

87-150-9

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WASHINGTON STATE COURT OF APPEALS

DIVISION 11

40962-3-II

RE: APPEAL No: 41672-7

Adrian Contreras-Rebollar,
PETITIONER

v.

PETITIONERS RESPONSE TO
RESPONDANTS BRIEF

State of Washington
RESPONDANT.

I, Adrian Contreras-Rebollar, Petitioner pro se, do hereby enter this document as an answer and /or response to the Brief submitted by the respondent on 7/2/11, in connection to the above listed legal action.

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Mr. Contreras' claim concerning the exclusion of his retained co-counsel through direct arbitrary action by the trial court is a direct litigation on its merits.
2. Petitioner's claim he now raises concerning the said exclusion has not been previously heard and determined on the merits as briefed here.
3. The zealous interests of Justice requires a reexamination of issue B of Petitioner's Opening Brief, concerning the failure of his remaining trial counsel to adequately instruct the jury.

B. Issues Pertaining to the Assignments of Error

1. Procedural technical bars to limit review is not so limited as to prevent the consideration and thus reexamination of serious and potential valid claims. (Assignments of Error 3)

2. Petitioner's grounds are indeed different and stand upon different merits which require direct litigation based upon those merits. (Assignments of Error 1, 2, and 3)
3. The ends of Justice would best be served by reaching the merits of Petitioner's PRP. (Assignments of Error 3)
4. Did Petitioner's appellate counsel render ineffective assistance to Petitioner? (Assignments of Error 1 and 2)
5. This Court should have reasonable doubts concerning whether the grounds Petitioner raises are different or the same and thus should be resolved in favor of the applicant. (Assignments of Error 1, 2, and 3)

A. PETITIONER'S RESPONSE TO RESPONDANT'S BRIEF

1. ARGUMENT.

- a. Collateral relief has been restricted by imposing technical procedural bars to limit review, but not so limited as to prevent the consideration of both serious and potentially valid claims.

Washington Courts translate the rules of "similar relief" as relating to the grounds advanced in previous review of claims rather than the type of relief sought. In re Haverty, 101 Wn.2d 498, 502-03, 681 P.2d 835 (1984).

Applying the analysis used in Haverty requires that the Court determine whether Petitioner's grounds for relief have been "heard and determined" in a previous petition and if Petitioner is abusing this PRP process.

In his direct review, defendant's chief argument was abuse of discretion by the trial court based on a denied motion. A poorly articulated trial discretion error compared to his PRP issue of direct Federal Constitutional defect. Petitioner firmly and respectably believes that the grounds argued on direct appeal differ signif-

icantly, if entirely, to those grounds argued in his PRP, as well as such grounds have not, in and of themselves, been previously "heard and determined." And, that error (the attorney exclusion issue) differs substantially on Petitioner's PRP when compared to a mere trial court discretion error as to that of a direct constitutional structural defect, which if proven would require relief without the showing of prejudice.

The issues are "The trial court abused its discretion, and denied Contreras his constitutional rights to a fair trial and effective assistance of counsel, when it denied Contreras's motion for a mistrial." In direct. And, "The trial court denied Petitioner his 6th Amend. U.S. Constitutional right when it took direct arbitrary action excluding his co-counsel attorney while in trial with no explanation given for its action." Specifically argued on his PRP.

Thus, in regards to this 1st issue presented on his timely filed PRP, petitioner contends these 2 grounds are entirely if not substantially different concerning the issues in them.

Respondant would have this Court believe that the

issues are the same and further mention that I've failed to identify ~~why~~ the interest of Justice would require relitigation of the same issues. As already mentioned the issues differ entirely.

Petitioner may not renew an issue that was raised and rejected on direct appeal unless the interest of Justice require re-examination of the issue. In re Taylor, 105 Wn.2d 683, 105, 717 P.2d 755 (1986).

However, "An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal and if that prior determination was on the merits." In re Taylor, at 683, 687.

Further, in Taylor, the Supreme Court of WA. held "We hold the mere fact that an issue was raised on appeal does not automatically bar review on PRP. Rather, a court should dismiss only if the prior appeal was denied on the same ground and the ends of Justice would not be served by reaching the merits of the subsequent issue." In re Taylor, at 688.

By "ground" we mean a distinct legal basis for granting

review. And, should doubts arise in a particular case as to whether 2 particular grounds are different or the same, they should be resolved in favor of the applicant. In addition the prior denial must have rested on an adjudication of the same merits of the ground presented in the subsequent application. *In re Taylor*, 105 Wn.2d 683, at 688.

Although *In re Haverly* differs on the facts of the cases, Petitioner believes *Haverly* offers relevant legal language pertinent and pertaining to this case. Adopting the "similar relief" and "heard and determined" language as used in *Haverly* would better enable this Court to distinguish if I am indeed abusing the writ process in concerns to my ground raised regarding the exclusion of my counsel, as opposed to the "issue" language used in *In re Word*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994), in which respondent relies on.

Not to mention that Respondents use of *Word* on p.g. 22 of its brief is non-existent on the case itself. In other words, *Word* at 329 does not exist for there is no 329 in *In re Word*, 123 Wn.2d 296 (1994).

Although the opinion in *re Haverly*, does not define the legal term "ends of justice" the WA. Supreme Court notes with approval the Court's discussion of the term in *re Taylor*:

Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. Some justification for having failed to raise a crucial point or argument in the prior application. If purely legal questions are involved, the applicant may be entitled to a new hearing. *re Taylor*, at 688.

WA. State, also, has relied heavily on the U.S.

Supreme Court's decision in *U.S. v. Sanders*, 373 U.S. 1, 10 L.Ed 2d 148, 83 S.Ct 1068 (1963), for its definition of "similar relief" as it did in its decision of *re Haverly*. See *Haverly* at 502.

The U.S. Supreme Court decided in *Sanders*, that under their language of law there are only 2 limited instances in which, so called, successive petitions could be dismissed: (1) where the prior had been denied on "grounds previously heard and determined"; or (2) "if there has been an abuse of the writ or motion remedy."

Hawerty, at 503 (quoting U.S. v. Sanders, at 15, 17). Thus, For an issue to have been previously heard and determined, it must be found that: (1) The same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. Sanders, 373 U.S. at 15.

Respondent fails to acknowledge these definitions, but Petitioner will hope that this Court rules on his petition based on the aforementioned standards, in regards to Respondents argument that Petitioner is raising the same "grounds".

Respondent also argues that I have failed to show why the interest of justice require relitigation of the same underlying issues.

Petitioner will respectfully concede that issue # 2 is essentially the same underlying issue, however, Petitioner believes that issue # 1 is not. Further, because Respondent has initiated the argument as to why the interest of justice requires relitigation of the 1st issue.

In that regard, should this Court decide that, or treat that issue as the same, Petitioner will contend that he has indeed shown why the interest of Justice requires relitigation of that issue on his Opening Brief relying upon U.S. v. Laura, 607 F.2d 52 (3rd Cir. 1979), (APPENDIX-A).

Based on that case, Petitioner has shown, that the interest of Justice require that said issue should not only be relitigated but a direct litigation of that issue is required as this State has not previously nor directly discussed such a claim. And, as already mentioned, it is not the same issue or ground raised, in that: on his direct appeal the fundamental underlying principle issue argued was that of a mere trial court discretionary error and not of the magnitude of a direct structural defect in which Petitioner was critically denied his Const. rights to Due Process and to be represented by the private attorney of his choice.

The interests of Justice would be served by reexamining Petitioner's 1st claim of his Opening Brief concerning the exclusion of his attorney through a direct

arbitrary action by the trial court. Petitioner believes the interests of justice requires relitigation of the 1st ground of his Opening Brief, citing ineffective assistance of appellate counsel which failed to properly and adequately argue this critically fundamental error.

To save the niceties of a lengthy argument, Petitioner will briefly state the relevant facts.

Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. Some justification for having failed to raise a crucial point or argument in the prior application. And, if purely legal questions are involved, the applicant may be entitled to a new hearing. In re Taylor, 105 Wn.2d at 688.

The pure legal question here then becomes that of : were appellate counsel rendered ineffective assistance during direct review of Petitioner's appeal concerning a potential grave structural defect of Justice Jurisprudence at Petitioner's trial, should Petitioner's issue be reexamined?

And, when such error, if it had been properly presented during Petitioner's initial review, would not have required the showing of prejudice, for the gravamen of the structural defect in violation of Petitioner's right, would have carried with it the automatic presumption of adverse prejudice requiring the reversal of the conviction. Should this Court rule such appellate representation as proper? And if, deemed ineffective, should Petitioner be allowed to have a hearing and reexamination on the merits, on Petitioner's subsequent application?

Every criminal defendant is entitled to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, §. 22 (amend. x); see also Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This right extends to the effectiveness of appellate counsel during direct review. In re Pers. Restraint of Orange, 152 Wn.2d 759, 814, 100 P.3d 291 (2004). Petitioner contends his appellate counsel rendered ineffectively during direct review for not directly and therefore properly and effectively argue, the otherwise per se prejudicial error which he now raises to this Court

for proper review. That error being, the direct arbitrary action the trial court indulged in taking when it excluded Petitioner's co-counsel with no written or oral explanation for and when doing so. (RP 5 460; Appendix-B)

Petitioner will take the time to correct potential confusion on/of his Opening Brief in pages 16 and 17, mainly 17, and includes the following documents to clarify his argument there, (Appendix-C) which include all documents cited on p.g. 17.

Now, Petitioner relies *In re Orange*, 152 Wn.2d 759, contending appellate counsel rendered ineffectively when it failed to directly and adequately argue the exclusion of Petitioner's co-counsel issue, on direct review, when the error, otherwise, would have been presumed per se prejudicial. See *U.S. v. Gonzalez-Lopez*, 547 U.S. 140, 126 S.Ct 2557, 165 L.Ed.3d 409 (2006); and *U.S. v. Laura*, 607 F.2d 52 (3rd Cir. 1979) (Appendix-D).

Thus, the error to properly engage this issue below constituted ineffective assistance of appellate counsel.

Thus, through such failure of appellate counsel to raise such a claim, Petitioner asserts that he was caused actual prejudice through the ineffective assistance he received from his appellate counsel.

Petitioner was actually prejudiced in that: had appellate counsel investigated the relevant facts and law of this issue and argued it directly to this court, instead of the indirect means in which it did, the error would have been properly heard and determined and held per se prejudicial to Petitioner. By the law in which this issue stands. (Please see Appendix - A and [REDACTED] D)

Thus, Mr. Contreras' burden of establishing prejudice by a preponderance of evidence, in this, instance and should this court find appellate counsel was ineffective, "may be waived were the error gives rise to a conclusive presumption of prejudice. In re Orange, 152 Wn.2d 759, 100 P.3d 291 (2004).

