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Administration of the Criminal Justice System: When Efficiency Trumps a Fundamental Right

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ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM: WHEN EFFICIENCY TRUMPS A FUNDAMENTAL RIGHT

COURT OF APPEALS OF NEW YORK

People v. O'Daniel[1]
(decided October 21, 2014)

I. INTRODUCTION

The right of accused persons to retain counsel for their defense, while not firmly rooted in our common law heritage, is of great significance to the preservation of liberty.[2] Still, nowhere in the language of the Sixth Amendment can a reader find an express right regarding choice of counsel. However, as the United States Supreme Court held in 1932 when deciding the seminal case of *Powell v. Alabama*, it is now "*hardly necessary*" to point out that a criminal defendant needs to be granted a fair opportunity to retain counsel of his or her own choice.[3]

In New York, non-indigent criminal defendants facing a sentence of imprisonment retain a qualified constitutional right to representation by their counsel of choice, and as such must be permitted an opportunity to choose and retain counsel for their defense.[4] And, because the choice of attorney in a criminal proceeding can be critical to a successful defense, it has been deemed to constitute a fundamental right provided by the Sixth Amendment of the United States Constitution.[5] However, not giving the accused an ample opportunity to hire and consult with his or her chosen attorney produces outcomes

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[1] 21 N.E.3d 209 (N.Y. 2014) [hereinafter *O'Daniel 2*].

[2] Crooker v. Alabama, 357 U.S. 433, 439 (1958).

[3] 287 U.S. 45, 53 (1932) (emphasis added).

[4] People v. O'Daniel, 963 N.Y.S.2d 737, 740 (App. Div. 3d Dep't 2013) [hereinafter *O'Daniel 1*]; Wheat v. United States, 486 U.S. 156, 159 (1988).

[5] People v. Arroyave, 401 N.E.2d 393, 396 (N.Y. 1980); U.S. CONST. amend. VI; N.Y. CONST. art. 1, § 6; "It is hardly necessary to say that . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53 (1932). However, the right to counsel of choice is "circumscribed in several important respects." *Wheat*, 486 U.S. at 159.

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where the right to counsel is just short of worthless.[6]

On April 11, 2013, in *People v. O'Daniel*, New York's highest court upheld the Clinton County Court's decision to deny William O'Daniel this constitutionally-granted right by invoking "[t]he efficient administration of the criminal justice system" and, in doing so, endorsed the decision that required him to go to trial with counsel not of his choosing.[7] That decision, efficient as it may have been, was arguably not constitutionally permissible.[8] The purpose of this Note is to scrutinize the facts surrounding the conviction of William O'Daniel and to examine whether—as the Chief Judge of New York's Court of Appeals has concluded—Mr. O'Daniel's Sixth Amendment right to counsel of his choosing was violated. Ultimately, this Note concludes that the decision by the trial court to force William O'Daniel to trial was a structural defect of the sort that should have required an automatic reversal of his conviction and a new trial, regardless of the strength of the evidence.

II. BACKGROUND

A. Facts of the Case

Finding himself faced with a myriad of serious criminal charges, William O'Daniel retained defense counsel.[9] When he was retained, O'Daniel's attorney, James Martineau Jr., was ailing from a debilitating medical condition.[10] As the case progressed, two adjournments were requested due to Martineau's poor health;[11] in March 2010, Martineau's condition worsened due to a "flare-up," and, in April of the same year, a second adjournment request on medical grounds was made following Martineau's hospitalization.[12] During the April request, the defense mentioned that "if adjournment were problematic for County Court then he would 'advise his client

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[6] Chandler v. Fretag, 348 U.S. 3, 10 (1954).

[7] *O'Daniel 2*, 21 N.E.3d at 211-12.

[8] *Id.* at 214 (Lippman, C.J., dissenting).

[9] *Id.* at 210. O'Daniel was charged with "two counts of rape in the first degree, one count of attempted rape in the first degree, two counts of sexual abuse in the first degree, and two counts of endangering the welfare of a child." *Id.*

[10] *Id.*

[11] *O'Daniel 2*, 21 N.E.3d at 210.

[12] *Id.*

and assist him in attempting to obtain substitute counsel in an effort to move this matter along.'"[13] At the behest of Clinton County Court, a second chair, Keith Bruno, was chosen in advance of the rescheduled trial date by Martineau to take over if his health deteriorated further.[14] In the fall of 2010, just before trial was set to begin, Martineau's health took a turn for the worse.[15] From there, the defendant's file was sent to Bruno's office, and he and O'Daniel met the following day.[16]

A week before the trial was set to start, Bruno moved to adjourn the trial date on behalf of the defendant.[17] The reasoning presented to the court was that O'Daniel believed "that the legal system . . . was being unfair to him because of Martineau's health."[18] Bruno also informed the court that he had "'reviewed defendant's entire file' and was 'confident' that, should the motion be denied, he would 'be prepared and ready to go forward to trial' the following week," adding that he told O'Daniel that the court had an "obligation to move matters along in a timely fashion."[19] That request, opposed by the People, was denied.[20]

Subsequently, on the day the trial was set to begin, a second request for postponement was made by Bruno on behalf of the defendant, based specifically on the fact that O'Daniel's retained counsel, Martineau, was disabled and unable to assist him at trial.[21] Bruno informed the court that O'Daniel, "from his perspective, [was] of the opinion that we need more time to prepare for the trial."[22] Again the People opposed the defendant's request, and the court denied the motion, finding that "Bruno had not indicated 'that he is unable to proceed directly' or 'that he is in need of extra time with regard to a spe-

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[13] *Id.* (internal brackets omitted).

[14] *O'Daniel 1*, 963 N.Y.S.2d at 740.

[15] *O'Daniel 2*, 21 N.E.3d at 210.

[16] *Id.*

[17] *Id.*

[18] *Id.* (internal brackets omitted).

[19] *Id.*

[20] *O'Daniel 2*, 21 N.E.3d at 210.

[21] *Id.* at 212-13. *See also* N.Y.C.P.L.R. § 321(c) (McKinney 2015) ("If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.").

