to counsel."¹⁸ However, this single right encompasses both the right to retained counsel of choice and the right to appointed counsel for indigent defendants.¹⁹ Further, the rights to appointed counsel and counsel of choice have been held to be distinct and independent of one another.²⁰

The reason these rights are evaluated independently stems from the different derivations of these rights. The right to choice of counsel is derived from the recognition that "[r]epresentation by counsel would usually be of great value to the defendant" and the acknowledgment of the importance of a defendant's freedom to

¹³ *Gonzalez-Lopez*, 548 U.S. at 147-48; *Wheat v. United States*, 486 U.S. 153, 159 (1988).

¹⁴ *United States v. Jiminez-Antunez*, 820 F.3d 1267, 1271 (11th Cir. 2016); *see also Com.*, 474 N.E.2d at 542 (stating that there is not "an all-inclusive list of factors for the judge to consider" and that "the judge must blend an appreciation of the inevitable difficulties of trial administration with a concern for constitutional protections").

¹⁵ *See, e.g., Jiminez-Antunez*, 820 F.3d at 1271; *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010).

¹⁶ *See, e.g., United States v. Austin*, 812 F.3d 453, 456 (5th Cir. 2016); *United States v. Mota-Santana*, 391 F.3d 42, 46-47 (1st Cir. 2004).

¹⁷ *See, e.g., Hyatt v. Branker*, 569 F.3d 162 (4th Cir. 2009); *State v. Andrews*, 249 P.3d 912, 171 (Kan. Ct. App. 2011).

¹⁸ WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 11.1 (5th ed. 2009) (hereinafter LAFAYE).

¹⁹ *Id.*

²⁰ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006).

choose the manner of representation that would best suit his defense.²¹ The right to appointed counsel for indigent defendants is derived from the need to ensure a fair trial and achieve a just result in all criminal cases, not just cases where a defendant can afford to hire counsel.²² While these two rights generally coincide and need not conflict, there are times when they overlap and create confusion for trial courts and attorneys alike.

Perhaps the most well known of the rights that fall under the Sixth Amendment's right to counsel is the right to appointed counsel for indigent defendants. Familiarity with this right likely stems from its use in *Miranda* warnings and the large number of indigent criminal defendants who cannot afford to hire private attorneys.²³ However, the right to appointed counsel has not always been interpreted as a right granted to all indigent defendants under the Constitution. It was not until 1932, in *Powell v. Alabama*, that the Supreme Court first determined that criminal defendants are entitled to appointed counsel in certain federal cases.²⁴ Moreover, it was not until 30 years after *Powell*, in the landmark case of *Gideon v. Wainwright*, that the Supreme Court held the Sixth Amendment conferred a right to counsel upon indigent criminal defendants in both state and federal criminal proceedings.²⁵ *Gideon* emphasized the fundamental importance of the right to counsel in our adversarial system of justice.²⁶ Quoting an earlier case, the Court stated that "[the assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"²⁷

This right does not, of course, mean that defendants are afforded counsel in all criminal proceedings.²⁸ Since *Gideon*, the right to appointed counsel has been limited in many respects:²⁹ for example, there is no constitutional right to counsel before the

²¹ LAFAVE, *supra* note 18, at § 11.1.

²² *Id.* ("[N]o Sixth Amendment distinction should exist between the indigent and affluent defendant as to their basic right to be represented by counsel; both obviously are entitled to a fair hearing.").

²³ Edward L. Fiandach, *Miranda Revisited*, CHAMPION, Nov. 2005, at 22, 26; *see also* John J. Cleary, *Federal Defender Services: Serving the System or the Client?*, 58 LAW & CONTEMP. PROBS. 65, 80 (1995) (noting that while "[s]tatistics are not maintained on the percentage of federal defendants represented by appointed counsel" "[t]hree out of every four defendants charged with a serious crime are unable to afford counsel").

²⁴ *Powell v. Alabama*, 287 U.S. 45 (1932).

²⁵ *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963).

²⁶ *Id.* at 344 ("[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

²⁷ *Id.* at 343 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)) (alterations in original).

²⁸ *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the Constitution does not require counsel to be appointed in petty cases that do not result in imprisonment).

²⁹ *See* Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 499 (2009). *See, e.g.*, *United States v. Parker*, 469 F.3d 57, 61 (2d Cir. 2006) (holding that the right to counsel does not guarantee

initiation of formal criminal charges,³⁰ nor is there a constitutional right to counsel after the first direct appeal of a case.³¹ Another way in which the right to appointed counsel is indirectly limited is the ability of a defendant to choose, or fire, an appointed attorney.³² The Court has found that a criminal defendant does not have the right to choose his attorney when he seeks court-appointed counsel.³³ A defendant must accept the court's appointed attorney and typically has little to no influence over the choice of that attorney.³⁴ This does not mean that a defendant can never successfully replace one court-appointed counsel with another.³⁵ Instead, the defendant must meet the high standard set by the courts in order to prevail on his motion to substitute counsel.³⁶

A defendant can only successfully move to replace court-appointed counsel when he can demonstrate "good cause" for the substitution.³⁷ An example of "good cause" to substitute counsel can be found when a defendant can demonstrate that his attorney has an actual conflict of interest.³⁸ In such a case, the defendant has shown good cause to replace that attorney with another appointed counsel.³⁹ The burden is

the right to the same attorney throughout the proceedings); *United States v. Mutuc*, 349 F.3d 930, 934 (7th Cir. 2003) (finding that the right to counsel does not guarantee the right to a "friendly and happy attorney-client relationship"); *Siers v. Ryan*, 773 F.2d 37, 44 (3d Cir. 1985) (noting that the right to counsel does not afford criminal defendant's the right to confidence in appointed counsel).

³⁰ *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) ("[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.").

³¹ *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (holding that a state need not provide a defendant with counsel in his discretionary appeal to the high court of the state).

³² *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985) (holding that an indigent defendant who is eligible for appointed counsel "does not have a right to have a particular lawyer represent him, nor demand a different appointed lawyer except for good cause") (internal citations omitted).

³³ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.").

³⁴ *Utah v. Wulffenstein*, 733 P.2d 120, 121-22 (Utah 1986) ("The right to counsel does not include the right of a defendant to designate his own court-appointed counsel by either the process of an affirmative demand or the selective elimination of other attorneys."); *May v. State*, 62 P.3d 574, 584 (Wyo. 2003); see *LAFAVE*, *supra* note 18, at §11.4(a) ("[T]he initial selection of counsel to represent an indigent is a matter resting within the almost absolute discretion of the trial court.").

³⁵ *Wainwright*, 767 F.2d at 742.

³⁶ *Id.*

³⁷ *Id.* (quoting *McKee v. Harris*, 649 F.2d 927, 932 (2d Cir. 1981) ("Good cause for substitution of counsel cannot be determined 'solely according to the subjective standard of what the defendant perceives.'")).

³⁸ *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972).

³⁹ *Id.* Other ways in which the defendant can show "good cause" for substitution are a "complete breakdown in communication" with his attorney or "an irreconcilable conflict which leads to an apparently unjust verdict." *Id.*

on the defendant, in these circumstances, to show why the replacement is constitutionally necessary and required to ensure a fair trial.⁴⁰ Thus, while the right to appointed counsel for indigent defendants is a significant and weighty entitlement, it is restricted in many important ways.

The standards by which the right to choice of counsel is evaluated differ from the standards used to evaluate a defendant's right to appointed counsel. The courts have interpreted the language of the Sixth Amendment to grant to defendants the right to counsel of their choosing.⁴¹ Although this right is subject to some limitations,⁴² the right to choice of counsel essentially means that a defendant can hire any attorney who is willing and able to represent him.⁴³ The right to choice of counsel also means that a defendant is able to fire his retained counsel for any reason.⁴⁴ Thus, the Supreme Court has held that the Sixth Amendment right to counsel of choice requires the defendant be permitted to hire the attorney "he believes to be best."⁴⁵ This right creates a "presumption" in favor of a defendant's right to retain the attorney of his choosing.⁴⁶

Just as the right to appointed counsel is not without limitation, so too is the right to choice of counsel, as the right has also been restricted in several important ways.⁴⁷ Regardless of his selection, a defendant cannot choose counsel who is not a member of the bar or is not admitted to practice in the court where the defendant is being tried.⁴⁸ Nor may a defendant "insist on representation by an attorney he cannot afford

⁴⁰ Indeed, "[a] defendant must do more than show that he or she does not have a 'meaningful relationship' with his or her attorney" in order to meet the "heavy burden" of showing good cause for substituting his appointed attorney. *State v. Scales*, 946 P.2d 377, 382 (Utah Ct. App. 1997).