Appellate counsel ineffectiveness may be further evidenced by page 1 of the Court's decision which and when read, the overriding issue to this otherwise structural defect error, was decided through the means

of handling this issue as a mere trial court discretionary error. (Appendix-^E) "arguing that (i) the trial court erred by denying his motion..."

Thus, Petitioner leaves hoping he has met the burden of the 2 prong test of *Strickland v. Washington*, and hereby, leaves to have this Court to decide whether he received effective representation during direct review of his case.

Petitioner incorporates portions of the dissent of Justice MARSHALL, in *Strickland* hoping this Court may also indulge on his opinions when deciding this issue.

(Appendix - F)

Petitioner respectfully asserts, he is entitled to relief and review of this error (the exclusion of his co-counsel) because this worked to both his actual and substantial prejudice because Contreras' paid attorney of choice was excluded without cause shown by the trial court, as stated on p.g.'s 16-17 of his Opening Brief, also, while testifying, Berneburg was forced to state the highly inflammatory evidence that because of conversations with me, he had questioned Hernandez about

the lights, (RP 7 813-27)(Appendix-G) both a violation of my attorney-client privilege, but even more so, leaving the wrong impression to the Jury, that I, potentially had something to do with the questioning which occurred between the attorney and the [REDACTED] tainted witness Regina Hernandez. Keeping in mind, that from the beginning of Greer's cross-examination of Berneburg, questioning and answering by both, were heated exchanges, which ended and culminated to (RP 7 825; Appendix-G) the reference to me/Petitioner, the trial court then stopped the proceedings. Also, the reason why Berneburg's testimony was allowed in the 1st place was to null the potential prejudice against me, incurred by the inflammatory testimony of/from Hernandez, (RP 5 451-52; Appendix-H) and for assessing her credibility. However, due to the prosecution wanting to take questioning beyond the court parameters and tried to instead prove to the Jury that Berneburg indeed forced a witness to commit perjury, (RP 7 825-27) the final testimony heard and received by the Jury from the excluded lawyer, to wit proceedings were then stopped, which all but emphasized that because of conversations with

Contreras, he had asked Hernandez about the lights, or to the prosecution's credit that I had something to do with the perjured testimony of Hernandez.

Petitioner argues, this played to his substantial prejudice because this testimony was accepted with the intention to negate the prejudicial impact which Hernandez' testimony might have negatively caused. Petitioner, but due to the prosecution stepping outside the set trial court parameters concerning this otherwise limited issue, instead, Petitioner was directly implicated.

This is substantial prejudice inflicted because the jury may very well have been left not only with a direct implication of my having caused a witness to commit perjury, but also the cloud that Mr. Contreras is both potentially and essentially in prison for someone else's wrongdoing, that of Mr. Berneburg's.

Petitioner hereby asks for a reference hearing pursuant to RAP 16.2, in order to further and more concisely prove those facts reiterated on p.g. 18 of his Opening Brief and offers the Report of Proceedings cited therein, as well as his Affidavit in (Appendix-H).

Also, concerning issue #2, cited as B. on the Table of Contents of his Opening Brief, Petitioner believes that this Court could and should exercise its discretion, both under RAP 1.2 (a);(c) and RAP 18.8 (a) which state said rules of Appellate Procedure will be liberally interpreted to promote justice and to facilitate the decision of cases on their merits. The appellate court may waive its rules in order to serve the ends of justice. The rule asking to be waived is RAP 16.4 (d). RAP 1.2 (a);(c) and 18.8 (a) are founded on the promotion of justice. Instead, and for both issues, should this Court rule [REDACTED] the 1st issue as the same underlying previously heard and determined issue, Petitioner urges this Court should allow for relitigation of [REDACTED] those issues under RAP 16.4(c)(3).

Petitioner respectfully believes issue #2 should be allowed for reexamination pursuant to RAP 18.8(a), and

in the interest of Justice, as Petitioner believes this Court's prior decision on that issue was based on an [REDACTED] unreasonable determination of the facts in light of the evidence presented in that state Court proceeding.

Thereby, pursuant to RAP 16.4 (c)(3), new material facts exist which have not been previously presented and heard, which in the interest of Justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding.....

And, per U.S. v. Sanders, 373 U.S. at 15, because the ends of Justice would best be served due to the holding of/on State v. Remm, 89 Wn.2d 63, 568 P.2d 797 (1977), in which this State's Honorable Supreme Court held the importance why this Court should do so, stating: "We are aware this approach may cause an innocent person who is striking in self-defense, to be harmed with impunity merely because appearances were against him." And, more importantly "However, we consider this to be a lesser evil than allowing an innocent defender who is acting under a mistake of fact to be convicted of a serious crime." The Court reversed and remanded Remm for a

a new trial. That statement made in Penn by the WA State Supreme Court, Petitioner believes should move this Court to, and in the interests of Justice, allow for a reexamination of that issue.

Finally, Petitioner's co-counsel, in whom he had confided, was deliberately excluded without having been blamed for any actual or indirect wrongdoing, (RP6 681-82; Appendix-I) and with no cause shown, other than defending his client's rights, (RP5 457-61; as those portions marked in Appendix-B) which said exclusion occurred in the middle of trial, which Petitioner urges this Court to find, requires a direct litigation of that issue.

The outcome of trying to cure this error by the trial court, was to no avail, and instead further prejudiced Contreras when the prosecutor tried to disprove Contreras' co-counsel credibility, which was never in issue, and questioned him in violation of the trial court's previously set parameters concerning the very limited issue of "whether (Berneburg) told her to say this in the interview in jail and leave it at that?"

(RP 6 681 at 14; Appendix-I) Berneburg indeed testified to this regard in the frank and simple matter in which it was intended. (RP 7 813-27; Appendix-G)

The prosecutor however, instead moved this limited issue to a much broader issue to disprove Berneburg's credibility, which the record clearly shows was never at issue. This, Petitioner contends, was a planned attack by the prosecution to diminish Petitioner's prevalent self-defense claim at trial, as he well knew certain information may exist outside police reports and exist between client-attorney only, Contreras' self-defense was diminished during Berneburg's cross-examination when when prosecution intended to disprove his credibility and violated the trial court set parameters, which in turn, prejudiced the petitioner, in which Contreras' credibility too, was directly impacted and put into issue.

B. CONCLUSION

Petitioner respectfully urges this Court to allow for the litigation of these issues. Petitioner presents Federally protected Constitutional rights violations

concerning both of his issues which warrant a reversal of his convictions and remanded for a new trial.

Petitioners co-counsel was deliberately excluded without being blamed for any wrongdoing and with no cause shown by the trial court in the middle of trial, which Petitioner urges, requires remand for a new trial as this direct arbitrary action, by the trial court was taken in violation of Contreras' Federally protected 6th amend. Constitutional right. This error caused actual and substantial prejudice to Petitioner in that his established defense was comprised and directly impacted due to said arbitrary action taken by the trial court. The outcome of trying to cure this error further prejudiced Contreras' and put his credibility in jeopardy to the Jury when the prosecutor began arguing with and questioned Berneburg in violation of the trial court set parameters concerning an otherwise very limited issue.

Although prevalent Federal and U.S. Supreme Court cases and law are clear as to this issue, Petitioner asks for a reference hearing to be ordered to more

concisely clarify the particularities of this issue.

Finally, should this Court not be persuaded as to granting relief to Petitioner, this Court should expressly waive the exhaustion requirement per 28 U.S.C. sec. 2254 (b)(1), concerning both of Mr. Contreras' issues.

DATED: October 27, 2011



Adrian Contreras-Rebollar
Petitioner, pro se

Certificate of Service

I, Adrian Contreras-Rebollar, certify that on this day I delivered via U.S. Mail true and correct copies of this brief both to the Court of Appeals, Div. 2 and prosecutor Jason Ruyf of/in Tacoma, WA. This statement is certified to be both true and correct under penalty of perjury of the laws of the state of WA.


Signature

10/27/11
Date

APPENDIX A

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607 F.2d 52 (1979)

UNITED STATES of America

v.

Priscilla Dominguez LAURA, Appellant.

No. 79-1102.

United States Court of Appeals, Third Circuit.

Argued July 12, 1979.

Decided October 5, 1979.

As Amended October 15, 1979.

53 *53 Paul Casteleiro (argued), Law Offices of Michael Kennedy, New York City, for appellant.

Peter Vaira, U.S. Atty., Walter S. Batty, Jr., Asst. U.S. Atty., Chief, App. Div., James J. Rohn (argued), Asst. U.S. Atty., Philadelphia, Pa., for appellee.

Before ADAMS, ROSENN and HIGGINBOTHAM, Circuit Judges.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.

I.

The right to the assistance of counsel is a critical element of our American system of jurisprudence. A defendant's decision to exercise that right and to place his liberty and possibly his life in the hands of an attorney of his choice may not be lightly tampered with. In this case, the district judge dismissed one of the defendant's attorneys without making any findings to justify that dismissal. Because we believe that this dismissal without adequate findings may have violated the defendant's right to counsel, we will reverse the decision of the district court and will remand for further proceedings consistent with this opinion.

II.

In February 1976 Priscilla Dominguez Laura, the appellant, was indicted in the Eastern District of Pennsylvania under two counts of a five-count indictment which charged eleven people with conspiracy to import cocaine, Count 1, importation of cocaine, Count II, conspiracy to distribute cocaine, Count III, and possession with intent to distribute cocaine,

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Counts IV and V.^[1] Priscilla Laura was charged under Counts I and II, and her husband, Anthony Laura, was charged under all five counts. In October 1976 she pled guilty to Counts I and II and received a five-year probationary sentence *54 under the Youth Corrections Act.^[2] Her husband also pled guilty; he received a sentence of two years' imprisonment and three years' special parole. Throughout the proceedings Priscilla and Anthony Laura were represented by the same counsel.

In August 1978 Priscilla Laura was convicted in a Florida federal court for distribution and possession of cocaine and received a sentence of two years' imprisonment and three years' special parole.

In September 1978 Laura's supervising probation officer petitioned in the Eastern District of Pennsylvania for the revocation of Laura's probation. Following an evidentiary hearing in October 1978, the United States Magistrate found probable cause for violation of probation. In November 1978 Laura filed a Motion to Withdraw Guilty Plea and to Vacate Sentence pursuant to Rule 32, Fed.R.Crim.P. and Rule 35, Fed.R.Crim.P. She argued that her 1976 Pennsylvania sentence was invalid because she had been denied her sixth amendment right to counsel and because the district judge had not complied with the requirements of Rule 11, Fed.R.Crim.P., when he accepted her plea.