[22] *O'Daniel 2*, 21 N.E.3d at 210.

cific need to prepare in some specific way.'"[23] Jury selection began that same day, followed by a trial that ended in the conviction and sentencing of William O'Daniel.[24] An appeal followed.[25]

B. Supreme Court, Appellate Division

The New York Supreme Court, Appellate Division, Third Department, affirmed the decision of County Court.[26] Regarding O'Daniel's assertion that he was without the assistance of counsel at a pretrial conference,[27] the court observed that, even though Bruno, not Martineau, appeared on the defendant's behalf at the conference, "Bruno . . . indicated that he had reviewed defendant's 'entire file' and discussed 'at length' . . . the terms of the People's pending offer . . . [and] the 'potential consequences of going to trial . . . .'"[28] As such, the court regarded the claim as "patently meritless."[29]

O'Daniel's next claims—that he was unable to go forward with counsel of his choosing, that the court interfered with a standing attorney/client relationship, and that the court abused its discretion when refusing to grant an additional adjournment—were found by the court to be equally unpersuasive.[30] "[N]oticeably absent from the record is any indication that defendant was unwilling to proceed to trial with Bruno as counsel or . . . that he sought further adjournment of the trial date for the express purpose of retaining another attorney."[31] To the contrary, the court noted, "Bruno indicated . . . that he had reviewed defendant's 'entire file,' met with [O'Daniel] 'quite frequently' and was 'confident' that, if the trial proceeded as scheduled, he would be 'prepared and ready to go forward.'"[32]

An additional claim that O'Daniel was denied effective assistance of counsel was also found to be without merit.[33] Satisfied that

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[23] *Id.*

[24] *Id.*

[25] *Id.* at 211.

[26] *Id.*

[27] *See* N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 2010) ("The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action.").

[28] *O'Daniel 1*, 963 N.Y.S.2d at 740.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *O'Daniel 1*, 963 N.Y.S.2d at 741.

O'Daniel received "meaningful representation," the court referred to the trial record, which indicated that Bruno's opening and closing statements were "cogent," that his cross-examination of the People's witnesses was "effective," that he "made appropriate objections" throughout the trial, and presented a "viable–albeit unsuccessful–defense."[34] The last claim the court considered was that the underlying verdict was against the weight of the evidence.[35] After discussing the trial testimony and the evidence presented, the court ultimately deferred to the decision made by the jury, discerning no basis on which to disturb their determination.[36]

In its holding, the court conceded that criminal defendants have a "constitutional right to be represented by counsel of their choosing and must be accorded an opportunity to select and retain such counsel."[37] In finding no error with respect to choice, the opinion focused on the fact that the right to choose is not without qualification; a defendant may not exercise this right with the goal of delaying a judicial proceeding, which is what the Third Department concluded O'Daniel was attempting to accomplish[38]

C. Court of Appeals of New York

1. The Majority

Upon being denied relief by the state Supreme Court, O'Daniel pursued his appeal and was granted leave by the Court of Appeals of New York in 2014.[39] Basing its decision on the premise that O'Daniel's adjournment requests were meant to delay justice (and not meant to exercise his constitutionally-guaranteed right of proceeding with counsel of his choosing), the court, in a 6-1 decision, affirmed the order of the Appellate Division.[40]

In its decision, the majority opinion framed the question presented as whether Clinton County Court was responsible to inquire whether the defendant was actually seeking new counsel when re-

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 740.
[38] *O'Daniel 1*, 963 N.Y.S.2d at 740.
[39] O'Daniel *2*, 21 N.E.3d at 211.
[40] *Id.* at 211-12.

questing an adjournment.[41] The holding specified that denials of such motions are not unconstitutional solely because they are not accompanied by an inquiry relative to a defendant seeking new counsel.[42] The lower court's decision was affirmed when the Court of Appeals concluded that O'Daniel was not in fact seeking new counsel, nor was he requesting an adjournment with hope that the health of Martineau—his sole retained legal counsel—would improve quickly.[43] Limiting the analysis to only that which was addressed by the majority's holding, the efficient administration of criminal justice, may seem to lend itself to upholding the conviction; however, as then-New York Court of Appeals Chief Judge Lipmann explained, William O'Daniel's fundamental and constitutional rights were violated.[44]

2. The Dissent

Chief Judge Lippman's dissent in *People v. O'Daniel* took issue with considerations made by the majority, as well as the Third Department. He pointed out that Bruno was "never substituted for Martineau, or even retained as co-counsel by defendant," and that the trial court, which was primarily responsible for Bruno's becoming trial counsel, "knew that Mr. Bruno was not appearing at defendant's behest but at the request of Mr. Martineau to accommodate the trial court's concern with Standards and Goals."[45] Chief Judge Lipmann went on to say that O'Daniel's actions could have left "*no doubt* that defendant was invoking his right to be represented by an attorney of his choosing."[46] He came to this conclusion based on the substance of a motion filed by O'Daniel pursuant to N.Y.C.P.L.R. section 321(c).[47] This civil statute calls for a thirty-day stay of all proceedings against a party whose attorney becomes disabled so as to permit the party to retain other counsel.[48] Everyone involved understood Martineau to be disabled, and Bruno reiterated to the trial court, upon filing the motion, that Martineau, not he, was O'Daniel's retained

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41 *Id.* at 212.

42 *Id.*

43 *Id.*

44 *O'Daniel 2*, 21 N.E.3d at 214 (Lippman, C.J., dissenting).

45 *Id.* at 212.

46 *Id.* at 212-13 (emphasis added).

47 *Id.* at 213; *supra* note 21.

48 *Id.*

counsel.[49] Further, while both majority decisions eschewed the possibility of a valid, legal reason having existed for the defendant's adjournment request, Chief Judge Lipmann pointed out in his dissent that "the lengthy pendency of the prosecution was attributable to adjournments requested by both sides and there was . . . no apparent urgency to try [a] matter . . . based on relatively recent allegations of misconduct said to have taken place years before."[50] It is clear, he added, that defendant's request for a stay was not a dilatory tactic; the serious deterioration of Martineau's health only two weeks prior to the start of trial was not something over which O'Daniel had any control.[51] Finally, Chief Judge Lipmann—the lone dissenter—concluded that the trial court's decision was not a constitutionally permissible alternative since it forced the defendant to trial forthwith with counsel he had not retained.[52]

The rationale applied by the dissent, although lacking support, is grounded in fairness and precedent. William O'Daniel was not, in fact, wasting the trial court's time by causing unnecessary delays. Rather, he was subject not only to his chosen attorney's poor health, but also to a ruling that rendered his fundamental right to choose virtually worthless.

III. THE QUALIFIED RIGHT TO CHOOSE

Without question, the right to choice of counsel is qualified in many important respects.[53] Because O'Daniel is not an indigent defendant and does not require counsel to be appointed for him, that

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[49] *O'Daniel 2*, 21 N.E.3d at 213.