⁴¹ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006).

⁴² "The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

⁴³ *Utah v. Barber*, 206 P.3d 1223, 1233 (Utah Ct. App. 2009).

⁴⁴ *Id.* at 1234 ("Assuming that incoming counsel is willing and ethically available, a defendant has a Sixth Amendment right to fire retained counsel and hire new retained counsel irrespective of the defendant's reasons for doing so, so long as the substitution does not unreasonably disrupt the proceedings."); *see also* *United States v. Rivera-Corona*, 618 F.3d 976 (9th Cir. 2010) ("Unless the substitution would cause significant delay or inefficiency or run afoul of the other considerations we have mentioned, a defendant can fire his retained or appointed lawyer and retain a new attorney for any reason or no reason.").

⁴⁵ *Gonzalez-Lopez*, 548 U.S. at 146.

⁴⁶ *Wheat*, 486 U.S. at 164.

⁴⁷ *Id.* at 159; *see also* Keith Swisher, *Disqualifying Defense Counsel: The Curse of the Sixth Amendment*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 374, 388 (2014) ("[I]n light of countervailing interests—which are indeed present in the majority of cases—the rights to counsel of choice or to waive conflict-free counsel may well fail to prevent disqualification.").

⁴⁸ *Wheat*, 486 U.S. at 159.

or who for other reasons declines to represent the defendant.”⁴⁹ Further, a defendant cannot choose “an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the government.”⁵⁰ But aside from these general restrictions concerning an attorney’s eligibility to represent a particular defendant, the right to counsel of choice has been vigorously guarded as a fundamental protection under the Sixth Amendment.⁵¹

It should be noted that overarching both the right to appointed counsel and the right to retained counsel of choice is the requirement that counsel provide “effective assistance” to the defendant.⁵² Regardless of whether a defendant retains counsel himself or is appointed counsel by the court, he is entitled to effective assistance of counsel.⁵³ Of course, effective assistance does not mean the best representation.⁵⁴ Indeed, a defendant can only succeed in an ineffective assistance of counsel claim if he can show that the failure in the attorney’s performance “undermine[d] confidence in the result it produced.”⁵⁵ In order to demonstrate ineffective counsel, the defendant must show (1) that his attorney failed to meet an “objective standard of reasonableness” and (2) there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁵⁶ Because this standard is famously difficult to meet, cases are rarely reversed for ineffective assistance of counsel.⁵⁷ Thus, regardless of whether a defendant is represented by retained or appointed counsel, he can only succeed in challenging a conviction for ineffective assistance of counsel if he can meet this high standard and show prejudice to his case.⁵⁸

Courts have emphasized the distinct nature of these rights derived from the Sixth Amendment right to counsel.⁵⁹ Thus, the rights to appointed counsel, effective assistance of counsel, and counsel of choice are all evaluated independently using distinct standards.⁶⁰ For example, a defendant may not have a claim for ineffective assistance of counsel—indeed, his attorney may have ably represented him—but if

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006).

⁵² *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010).

⁵³ *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

⁵⁴ LAFAVE, *supra* note 18, at § 11.7(c) (noting that the standard for effective assistance of counsel does not measure the attorney’s actual performance against “some model for attorney performance” nor does it assign a grade to the lawyer’s efforts).

⁵⁵ *Id.* at § 11.7(d).

⁵⁶ *See Strickland v. Washington*, 466 U.S. 668 (1984).

⁵⁷ *See, e.g., Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 281 (1997) (noting that in a review of Illinois criminal cases, very few cases were reversed on the basis of an ineffective assistance of counsel claim).

⁵⁸ *Cuyler*, 446 U.S. at 344-45.

⁵⁹ *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

⁶⁰ *Id.*

he requested to fire his retained counsel and hire a different attorney and that request was wrongfully denied, his right to counsel of choice was violated.⁶¹ The Supreme Court has held such a violation to constitute structural error requiring reversal and a new trial.⁶² In order to succeed on such a claim, the defendant need not prove ineffective assistance of counsel regarding the representation he did receive nor does he need to demonstrate any prejudice.⁶³ On the other hand, a defendant who has appointed counsel and seeks to replace that appointed counsel with a different court-appointed attorney can only succeed in reversing the denial of his request if he can show prejudice and meet the high burden of an ineffective assistance of counsel claim.⁶⁴

These disparate standards are a function of the way courts view the different rights encompassed by the Sixth Amendment's right to counsel. While the right to appointed counsel is seen as a means of ensuring a fair trial, the Supreme Court has held that the right to counsel of choice is a right distinct from ensuring the fairness of proceedings.⁶⁵ As the Court explained,

The right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee. Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is 'complete' when the defendant is erroneously prevented from being

⁶¹ *See id.* at 148.

⁶² A structural error impacts the trial process in such a way that it renders the trial fundamentally unfair. Examples of structural error are the denial of the right to counsel, denial of the right to a jury, and denial of a public trial. *See id.* at 148-49. Automatic reversal for structural error necessarily preserves the rights of the defendant, but also can create significant burdens on other parties involved in the case. As the Supreme Court has noted:

[I]nconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less. But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts. The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

Morris v. Slappy, 461 U.S. 1, 14-15 (1983).

⁶³ *Gonzalez-Lopez*, 548 U.S. at 147-48; *see also* *Utah v. Barber*, 206 P.3d 1223, 1228 (Utah Ct. App. 2009).

⁶⁴ *Gonzalez-Lopez*, 548 U.S. at 147 (“[A] violation of the Sixth Amendment right to effective representation is not ‘complete’ until the defendant is prejudiced.”).

⁶⁵ *Id.*

represented by the lawyer he wants, regardless of the quality of the representation he received.⁶⁶

Thus, while a defendant with an appointed attorney who wishes to choose a different counsel can only have his conviction reversed if he can show that he was prejudiced by the denial, a defendant with a retained counsel can have a conviction reversed merely by showing that his request to substitute counsel was wrongly denied, regardless of whether that denial led to ineffective assistance or prejudice.⁶⁷

The Supreme Court's jurisprudence on the right to choice of counsel has gone through significant changes over the last three decades. In 1988, in *Wheat v. United States*, the Court reviewed the denial of a defendant's motion to substitute retained counsel prior to trial.⁶⁸ In examining the right to choice of counsel under the Sixth Amendment, the Court noted "that the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial,' and that in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'"⁶⁹ In this way, the Court seemed to place greater weight on the defendant's right to effective counsel rather than the defendant's right to counsel of choice.⁷⁰ In balancing these interests under the Sixth Amendment, the Court also focused on the limitations to the right to choice of counsel and emphasized that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."⁷¹ Thus, while the Supreme Court acknowledged that a trial court "must recognize a presumption in favor of petitioner's counsel of choice," it gave broad discretion to the trial judge in making a determination on whether to allow for substitution of counsel.⁷²

The *Wheat* decision has been heavily cited by lower courts to support limitations on the right to counsel of choice and the discretion afforded to trial judges in determining whether to allow for substitution of retained counsel.⁷³ Courts used *Wheat* to support their conclusion that the Sixth Amendment right to counsel served

⁶⁶ *Id.* at 147-48 (internal citations omitted).

⁶⁷ Compare *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989) ("[T]hose 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."), with *Gonzalez-Lopez*, 548 U.S. at 147-48 ("Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.").

⁶⁸ *Wheat v. United States*, 486 U.S. 153, 154 (1988).

⁶⁹ *Id.* at 158-59.

⁷⁰ *Id.* at 159.

⁷¹ *Id.* at 160.

⁷² *Id.* at 163-64.