Until the December 1978 violation of probation proceeding Priscilla Laura was represented solely by Paul Casteleiro. At that time the trial judge ordered Laura to get local counsel. In response to this order she retained James Rothstein, a member of the bar of the United States District Court for the Eastern District of Pennsylvania. Subsequently, Laura made a motion to transfer or reassign her case to another judge in the Eastern District of Pennsylvania. She asserted that the judge who was considering the motions on her Pennsylvania conviction may have been biased against her local counsel James Rothstein. She alleged that the judge had a "current personal interest in favor of" a corporation which had sued certain defendants in a state court, that the trial judge had been listed as "an expected witness" in the pre-trial memoranda, and that Rothstein represented the defendants in the state court proceeding, thus opposing the trial judge's alleged interest.

On December 28, 1978, before ruling on Laura's motion to withdraw her guilty plea, the trial judge dismissed Rothstein. We use the term dismissal purposely because when the trial judge ruled, "Therefore, I will order your withdrawal from this case, Mr. Rothstein, and I will sign an appropriate order to that effect. Thank you", he was dismissing Mr. Rothstein from the case despite counsel's and the defendant's objection. The following colloquy took place.

MR. ROTHSTEIN: I feel that my duty in this case is to Miss Laura as her local counsel. I placed in Miss Laura's hands the question of whether or not she wished that I withdraw as her local counsel. I intend to be bound by her instructions. If she wishes that I withdraw, then I will request the Court to withdraw.

My statement in paragraph 6 is stated to clarify that I placed that question to Miss Laura as to whether or not she wished me to withdraw. She stated that she did not. Therefore, I do not at this time ask the Court for leave to withdraw.

THE COURT: All right. Anything else in regard to the matter before me? From anyone?

MR. CASTELEIRO: No, your Honor.

MR. ROTHSTEIN: No.

THE COURT: All right, Mr. Rothstein. Paragraph 6 of the petition that you have

filed, as I said a moment ago, states that you offered to withdraw as counsel in the Priscilla Laura matter. I will treat that offer to withdraw as a petition or as a motion to withdraw as counsel. I will grant the motion and permit you to withdraw as counsel in this case.

I find that Paul Casteleiro, who is a member of the New York Bar is the principal counsel in this case, the *Priscilla Laura* matter; that he has prepared all of the papers, all of the motions, *other than the motion to transfer* which is before me today; that he had done, up *until very recently*, all of the legal work in respect to the Priscilla Laura matter; that you have been local counsel, you continue to be local counsel; that your familiarity with this case is very recent; that at the time you were retained, Priscilla Laura had never heard of you and you never heard of her and the two of you had not met.

It is also the law that a person is not entitled to a particular counsel. I shall not require in this case that there be local counsel. We can communicate with Mr. Casteleiro effectively. He has been a perfect gentleman throughout these proceedings and I am confident there will be no problem requiring the appearance of local counsel.

Therefore, I will order your withdrawal from this case, Mr. Rothstein, and I will sign an appropriate order to that effect. Thank you.

Appellant's App., at 121-23. (emphasis added)

Thus he dismissed Rothstein without making any findings about the dismissal, and reasoned that Laura was left with adequate representation.

After dismissing Rothstein, the judge proceeded to consider Laura's motions to withdraw her guilty plea and vacate her sentence. Both motions were denied. The trial judge then found Laura in violation of her probation. He revoked her probation and sentenced her to two years' imprisonment and three years' special parole. Casteleiro represented Laura throughout this portion of the hearings.

Laura has appealed to this court. She argues that her guilty plea on the 1976 federal indictment should be withdrawn because she was denied the right to effective assistance of counsel by the joint representation of her and her husband by Robert Kalfina (in 1976 Casteleiro did not participate in the defense of Priscilla Laura or her husband) and because the trial judge did not comply with Rule 11, Fed.R.Crim.P. She further asserts that her motion to transfer should have been granted because of the possibility of judicial bias. We find that on the present record the dismissal of James Rothstein may have violated Laura's sixth amendment right to counsel and that the dismissal may have tainted the proceedings that followed. We will therefore remand to the district court without reaching Laura's claims as to the validity of her original 1976 conviction.

III.

The sixth amendment to the Constitution guarantees to any criminal defendant the right "to have the Assistance of Counsel for his defense."⁵³ The importance of that right has been recognized by a ceaseless stream of Supreme Court decisions that have mandated that a vast array of defendants who would otherwise "face] the danger of conviction because [they do] not know how to establish [their] innocence," *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932), have the aid of a trained attorney when confronted by "[g]overnments, both state and federal, [who] quite properly spend vast sums of money to establish machinery to try defendants accused of crime." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963). See, e. g., *Faretta v. California*, 422 U.S.

806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The reasoning underlying these decisions makes it clear that the sixth amendment generally protects a defendant's decision to select a particular attorney to aid him in his efforts to cope with what would otherwise be an incomprehensible "56 and overpowering governmental authority. While the right to select a particular person as counsel is not an absolute right, the arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel.

Embodied within the sixth amendment is the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount. See *Faretta v. California, supra*; *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972). It is from this principle and belief that the defendant's right to select a particular individual to serve as his attorney is derived. For the most important decision a defendant makes in shaping his defense is his selection of an attorney. The selected attorney is the mechanism through which the defendant will learn of the options which are available to him. It is from his attorney that he will learn of the particulars of the indictment brought against him, of the infirmities of the government's case and of the range of alternative approaches to oppose or even cooperate with the government's efforts.

As the Supreme Court has noted:

Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. *Powell v. Alabama*, 287 U.S. at 69, 53 S.Ct. at 64.

Not only does the selection of an attorney demarcate the sphere of defense strategies a defendant will have presented to him; with his selection he may also give his attorney the authority to make decisions for him. For once a lawyer has been selected "law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." *Faretta v. California*, 422 U.S. at 820, 95 S.Ct. at 2534.¹⁴¹

We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.

Further, the defendant's decision to select a particular counsel will affect other constitutional rights. For example, a defendant, on the advice of counsel, may decide not to object at trial to the introduction of evidence seized in violation of his fourth amendment rights. This decision may preclude any collateral review of the fourth amendment violation. *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). While "only a deliberate or considered bypassing or waiver of the opportunity to raise the issue" will preclude collateral attack, an attorney's advice will be weighed in evaluating whether the decision was made deliberately. See *United States v. ex rei. LaMolnure v. Duggan*, 415 F.2d 730, 731 (3d Cir. 1969).

We also note that the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured.

Thus, if a defendant chooses a particular counsel, the sixth amendment prevents a court from taking any "arbitrary action prohibiting the effective use of [a particular] counsel." *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969), cert. denied, 397 U.S. 946, 90 S.Ct. 964, 25 L.Ed.2d 127 (1970).

In reaching this conclusion we are not suggesting that a court lacks any authority to dismiss a defendant's counsel, or to reject a defendant's decision to select a particular individual for his defense. This court has already recognized that "there is no absolute right to a particular counsel," and the trial judge has some discretion to effect the defendant's selection of counsel. *Id.* For example, unless a defendant can show good cause, e. g., a breakdown in communication, the court may deny an indigent defendant's wish to obtain different court-appointed counsel. See *United States v. Young*, 482 F.2d 993 (5th Cir. 1973). Also, in certain circumstances, a court may deny a defendant's attempt to obtain new counsel immediately before trial. See *United States ex rel. Carey v. Rundle*, *supra*. And a court, under its supervisory authority, if it deems it necessary, may dismiss counsel because the defendant would otherwise be inadequately represented. *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978).

Given the precepts discussed above, it would certainly have been error if in this case the trial judge had ordered dismissal of the defendant's primary and lead counsel, Paul Casteleiro, in order to eliminate any possible conflict between the judge and lead counsel. The question remaining here is whether there are different standards applicable to the dismissal of "local counsel." On this limited record we find no basis in law to distinguish treatment of local counsel from primary or lead counsel. Apparently local counsel does serve an important function because the rules of the Eastern District of Pennsylvania require local counsel, E.D.Pa.R. 10; and the judge in this case directed the defendant to obtain local counsel.

Moreover, it seems clear to us that, at the very least, local counsel may be of particular assistance to a defendant confronting sentencing, as local counsel may be aware of a local judge's unique approaches or preferences. Certainly when one is dealing with sentencing and the extraordinary discretion allowed each judge, we would be disregarding the reality of legal life if we failed to recognize that there are several nuances — even about judges — which are relevant in the sentencing process. If local counsel did no more than offer those insights his contribution could be invaluable.

Except for the limitation that we set forth herein, a judge cannot dismiss local counsel because counsel's participation was, in the eyes of the judges, modest or miniscule. The gravamen of defendant's complaint in this case must not be lost sight of. Here the defendant filed a motion to transfer claiming that there was a possible conflict between her counsel and the judge because of the "current personal interest" the judge had in a civil suit pending in the state court where local counsel represented persons adverse to the judge's interest. Instead of ruling on the motion to transfer and determining whether there was a conflict which would warrant granting the motion, the trial judge eliminated the potential conflict by eliminating the local counsel.

58 He made no findings as to the possibility of a conflict of interest between him and Rothstein; he made no finding that Laura had in anyway acted improperly by retaining Rothstein or by wishing to continue to retain him; he made no finding that Laura or Rothstein knew of the potential conflict when she retained Rothstein; he made no finding that Rothstein improperly delayed "58 the motion to transfer;¹²¹ and he made no finding that the court's interest in the orderly administration of its caseload would be jeopardized by granting the motion to transfer. Under these circumstances, the dismissal of Laura's counsel of choice cannot be countenanced.

We do not consider it important that Laura originally retained Rothstein as a result of the trial court's request that she have local counsel. By the time of the hearing Rothstein was one of Laura's counsel of choice and we must evaluate her decision in that light.

Nor do we consider it decisive that after the dismissal of her local counsel Laura continued to have the services of Casteleiro. By the time of her hearing, she had a defense team composed of two attorneys who may have served distinct and important functions on her behalf. As she wished to retain both attorneys we can only presume that she felt that she needed both attorneys. That choice is hers to make and not the court's, unless some appropriate justification for the dismissal is provided.

Moreover, as long as Rothstein performed a defense function, we do not believe that the defendant should be faced with the burden of proving the importance of his assistance. Therefore, Laura need not show that the dismissal was prejudicial. The right to counsel is among those "constitutional rights [which are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 and n. 8, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

We make no finding on the merits as to whether Laura's probation should have been revoked, or whether her original sentence and guilty plea of 1976 were valid. Certainly it is within the discretion of a trial judge to revoke the probation where a guilty plea had been entered validly and where the defendant was involved in a serious crime during her probationary period. However, regardless of the validity of the trial judge's decision on the merits, there is no justification here for dismissing her trial counsel and thereby precluding him from assisting her in her defense. The challenge to her guilty plea and to the revocation of her probation was rejected in a proceeding where the defendant's sixth amendment rights may have been violated. If this is the case, the judge's decisions on the merits may not stand.