[50] *Id.*

[51] *Id.* at 213-14.

[52] *Id.* at 214.

[53] *Wheat*, 486 U.S. 153, 159 (1988); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 151-52 (2006) [hereinafter *Gonzalez-Lopez 2*].

> [T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them . . . [n]or may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation . . . [and] we have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar . . . [and] the court [*sic*] has, moreover, 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.

Id.

particular qualification will not be a subject of this Note. And since no conflicts existed that might have precluded either Martineau or Bruno from litigating the case, that qualification is considered moot for the purposes of this paper as well. This Note's purpose is to examine the law governing adjournments made on the basis of the constitutionally-granted right to choice of counsel, and whether William O'Daniel's request was sufficiently *reasonable*.[54]

A. The Federal Approach

Similar to all criminal defendants in the various states, an individual charged with a crime in a federal court is entitled to the assistance of counsel for his defense.[55] When defendants are able to retain their own counsel and do not ask that one be appointed, they must be given a fair opportunity and a reasonable time to secure counsel of their own choice, though they may not insist upon that right in such a way that impedes the orderly procedure in courts of justice.[56] A profusion of case law exists in which federal courts have found constitutional violations when trial courts have denied continuances that were sought by a defendant so that the retained attorney could try the case.[57]

The facts of *Releford v. United States* are quite similar to the circumstances in which William O'Daniel found himself. Defendant Releford's retained attorney was hospitalized before the start of trial.[58] As the trial date neared, it became evident that the attorney, Mr. Kay, would not be out of the hospital quickly enough to be at trial.[59] At that point, a different attorney who shared office space with Kay filed an affidavit indicating Kay was in the hospital and that he was expected to be released within fifteen days.[60] In an attempt to appoint new counsel to Releford, the court ordered Kay's office-suitemate, Mr. Buckalew, to bring the defendant into court so that a pauper's

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[54] *See* United States v. Burton, 584 F.2d 485, 490-91 (D.C. 1978) ("What is a reasonable delay necessarily depends on all the surrounding facts and circumstances," and there are many "factors to be considered in the balance . . . .").

[55] Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

[56] Releford v. U.S., 288 F.2d 298, 301 (9th Cir. 1961).

[57] Morris v. Slappy, 461 U.S. 1, 21 (1983) (Brennan, J., concurring).

[58] *Releford*, 288 F.2d.at 299.

[59] *Id.*

[60] *Id.*

oath could be signed and Buckalew could be appointed.[61] The defendant declined to sign, stating that he was not a pauper and also that he did not wish to have Buckalew serve as a substitute for his retained counsel.[62] At somewhat of an impasse, the court was not able to appoint or compensate Buckalew because the oath had not been signed by the defendant, yet the court went on to express that "under the circumstances it was necessary for Buckalew to accept the responsibility of defending Releford . . . because Buckalew and Kay shared offices . . . [and] he would have to look to Kay for his compensation."[63] The court went on to tell Buckalew that its decision to appoint him was based on the fact he shared an office with Kay and knew something about the case—an assumption quickly disabused by Buckalew—though he did admit to both having the case for a week and discussing it with Releford.[64] The trial went on as planned and Releford was convicted.[65]

On appeal, Releford's contention was that he was denied the right to counsel of his own choice, and that even though Buckalew's defense was not ineffective,[66] the error is reversible without a need to show any prejudice.[67] Granting leave to appeal, the United States Court of Appeals for the Ninth Circuit agreed with the defendant, holding that "the proper alternative . . . was to inform Releford that the trial could not be that long delayed and that a continuance would be granted for such reasonable time as might be necessary for Releford to secure substitute counsel . . . ."[68] The judgment by the lower court was then reversed and remanded with directions for a new trial.[69]

The facts of *Releford* are not all that distinguishable from

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[61] *Id.*

[62] *Releford*, 288 F.2d at 299.

[63] *Id.* at 300.

[64] *Id.* at 300-01.

[65] *Id.* at 301.

[66] *See generally* Strickland v. Washington, 466 U.S. 668 (1984). Claims charging ineffective assistance of counsel must be evaluated under the two-prong standard set forth in *Strickland v. Washington*. Under the first prong, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. The second prong necessitates displaying that the "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.* at 693.

[67] *Releford*, 288 F.3d at 301.

[68] *Id.* at 301-02.

[69] *Id.* at 302.

what transpired in William O'Daniel's case. The court, in the interest of efficiency, appointed an unwanted attorney who tried a case under circumstances that gave rise to a genuine and reasonable concern regarding representation. Buckalew—like Bruno—was able to competently advocate for his client, but the Ninth Circuit, unlike the County Court in O'Daniel's case, correctly recognized that effective representation does not vitiate the right to counsel of choice.

Subsequently, in *Gandy v. Alabama*,[70] the Court of Appeals for the Fifth Circuit found that due process had been violated when the trial court denied a continuance and forced the defendant to trial with an attorney he had not retained.[71] Refusing the defendant the right to choose his counsel, in the court's view, rendered the trial "fundamentally unfair."[72]

Years later, in *Linton v. Perini*,[73] defendant Linton appealed the denial of a writ of habeas corpus petition, claiming that he was denied, without sufficient reason, the right to go to trial with the counsel of his choosing.[74] At arraignment in the Ohio Common Pleas Court,[75] Mr. Linton was represented by his retained counsel, Mr. Fanelly, and pled not guilty.[76] Subsequently, Fanelly requested that the trial date be set for early the next month, rather than ten days later, because he had other obligations and could not adequately prepare for trial.[77] The trial judge declined to push back the trial date over defendant's objections, at which point Fanelly withdrew as counsel.[78] Allowing the withdrawal, the court instructed Mr. Linton to retain a different attorney to defend him ten days later.[79] That same day, the defendant told the court that he could not obtain counsel, which, in turn, caused the court to appoint Robert Bulford to represent him.[80] Bulford immediately filed for a continuance, claiming that he would need more than ten days to prepare for trial.[81] The trial judge denied

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[70] 569 F.2d 1318 (5th Cir. 1978).

[71] *Gandy*, 569 F.2d at 1319.

[72] *Id.* at 1327.

[73] 656 F.2d. 207 (6th Cir. 1981).

[74] *Linton*, 656 F.2d at 208.

[75] Linton was charged with five felony counts – four for rape and one for kidnapping. *Id.*

[76] *Id.*

[77] *Id.*

[78] *Linton*, 656 F.2d. at 208.