⁷³ See, e.g., *United States v. Self*, 681 F.3d 190, 198 (3d Cir. 2012); *United States v. Gharbi*, 510 F.3d 550, 553 (5th Cir. 2007).

as a means to ensure a fair trial and that choice of counsel was secondary to effective assistance of counsel as a constitutional concern.⁷⁴

The Supreme Court revisited the right to choice of counsel under the Sixth Amendment in 2006.⁷⁵ In *United States v. Gonzalez-Lopez*, the Court reviewed a case in which the trial court wrongly denied pro hac vice admission to defendant's chosen counsel.⁷⁶ The defendant was represented by local counsel and ultimately convicted.⁷⁷ The defendant appealed, arguing that his right to choice of counsel was wrongfully denied.⁷⁸ While the government conceded that the court should not have denied defendant's counsel of choice admission pro hac vice, it argued that the denial did not prejudice the defendant, and therefore, there was no reversible error.⁷⁹

In a shift from its line of reasoning in *Wheat*, the majority stated that the Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."⁸⁰ Thus, the Court found that a defendant wrongly denied of his chosen counsel does not need to show that this denial prejudiced his case in any way.⁸¹ In so finding, the Court further emphasized the distinction between "the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness . . . [and] the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed."⁸² While the Court acknowledged the limitations on the right to counsel of choice and cited *Wheat* to support the court's "independent interest in ensuring" the fairness and perceived fairness of criminal proceedings, the Court held that violation of the Sixth Amendment right to counsel of choice was a structural error requiring reversal without any need to demonstrate prejudice.⁸³

Justice Alito, joined by the Chief Justice and Justices Kennedy and Thomas, noted in dissent the numerous ways in which a defendant's right to choose his own counsel is limited and argued that "[f]undamental unfairness does not inexorably follow from the denial of first-choice counsel. The 'decision to retain a particular lawyer' is 'often uninformed,'; a defendant's second-choice lawyer may thus turn out to be better than the defendant's first-choice lawyer. More often, a defendant's first- and second-choice lawyers may be simply indistinguishable."⁸⁴ Therefore, the

⁷⁴ See, e.g., *United States v. Hall*, 200 F.3d 962, 966 (6th Cir. 2000).

⁷⁵ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

⁷⁶ *Id.* at 142.

⁷⁷ *Id.*

⁷⁸ *Id.* In *Gonzalez-Lopez*, the wrongful denial was the result of the trial judge erroneously applying state ethical rules to a motion for admission pro hac vice. Other examples of a wrongful denial would be a court refusing to allow a defendant his counsel of choice because of a non-existent conflict of interest.

⁷⁹ *Id.* at 147-48.

⁸⁰ *Id.* at 146.

⁸¹ *Id.* at 148.

⁸² *Id.*

⁸³ *Id.* at 152.

⁸⁴ *Id.* at 158 (Alito, J., dissenting).

dissent reasoned that under the majority's holding, a defendant who was represented "brilliantly" by counsel would be "automatically entitled to a new trial," in contrast to a defendant represented by ineffective counsel who must show prejudice in order to obtain a new trial.⁸⁵ To that end, "a defendant should be required to make at least some showing that the trial court's erroneous ruling adversely affected the quality of assistance that the defendant received" in order to successfully seek reversal of his conviction.⁸⁶

Despite the Supreme Court's holding in *Gonzalez-Lopez* and its shift from the reasoning of *Wheat*, the majority in *Gonzalez-Lopez* emphasized that the 2006 decision does not "cast[] any doubt or place[] any qualification upon [its] previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them."⁸⁷ This assertion has left lower courts struggling to reconcile the *Wheat* and *Gonzalez-Lopez* lines of authority in circumstances where the right to choice of counsel and the right to appointed counsel overlap.⁸⁸ While most courts have found that the *Gonzalez-Lopez* reasoning means that a defendant need not show any cause supporting the replacement of his retained counsel for appointed counsel, some courts hold that a defendant must demonstrate good cause in order to successfully seek such a substitution.⁸⁹ Still, other courts have followed a different path, focusing on a court's discretionary powers in reviewing a motion for continuance and viewing the defendant's motion to substitute counsel through that lens.⁹⁰

III. CONFLICTING STANDARDS APPLIED TO MOTIONS TO SUBSTITUTE COUNSEL

The courts have adopted clear and consistent standards to apply to motions to substitute counsel where the rights to appointed and choice of counsel do not overlap.⁹¹ However, the Supreme Court has yet to provide clear guidance on the standard to apply when these rights do intersect. Thus, courts have struggled to come up with a consistent rule when a defendant seeks to replace his retained attorney with appointed counsel. Consequently, courts have employed three different procedures to address these motions to substitute. First, some courts have found that a defendant

⁸⁵ *Id.* at 160.

⁸⁶ *Id.* at 153.

⁸⁷ *Id.* at 151.

⁸⁸ *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1271 (11th Cir. 2016) (describing the different directions courts have gone in determining what standard to apply to cases in which a defendant represented by retained counsel seeks to substitute that counsel with appointed representation); *State v. Barber*, 206 P.3d 1223, 1234 n.10 (Utah 2009) (describing various cases that have adopted different standards in these cases).

⁸⁹ *Jimenez-Antunez*, 820 F.3d at 1271.

⁹⁰ *See, e.g., United States v. Hagen*, 468 F. App'x 373 (4th Cir. 2012).

⁹¹ Where a defendant seeks to replace retained counsel for new retained counsel, he need only show that the new attorney is qualified and willing to represent him, and that the substitution will not impact the fairness of the proceedings. *See Wheat v. United States*, 486 U.S. 153, 166 (1988). Where a defendant seeks to replace appointed counsel with new appointed counsel, he must show good cause for the substitution. *See United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973).

need not show any cause to fire his retained counsel and need only demonstrate he is statutorily eligible to replace his attorney with appointed counsel. Second, other courts have required defendants to show good cause in order to succeed in a motion to substitute retained counsel for appointed counsel. Third, many courts avoid employing a specific standard to address the Sixth Amendment issue, focusing instead on the discretionary powers afforded courts to manage their dockets and reject actions that will result in a delay of trial. These inconsistent standards have led to disparate results in the lower courts and fail to adequately protect the constitutional rights of the defendant along with the need for fair and efficient proceedings.

A. *No Showing of Cause Required: The Eleventh and Ninth Circuit Standard for Replacement of Retained Counsel*

Federal circuit and state appellate courts have been divided on which standard trial courts should use to determine whether a motion to substitute retained counsel for appointed counsel should be granted. In April 2016, the Eleventh Circuit joined the prevailing line of authority, holding that a defendant who moves to dismiss his retained counsel and replace her with appointed counsel need not show good cause for the substitution.⁹² The court emphasized that the right to choose counsel necessarily includes the right to dismiss retained counsel and reasoned, “A defendant exercises the right to counsel of choice when he moves to dismiss retained counsel, regardless of the type of counsel he wishes to engage afterward.”⁹³ The only limitation the court placed on the ability of a defendant to substitute counsel was when such substitution would “interfere with the ‘fair, orderly and effective administration of the courts.’”⁹⁴

The reasoning expressed by the Eleventh Circuit mirrors that espoused by the Ninth Circuit in two notable cases. In the 2010 case of *United States v. Rivera-Corona*, the Ninth Circuit noted, “The Sixth Amendment’s right to counsel encompasses two distinct rights: a right to adequate representation and a right to choose one’s own counsel.”⁹⁵ In the *Rivera-Corona* case, the defendant sought to substitute counsel, and the district court rejected this request “because of the expense and the stage of the proceedings” at which the request was made.⁹⁶ The circuit court found that the right to choice of counsel allows a defendant to “fire his retained *or* appointed lawyer and retain a new attorney for any reason or for no reason.”⁹⁷ The court went on to reason that the right to counsel of choice may only be limited if the choice would result in undermining the “‘purposes inherent in the fair, efficient and orderly administration of justice.’”⁹⁸ The court explained that these principles would

⁹² *Jiminez-Antunez*, 820 F.3d 1267.

⁹³ *Id.* at 1271.

⁹⁴ *Id.* at 1272 (quoting *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir. 1986)).

⁹⁵ *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010) (quoting *Daniels v. Lafler*, 501 F.3d 735, 738 (6th Cir. 2007)).

⁹⁶ *Id.* at 981.

⁹⁷ *Id.* at 980.