Trial judges have an arduous task in dealing with an excessive caseload while attempting to decide fairly the myriad issues presented daily. Like us, they cannot always be errorless; when the facts of a case are isolated on appeal and focused on with greater specificity, it is obvious that often some aspects considered decisive by the appellate court had not been adequately reflected upon by the trial judge in the crunch of the caseload. This factor probably occurred in this case since a reading of the record indicates that the learned trial judge was appropriately concerned about a reasonably prompt disposition of his substantial caseload. He desired to move this case with reasonable dispatch. But such dispatch, without adequate findings, cannot justify the ruling below.

We will therefore remand this case to the district court. On remand, the district court may either grant the defendant's motion to transfer without considering the conflict of interest issue; or it may make findings on the question and act in accord with its findings.¹²¹

59 "59 Of course, if the matter is transferred to another judge, the sentence on the revocation of the probation must be vacated, so that the transferee judge may decide all of the issues *ab initio*.

ADAMS, Circuit Judge, concurring in the result.

Although I agree with the result reached by Judge Higginbotham, I write separately because I view the issue in this matter from a different perspective.

This is not a case in which a defendant has been forced to face "incomprehensible and overpowering" prosecutorial forces alone, without the assistance of counsel.¹²¹ Nor is it a case in which a defendant's choice of trial strategy has been impeded by the trial court.¹²² Rather, as I see it, the issue posed by this appeal is whether a defendant, who has been required to retain local counsel, may hire an attorney who has a conflict with the trial judge and then seek to recuse the trial judge because of the conflict.

The district court judge who presided over this case also presided over the criminal proceedings that resulted in Mrs. Laura's pleading guilty to conspiracy and importation of

cocaine in 1976. During the 1976 proceedings, Mrs. Laura and her former husband, one of her codefendants, were represented by Robert I. Kalina, Esquire. Prior to hearing the pretrial motions in that case, the district judge ordered Mr. and Mrs. Laura to obtain separate counsel. Both defendants, through their attorney, moved to vacate that order. The district judge then carefully explained to Mrs. Laura the problem of having the same attorney and the conflict it posed. Mrs. Laura nevertheless elected to keep the one attorney, and the judge permitted the Lauras to continue jointly to employ Mr. Kalina. Mr. Kalina represented both Mr. Laura and Mrs. Laura through the time of their sentencing in 1977; Mrs. Laura was sentenced to five years of probation.

In August 1978, Mrs. Laura was convicted in a Florida federal court of illegally possessing and distributing cocaine, and was sentenced to two years in prison and three years on special parole. In September 1978, Mrs. Laura's supervising probation officer petitioned the district court to revoke her probation that had been imposed in the earlier Eastern District Court prosecution. Following an evidentiary hearing in October, a United States Magistrate found probable cause to revoke probation. In November, Mrs. Laura filed a motion with the district court to withdraw her guilty plea and to vacate her sentence.^[31] She claimed that her 1976 conviction was invalid under the sixth amendment because the district court failed to order her and Mr. Laura to retain separate counsel at the time they were negotiating their respective pleas of guilty.

60 *80 Throughout the 1978 proceedings, Mrs. Laura was represented by Paul Casteleiro, Esquire, a member of the New Jersey Bar. At the probation revocation hearing, the district court ordered Mrs. Laura to retain local counsel as required by Local Rule of Criminal Procedure 2 of the District Court for the Eastern District of Pennsylvania.^[4] Mr. Casteleiro then hired James Rothstein, Esquire, a member of the Berks County bar. Mr. Rothstein was defense counsel in a case in a Pennsylvania state court in which the district judge was listed as an expected witness for the defendant. Mrs. Laura, acting through Mr. Rothstein, then filed a motion requesting the judge to recuse himself because of the apparent conflict between him and Mr. Rothstein. The district judge interpreted the motion as also offering that Mr. Rothstein withdraw from the case^[5] and, over Mrs. Laura's objection, ordered Mr. Rothstein to withdraw.

As Judge Higginbotham points out, the right of a criminal defendant to be represented by counsel of her choice is an important right — one that may not lightly be frustrated. But this right is not absolute, and a court may, for substantial reasons, refuse to permit the defendant's choice of counsel to participate in a case.^[6]

Thus, the district court's decision to dismiss Mr. Rothstein may be justifiable; but, like the majority, I am unable to address that issue in a thoughtful manner because the district judge did not set forth the reasons for his ruling. A hearing on this issue followed by a written explanation not only would facilitate review by the Court, but also would help to ensure that Mrs. Laura's sixth amendment rights are not impaired without adequate justification.

Because of the importance of the right at stake, and the closeness of the issue, a few examples of the facts I would deem relevant to an adjudication of this question might be helpful to the district court. Although the district court *sua sponte* ordered Mrs. Laura to obtain local counsel, it would not necessarily be unreasonable for the court to require her to select an attorney who does not have an apparent conflict with the trial judge who has participated in the proceedings for several years. Thus, if the district court finds that Mr. Rothstein was selected because of his possible conflict with the trial judge, for the purpose of forcing the judge out of this case, the dismissal of Mr. Rothstein might be justifiable.^[7] Similarly, findings by the district court that Mr. Rothstein and Mrs. Laura have had little contact regarding this case, or that Mr. Rothstein's participation in the preparation of the proceedings has been slight, might also weigh heavily in favor of a decision to dismiss Mr. Rothstein. The trial judge's long involvement in both this case and the 1976-1977 criminal proceedings out of which the substantive issue of the present appeal arises, also might support a decision to

require Mr. Rothstein to withdraw. On the other hand, evidence that Mr. Rothstein had assumed an active role in the preparation of Mrs. Laura's motions prior to the district court's decision to dismiss him, or that Mr. Rothstein was hired for his expertise in this type of case, beyond his mere status as local counsel, might militate against a dismissal decision.

The right to select counsel of one's choice is a critical constitutional right that may be abridged only for substantial reasons. Neither this Court nor a district court can evaluate, under the facts of a particular case, whether the right has been unduly fettered unless the issue has been briefed and argued, and the trial judge sets forth findings to justify his decision. Accordingly, I agree that the matter should be remanded for a further hearing and for findings.

ROSENN, Circuit Judge, also joins in this opinion.

[1] 21 U.S.C. § 963; 21 U.S.C. § 962 and 18 U.S.C. § 2, 21 U.S.C. § 841 and 18 U.S.C. § 2, respectively.

[2] The Youth Corrections Act provides for special sentencing of persons who are less than 22 years of age. 18 U.S.C. §§ 5005-5026.

[3] U.S. Constitution, VI Amendment provides:

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

[4] See also ABA Standards Relating to the Administration of Criminal Justice, The Defense Function (1971), quoted in *Feretta* and *The Personal Defense* 65 Cal.L.Rev. 636, 638-39 nn. 6 & 7 (1977).

Section 1.1(a) provides:

Counsel for the accused is an essential component of the administration of criminal justice: A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

Section 5.2(b) states:

The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.

[5] The judge specifically asked Rothstein why the motion had been filed so close to the time of the hearing. In response, Rothstein outlined his efforts to determine whether the motion was necessary and to determine Laura's feelings as to whether he should withdraw. The record suggests that Rothstein acted in a timely manner and therefore the timing of the motion would not serve as a basis to dismiss Rothstein. Appellant's App., at 117-19.

[6] We express no judgment as to the propriety of dismissing counsel if a conflict exists. However, we note that if a conflict exists, 28 U.S.C. § 455 may be employed to transfer Laura's case to another judge.

28 U.S.C. § 455 provides in pertinent part:

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

[1] Compare *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 91 Ed.2d 799 (1963) (state's refusal to appoint counsel for indigent defendant in a noncapital felony trial violated sixth amendment as applied to the states through the fourteenth amendment); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (state court's refusal to appoint counsel for indigent defendant in capital case violated sixth amendment as applied through due process clause of fourteenth amendment).

[2] Compare *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (sixth and fourteenth amendments guarantee criminal defendant right to defend himself without assistance of attorney); *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972) (state's requirement that criminal defendant who desires to testify on his own behalf must do so prior to presentation of any other defense testimony violates due process and right to effective assistance of counsel).

[3] Fed.R.Crim.P. 32(d), 35.

[4] Local Rule of Criminal Procedure 2 applies Local Rule of Civil Procedure 10 to criminal trials.

[5] The disputed portion of Mrs. Laura's motion to transfer the case to another judge read as follows:

(6) Local counsel for Defendant, Priscilla Dominguez Laura, has advised said Defendant, Priscilla Dominguez Laura, of the facts set forth hereinabove and has offered to withdraw from the matter of *United States of America vs. Priscilla Dominguez Laura* and obtain substitute local counsel for the Defendant herein.

(7) Defendant, Priscilla Dominguez Laura, has informed James S. Rothstein, Esq. that she does not wish him to withdraw as her local counsel in the case at bar.

WHEREFORE, Defendant respectfully requests the Court (i) to waive Federal Rule of Criminal Procedure 45 and Local Rule of Criminal Procedure 11 and (ii) to transfer the above-captioned case to the Clerk of this Court for re-assignment.

App. 247. Although the language is somewhat confusing, the district court's interpretation of it as an offer that Mr. Rothstein withdraw is questionable. For the remainder of this opinion, I will assume that the district court dismissed Mr. Rothstein.

[6] See *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), in which we upheld a district court's order, over both defendants' objections, that an attorney who represented codefendants in a single criminal trial withdraw as counsel for one defendant. The district court had made extensive findings that the joint representation presented an actual conflict of interest. *United States v. Garafola*, 428 F.Supp. 620 (D.N.J. 1977), *aff'd sub nom. United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978).

[7] A judge will frequently recuse himself, for example, from participating in cases in which one of the parties is represented by the law firm with which the judge was associated prior to coming on the court, and from cases implicating organizations for which the judge, in the past, has been a director or trustee. Thus, in the absence of some means of permitting the court to refuse to accept a litigant's choice of local counsel, it would be relatively facile for litigants to remove the judge assigned to their case simply by hiring as local counsel one who is involved in a separate matter with an organization with which the judge has been associated.

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APPENDIX B

Used in
Appendix
P.g. 19
of this Brief

1 assuming -- Mr. Berneburg just told me he didn't say
2 this. I'm assuming that's what he'll say. What do I
3 learn from that? Nothing that I don't already know, so
4 it's unnecessary to do that.

5 MR. BERNEBURG: Your Honor, one of the
6 problems we have here is with this instruction and Mr.
7 Greer trying to call attention -- this is what he's
8 trying to do, is color this evidence. This witness has
9 given inconsistent statements at various times on a
10 number of different issues.