[79] *Id.*

[80] *Id.*

[81] *Id.*

the motion, which was followed by another continuance request—filed the morning on which the trial was set to begin, and this time in an attempt to allow defendant's originally retained counsel, Mr. Fanelly, to resume his representation.[82] After the denial of that request as well, the trial commenced the following week and, two days later, the jury came back with a verdict of guilty on four of the five charges.[83]

Following the guilty verdict, the Ohio Court of Appeals affirmed the judgement and the Supreme Court of Ohio denied leave to appeal.[84] Linton brought a habeas petition in the United States District Court for the Northern District of Ohio, which resulted in the Magistrate producing a detailed report recommending the dismissal of the petition.[85] While the District Court Magistrate held that "the State had not met its burden of showing that the denial of the continuance was reasonable" and that Linton "had established a denial of his constitutional right to be represented by counsel of his own choice," he concluded that Linton "had not met his burden of establishing prejudice as a result of the trial court's deprivation of his right to representation of counsel of his choice."[86] The District Court agreed and adopted the Magistrate's recommendation, which led to an appeal to the United States Court of Appeals for the Sixth Circuit.[87]

The Sixth Circuit, finding that the trial judge "acted unreasonably and arbitrarily,"[88] explained:

> The right to choose one's own counsel is an *essential component* of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut. It is also true that a trial court, acting in the name of calendar control, cannot arbitrarily

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[82] *Id.* Although the second request for a continuance was denied, the court had scheduling problems and pushed back the trial date an additional four days. *Linton*, 656 F.2d at 208.

[83] *Id.* Linton was sentenced to be incarcerated to between seven and twenty-five years. *Id.*

[84] *Id.*

[85] *Id.*

[86] *Linton*, 656 F.2d at 208.

[87] *Id.*

[88] *Id.* at 212.

> and unreasonably interfere with a client's right to be represented by the attorney he has selected . . . . This does not mean that a trial court cannot tightly control its own docket, or that its assignment of cases can be [unreasonably delayed] by defense counsel and defendants. A court must always keep control of its own docket, but in doing so it must be reasonable and consider the constitutional right of a defendant to have retained counsel of his choice.[89]

The court went on to observe that "nothing in the record indicate[d] that the requested continuance involved a scheme to delay the trial . . . [and that] there was no showing of inconvenience to the witnesses, opposing counsel, or the court."[90] As such, the District Court's decision was reversed and the case remanded for a new trial.[91]

Linton is comparable to *O'Daniel* because there was no indication in either case that the defendant's objective was to delay the start of the trial. In *Linton*, the defendant's attorney was physically incapable of assisting his client at the start of trial, just as Martineau was physically incapable of representing O'Daniel at trial. However, here, unlike the court in *O'Daniel*, when the court appointed an attorney who filed two continuances on behalf of his client because of his desire to proceed with an attorney of his choice, the Sixth Circuit Court of Appeals concluded the action was arbitrary and unreasonable.

1. What is Reasonable?

The *Linton* opinion explains that the right to retain counsel of choice is subject to a standard of reasonableness when requesting delays.[92] A leading case on the somewhat elusive concern, *United States v. Burton*, decided by the United States Court of Appeals for the District of Columbia Circuit, offers some guidance in evaluating requests for a continuance:

> What is a reasonable delay necessarily depends on all

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[89] *Id.* at 209 (emphasis added).
[90] *Id.* at 212.
[91] *Linton*, 656 F.2d at 212.
[92] *Id.* at 209.

> the surrounding facts and circumstances. Some of the factors to be considered in the balance include: the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; whether defendant has other competent counsel prepared to try the case, including the consideration of whether other counsel was retained as lead or associate counsel; whether denying the continuance will result in an identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case.[93]

The decision to grant a continuance is customarily completely at the discretion of the trial judge, and there are no mechanical tests which can decide whether a denial arbitrarily violates due process.[94] The conclusion of any examination must be based on the circumstances that exist in every case, especially those reasons available to the trial judge when the request is denied.[95]

Notably, the *Burton* court included prejudice of a substantial or material nature when identifying the "appropriate subject of a trial court's attention" where continuances are sought.[96] Considering the great volume of appeals based on Sixth Amendment rights, this inexorably leads to the inquiry: by what standard do we evaluate claims alleging a violation of the constitutionally-granted right to retain counsel of one's choosing? After all, we have seen what happens as a result of *Strickland's* prejudice prong[97] needing to be satisfied.[98]

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[93] *Burton*, 584 F.2d at 490-91.

[94] Ungar v. Sarafite, 376 U.S. 575, 589 (1694).

[95] *Ungar*, 376 U.S. at 589.

[96] *Burton*, 584 F.2d at 490-91.

[97] *See supra* note 66.

[98] *See* Richard Klein, *A Generation Later: The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1479 (1999) (focusing on the numerous decisions by which "the [Supreme] Court has led us down a path which has constitutionalized the inade-

Fortunately we were given a great deal of direction by the Supreme Court in *United States v. Gonzalez-Lopez*.

2. United States v. Gonzalez-Lopez

i. Background

In 2006, the Supreme Court heard *United States v. Gonzalez-Lopez* and directly addressed the right to retain counsel of choice, referring to it as "*the root meaning*" of the Sixth Amendment guarantee.[99] Three years earlier, Cuauhtemoc Gonzalez-Lopez was charged in the Eastern District of Missouri with conspiracy to distribute more than one hundred kilograms of marijuana.[100] Upon his arrest his family members hired an attorney, John Fahle, to represent him, and he eventually appeared at both the defendant's detention hearing as well as his arraignment.[101] After his arraignment, Gonzalez-Lopez hired Joseph Low, a California attorney, who appeared along with Fahle at an evidentiary hearing.[102] Even though Low had not yet entered his appearance, the Magistrate accepted Low based on assertions that he intended to file a motion for admission *pro hac vice*.[103] That provisional acceptance would prove to be short-lived when the Magistrate rescinded it after Low passed a note to Fahle during cross-examination in direct violation of a rule of the court.[104] Next, on March 11, 2003, the defendant asked Fahle to stop representing him and told Low he wanted him to be his only attorney.[105] Six days later Low filed for admission *pro hac vice* which was denied the next day without an explanation.[106] Four weeks later, Low submitted a second motion for admission which was again denied without any explanation.[107] Two weeks subsequent Low filed a writ of mandamus in an

quate, incompetent, ineffective assistance of counsel.").