⁹⁸ *Id.* at 979 (quoting *United States v. Ensign*, 491 F.3d 1109, 1115 (9th Cir. 2007)).

be undermined if the substitution of counsel would result in a “significant delay or inefficiency.”⁹⁹

The *Rivera-Corona* court was particularly concerned with a trial court requiring a retained attorney to continue to represent a defendant who no longer wants or can afford the retained counsel.¹⁰⁰ The court noted that such a situation was likely to cause resentment by the retained counsel and could influence her to “seek to end the representation as expeditiously as possible” rather than zealously advocating for the defendant.¹⁰¹

In 2015, the Ninth Circuit reinforced its *Rivera-Corona* holding in *United States v. Brown*.¹⁰² In *Brown*, the defendant sought to substitute his retained counsel on the eve of trial due to a breakdown in communication and possible lack of resources.¹⁰³ The trial judge found that the defendant’s retained counsel was “reputable and qualified” and denied the request.¹⁰⁴ The appellate court reversed the trial court’s decision and found that the trial judge violated the defendant’s Sixth Amendment right to choice of counsel by denying his request.¹⁰⁵ In so holding, the court explained succinctly the two rules espoused in the *Rivera-Corona* decision:

A defendant enjoys a right to discharge his retained counsel for any reason ‘unless a contrary result is compelled by purposes inherent in the fair, efficient and orderly administration of justice,’ . . . and (2) if the court allows a defendant to discharge his retained counsel, and the defendant is financially qualified, the court must appoint new counsel for him under the Criminal Justice Act.¹⁰⁶

The court noted that the two different constitutional rights at issue in these cases—the right to choice of counsel and the right to appointed counsel—are intertwined, but that no matter the order in which the two issues are addressed, the defendant may not be left “without any counsel at all, absent a voluntary, knowing, and intelligent decision to proceed pro se.”¹⁰⁷

⁹⁹ *Id.* at 979-80.

¹⁰⁰ *Id.* at 982.

¹⁰¹ *Id.*

¹⁰² *United States v. Brown*, 785 F.3d 1337 (9th Cir. 2015).

¹⁰³ *Id.* at 1341.

¹⁰⁴ *Id.* at 1343.

¹⁰⁵ *Id.* at 1347.

¹⁰⁶ *Id.* at 1340 (quoting *Rivera-Corona*, 618 F.3d at 979)).

¹⁰⁷ *Id.* at 1345. Notably, “[w]hen a court denies a defendant’s request for appointment of new counsel or for a continuance to permit the defendant to hire new counsel, it commonly will inform the defendant that he either must proceed with his current counsel or represent himself.” LAFAYE, *supra* note 18, at § 11.4(d), at 617. Frequently the defendant in this circumstance will choose to represent himself, finding that preferable to being represented by counsel in whom he no longer has confidence. *Id.* If, on appeal, the appellate court finds that the defendant’s motion to substitute counsel was erroneously denied, his decision to proceed as a pro se party will be held involuntary. *Id.*

Other courts use reasoning similar to that espoused by the Ninth and Eleventh Circuit decisions, holding that the right to choice of counsel mandates that a trial judge must allow for substitution of retained counsel “unless a contrary result is compelled by purposes inherent in the fair, efficient and orderly administration of justice.”¹⁰⁸ In *Utah v. Barber*, the Utah Court of Appeals reversed the trial court’s denial of a request to substitute retained counsel for appointed counsel.¹⁰⁹ In its reasoning, the court noted, “Attorneys are not fungible; often the most important decision a defendant makes in shaping his defense is his selection of an attorney.”¹¹⁰ The court identified the limitations on the right to counsel of choice but held that, as long as the “incoming counsel is willing and ethically available,” the defendant can fire his retained counsel for any reason or no reason.¹¹¹ The court further found that the defendant must show “good cause” to justify the substitution of counsel only when the defendant’s substitution would “obstruct the orderly procession of the case.”¹¹²

Similarly, the Oklahoma Court of Criminal Appeals held as a matter of first impression that “absent a showing of undue delay, disruption of the orderly process of justice or prejudice to the defendant or opposing counsel, a defendant who timely seeks to discharge retained counsel—whether indigency results or not—should be permitted to do so.”¹¹³ The Oklahoma court, thus, placed the burden on the court to find that there would be a disruption of the criminal justice process rather than requiring the defendant to show good cause supporting his motion to fire his retained counsel and replace him with an appointed attorney.¹¹⁴

The courts have extended this rationale for replacing retained counsel with appointed counsel to other areas that the Sixth Amendment implicates. For example, the Maryland Court of Appeals noted the presumption in favor of a defendant’s right to choice of counsel after a trial court barred one of the defendant’s three retained attorneys from representing him based upon a potential conflict of interest.¹¹⁵ The Maryland appellate court reversed the conviction, finding that the trial court did not properly scrutinize the potential for conflict.¹¹⁶ While the appellate court acknowledged the limitations on the right to choice of counsel, it emphasized that by barring one of the defendant’s chosen counsel from representing him at trial, the

¹⁰⁸ *Brown*, 785 F.3d at 1343-44.

¹⁰⁹ *Utah v. Barber*, 206 P.3d 1223 (Utah Ct. App. 2009).

¹¹⁰ *Id.* at 1233 (quoting *United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990)).

¹¹¹ *Id.* at 1234.

¹¹² *Id.* at 1233.

¹¹³ *Dixon v. Owens*, 865 P.2d 1250, 1252 (Okla. Crim. App. 1993).

¹¹⁴ *See also* *Colorado v. Munsey*, 232 P.3d 113, 127 (Colo. App. 2009) (“[A] defendant, whether indigent or not, is free to discharge his or her retained counsel without having to show cause, and an indigent defendant may subsequently request appointed counsel, so long as the discharge or request is not made for improper purposes and does not significantly disrupt judicial proceedings.”).

¹¹⁵ *Maryland v. Goldsberry*, 18 A.3d 836 (Md. Ct. App. 2011).

¹¹⁶ *Id.* at 855.

court engaged in a “drastic action” violating the Sixth Amendment right to counsel of choice.¹¹⁷

The Colorado Court of Appeals further extended the reasoning of cases involving a motion to substitute retained counsel for appointed counsel to circumstances where a retained attorney moved to withdraw against the wishes of his client.¹¹⁸ In *Colorado v. Cardenas*, the trial court held an *in camera* hearing in the absence of the defendant in order to determine whether to grant his attorney’s motion to withdraw.¹¹⁹ The appellate court reversed the defendant’s conviction on the basis that the grant of the motion to withdraw and subsequently appoint counsel without the defendant’s presence violated his Sixth Amendment right to counsel of choice.¹²⁰ In support of its decision to apply this standard to cases in which an attorney seeks to withdraw against the wishes of his client, the court noted the fundamental importance of the right to counsel of choice in the adversarial system.¹²¹

Thus, courts following the Ninth and Eleventh Circuit line of reasoning vigorously protect the defendant’s Sixth Amendment rights to choice of counsel by refusing to require that the defendant show any cause supporting his motion to substitute. These decisions place great weight on the constitutional protections afforded under the Sixth Amendment, finding that a trial court’s denial of such a motion to substitute for failure to show good cause creates a fundamental unfairness in the trial that leads to structural error and automatic reversal.

*B. A Showing of Good Cause Required: The First Circuit Standard for
Substitution of Appointed for Retained Counsel*

Even some cases that have strongly protected a defendant’s Sixth Amendment right to counsel of choice have had concurring or dissenting opinions expressing concern over the conflicting standards applied to defendants under the right to choice of counsel and the standards applied to defendants under the right to appointed counsel. Indeed, the Ninth Circuit case frequently cited to support the sanctity of a defendant’s right to choose counsel itself contained a concurrence expressing some reservations and exploring the different interpretations of the two rights.¹²²

In his concurrence in the *Rivera-Corona* case, Judge Fisher examined the difference between a defendant seeking to replace appointed counsel with appointed counsel, where good cause must be shown for the substitution, and a defendant

¹¹⁷ *Id.* The Maryland Court of Appeals explained that, “Before a trial court is permitted to disqualify a criminal defendant’s privately obtained counsel (regardless of whether counsel is the defendant’s only attorney or one of several on the defense team), the court must conduct a hearing on the matter, ‘scrutinize closely the basis for the claim,’ and make evidence based-findings to determine . . . whether there is ‘actual or serious potential for conflict’ that overcomes the presumption the defendant has to his or her counsel of choice.” *Id.* at 850 (internal citations omitted).