11 THE COURT: I've heard enough on this. I'm
12 not going to give this proposed instruction at this
13 time. We can take it up, I guess, at the end of the
14 trial if you think it's still appropriate, Mr. Greer.
15 I am going to exclude Mr. Berneburg from participating
16 in the trial unless prior court permission has been
17 granted. If I'm given some good reason why he needs to
18 participate, then we'll discuss it again. I'm not
19 going to order him out of the courtroom.

20 If he wants to sit and watch as a member of the
21 public, he can, but not at counsel table without prior
22 court permission. So anything else before we bring in
23 the jury for Mr. Kelley?

24 MR. GREER: We just need Mr. Kelley here.

25 MR. BERNEBURG: Your Honor, there is an issue

APPENDIX C

the courtroom." (AP-A 5)³

Petitioner however, relies on the arbitrary action taken by the trial court the previous day, January 24, 2007. "THE COURT: I've heard enough on this...I am going to exclude Mr.Berneburg from participating in the trial..." (RP5 460) Mr. Berneburg, still part of the defense, certainly objected to this exclusion. (RP5 455-56, 460) Lead-counsel Schoenberger certainly objected after this arbitrary action was taken by the trial court. (RP5 464) And, even do on this date Mr.Schoenberger proposed putting Mr.Berneburg on the witness stand. (RP5 459) The court, clearly saw no reason to do so stating: "IT doesn't do anything...so it's unnecessary to do that." (RP5 459-60)

Nonetheless, the court excludes Mr.Berneburg from participating in Mr.Contreras' defense, while giving absolutely no reason, none which may be discernible from the record, for its direct arbitrary action taken against Petitioner's defense and, against his defense team composed. (RP5 460)

³ Citations to the Appendix will be AP (Appendix) followed by the letter of the Appendix, with the page number. (AP-__ #)

1 Mr. Jay Berneburg.

★ 2 THE COURT: And Mr. Berneburg will be working ★
3 with Mr. Schoenberger on the case, maybe not all the
4 time, but parts of it, so he'll be here too.

5 This is, again, a criminal case, and I'll just
6 give you a little bit of background about the case.
7 What I tell you, of course, isn't evidence. This is
8 just so you have some idea what we're going to be
9 talking about in jury selection.

10 Mr. Contreras-Rebollar is charged with two counts
11 of assault in the first degree. This is supposed to
12 have occurred, I believe, in April of last year, 2006,
13 in the East Side of Tacoma in the 1000 block of East
14 66th Street, which I think is a couple of blocks east
15 of McKinley Avenue. It's on the East Side of Tacoma,
16 Southeast Tacoma. He's accused of shooting two people.

17 Mr. Contreras-Rebollar has pled not guilty to
18 that, and, as you know, he's presumed innocent just as
19 any other defendant is, and that's a presumption that
20 stays with him throughout the entire trial unless the
21 jurors find that it's been overcome by evidence beyond
22 a reasonable doubt.

23 Mr. Contreras-Rebollar has also raised the issue
24 of self-defense, that he was defending himself in the
25 use of force. Later in the trial you'll get some

1 THE COURT: Then you've got the transcript of
2 the cross that Mr. Schoenberger asked you about this.

3 MR. BERNEBURG: First of all, I want to say
4 to the Court that I interviewed many witnesses in many
5 cases and I've never done anything improper with the
6 witness, and I certainly didn't in this case. Never
7 have I told a witness to say anything -- I questioned
8 them hard about the truth and questioned them hard
9 about their memory of what happened, particularly with
10 a witness like this when the transcripts were very
11 apparent that she was under the influence of
12 methamphetamine when she gave her tape-recorded
13 statement to the police, so it's really important, I
14 think, to question a witness. And again, repeatedly
15 Mr. Schoenberger and I told her we want the truth, we
16 don't want something -- that Mr. Greer is a skillful
17 cross-examiner, and if you're going to say something
18 that isn't the truth, it's going to be big problems and
19 we want the truth. So at no time did I do anything
20 improper.

21 As far as excluding me from the courtroom, I think
22 that's an extreme measure. My plans aren't to
23 participate in the trial in any event, but should I be
24 needed here for something, I don't think I should be
25 precluded from the courtroom. I'm not being called as

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a witness in the case.

THE COURT: Do you plan to be here for anything?

MR. BERNEBURG: There's no plans on that, but I would like to leave the option open. I mean, excluding attorneys that have been retained from the courtroom is extreme. I've done nothing improper. There would be no reason to do that.

Having attorneys in and out during the trial -- Mr. Contreras has a right to be represented by counsel in all critical phases of the trial. Mr. Schoenberger has been with him at all critical phases. He's lead counsel. I am in a support role, and when called upon to come in to support, I should be allowed to do that. Particularly a witness like this that has memory issues should not affect Mr. Contreras's representation and what the attorneys and what the officers of the court do in regards to that representation.

So I'm opposed to it. I don't plan on being here anyway, but to put down such an order, I think, is incorrect, and I would ask the Court not to do that.

THE COURT: Anything else, Mr. Greer, on your instruction and request?

MR. GREER: Well, Your Honor, the Court had the court reporter read into the record the direct

*Cited on P. 9-18
on "Opening
Brief" Appendix
H* ★ (13)

1 examination. I don't have a copy of the transcript of
2 cross, but as I understand it, the issue was raised
3 again on cross, and it was a lot more clear on cross
4 than it was on direct, her statements about Mr.
5 Berneburg telling her what to say, and I believe that's
6 accurate, that in cross-examination she made it clear
7 that Mr. Berneburg actually told her what to say.

8 THE COURT: I don't have the transcript of
9 the cross either. I guess we have one copy.

10 MR. GREER: The reason I bring it up is
11 because of the significance of excluding Mr. Berneburg,
12 I think, is real, and the Court should exclude him.
13 I'm not saying Mr. Berneburg did it, obviously, but I
14 am saying that Mr. Berneburg in this case put in a
15 Notice of Appearance well before this trial started.
16 My understanding was that he was to be here and
17 participate as co-counsel.

18 In my experience I've never had a case where two
19 defense attorneys have tag-teamed more or less, but in
20 this case that's not even what's happening. Mr.
21 Berneburg came in and gave an opening statement, which
22 included a recitation of facts that these headlights
23 were off as if this was a drive-by. That's not in any
24 of the discovery. The defendant didn't give a
25 statement. No other witness has ever given a statement

1 A Yes, sir.

2 Q And we didn't tell you the headlights were
3 off, did we? We said were the headlights on or off;
4 isn't that right?

5 A Mr. Berneburg told me that the lights were
6 off and to say that when I got to court.

7 So she's saying Berneburg told her to say the
8 lights were off. And later on in just a couple of
9 questions: Question by Mr. Schoenberger: But it's
10 your testimony that Mr. Berneburg told you to say that
11 the lights were off?

12 A Yes, sir.

13 She said Berneburg told her to say that the lights
14 were off. Now, what he told her, if anything, is
15 another issue, so there is something of a problem.

16 MR.SCHOENBERGER: I was there, and I said
17 this before. Nothing like this happened. I can't take
18 the stand.

19 THE COURT: You told me that yesterday. I
20 know what you said. I'm not making any finding of
21 anything. That's what she said to the jury. A

22 MR.SCHOENBERGER: I propose putting Mr.
23 Berneburg on the witness stand to refute or rebut this.

24 THE COURT: Let's assume he does that. What
25 does that do for me? It doesn't do anything. I'm

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here. We're not ready. We received --

THE COURT: Wait a minute. You're not participating.

MR. BERNEBURG: Okay.

MR.SCHOENBERGER: Judge, Mr. Kelley -- we interviewed and spoke with Mr. Kelley before he had his offer of immunity. He now has an offer of immunity and he's changed his story. He was silent to the police when he was interviewed except for saying he didn't see who shot him. When Mr. Berneburg and I interviewed him at the Pierce County Jail, he told us a number of things that I now understand are inconsistent with what his testimony will be.

THE COURT: When did you interview him, approximately?

MR.SCHOENBERGER: Several weeks ago when he was first brought in on his material witness warrant. I can look at my time records, but it was quite awhile ago. Now, since then he has been given a grant of immunity and he has changed his story, and I need to talk to him and I need to question him in more detail. Now he's willing to talk. Now he'll answer questions that I couldn't ask him before.

THE COURT: Can I ask why you didn't talk about this yesterday before we have all 14 jurors

APPENDIX D

D

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547 U.S. ___ (2006)

UNITED STATES, PETITIONER
v.
CUAUHTEMOC GONZALEZ-LOPEZ

No. 05-352.

Supreme Court of United States.

Argued April 18, 2006.
Decided June 26, 2006.

JUSTICE SCALIA delivered the opinion of the Court.

We must decide whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction.

I

Respondent Cuauhtemoc Gonzalez-Lopez was charged in the Eastern District of Missouri with conspiracy to distribute more than 100 kilograms of marijuana. His family hired attorney John Fahle to represent him. After the arraignment, respondent called a California attorney, Joseph Low, to discuss whether Low would represent him, either in addition to or instead of Fahle. Low flew from California to meet with respondent, who hired him.

Some time later, Low and Fahle represented respondent at an evidentiary hearing before a Magistrate Judge. The Magistrate Judge accepted Low's provisional entry of appearance and permitted Low to participate in the hearing on the condition that he immediately file a motion for admission *pro hac vice*. During the hearing, however, the Magistrate Judge revoked the provisional acceptance on the ground that, by passing notes to Fahle, Low had violated a court rule restricting the cross-examination of a witness to one counsel.

The following week, respondent informed Fahle that he wanted Low to be his only attorney. Low then filed an application for admission *pro hac vice*. The District Court denied his application without comment. A month later, Low filed a second application, which the District Court again denied without explanation. Low's appeal, in the form of an application for a writ of mandamus, was dismissed by the United States Court of Appeals for the Eighth Circuit.

Fahle filed a motion to withdraw as counsel and for a show-cause hearing to consider sanctions against Low. Fahle asserted that, by contacting respondent while respondent was

represented by Fahle, Low violated Mo. Rule of Professional Conduct 4-4.2 (1993), which prohibits a lawyer "[i]n representing a client" from "communi- cat[ing] about the subject of the representation with a party . . . represented by another lawyer" without that lawyer's consent. Low filed a motion to strike Fahle's motion. The District Court granted Fahle's motion to withdraw and granted a continuance so that respondent could find new representation. Respondent retained a local attorney, Karl Dickhaus, for the trial. The District Court then denied Low's motion to strike and, for the first time, explained that it had denied Low's motions for admission *pro hac vice* primarily because, in a separate case before it, Low had violated Rule 4-4.2 by communicating with a represented party.