[99] *Gonzalez-Lopez 2*, 548 U.S. at 147-48 (emphasis added).

[100] United States v. Gonzalez-Lopez, 399 F.3d 924, 926 (8th Cir. 2005) [hereinafter *Gonzalez-Lopez 1*].

[101] *Id.*

[102] *Id.* at 926-27.

[103] *Id.* at 927.

[104] *Id.*

[105] *Gonzalez-Lopez 1*, 399 F.3d at 927.

[106] *Id.*

[107] *Id.*

attempt to compel the court to grant his motion for admission *pro hac vice*.[108] The application was dismissed and, additionally, Low submitted a general application for admission to Missouri's Eastern District, a motion that was not responded to until after the Gonzalez-Lopez's trial.[109]

Simultaneous to Low's applications, Fahle filed for a continuance to withdraw as counsel and initiated a 'show cause' hearing seeking sanctions against Low.[110] Fahle's complaint regarding Low was based on Low's having communicated with the defendant about the case even though Low knew Fahle was representing the defendant.[111] At the next hearing the court granted Mr. Gonzalez-Lopez two weeks to retain new counsel and pushed the trial date back more than one month.[112]

The defendant then retained Karl Dickhaus, a St. Louis attorney, as counsel, doing so through Low.[113] Shortly after that, the district court provided its reasons for denying Low admission *pro hac vice*.[114] On July 7, 2013, the first day of trial, Low again made a motion for acceptance and was again denied.[115] Dickhaus—far less experienced with criminal trials than Low—requested of the court that Low be allowed to sit with him during the trial.[116] The court responded by forbidding contact between the two attorneys, and also between Low and Mr. Gonzalez-Lopez, throughout the course of the trial.[117] In fact, there was a United States Marshal that sat between

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[108] *Id.*

[109] *Id.*

[110] *Gonzalez-Lopez 1*, 399 F.3d at 927.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *See id.* at 927-28 ("In denying the motions . . . the Court considered Mr. Low's conduct before the Court in United States v. Serrano . . . . The record in that proceeding indicates that Mr. Low 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. In the same order, the district court noted: 'Mr. Low has sought admission into this Court by every means available. He has been denied admission *pro hac vice* because of allegations of ethical improprieties--the very improprieties that are the subject of the motion for sanctions.").

[115] *Gonzalez-Lopez 1*, 399 F.3d at 928.

[116] *Id.*

[117] *Id.* (The defendant was not able to meet with Low the day the trial started, during lunch or breaks, or after the trial finished for the day. Low was also denied access to a detention facility until a district court ordered permission.) *Id.*

Low and Dickhaus throughout the trial.[118] Cuauhtemoc Gonzalez-Lopez was convicted by a jury of his peers on July 11, 2003.[119]

ii. Holdings

Although the Supreme Court subsequently decided the standard by which denial of counsel claims are to be judged, much is gained by examining closely the holding crafted by the United States Court of Appeals for the Eighth Circuit. Acknowledging plainly that the Sixth Amendment affords the qualified right to choose counsel when facing criminal charges, the court concluded that the lower court erred in denying Low's *pro hac* vice application.[120]

Invoking the Supreme Court's holding in *Arizona v. Fulminante*,[121] the Eighth Circuit explained that constitutional errors that occur during criminal proceedings necessarily fall into one of two classes of errors: those reflecting "structural defects" and those implicating "trial errors."[122] 'Trial error' occurs when the case is being presented to a jury.[123] It is subject to harmless error analysis because it may "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[124] 'Structural defects,' on the other hand, are so exceptionally harmful that they require automatic reversal without consideration of whether error ensued as a direct result.[125]

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[118] *Gonzalez-Lopez 1*, 399 F.3d at 928.

[119] *Id.*

[120] *Gonzalez-Lopez 1*, 399 F.3d at 926.

[121] Ariz. v. Fulminante, 499 U.S. 279 (1991).

[122] *Gonzalez-Lopez 1*, 399 F.3d at 932.

[123] *Fulminante*, 499 U.S. at 307-08; *Annual Review of Criminal Procedure*, 37 GEO. L.J. ANN. CRIM. PROC. 805, 853-56 (2008) ("Trial errors that are subject to harmless error analysis . . . include: (1) certain grand jury procedural violations; (2) errors in examination of prospective jurors; (3) variances between the indictment before the grand jury and the proof offered at trial; (4) misjoinder of defendants or offenses; (5) failure to determine if the defendant understands the nature of charges; (6) failure to inquire whether a guilty plea is voluntary; (7) certain violations of a defendant's rights under the Fourth, Fifth, or Sixth Amendments; (8) the absence of the defendant from trial proceedings; (9) juror misconduct; (10) prosecutorial misconduct; (11) improper exclusion of exculpatory evidence; (12) errors in jury instructions; and (14) sentencing errors, including both constitutional and statutory *Booker* errors.").

[124] *Fulminante*, 499 U.S. at 307-08.

[125] *Id.* at 310; *Annual Review of Criminal Procedure*, 37 GEO. L.J. ANN. CRIM. PROC. 805, 857-60 ("Structural errors include: (1) denial of the right to a jury trial; (2) racial discrimination in jury or grand jury selection; (3) denial of the defendant's right to peremptory challenges; (4) improper removal of potential jurors for cause in capital trials; (5) improper

In *Gonzalez-Lopez*, the precise issue on which the Court of Appeals decided was "whether a solvent [non-indigent] defendant who is denied chosen counsel and who is not impeding the administration of justice, must show prejudice from this denial in order to obtain relief."[126] With an abundance of case law responding to that question in the negative,[127] it was decided here also that the denial of the right to be represented by a chosen attorney results in an automatic reversal of a given conviction.[128] According to the opinion from the Eighth Circuit, utilizing harmless error analysis to decide such cases is improper, as its application effectively *obliterates* the Sixth Amendment right to be represented by counsel of choice by transforming the right to choice of counsel into the right to have effective assistance of counsel.[129]

The United States Supreme Court affirmed the decision five votes to four, identifying a Sixth Amendment violation that required vacating the conviction and remanding the case for a new trial.[130] In fact, the Court noted that it had "little trouble" concluding that unwarranted deprivation of the right to counsel of choice, with "consequences that are necessarily unquantifiable and indeterminate," plainly constitutes structural error.[131]

In its failed attempt to convince the Court, the Government contended that the Sixth Amendment violation was not complete unless the assistance received by substitute counsel was both deficient and prejudicial.[132] The majority adroitly distinguished effective as-

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amendment of the indictment; (6) denial of the right to counsel; (7) denial of the right to choice of counsel due to erroneous disqualification; (8) denial of the right to self-representation at trial; (9) denial of the right to an impartial judge; (10) denial of the right to a public trial; (11) egregious violation of the right to a fair trial; (12) certain discovery violations; and (13) erroneous jury instructions regarding reasonable doubt.").