¹¹⁸ *Colorado v. Cardenas*, No. 12CA1536, 2015 Colo. App. LEXIS 1051, 2015 WL 4312496, at *1 (Colo. Ct. App. July 16, 2015).

¹¹⁹ *Id.* at *4.

¹²⁰ *Id.* at *5.

¹²¹ *Id.* (“[V]iolation of a defendant’s right to choice of counsel is structural error.”).

¹²² *United States v. Rivera-Corona*, 618 F.3d 976, 985 (9th Cir. 2010) (Fisher, J., concurring).

seeking to replace existing counsel with retained counsel, where good cause need not be shown unless the substitution would result in a delay.¹²³ The concurrence then noted the law is not so clear when a defendant seeks to substitute a retained counsel for an appointed counsel.¹²⁴ The judge argued that prior Ninth Circuit precedent mandated a finding that a defendant must demonstrate good cause for a substitution of counsel under the doctrine of stare decisis.¹²⁵ At the same time, however, the concurring judge indicated that good arguments supported abandoning that standard in favor of the one adopted by the majority.¹²⁶ In its analysis, the concurrence described the conflicting lines of authority addressing these circumstances.¹²⁷ Some courts, like the Ninth Circuit, hold “that a defendant can freely discharge and obtain appointed counsel without establishing good cause.”¹²⁸ But other courts have held that a defendant seeking to replace any counsel with appointed counsel must show good cause for the substitution.¹²⁹

The First Circuit falls into this latter line of authority, holding that a defendant who seeks to substitute his retained counsel with appointed counsel must show good cause for doing so.¹³⁰ In *United States v. Mota-Santana*, the First Circuit held that a defendant who sought to replace retained counsel with appointed counsel must support his motion by showing that the conflict he alleged with his retained counsel “was so great that it resulted in a total lack of communication preventing an adequate defense.”¹³¹ The First Circuit reasoned that, when a defendant seeks to fire his retained counsel and have counsel appointed, “the two actions merge” and therefore the burden is on the defendant to demonstrate good cause as to why the court should permit him to substitute retained counsel for appointed counsel.¹³²

It is interesting to note that those courts that have required a showing of good cause before allowing the substitution of retained counsel for appointed counsel have continued to do so even after the *Gonzalez-Lopez* decision. In April of 2016, the United States District Court for the Northern District of Illinois held that “[t]he right to counsel of choice ‘does not extend to defendants who require counsel to be appointed for them.’”¹³³ The court further noted that as long a defendant is “afforded

¹²³ *Id.* at 984.

¹²⁴ *Id.* at 985.

¹²⁵ *Id.* at 987.

¹²⁶ *Id.* (noting that there are “a number of strong arguments for the proposition that the replacement of retained with appointed counsel should not require a showing of good cause”).

¹²⁷ *Id.* at 985.

¹²⁸ *Id.* at 985.

¹²⁹ *Id.* (noting that the opposing line of authority “perhaps reflect[s] the principle that ‘the right to counsel of choice does not extend to defendants who require counsel to be appointed for them’”).

¹³⁰ *United States v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Fluker v. United States*, No. 13C7643, 2016 U.S. Dist. LEXIS 53823, 2016 WL 1613464, at *9 (N.D. Ill. Apr. 22, 2016) (quoting *United States v. Wallace*, 753 F.3d 671, 675 (7th Cir. 2014)).

adequate representation, an erroneous denial of a motion for substitution is not prejudicial and is therefore harmless.”¹³⁴ The Fifth Circuit has likewise recently held that a “defendant does not have an absolute right to counsel of his choice. Instead, good cause must exist for the withdrawal of counsel.”¹³⁵

There are several factors that have led courts to disagree over the standard to apply where a defendant seeks to substitute retained counsel for appointed counsel. First and foremost, because the language of the Sixth Amendment does not contain any specific reference to either right, courts have broad latitude to interpret the way these rights compare and overlap.¹³⁶ As a result of this lack of constitutional guidance, courts struggle with determining the relative weight to place on the right to choice of counsel versus the right to appointed counsel. Courts that have found a defendant need not show any reason for the substitution of counsel have placed fewer restrictions and, therefore, greater weight on the right to choice of counsel by allowing the defendant to reverse the denial of a substitution of counsel simply by showing that the denial occurred. On the other hand, courts that place equivalent restrictions on a defendant seeking to substitute retained counsel and a defendant seeking to substitute appointed counsel appear to give equal weight to the two rights.

Additional factors that have led courts to disagree on the standards applied relate to the practical difficulties that arise when a defendant seeks to replace counsel. On the one hand, by placing no burden on a defendant seeking to substitute retained counsel, courts emphasize the importance of a defendant’s ability to strategize his own defense. These courts note the difficulties that arise when a retained counsel is forced to continue his representation of a criminal defendant despite his client’s wishes or resources.¹³⁷ On the other hand, by imposing a burden on defendants seeking to substitute retained counsel for appointed counsel, courts emphasize the need for a fair trial and the efficacy of the attorney as a safeguard in ensuring fairness. Requiring defendants to show good cause for the substitution of counsel in these cases also recognizes the sheer number of criminal defendants represented by appointed counsel and the dissatisfaction that many criminal defendants have with their attorneys leading to frequent requests for new counsel.¹³⁸ Concerns over judicial efficiency and the struggle of trial judges to maintain their calendars have

¹³⁴ *Id.* at *8.

¹³⁵ *United States v. Austin*, 812 F.3d 453, 456 (5th Cir. 2016).

¹³⁶ Indeed, the broad language of the Sixth Amendment’s right to counsel has required the courts to determine what, exactly, the right to counsel entails. As discussed *supra* Part I, over the course of the last century, the Supreme Court has interpreted the right to counsel to include the right to choice of counsel, the right to effective assistance of counsel, and the right to appointed counsel. *See also* Kellsie J. Nienhuser, *Criminal Law-Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming After Osborne v. State*, 2012 *Wy* 123, 285 P.3d 248 (Wyo. 2012), 14 WYO. L. REV. 161, 162-63 (2014).

¹³⁷ *See, e.g., United States v. Rivera-Corona*, 618 F.3d 976, 982 (9th Cir. 2010) (“[R]equiring a retained counsel to continue to represent the defendant even if the defendant cannot pay him and no longer wants him . . . is no substitute for appointed counsel paid with public funds and so could not, without more, be in the ‘interests of justice.’”).

¹³⁸ *United States v. White*, 174 F.3d 290, 296 (2d Cir. 1999) (“It would be an understatement to observe that disputes” between attorneys and clients arise often, and that motions to substitute counsel are often the result of those disputes.”).

led these courts to require defendants to demonstrate why they wish to substitute retained counsel for appointed counsel before allowing for such a substitution.

C. Avoiding a Constitutional Standard: Examining the Substitution of Counsel Through Rules Governing Discretionary Powers Afforded Courts to Grant or Deny Continuances

Perhaps in an attempt to reconcile these conflicting values, some courts avoid analyzing cases involving the substitution of counsel under Sixth Amendment standards. While these courts acknowledge the defendant's Sixth Amendment rights to choice of counsel, they focus their analysis on the discretion afforded trial courts in granting continuances that are frequently necessary when a motion to substitute is granted.¹³⁹ By focusing on the law governing a motion to continue, these courts avoid addressing whether the defendant needs to show cause to substitute counsel.¹⁴⁰ Under this discretionary framework, the decision of a trial court to refuse a motion to continue and the consequent denial of the motion to substitute are rarely reversed.¹⁴¹

A trial court has great discretion in maintaining its calendar and ensuring the efficient administration of justice.¹⁴² Because trial judges are balancing multiple cases, motions, pleas, and hearings, they must necessarily be afforded the flexibility to achieve the goal of ensuring a fair and effective process by balancing those needs and setting limits on timing for lawyers, defendants, and other participants in the trial process.¹⁴³

One way in which parties can have an influence over the scheduling of the pretrial and trial process is by moving for a continuance.¹⁴⁴ This happens frequently in criminal trials, and prosecutors and defense attorneys alike can file motions for continuance.¹⁴⁵ Continuances are often sought to ensure witness availability, allow for more discovery, give time for plea negotiations to take place, and countless other reasons.¹⁴⁶ One of the numerous reasons defendants seek a continuance is to give

¹³⁹ See, e.g., *Washington v. Aguirre*, 229 P.3d 669, 676-77 (Wash. 2010) (rejecting the defendant's argument that his right to choice of counsel was violated by denying a request for a continuance).