The case proceeded to trial, and Dickhaus represented respondent. Low again moved for admission and was again denied. The Court also denied Dickhaus's request to have Low at counsel table with him and ordered Low to sit in the audience and to have no contact with Dickhaus during the proceedings. To enforce the Court's order, a United States Marshal sat between Low and Dickhaus at trial. Respondent was unable to meet with Low throughout the trial, except for once on the last night. The jury found respondent guilty.

After trial, the District Court granted Fahle's motion for sanctions against Low. It read Rule 4-4.2 to forbid Low's contact with respondent without Fahle's permission. It also reiterated that it had denied Low's motions for admission on the ground that Low had violated the same Rule in a separate matter.

Respondent appealed, and the Eighth Circuit vacated the conviction. 399 F. 3d 924 (2005). The Court first held that the District Court erred in interpreting Rule 4-4.2 to prohibit Low's conduct both in this case and in the separate matter on which the District Court based its denials of his admission motions. The District Court's denials of these motions were therefore erroneous and violated respondent's Sixth Amendment right to paid counsel of his choosing. See *id.*, at 928-932. The Court then concluded that this Sixth Amendment violation was not subject to harmless-error review. See *id.*, at 932-935. We granted certiorari. 546 U. S. ___ (2006).

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat v. United States*, 486 U. S. 153, 159 (1988). Cf. *Powell v. Alabama*, 287 U. S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Government here agrees, as it has previously, that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U. S. 617, 624-625 (1989). To be sure, the right to counsel of choice "is circumscribed in several important respects." *Wheat, supra*, at 159. But the Government does not dispute the Eighth Circuit's conclusion in this case that the District Court erroneously deprived respondent of his counsel of choice.

The Government contends, however, that the Sixth Amendment violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U. S. 668, 691-696 (1984)—*i.e.*, that substitute counsel's performance was deficient and the defendant was prejudiced by it. In the alternative, the Government contends that the defendant must at least demonstrate that his counsel of choice would have pursued a different strategy that would have created a "reasonable probability that . . . the result of the proceedings would have been different." *id.*, at 694—in other words, that he was prejudiced within the meaning of *Strickland* by the denial of his counsel of choice even if substitute counsel's performance was not constitutionally deficient.

¹¹ To support these propositions, the Government points to our prior cases, which note that the right to counsel "has been accorded . . . not for its own sake, but for the effect it has on the ability of the accused to receive a fair trial." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (internal quotation marks omitted). A trial is not unfair and thus the Sixth Amendment is not violated, the Government reasons, unless a defendant has been prejudiced.

Stated as broadly as this, the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details. It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio v. Roberts*, 448 U.S. 56 (1980)) with regard to the Sixth Amendment's right of confrontation—a line of reasoning that "abstracts from the right to its purposes, and then eliminates the right." *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (SCALIA, J., dissenting). Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. See *Roberts*, *supra*, at 65-66. We rejected that argument (and our prior cases that had accepted it) in *Crawford v. Washington*, 541 U.S. 36 (2004), saying that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*, at 61.

So also with the Sixth Amendment right to counsel of choice. It 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. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland*, *supra*, at 684-685. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."¹²

The cases the Government relies on involve the right to the effective assistance of counsel, the violation of which generally requires a defendant to establish prejudice. See, e.g., *Strickland*, *supra*, at 694; *Mickens*, *supra*, at 166; *United States v. Cronin*, 466 U.S. 648 (1984). The earliest case generally cited for the proposition that "the right to counsel is the right to the effective assistance of counsel," *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970), was based on the Due Process Clause rather than on the Sixth Amendment, see *Powell*, 287 U.S. at 57 (cited in e.g., *McMann*, *supra*, at 771, n. 14). And even our recognition of the right to effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel "is critical to the ability of the adversarial system to produce just results." *Strickland*, *supra*, at 685. Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. See *Mickens*, *supra*, at 166. The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced. See *Strickland*, *supra*, at 685.

The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial.¹³ It has been regarded as the root meaning of the constitutional guarantee. See *Wheat*, 486 U.S. at 159; *Andersen v. Treat*, 172 U.S. 24 (1898). See generally W. Beaney, *The Right to Counsel in American Courts* 18-24, 27-33 (1955). Cf. *Powell*, *supra*, at 53. 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 represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to 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.

III

Having concluded, in light of the Government's concession of erroneous deprivation, that the trial court violated respondent's Sixth Amendment right to counsel of choice, we must consider whether this error is subject to review for harmlessness. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.*, at 307-308 (internal quotation marks omitted). These include "most constitutional errors." *Id.*, at 306. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affect[] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.*, at 309-310.¹⁴ See also *Neder v. United States*, 527 U.S. 1, 7-9 (1999). Such errors include the denial of counsel, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), the denial of the right of self-representation, see *Mckaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984), the denial of the right to public trial, see *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.*, at 282. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante*, *supra*, at 310—or indeed on whether it proceeds at all. 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. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

The Government acknowledges that the deprivation of choice of counsel pervades the entire trial, but points out that counsel's ineffectiveness may also do so and yet we do not allow reversal of a conviction for that reason without a showing of prejudice. But the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation occurred. A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied. Moreover, if and when counsel's ineffectiveness "pervades" a trial, it does so (to the extent we can detect it) through identifiable mistakes. We can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel—in matters ranging from questions asked on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently—or indeed, would have handled the same but with the benefit of a more

jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.¹⁵

IV

Nothing we have said today casts any doubt or places any qualification upon our 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. As the dissent too discusses, *post*, at 3, the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. See *Wheat*, 486 U. S., at 159; *Caplin & Drysdale*, 491 U. S., at 624, 626. Nor 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. See *Wheat*, 486 U. S., at 159-160. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, *id.*, at 163-164, and against the demands of its calendar, *Morris v. Slappy*, 461 U. S. 1, 11-12 (1983). The court 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." *Wheat supra*, at 160. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel. However broad a court's discretion may be, the Government has conceded that the District Court here erred when it denied respondent his choice of counsel. Accepting that premise, we hold that the error violated respondent's Sixth Amendment right to counsel of choice and that this violation is not subject to harmless-error analysis.

* * *

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

I disagree with the Court's conclusion that a criminal conviction must automatically be reversed whenever a trial court errs in applying its rules regarding *pro hac vice* admissions and as a result prevents a defendant from being represented at trial by the defendant's first-choice attorney. Instead, 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 my view, the majority's contrary holding is based on an incorrect interpretation of the Sixth Amendment and a misapplication of harmless-error principles. I respectfully dissent.

The majority makes a subtle but important mistake at the outset in its characterization of what the Sixth Amendment guarantees. The majority states that the Sixth Amendment protects "the right of a defendant who does not require appointed counsel to choose who will represent him." *Ante*, at 3. What the Sixth Amendment actually protects, however, is the right to have the assistance that the defendant's counsel of choice is able to provide. It follows

that if the erroneous disqualification of a defendant's counsel of choice does not impair the assistance that a defendant receives at trial, there is no violation of the Sixth Amendment.¹¹

The language of the Sixth Amendment supports this interpretation. The Assistance of Counsel Clause focuses on what a defendant is entitled to receive ("Assistance"), rather than on the identity of the provider. The background of the adoption of the Sixth Amendment points in the same direction. The specific evil against which the Assistance of Counsel Clause was aimed was the English common-law rule severely limiting a felony defendant's ability to be assisted by counsel. *United States v. Ash*, 413 U. S. 300, 306 (1973). "[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial," *id.*, at 309, and thereby "to assure fairness in the adversary criminal process," *United States v. Morrison*, 449 U. S. 361, 364 (1981). It was not "the essential aim of the Amendment. . . to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U. S. 153, 159 (1988); cf. *Morris v. Slappy*, 461 U. S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel").

There is no doubt, of course, that the right "to have the Assistance of Counsel" carries with it a limited right to be represented by counsel of choice. At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited,¹² that is how the right inevitably played out. A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure. But from the beginning, the right to counsel of choice has been circumscribed.

For one thing, a defendant's choice of counsel has always been restricted by the rules governing admission to practice before the court in question. The Judiciary Act of 1789 made this clear, providing that parties "in all the courts of the United States" had the right to "the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct cases therein." Ch. 20, §35, 1 Stat. 92. Therefore, if a defendant's first-choice attorney was not eligible to appear under the rules of a particular court, the defendant had no right to be represented by that attorney. Indeed, if a defendant's top 10 or top 25 choices were all attorneys who were not eligible to appear in the court in question, the defendant had no right to be represented by any of them. Today, rules governing admission to practice before particular courts continue to limit the ability of a criminal defendant to be represented by counsel of choice. See *Wheat*, 486 U. S., at 159.

The right to counsel of choice is also limited by conflict-of-interest rules. Even if a defendant is aware that his or her attorney of choice has a conflict, and even if the defendant is eager to waive any objection, the defendant has no constitutional right to be represented by that attorney. See *id.*, at 159-160.

Similarly, the right to be represented by counsel of choice can be limited by mundane case-management considerations. If a trial judge schedules a trial to begin on a particular date and defendant's counsel of choice is already committed for other trials until some time thereafter, the trial judge has discretion under appropriate circumstances to refuse to postpone the trial date and thereby, in effect, to force the defendant to forgo counsel of choice. See, e.g., *Slappy supra*; *United States v. Hughes*, 147 F. 3d 423, 428-431 (CA5 1998).

These limitations on the right to counsel of choice are tolerable because the focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation. Limiting a defendant to those attorneys who are willing, available, and eligible to represent the defendant still leaves a defendant with a pool of attorneys to choose from—and, in most jurisdictions today, a large and diverse pool. Thus, these restrictions generally have no adverse effect on a defendant's ability to secure the best assistance that the defendant's circumstances permit.

Because the Sixth Amendment focuses on the quality of the assistance that counsel of choice would have provided, I would hold that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received. This would not require a defendant to show that the second-choice attorney was constitutionally ineffective within the meaning of *Strickland v. Washington*, 466 U. S. 668 (1984). Rather, the defendant would be entitled to a new trial if the defendant could show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial." *Rodriguez v. Chandler*, 382 F.3d 670, 675 (CA7 2004), cert. denied, 543 U. S. 1156 (2005).