126 *Gonzalez-Lopez 1*, 399 F.3d at 933.

127 *See* Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000); United States v. Childress, 58 F.3d 693, 736 (D.C. Cir. 1995); Bland v. California, 20 F.3d 1469, 1478 (9th Cir. 1994); United States v. Mendoza-Salgado, 964 F.2d 993, 1015-16 (10th Cir. 1992); United States v. Panzardi Alvarez, 816 F.2d 813, 818 (1st Cir. 1987); Wilson v. Mintzes, 761 F.2d 275, 285-86 (6th Cir. 1985).

128 *Gonzalez-Lopez 1*, 399 F.3d at 933.

129 *Id.* at 935.

130 *Gonzalez-Lopez 2*, 548 U.S. at 152.

131 *Id.* at 150. "It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings . . . . Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id.*

132 *Id.* at 144.

sistance and choice of counsel, stressing that the need to illustrate prejudice in claims charging ineffective assistance emanates from the very meaning of the right at issue; it is a matter of "showing that a violation of the right to effective representation *occurred*."[133] Alternatively, a "choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied."[134] In essence, the Government's argument incorrectly read the Sixth Amendment "as a more detailed version of the Due Process Clause–and then proceeds to give no effect to the details."[135]

Gonzalez-Lopez demands that appellate courts treat deprivation of choice claims as structural errors, and that the level of representation received at trial—no matter how effective—is not relevant to the claim. What this means is that, where abuse of discretion is present in the denial of a choice of counsel request, the case must be remanded for a new trial. And so, whether William O'Daniel received effective representation by Bruno, or even representation that could be qualitatively found to be superior to what he would have received from his retained counsel, Martineau, the analysis must fall completely on the judge's decision not to grant the adjournment.

B. New York's State of Choice

The rights and protections afforded by the U.S. Constitution, when not required in a given state, are virtually meaningless.[136] This precise concern brought about the eventual need for the incorporation doctrine and, through it, selective incorporation—the Supreme Court's decisions regarding which aspects of the Bill of Rights should be applicable to the states as a matter of due process.[137] Consequently, the Sixth Amendment—as incorporated by the Fourteenth

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[133] *Id.* at 150.

[134] *Gonzalez-Lopez 2*, 548 U.S. at 150.

[135] *Id.* at 145.

[136] William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

[137] Ohio ex rel. Eaton v. Price, 364 U.S. 263, 274 (1960); for a more in-depth explanation of the incorporation doctrine and its implications, *see generally*: Jerald H. Israel, *Selective Incorporation: Revisited*, 71 GEO L.J. 253 (1982); *see also* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

Amendment—demands that, in each state, "the trial court must balance the defendant's constitutional right to counsel against the societal interest in the '*prompt and efficient administration of justice*.'"[138]

By now it is certainly well established in New York that the right to counsel includes the qualified right to counsel of choice for a criminal defendant.[139] In actuality, New York's highest court has reliably construed the right to counsel provided by the New York Constitution more broadly than the federal right to counsel has been interpreted by the Supreme Court.[140] Its stance on this matter is that courts ought to be cautious when interfering with an established attorney-client relationship.[141] An individual's right to select an attorney, according to the New York Court of Appeals, implicates both First Amendment and the Sixth Amendment guarantees and should not yield "unless confronted with some overriding competing public interest."[142] New York courts have even acknowledged—expanding on the Supreme Court's majority holding in *Morris v. Slappy*[143]—that the evolving relationship between a criminal defendant and his attorney is of tangible import.[144] In short, the highest binding jurisprudence has instructed the various courts of New York that each is "obligated to respect a party's choice of trial counsel" and, in doing so, "not readily interfere with an attorney-client relationship."[145]

This is not to say, of course, that New York's approach is so liberal that some absolute and unwavering right to choice of counsel exists. Similar to the federal approach, an indigent defendant in New York is guaranteed the right to counsel, but the right to counsel of choice extends only to individuals who are financially able to retain their own counsel.[146] Also, the same qualification to the right of

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[138] *Slappy*, 461 U.S. at 16-17 (emphasis added).

[139] People v. Arroyave, 401 N.E.2d 393, 396 (N.Y. 1980); *see* N.Y. CONST. art. I, § 6.

[140] *See* Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992) ("[S]o valued is the right to counsel in this [New York] State, it has developed independent of its Federal counterpart. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal-well before certain Federal rights were recognized.").

[141] People v. Hall, 387 N.E.2d 610, 611 (N.Y. 1979).

[142] Matter of Abrams, 465 N.E.2d 1, 7-8 (N.Y. 1984).

[143] *See Slappy*, 461 U.S. at 14. (explaining that the Court of Appeals created a "new constitutional rule under the Sixth Amendment" when finding that it "guarantees . . . a meaningful attorney-client relationship.").

[144] People v. Gomberg, 342 N.E.2d 550, 553 (N.Y. 1975).

[145] *See* Matter of Daniel C., 472 N.Y.S.2d 666, 675 (App. Div. 2d Dep't 1984) (citing to decisions of the New York Court of Appeals—the highest court in the state of New York).

[146] People v. Sawyer, 438 N.E.2d 1133, 1136 (N.Y. 1982); People v. Porto, 942 N.E.2d

choice applies when a conflict of interest exists.[147] Although affording an absolute right to choice of counsel would be improper, what results when that right of choice has actually been denied in New York?

1. Denial of Choice is Reversible Error

New York courts remain watchful in their attempts to ensure that the right to counsel of choice is protected.[148] In doing so, it has been held to be reversible error during circumstances in which "a court proceeds with the trial, the taking of a guilty plea, or sentencing in the absence of the defendant's retained counsel, even though an attorney has been assigned to represent the defendant's interests."[149]

In *People v. Fitch*,[150] the Second Department's Appellate Division held that substitution of assigned counsel in lieu of the defendant's absent retained counsel deprived the defendant of a substantial constitutional right.[151] In *People v. Gordon*,[152] the constitutional rights of the defendant were violated when, because of the absence of defendant's retained counsel, the court assigned counsel to the defendant when he was already represented by counsel of his own choosing.[153] Similarly, in *People v. Iacona*,[154] the court held that "the assignment of counsel was an improvident exercise of discretion

283, 287 (N.Y. 2010) ("While a court has a duty to investigate complaints concerning counsel, this is far from suggesting that an indigent's request that a court assign new counsel is to be granted casually.") (internal quotations omitted).