¹⁴⁰ See, e.g., *United States v. Cordy*, 560 F.3d 808, 815-16 (8th Cir. 2009) (noting the discretion afforded trial courts in denying motions to continue).

¹⁴¹ LAFAVE, *supra* note 18, § 11.4(b), at 613-14.

¹⁴² *Id.*; see also John P. Coffey, *Motion for Continuance*, 74 GEO. L.J. 681, 682-83 (1986) ("A trial court's ruling [denial of a motion to continue] will not be disturbed unless the defendant shows clear abuse of discretion that results in specific prejudice.").

¹⁴³ *Morris v. Slappy*, 461 U.S. 1, 11 (1983) ("Trial judges necessarily require a great deal of latitude in scheduling trials.").

¹⁴⁴ CALIFORNIA CRIMINAL MOTIONS § 1:6 (2015) (noting in the practice notes that "[w]hether for the prosecution or the defense, a motion to continue is often the most important motion that can be made in a criminal case").

¹⁴⁵ See *id.*

¹⁴⁶ Celeste Bacchi, *Continuances in Criminal Cases*, NOLO, <http://www.nolo.com/legal-encyclopedia/continuances-criminal-cases.html> (last viewed Nov. 20, 2016).

their attorneys more time to prepare for trial.¹⁴⁷ This need can often be the result of the appointment or hiring of new counsel just prior to trial.¹⁴⁸

Because a motion to substitute counsel prior to trial frequently leads to the need for a continuance in order to allow the new attorney time to prepare, judges often use their discretionary powers to deny such requests.¹⁴⁹ On review, many appellate courts downplay the constitutional implications of these denials, focusing instead on the discretion afforded trial judges in granting or denying a continuance.¹⁵⁰

The Fourth Circuit examined the trial court's denial of a defendant's request to substitute retained counsel for appointed counsel through the lens of the law on continuances in *United States v. Hagen*.¹⁵¹ In *Hagen*, the defendant fired one retained attorney and replaced him with another.¹⁵² After the relationship with his second attorney deteriorated, the defendant moved to substitute the retained counsel with appointed counsel and to postpone the trial in order to allow the appointed counsel time to prepare.¹⁵³ The trial judge denied both requests, finding that it would take the new attorney six months to prepare for trial, at which point the defendant would likely request a new attorney.¹⁵⁴ The Fourth Circuit concluded that the trial court's denial of the defendant's request was based upon an implicit finding that the request was "at least in part a 'transparent ploy for delay.'"¹⁵⁵ Although the trial court never explicitly stated that the defendant sought to substitute counsel as a mere delay tactic, the Fourth Circuit found that such a determination could be read into the colloquy between the court and the defendant, and this allowed the court to distinguish the case from *Rivera-Corona*.¹⁵⁶ The appellate court noted the high bar for abuse of discretion in denying a motion for a continuance and found that in this

¹⁴⁷ LAFAVE, *supra* note 18, at § 11.4(b).

¹⁴⁸ See Bacchi, *supra* note 146.

¹⁴⁹ LAFAVE, *supra* note 18, at § 11.4(b).

¹⁵⁰ See, e.g., *United States v. Hagen*, 468 F. App'x 373 (4th Cir. 2012).

¹⁵¹ *Id.* at 375.

¹⁵² *Id.*

¹⁵³ *Id.* at 375.

¹⁵⁴ *Id.* at 379. Specifically, the trial judge told the defendant:

[I]f I were to allow you to discharge Mr. Meier[,] . . . appoint another lawyer and continue the case, it would take six months for that lawyer to get up to snuff and be ready for trial. Now, at the end of that six months I'll be having another motion by David Hagen wanting another lawyer because that lawyer too does not want to do it like you want it done . . . You've had two privately retained lawyers now that you can't get along with and you want the court to appoint you a third one, and I'm not going to do it. I'm going to deny the motion, both motions. You either make peace with your lawyer or, Mr. Meier, when we go to trial a month from today, if Mr. Hagen insists on going pro se, you'll be standby counsel.

Id.

¹⁵⁵ *Id.* at 384.

¹⁵⁶ *Id.* at 384-86.

case that bar had not been met.¹⁵⁷ In so doing, the court found that the defendant's right to choice of counsel had not been wrongfully denied.¹⁵⁸

Similarly, the United States District Court for the Eastern District of Michigan examined whether the denial of a defendant's request to substitute counsel was erroneous and found that it was not based upon an application of the rules governing a motion for a continuance.¹⁵⁹ In *Abby v. Prelesnik*, the district court reviewed a habeas petition filed by a defendant who sought to replace retained counsel with appointed counsel prior to trial.¹⁶⁰ The trial judge denied the request and the defendant appealed, asserting a violation of his right to choice of counsel under the Sixth Amendment.¹⁶¹ The state appeals court affirmed, noting that the trial date "had been scheduled for nearly five months and the [defendant] had another attorney who was ready and able to represent his interests."¹⁶² In its habeas review, the district court acknowledged the Supreme Court's holding in *Gonzalez-Lopez* that the wrongful deprivation of the right to choice of counsel is structural error leading to reversal.¹⁶³ However, the court noted that there are limitations on that right and one of those limitations is the trial court's need for flexibility in scheduling and maintaining an efficient calendar.¹⁶⁴ As the court explained,

Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel.¹⁶⁵

The court reasoned that because the trial judge did not abuse his discretion by refusing to delay the date of trial, the defendant's right to choice of counsel was not erroneously denied.¹⁶⁶

The right to choice of counsel is also implicated in cases where a defendant seeks to replace appointed counsel with retained counsel.¹⁶⁷ Just as in cases where a

¹⁵⁷ *Id.* at 387 ("A trial court abuses its discretion when its denial of a motion for continuance is an 'unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.'") (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)).

¹⁵⁸ *Id.* at 387.

¹⁵⁹ *Abby v. Prelesnik*, No. 08-15333, 2012 WL 1019169, 2012 U.S. Dist. LEXIS 40472 (E.D. Mich. Mar. 26, 2012).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *3-4.

¹⁶² *Id.* at *10.

¹⁶³ *Id.* at *7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at *8 (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (internal citation omitted).

¹⁶⁶ *Id.*

defendant seeks to substitute appointed counsel for retained counsel, in cases where the defendant seeks retained counsel, courts have grappled with concerns over the constitutional right to counsel of choice as balanced against the concerns for fairness and scheduling.

For example, in *Washington v. Hampton*, the Supreme Court of Washington reviewed a trial judge's decision to deny a defendant's request to delay trial after granting his request to substitute retained counsel for appointed counsel on the day of trial.¹⁶⁸ The court acknowledged the Sixth Amendment rights at issue in the case but noted that the defendant's right to counsel of choice is limited by "the trial court's need to efficiently administer justice."¹⁶⁹ The court referenced the Supreme Court's *Gonzalez-Lopez* decision and noted that the Supreme Court did not provide guidance on how to determine whether a defendant was erroneously deprived of his right to choice of counsel.¹⁷⁰ However, the *Hampton* court held that the high court "did not limit the factors that trial courts can consider when balancing a defendant's right to choice of counsel and a trial court's need to manage its calendar."¹⁷¹ Thus, the *Hampton* court, in determining whether to grant a motion for continuance, examined various well-established factors, including the length of the continuance, the timing of the request, whether previous motions to continue had been granted, and "whether the continuance would seriously inconvenience witnesses."¹⁷²

After examining the trial court's reasoning for denying the motion for continuance, the state high court held that the denial was not an abuse of discretion,

¹⁶⁷ See, e.g., *Washington v. Hampton*, 361 P.3d 734, 736 (Wash. 2015).