This approach is fully consistent with our prior decisions. We have never held that the erroneous disqualification of counsel violates the Sixth Amendment when there is no prejudice, and while we have stated in several cases that the Sixth Amendment protects a defendant's right to counsel of choice, see *Caplin & Drysdale, Chartered v. United States*, 491 U. S. 617, 624-625 (1989); *Wheat, supra*, at 159; *Powell v. Alabama*, 287 U. S. 45, 53 (1932), we had no occasion in those cases to consider whether a violation of this right can be shown where there is no prejudice. Nor do our opinions in those cases refer to that question. It is therefore unreasonable to read our general statements regarding counsel of choice as addressing the issue of prejudice.¹⁹

II

But even accepting, as the majority holds, that the erroneous disqualification of counsel of choice always violates the Sixth Amendment, it still would not follow that reversal is required in all cases. The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions. Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a), which instructs federal courts to "disregard[]" "[a]ny error. . . which does not affect substantial rights." See also 28 U. S. C. §2111; *Chapman v. California*, 386 U. S. 18, 22 (1967). The only exceptions we have recognized to this rule have been for "a limited class of fundamental constitutional errors that 'defy analysis by 'harmless error' standards.'" *Neder v. United States*, 527 U. S. 1, 7 (1999) (quoting *Arizona v. Fulminante*, 499 U. S. 279, 309 (1991)); see also *Chapman, supra*, at 23. "Such errors . . . 'necessarily render a trial fundamentally unfair [and] deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder, supra*, at 8-9 (quoting *Rose v. Clark*, 478 U. S. 570, 577-578 (1986) (second omission in original)); see also *ante*, at 9 (listing such errors).

Thus, in *Neder*, we rejected the argument that the omission of an element of a crime in a jury instruction "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U. S., at 9. In fact, in that case, "quite the opposite [was] true: *Neder* was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to *Neder's* defense. . . ." *Ibid*.

Neder's situation—with an impartial judge, the correct standard of proof, assistance of counsel, and a fair jury—is much like respondent's. Fundamental unfairness does not inexorably follow from the denial of first-choice counsel. The "decision to retain a particular lawyer" is "often uninformed," *Cuyler v. Sullivan*, 446 U. S. 335, 344 (1980); 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. These possibilities would not justify violating the right to choice of counsel, but they do make hard put to characterize the violation as "always render[ing] a trial unfair," *Neder, supra*, at 9. Fairness may not limit the right, see *ante*, at 5, but it does inform the remedy.

Nor is it always or nearly always impossible to determine whether the first choice would have provided better representation than the second choice. There are undoubtedly cases

in which the prosecution would have little difficulty showing that the second-choice attorney was better qualified than or at least as qualified as the defendant's initial choice, and there are other cases in which it will be evident to the trial judge that any difference in ability or strategy could not have possibly affected the outcome of the trial.

Requiring a defendant to fall back on a second-choice attorney is not comparable to denying a defendant the right to be represented by counsel at all. Refusing to permit a defendant to receive the assistance of any counsel is the epitome of fundamental unfairness, and as far as the effect on the outcome is concerned, it is much more difficult to assess the effect of a complete denial of counsel than it is to assess the effect of merely preventing representation by the defendant's first-choice attorney. To be sure, when the effect of an erroneous disqualification is hard to gauge, the prosecution will be unable to meet its burden of showing that the error was harmless beyond a reasonable doubt. But that does not justify eliminating the possibility of showing harmless error in all cases.

The majority's focus on the "trial error"/"structural defect" dichotomy is misleading. In *Fulminante*, we used these terms to denote two poles of constitutional error that had appeared in prior cases; trial errors always lead to harmless-error review, while structural defects always lead to automatic reversal. See 499 U. S., at 306-310. We did not suggest that trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors "affecting the framework within which the trial proceeds," *id.*, at 310, are structural. The touchstone of structural error is fundamental unfairness and unreliability. Automatic reversal is strong medicine that should be reserved for constitutional errors that "always" or "necessarily," *Neder, supra*, at 9 (emphasis in original), produce such unfairness.

III

Either of the two courses outlined above—requiring at least some showing of prejudice, or engaging in harmless-error review—would avoid the anomalous and unjustifiable consequences that follow from the majority's two-part rule of error without prejudice followed by automatic reversal.

Under the majority's holding, a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly. By contrast, a defendant whose attorney was ineffective in the constitutional sense (i.e., "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," *Strickland*, 466 U. S., at 687) cannot obtain relief without showing prejudice.

Under the majority's holding, a trial court may adopt rules severely restricting *pro hac vice* admissions, cf. *Leis v. Flynt*, 439 U. S. 438, 443 (1979) (*per curiam*), but if it adopts a generous rule and then errs in interpreting or applying it, the error automatically requires reversal of any conviction, regardless of whether the erroneous ruling had any effect on the defendant.

Under the majority's holding, some defendants will be awarded new trials even though it is clear that the erroneous disqualification of their first-choice counsel did not prejudice them in the least. Suppose, for example, that a defendant is initially represented by an attorney who previously represented the defendant in civil matters and who has little criminal experience. Suppose that this attorney is erroneously disqualified and that the defendant is then able to secure the services of a nationally acclaimed and highly experienced criminal defense attorney who secures a surprisingly favorable result at trial—for instance, acquittal on most but not all counts. Under the majority's holding, the trial court's erroneous ruling automatically means that the Sixth Amendment was violated—even if the defendant makes no attempt to argue that the disqualified attorney would have done a better job. In fact, the defendant would still be entitled to a new trial on the counts of conviction even if the defendant publicly proclaimed after the verdict that the second attorney had provided better representation

than any other attorney in the country could have possibly done.

Cases as stark as the above hypothetical are unlikely, but there are certainly cases in which the erroneous disqualification of a defendant's first-choice counsel neither seriously upsets the defendant's preferences nor impairs the defendant's representation at trial. As noted above, a defendant's second-choice lawyer may sometimes be better than the defendant's first-choice lawyer. Defendants who retain counsel are frequently forced to choose among attorneys whom they do not know and about whom they have limited information, and thus a defendant may not have a strong preference for any one of the candidates. In addition, if all of the attorneys considered charge roughly comparable fees, they may also be roughly comparable in experience and ability. Under these circumstances, the erroneous disqualification of a defendant's first-choice attorney may simply mean that the defendant will be represented by an attorney whom the defendant very nearly chose initially and who is able to provide representation that is just as good as that which would have been furnished by the disqualified attorney. In light of these realities, mandating reversal without even a minimal showing of prejudice on the part of the defendant is unwarranted.

The consequences of the majority's holding are particularly severe in the federal system and in other court systems that do not allow a defendant to take an interlocutory appeal when counsel is disqualified. See *Flanagan v. United States*, 465 U.S. 259, 260 (1984). Under such systems, appellate review typically occurs after the defendant has been tried and convicted. At that point, if an appellate court concludes that the trial judge made a marginally incorrect ruling in applying its own *pro hac vice* rules, the appellate court has no alternative but to order a new trial—even if there is not even any claim of prejudice. The Sixth Amendment does not require such results.

Because I believe that some showing of prejudice is required to establish a violation of the Sixth Amendment, I would vacate and remand to let the Court of Appeals determine whether there was prejudice. However, assuming for the sake of argument that no prejudice is required, I believe that such a violation, like most constitutional violations, is amenable to harmless-error review. Our statutes demand it, and our precedents do not bar it. I would then vacate and remand to let the Court of Appeals determine whether the error was harmless in this case.

[1] The dissent proposes yet a third standard—viz., that the defendant must show “an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial.” *Post*, at 4 (opinion of ALITO, J.). That proposal suffers from the same infirmities (outlined later in text) that beset the Government's positions. In addition, however, it greatly impairs the clarity of the law. How is a lower-court judge to know what an “identifiable difference” consists of? Whereas the Government at least appeals to *Strickland* and the case law under it, the most the dissent can claim by way of precedential support for its rule is that it is “consistent with” cases that never discussed the issue of prejudice. *Id.*

[2] The dissent resists giving effect to our cases' recognition, and the Government's concession, that a defendant has a right to be defended by counsel of his choosing. It argues that because the Sixth Amendment guarantees the right to the “assistance of counsel” it is not violated unless “the erroneous disqualification of a defendant's counsel of choice . . . impair[s] the assistance that a defendant receives at trial.” *Post*, at 142 (opinion of ALITO, J.). But if our cases (and the Government's concession) mean anything, it is that the Sixth Amendment is violated when the erroneous disqualification of counsel “impair[s] the assistance that a defendant receives at trial [from the counsel that he chose].”

[3] In *Wheat v. United States*, 486 U.S. 153 (1988), where we formulated the right to counsel of choice and discussed some of the limitations upon it, we took note of the overarching purpose of fair trial in holding that the trial court has discretion to disallow a first choice of counsel that would create serious risk of conflict of interest. *Id.*, at 159. It is one thing to conclude that the right to counsel of choice may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair.

[4] The dissent criticizes us for our trial error/structural defect dichotomy, asserting that *Fulminante* never said that “trial errors are the only sorts of errors amenable to harmless-error review, or that all errors affecting the framework within which the trial proceeds are structural,” *post*, at 8 (opinion of ALITO, J.) (internal quotation marks and citation omitted). Although it is hard to read that case as doing anything other than dividing constitutional error into two comprehensive categories, our ensuing analysis in fact relies neither upon such comprehensiveness nor upon trial error as the touchstone for the availability of harmless-error review. Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. See *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (violation of the public-trial guarantee is not subject to harmless-review because “the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance”); *Vesquez v. Hillery*, 474 U.S. 254, 263 (1986) (“[W]hen a petit jury has been

selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained”). The dissent would use “fundamental unfairness” as the sole criterion of structural error, and cites a case in which that was the determining factor, see *Neder v. United States*, 527 U.S. 1 (1999) (quoted by the dissent, *post*, at 6). But this has not been the only criterion we have used. In addition to the above cases using difficulty of assessment as the test, we have also relied on the irrelevance of harmless-review, see *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (“Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to ‘harmless error’ analysis”). Thus, it is the dissent that creates a single, inflexible criterion, inconsistent with the reasoning of our precedents, when it asserts that only those errors that always or necessarily render a trial fundamentally unfair and unreliable are structural, *post*, at 8.

[5] In its discussion of the analysis that would be required to conduct harmless-error review, the dissent focuses on which counsel was “better.” See *post*, at 7-8 (opinion of ALITO, J.). This focus has the effect of making the analysis look achievable, but it is fundamentally inconsistent with the principle (which the dissent purports to accept for the sake of argument) that the Sixth Amendment can be violated without a showing of harm to the quality of representation. Cf. *McKaskle, supra*, at 177 n.8. By framing its inquiry in these terms and expressing indignation at the thought that a defendant may receive a new trial when his actual counsel was at least as effective as the one he wanted, the dissent betrays its misunderstanding of the nature of the right to counsel of choice and its confusion of this right with the right to effective assistance of counsel.

[11] This view is consistent with the Government's concession that “[t]he Sixth Amendment . . . encompasses a non-indigent defendant's right to select counsel who will represent him in a criminal prosecution.” Brief for United States 11, though this right is “circumscribed in several important respects,” *id.*, at 12 (citation and internal quotation marks omitted).