147 In *People v. Jean-Baptiste*, the Appellate Division, Second Department held that the defendant "was not deprived of his right to counsel of his choice . . . by the trial court's decision to disqualify defense counsel . . . [when] defense counsel's continued representation of the defendant would present a clear conflict of interest." 858 N.Y.S.2d 388, 388-89 (App. Div. 2d Dep't 2008).

148 *Arroyave*, 401 N.E.2d at 396.

149 *Id.* (emphasis added).

150 People v. Fitch, 269 N.Y.S.2d 521 (App. Div. 2d Dep't 1966).

151 *Id.* at 521.

152 People v. Gordon, 30 N.Y.S.2d 625 (App. Div. 2d Dep't 1941).

153 *Id.* at 627.

> In our opinion the constitutional rights of the appellant were violated. It was error for the learned County Judge to refuse to honor the legal engagement of the defendant's attorney in the highest court of a sister State. The learned court committed further error by assigning counsel to defend the appellant at a time when he was represented by an attorney of his own choosing.

Id.

154 People v. Iacona, 254 N.Y.S.2d 359 (App. Div. 2d Dep't 1964).

since the defendant was thereby deprived of the services of counsel theretofore retained by him."[155] And, in *People v. DiSalvo*,[156] an associate from the office of the defendant's retained counsel requested an adjournment based on the fact that the attorney was absent from the proceeding and could not be in court.[157] In its holding, the Second Department ruled that "the denial of the adjournment so as to enable counsel of the defendant's choice to be present" deprived him of a substantial constitutional right.[158]

Each of these cases, especially when read as clarifying the scope of what constitutes the denial of counsel, leads to the conclusion that William O'Daniel's conviction should have been reversed. Not only was his counsel substituted by the court in lieu of retained counsel, his retained attorney was physically incapable of being present and he was forced to trial nevertheless. It is curious that William O'Daniel can meet the bar of either holding's concerns, and yet he remains without a new trial.

As noted by each court, respectively, denial of the right of choice of counsel is a denial of a significant constitutional right. In each New York case cited above (as with a myriad of others throughout the development of this particular Sixth Amendment protection in New York and across the country), the decisions by the lower courts involved were "reversed on the law."[159] Conversely, many cases regarding the deprivation of counsel of choice in New York have been decided with very different outcomes, largely because the judgments made at trial were not eventually found to be abuses of discretion on appeal.[160] The most relevant New York case regarding these concerns and the efficient administration of criminal justice is *People v. Arroyave*.

In *Arroyave*, the sole issue presented for determination was whether the denial of a motion requesting an adjournment for newly retained counsel to prepare for the trial deprived the defendant of his

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155 *Id.* at 360.

156 People v. DiSalvo, 242 N.Y.S.2d 886 (App. Div. 2d Dep't 1963).

157 *Id.* at 887. Unlike in *O'Daniel*, however, the associate protested vigorously because he was completely unfamiliar with the facts of the case. *Id.*

158 *Id.*

159 *Gordon*, 30 N.Y.S.2d at 628; *DiSalvo*, 242 N.Y.S.2d at 886; *Iacona*, 254 N.Y.S.2d at 360; *Fitch*, 269 N.Y.S.2d at 521.

160 *See generally* People v. Milord, 981 N.Y.S.2d 453 (App Div. 2d Dep't 2014); People v. Kearney, 806 N.Y.S.2d 777 (App. Div. 3d Dep't 2005); People v. Teen, 561 N.Y.S.2d 94 (App. Div. 3d Dep't 1990).

right to be defended by his counsel of choice.[161] Addressing the right to counsel of choice directly, the Court of Appeals acknowledged that the right of choice serves "many critical needs," including the need for a given defendant to be "willing to confide freely and fully in his attorney so that the channels of communication and advice between counsel and his client may remain free-flowing and unobstructed."[162] Such communication, the court opined, is "often times a critical prerequisite to effective legal representation [because] an atmosphere of trust and respect can best be obtained if a defendant's choice of counsel is honored."[163] What follows from this is that defendants are more likely to believe that their rights are scrupulously and diligently protected at trial, best effectuating the ultimate public concern at any criminal trial: "the need to discern the truth."[164] The court then delved into the fact that the right to choose is qualified to the extent that judicial proceedings may not be delayed if doing so prevents the efficient administration of criminal justice.[165]

In its balanced analysis the court noted that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality," proceeding to instruct that "it is equally true that . . . right . . . does not bestow upon a criminal defendant the absolute right to demand that his trial be delayed" because he or she has indicated a desire for a new attorney.[166] Finally, the court instructed that a continuance should be granted largely at the discretion of the trial judge and that claims of denial of counsel of choice can only be assessed through examining the specific facts of each case.[167]

Ultimately, *Arroyave* turned on whether the Department of Corrections obstructed the defendant's attempts to secure counsel of

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[161] *Arroyave*, 401 N.E.2d at 394.

[162] *Id.* at 396.

[163] *Id.*

[164] *Id.*; *Arroyave*, 401 N.E.2d at 396-97 ("In short, courts must remain sensitive to the benefits which both the defendant and the legal process itself derive from permitting the criminally accused to obtain counsel of his own choosing, and should undertake the steps reasonably required to ensure that the defendant's right to retain counsel is honored.").

[165] *Id.* at 397. ("The efficient administration of the criminal justice system is a critical concern to society as a whole, and unnecessary adjournments for the purpose of permitting a defendant to retain different counsel will disrupt court dockets, interfere with the right of other criminal defendants to a speedy trial, and inconvenience witnesses, jurors and opposing counsel.").

[166] *Id.*

[167] *Id.*

his choosing.[168] More than two decades prior to the decision in *Gonzalez-Lopez*, the New York Court of Appeals declined to accept the People's contention that the defendant would be entitled to a new trial only when he can establish prejudice resulting from the court's rejection of an adjournment request.[169] Rather, the correct approach is to ascertain whether the denial of the adjournment request was a proper exercise—or, alternatively, an abuse—of discretion by the trial judge by examining the reasonableness of the decision in light of each of the existing circumstances.[170]

An abuse of discretion occurs when a court fails to exercise legal, reasonable, and sound decision-making.[171] As noted above, continuances should be granted largely at the discretion of a trial judge, which makes successfully proving an abuse of discretion a difficult task; however, the decisions throughout O'Daniel's appeals process overwhelmingly reflected a preference for finality and efficiency, and ignored the fact that he was forced to proceed to trial with the lawyer that he had not retained.[172] As the Chief Judge of New York's highest court concluded, there was "no doubt" that O'Daniel was invoking his constitutionally-granted right to be represented by counsel of his choice,[173] the denial of which constituted a real failure to exercise sound, reasonable, and legal decision-making by the trial court.