¹⁶⁸ *Id.* at 736.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 738.

¹⁷¹ *Id.* at 737-38.

¹⁷² *Id.* at 740. The factors cited by the court to consider in determining a motion for continuance include:

- 1) whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar;
- 2) the length of the continuance requested;
- 3) whether the continuance would carry the trial date beyond the period specified in the state speedy trial act;
- 4) whether the court had granted previous continuances at the defendant's request;
- 5) whether the continuance would seriously inconvenience the witnesses;
- 6) whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel;
- 7) whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel;
- 8) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation;
- 9) whether there was a "rational basis" for believing that the defendant was seeking to change counsel "primarily for the purpose of delay";
- 10) whether the current counsel was prepared to go to trial;
- 11) whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

Id. (quoting LAFAVE, *supra* note 18, at § 11.4(c)).

and there was, therefore, no erroneous denial of the right to choice of counsel.¹⁷³ Worth noting is the vigorous dissent, which argued that the factors the court relied upon “overvalue the right to appointed counsel at the expense of the right to retained counsel and therefore violate the rule that the right to appointed counsel is a corollary of the Constitution’s principal right to retain counsel of choice.”¹⁷⁴ The dissent also asserted that the court’s consideration of the “convenience factors” did not properly express that “slight inconvenience alone cannot outweigh the fundamental constitutional right to retain counsel of choice.”¹⁷⁵

Significantly, even where the defendant does not explicitly request a continuance, courts have found that a motion to substitute counsel was not erroneously denied based upon the discretion afforded courts in granting motions to continue.¹⁷⁶ In *Hyatt v. Baker*, the defendant moved to substitute retained counsel for appointed counsel during jury selection.¹⁷⁷ The court denied the motion, finding that implicit in the motion was “a prospective motion to continue the case” and further finding that the defendant’s appointed counsel was not shown to be ineffective.¹⁷⁸ The state high court found that the effectiveness of the attorney was irrelevant to an examination of a claimed violation to the right to choice of counsel. However, the court held the trial court had not erroneously denied the substitution request because the request contained an implicit motion to continue and the trial court was within its discretion to deny such a motion.¹⁷⁹ In its review of the habeas petition, the Fourth Circuit affirmed the state court’s ruling, noting “a trial court maintains ‘wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.’”¹⁸⁰ The federal court rejected the defendant’s contention that a continuance was neither necessary nor implicit in his request to substitute counsel, finding that the evidence he provided of this was “insufficient to overcome the trial court’s finding that a motion to continue was ‘implicit’ in [the defendant’s] motion to change attorneys.”¹⁸¹ In so holding, the district court relied

¹⁷³ *Id.* at 741. In considering the defendant’s request, the trial court noted that he knew the defendant’s counsel was “‘a very capable attorney. It wouldn’t be the first time he’s represented someone who may not have always been happy with [him].’ The trial judge further stated ‘I think that happens for most of the defense attorneys that they occasionally have a client who would rather have a different attorney appointed. I don’t think that would in any way impair [the attorney’s] ability to represent his client zealously and capably, and I don’t think there’s any question that [the attorney] is a highly qualified criminal defense attorney.’” *Id.* (alterations in original).

¹⁷⁴ *Id.* at 742-43.

¹⁷⁵ *Id.*

¹⁷⁶ *Hyatt v. Branker*, 569 F.3d 162, 173 (4th Cir. 2009).

¹⁷⁷ *Id.* at 171.

¹⁷⁸ *Id.* at 171-72.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)).

¹⁸¹ *Id.* at 173.

upon the experience of the trial judge in overseeing trials and understanding the nature of the case and the time it would take an attorney to prepare for trial.¹⁸²

Similarly, the Kansas Court of Appeals found a defendant's motion to substitute counsel contained an "implicit" request to continue the case and, therefore, held that denial of the motion was within the trial court's discretion.¹⁸³ In *Kansas v. Andrews*, the defendant sought to replace his appointed counsel with retained counsel on the first day of trial, indicating that he had more confidence in retained counsel and that he did not previously have the money to hire retained counsel.¹⁸⁴ The trial judge denied the defendant's motion, "noting the imposition that the delay would cause the parties, the jury, and the court staff."¹⁸⁵ The court of appeals acknowledged that the defendant did not explicitly request a continuance, but found that "the need for a continuance was implicit in the request for new counsel on the day of trial."¹⁸⁶ The appellate court then went on to examine the denial of the defendant's request under the law governing denials of motions to continue.¹⁸⁷ In examining the case under the standards of a motion to continue, the court distinguished *Gonzalez-Lopez*—finding that the denial of the implicit motion to continue was not erroneous because the trial court did not abuse its discretion in denying an implicit request for continuance.¹⁸⁸ In so holding, the court noted that while the record did not reflect whether a continuance would inconvenience the court, witnesses, counsel, or other parties, the burden was on the defendant to establish an abuse of discretion. By failing to establish any inconvenience, the defendant did not meet that burden.¹⁸⁹ Thus, despite the absence of a motion to continue or any evidence of inconvenience if such a motion had been filed, the court found that the trial court's denial of the motion to substitute was not an abuse of discretion.

¹⁸² *Id.* ("The trial court properly drew on its experience in determining whether a motion to change counsel in the midst of a capital case involving two victims, two murder charges, and two different accomplices would require a delay of the trial. Given these facts, the trial court could reasonably believe that, in order to be effective, any new attorney would require a continuance *after* undertaking the defense. In such a complicated and weighty case, new counsel would undoubtedly need time to study the state's allegations and evidence, the procedural history of the case, and—in consultation with the accused—formulate a defense strategy.") (emphasis in original).

¹⁸³ *State v. Andrews*, No. 102,367, 2011 Kan. App. Unpub. LEXIS 265, at *2 (Kan. Ct. App. Apr. 15, 2011) (unpublished table decision).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *3. The factors examined by the court were derived from *Kansas v. Anthony*, 898 P.3d 1109 (Kan. 1999), and included "(1) whether a continuance would inconvenience witnesses, the court, counsel, or the parties; (2) whether other continuances have been granted; (3) whether legitimate reasons exist for the delay; (4) whether the delay is the fault of the defendant; and (5) whether the denial of a continuance would prejudice the defendant." *Id.*

¹⁸⁸ *Id.* at *8 ("In essence, this court, unlike the *Gonzalez-Lopez* Court, is required to determine whether the district court's deprivation of Andrews' right to counsel of choice was wrongful. The *Anthony* factors, aside from perhaps the prejudice factor, guide this determination.")

¹⁸⁹ *Id.* at *4.

By focusing on the standards and discretion applicable to a motion for continuance, even in circumstances where no such motion was filed, courts avoid the rigid application of the Sixth Amendment right to choice of counsel, a violation of which would automatically lead to reversal and retrial. The discretion afforded trial judges to preserve their schedules, prevent the inconvenience of witnesses and other participants, and ensure the efficient administration of justice affords lower courts wide latitude in denying requests to delay trial.¹⁹⁰ By finding that whenever a defendant seeks to substitute counsel it is likely that a continuance also will be necessary, the courts can review the motion to substitute counsel through the lens of this discretionary standard. In so doing, trial judges can avoid a finding that the denial of a motion to substitute was erroneous and a violation of the Sixth Amendment with a simple determination that the defendant failed to show the trial court abused its discretion in refusing to grant a continuance. Thus, the bar is extremely high for a defendant to show the violation of a constitutional right deemed fundamental to our criminal justice system. Yet, courts regularly employ the high bar to avoid reversing a lower court's denial of a motion to substitute counsel on Sixth Amendment grounds.

The reason that reviewing courts examine these denials through the lens of a motion to continue is likely related to the practical realities of criminal trial practices expressed in many of these cases. Courts must balance the defendant's desire for new counsel against the needs of the judicial system to "efficiently administer justice."¹⁹¹ In so doing, the court must consider its own schedule, the schedules of the attorneys involved in the case, and the inconvenience to witnesses.¹⁹² Because "[a]ny substitution of counsel will 'almost certainly necessitate a last-minute continuance,'"¹⁹³ courts often determine that the substitution necessarily conflicts with "the public's interest in the prompt, effective, and efficient administration of justice"¹⁹⁴ thereby justifying a denial of the request.

The disparity in the standards that courts use to address situations in which the right to choice of counsel and the right to appointed counsel overlap demonstrates the need for the Supreme Court's guidance on this issue. Without such guidance, lower courts are left struggling to determine what a defendant must show in order to replace his attorney. The consequence of a failure to get the standard right is significant: the violation of the right to choice of counsel is a structural error requiring a new trial. Thus, a clear rule needs to be established that protects the fundamental right to choice of counsel while also preserving judicial efficiency and fairness.

¹⁹⁰ *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

¹⁹¹ *Washington v. Hampton*, 361 P.3d 734, 662 (Wash. 2015).

¹⁹² "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Morris*, 461 U.S. at 11; *see also* *Abby v. Prelesnik*, No. 08-15333, 2012 WL 1019169, 2012 U.S. Dist. LEXIS 40472, at *8 (E.D. Mich. Mar. 26, 2012).

¹⁹³ *Cobb v. Warden, Chillicothe Corr. Inst.*, 466 F. App'x 456, 463 (6th Cir. 2012) (quoting *United States v. Whitfield*, 259 F. App'x 830, 834 (6th Cir. 2008)).

¹⁹⁴ *State v. Andrews*, No. 102,367, 2011 Kan. App. Unpub. LEXIS 265, at *2 (Kan. Ct. App. Apr. 15, 2011) (unpublished table decision).

IV. DEVELOPING A CLEARER STANDARD FOR CASES INVOLVING THE
SUBSTITUTION OF COUNSEL

The lower courts' conflicting standards for evaluating the denial of a motion to substitute retained counsel for appointed counsel reflect the challenges presented to trial courts in trying to protect the defendant's constitutional right to choice of counsel while at the same time ensuring the efficiency and efficacy of the criminal justice process. As discussed, the Supreme Court itself has demonstrated the struggle to balance these two competing interests in their cases addressing the substitution of counsel. In *Wheat*, the Court emphasized the need to allow trial courts the latitude to ensure that their calendar needs were met and that "legal proceedings appear fair to all who observe them."¹⁹⁵ Eighteen years later, in the *Gonzalez-Lopez* decision, the Court emphasized the fundamental nature of the defendant's right to choice of counsel and noted that this right was independent of the defendant's right to a fair trial.¹⁹⁶ The *Gonzalez-Lopez* majority took care to note that the decision did not alter its previous opinions on the limitations to the right to counsel of choice. However, it did not provide clear guidance on how lower courts should resolve competing interests when confronted with a motion to substitute retained counsel for appointed counsel.¹⁹⁷

If, as the Supreme Court stated in *Gonzalez-Lopez*, the Sixth Amendment "commands . . . that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best[.]"¹⁹⁸ such a right should not be easily undercut by mere anticipation of delay in trial proceedings. And yet, trial courts must maintain some flexibility in denying such requests when granting the requests would lead to unreasonable delay or cause significant inconvenience to those involved with the proceedings.

The Court could promote both interests by establishing a standard that protects the distinct right to counsel of choice without undermining the court's interest in efficiency. Such a standard must reject the automatic requirement for a defendant to show cause when he chooses to fire his retained counsel and seeks appointed counsel. As the Ninth and Eleventh Circuit's precedent holds, because the right to counsel of choice is a fundamental right, independent of the right to a fair trial, courts cannot and should not place on defendants the burden of establishing good reasons for hiring or firing retained counsel.¹⁹⁹ As long as a defendant can show that he is eligible for appointed counsel, the defendant need not meet any additional standard to show that the motion to substitute should be granted.²⁰⁰ Thus, on appeal, the defendant need not show he was prejudiced by the denial of a request to substitute in order to succeed.²⁰¹ Eliminating the defendant's requirement to show

¹⁹⁵ *Wheat v. United States*, 486 U.S. 153, 160 (1988).

¹⁹⁶ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006).

¹⁹⁷ *Id.* at 151-52.

¹⁹⁸ *Id.* at 146.

¹⁹⁹ *See, e.g., Gonzalez-Lopez*, 548 U.S. at 151; *United States v. Jiminez-Antunez*, 820 F.3d 1267, 1271 (2016).

²⁰⁰ *Gonzalez-Lopez*, 548 U.S. at 151.

²⁰¹ *Id.*

cause clearly protects the presumption in favor of the defendant's right to counsel of choice.

At the same time, this presumption of defendant's right to counsel must be rebuttable in order to satisfy the need of trial courts for flexibility and latitude in maintaining their calendar and assessing scheduling interests. The burden to rebut the presumption of the defendant's right to counsel of choice should be placed on the trial court. The presumption could be overcome by demonstrating, for the record, the delay and inconvenience that the substitution would cause. This explanation should be done in open court with the participation of the defendant and all counsel involved in the case. Once the trial court has established a clear factual record showing the likely impact that a substitution would cause, discretion to deny the motion to substitute should lie with the trial court. The defendant should have the opportunity to contest the findings of the court. However, the ultimate decision on the motion would fall within the trial judge's discretion. Without factual findings on the record clearly indicating the negative impact of the substitution, the presumption would remain with the defendant, and a denial of the motion would be an abuse of discretion.

This standard formalizes many of the standards and strategies that lower courts currently employ to address cases involving motions to substitute. By requiring the trial judge to make clear findings on the record as to why the judge should deny a motion to substitute, the standard forces trial courts to carefully examine whether the substitution would lead to a delay in proceedings that would disrupt the trial process rather than simply making the assumption that such an action would lead to a disruptive result. This standard also provides protection for the defendant's Sixth Amendment rights by removing any burden on the defendant to support or explain his choice to replace counsel. Finally, the standard ensures that the criminal justice process is not only fair but also has the appearance of fairness by requiring transparency and support for a judge's decision to reject a motion to substitute.

V. CONCLUSION

The current conflicting standards that lower courts utilize to address a defendant's motion to substitute counsel reflect confusion over how to balance a defendant's Sixth Amendment right to choice of counsel with the need for a fair and efficient system of justice. Some courts have chosen to utilize the standards employed with the replacement of appointed counsel for different appointed counsel. Those courts have required a defendant to show good cause when he seeks to fire his retained counsel and replace her with appointed counsel. Other courts, recognizing the fundamental importance of the right to choice of counsel, have held that the defendant need not shoulder any burden of proof when firing his retained counsel. Those courts have held that a defendant may fire his retained counsel for any reason or no reason and may receive appointed counsel as long as he is statutorily eligible.

To establish constitutional consistency in this area, this conflict must be resolved in favor of the latter line of cases. As the Supreme Court has held, a defendant's right to choice of counsel is a right independent of the right to a fair trial, so a defendant need not show any prejudice or impact on the outcome of the case to support a finding that his right to choose retained counsel was violated.

While the Sixth Amendment rights of the defendant must be preserved, so too must the discretion of the trial court to maintain its administrative calendar. In order for a system of justice to work effectively and be perceived as fair to all, it must ensure that the trial process is efficient and not unduly inconvenient to all

participants. In order to protect this need, trial judges must be given great latitude in preventing unreasonable delays. By allowing the trial judge discretion to grant or deny a substitution request based upon the demands of the court calendar, such efficiency and fairness (both real and perceived) will be preserved. However, in order to ensure that there is, in fact, a real danger of a disruption to the court calendar or inconvenience to witnesses, the court should and must make findings of fact on the record to that effect, and the defendant must have an opportunity to respond. Once a trial judge has made such explicit findings and rejected the defendant's motion to substitute, an appellate court should only overturn his decision if it meets the high burden of the abuse of discretion standard. Consequently, a judge cannot simply predict or assume that a substitution of counsel would lead to a motion to continue the trial, but the court must make explicit findings as to why delay is likely.

With the current lack of guidance from the Supreme Court and the clear circuit split, neither courts nor defendants and their attorneys know the circumstances under which a motion to substitute will be granted. Should the Court adopt a standard such as that proposed in this Article, it would preserve the Sixth Amendment right to counsel of choice and ensure that the trial court continues to have great discretion in managing its calendar. The proposed standard would help provide clearer guidance to trial courts on how to handle motions to substitute.