IV. DISCUSSION

William O'Daniel was deprived of his Sixth Amendment right to proceed to trial with counsel of his choosing. He and all defendants similarly and unfairly denied their Sixth Amendment right to be represented by counsel of choice should be granted new trials. Without question, many claims regarding the deprivation of this right have been frivolous and should be treated as such. Take, for instance, *People v. Howard*,[174] where the defendant claimed on appeal that the

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[168] *Id.* at 395.

[169] *Arroyave*, 401 N.E.2d at 398. "The constitutional guarantee to be represented by counsel of one's own choosing is a fundamental right, and the doctrine of harmless error is inapplicable upon a showing that such right has been abridged." *Id.*

[170] *Id.* at 397.

[171] *Abuse of Discretion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[172] *O'Daniel 2*, 21 N.E.3d at 213-14.

[173] *Id.* at 212-213.

[174] People v. Howard, 988 N.Y.S.2d 726 (App. Div. 3d Dep't 2014).

County Court committed an abuse of discretion when it denied a request for new counsel without additional inquiry.[175] The Appellate Court responded by highlighting the fact that the defendant "proclaimed himself satisfied with defense counsel's performance . . . and did not request new counsel until after moving to withdraw his guilty plea."[176] Likewise, in *People v. Brown*,[177] the defendant complained that the court abused its discretion in denying an adjournment request in order for new counsel to be retained.[178] Finding no merit in the defendant's arguments, the court found that the record revealed that the trial court "repeatedly accorded the defendant the reasonable opportunity to retain new counsel and . . . despite [that] . . . he failed to produce any other attorney of his choice to pursue his defense and refused to proceed on his own behalf."[179] Certainly, there are innumerous claims without the merit that existed in William O'Daniel's claim. Unfortunately, in *O'Daniel*, as Chief Judge Lippman's dissenting analysis of the appeal recognized, "here, on facts establishing that defendant was, without compelling justification, forced to proceed to trial with an attorney other than the one he had retained, the majority denie[d] relief."[180]

Responding to any contention that O'Daniel was attempting to delay judicial proceedings, Lippman noted that "it is *clear* that defendant's request for a stay expressly to enable the exercise of the right to choose his lawyer, was not a dilatory tactic."[181] Unlike each of his counterparts on the Court of Appeals, and unlike each of his subordinate colleagues overseeing the courts below, the Chief Judge concluded that "there is no record support for the suggestion that . . . defendant was engaging in eleventh hour manipulation to prolong his period of release on bail."[182]

Addressing the true substance the choice being made by William O'Daniel, the dissent emphasized that Bruno had been retained by the defendant in the past to the extent that his decision to hire Martineau for such serious charges was a reflection of a considered

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175 *Id.* at 728.

176 *Id.*

177 People v. Brown, 521 N.Y.S.2d 61 (App. Div. 2d Dep't 1987).

178 *Id.* at 62-63.

179 *Id.* at 62.

180 *O'Daniel 2*, 21 N.E.3d at 212.

181 *Id.* at 213 (emphasis added).

182 *Id.* at 213-14.

preference.[183] The trial court was bound to uphold that preference, absent some compelling reason to do otherwise.[184] In this instance the trial court effectively obliterated O'Daniel's constitutional right and, in doing so, caused the kind of structural error that has been reversed on the federal and state levels.

Admittedly, the motion filed on behalf of O'Daniel is cause for consideration, given it is civil in its nature, but the defense put forth a valid argument for its consideration, an argument with which the Chief Judge agreed.[185] The very language of New York's own state constitution declares "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions."[186] What follows logically is that when a stay is required in a civil action to afford representation by chosen counsel because of an attorney's disability, the same must hold true in criminal proceedings.[187] Even if that is not the case, arguendo, the court was placed on "unequivocal notice that the defendant was asking for an opportunity to decide for himself who would represent him at trial."[188] Regardless, when N.Y.C.P.L.R. § 321(c) and the New York State Constitution are read in conjunction with one another, the inescapable conclusion is that William O'Daniel should have been granted a stay, so as to effectuate his constitutionally-granted right to proceed with counsel of choice. In choosing not to recognize that this is the case, the New York courts have effectively quantified that which cannot be quantified and determined that which cannot be determined without any real, overriding competing public interest.

It is only fair to acknowledge that the case was not in its in-

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183 *Id.* at 213.

184 *Id.*

185 *O'Daniel 2*, 21 N.E.3d at 213.

> [O'Daniel] points out that article I, section 6 of the State Constitution provides that '*In any trial in any court* whatever the party accused shall be allowed to appear and defend in person and with counsel *as in civil actions*' (emphasis added). The argument is thus made that if a stay is required in civil actions to allow representation by counsel — which is to say by chosen counsel — when a defendant's attorney becomes disabled, the same rule must be applicable in criminal proceedings.

Id.

186 N.Y. CONST. art. I, § 6.

187 *O'Daniel 2*, 21 N.E.3d at 213.

188 *Id.*

fancy;[189] however, credit (or blame) for the lengthy pendency of the case was assignable to both sides which had requested adjournments, and "no apparent urgency to try the matter" existed since the somewhat recent charges were attributable to misconduct alleged to have occurred years prior.[190]

V. CONCLUSION

William O'Daniel's retained counsel became unavailable through circumstances which were wholly out of his realm of control. Consequently, when the trial court proceeded to appoint and advance through the trial with counsel other than the lawyer retained and chosen by Mr. O'Daniel, there was a substantive deprivation of his constitutionally-granted Sixth Amendment right to counsel of choice.

Was this an efficient choice on behalf of the criminal justice system? Perhaps. But that point becomes irrelevant when weighed against the fact that the choice was, when analyzed thoroughly, neither reasonable nor constitutionally permissible. And, if efficiency does actually trump constitutional rights, the right to choose really can be just an empty formality after all.

Sean McLeod[*]

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189 *Id.*

190 *Id.*

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