[2] See Act of Apr. 30, 1790, ch. 9, §29, 1 Stat. 118 (providing for appointment of counsel in capital cases); *Betts v. Brady*, 316 U.S. 455, 467, n.20 (1942) (surveying state statutes).

[3] *Powell* is the case generally cited as first noting a defendant's right to counsel of choice. *Powell* involved an infamous trial in which the defendants were prevented from obtaining any counsel of their choice and were instead constrained to proceed with court-appointed counsel of dubious effectiveness. We held that this denied them due process and that “a fair opportunity to secure counsel of [one's] own choice” is a necessary concomitant of the right to counsel, 287 U.S. at 53; cf. *id.*, at 71 (“[T]he failure of the trial court to give [petitioners] reasonable time and opportunity to secure counsel was a clear denial of due process”). It is clear from the facts of the case that we were referring to the denial of the opportunity to choose any counsel, and we certainly said nothing to suggest that a violation of the right to counsel of choice could be established without any showing of prejudice.

In *Wheat*, we held that the trial judge had not erred in declining the defendant's waiver of his right to conflict-free counsel, and therefore we had no need to consider whether an incorrect ruling would have required reversal of the defendant's conviction in the absence of a showing of prejudice. We noted that “the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment,” 486 U.S. at 159, but we went on to stress that this right “is circumscribed in several important respects,” *id.*, including by the requirement of bar membership and rules against conflicts of interest. *Wheat* did not suggest that a violation of the limited Sixth Amendment right to counsel of choice can be established without showing prejudice, and our statements about the Sixth Amendment's “purpose” and “essential aim”—providing effective advocacy and a fair trial, *id.*—suggest the opposite.

Finally, in *Caslin & Drossdale*, we held that the challenged action of the trial judge—entering an order forfeiting funds that the defendant had earmarked for use in paying his attorneys—had been proper, and, accordingly, we had no occasion to address the issue of prejudice. We recognized that “the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds,” 491 U.S. at 624-625, but we added that “[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of . . . counsel,” *id.*, at 626 (omission in original).

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APPENDIX

E

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STATE OF WASHINGTON

BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

No. 35962-6-II

v.

ADRIAN CONTRERAS-REBOLLAR,

Appellant.

UNPUBLISHED OPINION

PENOYAR, A.C.J. — A jury convicted Adrian Contreras-Rebollar¹ of two counts of first degree assault and returned special verdicts finding that he was armed with a firearm during the commission of those crimes. Contreras now appeals, arguing that (1) the trial court erred by denying his motion for a mistrial; (2) the State did not produce sufficient evidence to prove beyond a reasonable doubt that he was not acting in self defense; and (3) the trial court erred by sentencing him based on a criminal history and offender score the State did not prove. Contreras also argues in a statement of additional grounds for review that he was denied effective assistance of counsel. We affirm Contreras's convictions, but remand for resentencing.

¹ The record indicates that the appellant's full name is "Adrian Contreras-Rebollar." However, we refer to him as "Contreras" throughout this opinion and mean no disrespect in doing so.

APPENDIX

F

"Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' *Ibid.*" *Barefoot v. Estelle*, 463 U.S. 880, 913-914, 103 S.Ct. 8383, 8405, 77 L.Ed.2d 1090 (1983) (dissenting opinion).

See also *id.*, at 924, 103 S.Ct., at 3405 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S., at 112, 102 S.Ct., at 875. In fact, as Justice O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." *Id.*, at 117, n., and 119, 102 S.Ct., at 877, n., and 878 (O'CONNOR, J., concurring).

¹⁷⁰⁶Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Comment, 83 Colum.L.Rev. 1544, 1549 (1983). See,

e.g., *Burger v. Zant*, 718 F.2d 979 (CA11, 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, 466 U.S. 902, 104 S.Ct. 1676, 80 L.Ed.2d 151 (1984). Accordingly, counsel's general duty to investigate, *ante*, at 2066, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Eddings v. Oklahoma*, *supra*, 455 U.S., at 112, 102 S.Ct., at 875 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

→ Justice MARSHALL, dissenting. ★

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense.¹ It has long been settled that "the right to counsel is the right to the effective assistance¹⁰⁷ of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, n. 14, 25 L.Ed.2d 763 (1970). The state and lower federal courts have developed standards for distinguishing effective from inade-

Cite as 104 S.Ct. 2052 (1984)

quate assistance.¹ Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." *Ante*, at 2065. Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. *Ante*, at 2068. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave ¹⁷⁰⁸"reasonably" and must act like "a reasonably competent attorney," *ante*, at 2065, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess

claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?² The majority offers no clues as to the proper responses to these questions.

The majority defends its refusal to adopt more specific standards primarily on the ground that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account⁷⁰⁹ of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defend-

1. See Note, Identifying and Remediating Ineffective Assistance of Criminal Defense Counsel: A New Look After *United States v. Decoster*, 93 Harv.L.Rev. 752, 756-758 (1980); Note, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U.Chi.L.Rev. 1380, 1386-1387, 1399-1401, 1408-1410 (1983).

2. Cf., e.g., *Moore v. United States*, 432 F.2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as "the exercise of the customary skill and knowledge which normally prevails at the time and place").

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ant." *Ante*, at 2065. I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, see *ante*, at 689; cf. *infra*, at 2077-2078, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F.2d 1243, 1251-1258 (CA5 1982) (en banc). For other, generally consistent efforts, see *United States v. Decoster*, 159 U.S.App.D.C. 326, 333-334, 487 F.2d 1197, 1203-1204 (1973), disapproved on rehearing, 199 U.S.App. D.C. 359, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); *Coles v. Peyton*, 389 F.2d 224, 226 (CA4), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); *People v. Pope*, 23 Cal.3d 412, 424-425, 590 P.2d 859, 866, 152 Cal.Rptr. 732, 739 (1979); *State v. Harper*, 57 Wis.2d 543, 550-557, 205 N.W.2d 1, 6-9 (1973).³ By refusing to address the merits of these proposals, and

3. For a review of other decisions attempting to develop guidelines for assessment of ineffective-assistance-of-counsel claims, see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am.Crim.L.Rev. 233, 242-248 (1979). Many of these decisions rely heavily on the standards developed by the American Bar Association. See ABA Standards for Criminal Justice 4-1.1-4-8.6 (2d ed. 1981).

4. Cf. *United States v. Ellison*, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed: "[T]he evil . . . is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-491, 98 S.Ct. 1173, 1181-1182, 55 L.Ed.2d 426 (1978) (emphasis in original). When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

1710B
 [I] object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.⁴ In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.]

ney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-491, 98 S.Ct. 1173, 1181-1182, 55 L.Ed.2d 426 (1978) (emphasis in original). When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

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[17] Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.⁵ The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

In *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is the right to the assistance of counsel at trial. *Id.*, at 23, n. 8, 87 S.Ct., at 827, n. 8; see *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).⁶ In my view, the right [17] to effective assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter.⁷ I would thus

5. See *United States v. Decoster*, 199 U.S.App.D.C. 359, 454-457, 624 F.2d 196, 291-294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Note, 93 Harv.L.Rev., at 767-770.

6. In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In *Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467-468, 86 L.Ed. 680 (1942), for example, we held:

"To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to

hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of "a range of legitimate" responses. *Ante*, at 2065. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. *Ibid.* The majority goes on, however, to suggest that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, *ibid.*; see *ante*, at 2066, 2069, and should "appl[y] a heavy measure of deference to counsel's judgments," *ante*, at 2066.

have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As the Court today acknowledges, *United States v. Cronin*, 466 U.S., at 662, n. 31, 104 S.Ct., at 2048, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.

7. See *United States v. Yelardy*, 567 F.2d 863, 865, n. 1 (CA6), cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978); *Beasley v. United States*, 491 F.2d 687, 696 (CA6 1974); *Commonwealth v. Badger*, 482 Pa. 240, 243-244, 393 A.2d 642, 644 (1978).

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I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, Elis would agree. See *United States v. Cronin*, 466 U.S., at 658, 104 S.Ct., at 2046. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional norms," *ante*, at 2065, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. See *ante*, at 2066. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

8. See, e.g., *State v. Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); *Hoover v. State*, 270 Ark. 978, 980, 606 S.W.2d 749, 751 (1980); *Line v. State*, 272 Ind. 353, 354-355, 397 N.E.2d 975, 976 (1979).

9. See, e.g., *Trapnell v. United States*, 725 F.2d 149, 155 (CA2 1983); *Cooper v. Fitzharris*, 586 F.2d 1325, 1328-1330 (CA9 1978) (en banc), cert.

B

For many years the lower courts have been debating the meaning of "effective" assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving "farce-and-mockery" standard,⁸ while others have adopted various versions of the "reasonable competence" standard.⁹ On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent "outcome-determinative" test,¹⁰ to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant.¹¹

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, *ante*, at 2064-2067, and so affects the trial that there is a "reasonable probability" that, absent counsel's error, the outcome would have been different, *ante*, at 2067-2069.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See *ante*, at 2069. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluctance,

denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

10. See, e.g., *United States v. Decoster*, 199 U.S. App.D.C., at 370, and n. 74, 624 F.2d, at 208, and n. 74 (plurality opinion); *Knight v. State*, 394 So.2d 997, 1001 (Fla.1981).

11. See n. 7, *supra*.

APPENDIX

G

1 Regina Hernandez only for the purpose of assessing her
2 credibility. You must not consider the testimony for
3 any other purpose.

4 Mr. Schoenberger?

5 MR. SCHOENBERGER: Thank you, Your Honor.

6 JAY BERNEBURG,

7 having been called as a witness by the plaintiff, being
8 first duly sworn, was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. SCHOENBERGER:

11 Q Good morning, Mr. Berneburg.

12 A Good morning.

13 Q Are you employed, sir?

14 A Yes, sir.

15 Q And how are you employed?

16 A I am an attorney.

17 Q How long have you been an attorney?

18 A This is my ten years in October.

19 Q Is that a licensed profession?

20 A Yes, it is.

21 Q You have a license to practice law in the State of
22 Washington?

23 A Yes, admitted by the Washington State Bar Association,
24 Bar No. 17265.

25 Q And have you been retained in this case?

1 A Yes, I have.

2 Q Do you recall the events of Sunday, January 15th of
3 this year?

4 A Are you referring to Regina Hernandez?

5 Q Yes.

6 A I have it down on the 21st.

7 Q A week after?

8 A Sunday afternoon.

9 Q And what happened that Sunday afternoon?

10 A We were working on preparing the case for trial. We
11 went with Adrian.

12 Q Who is "we"?

13 A You and I. Then we went to interview Regina Hernandez.

14 Q Where did he meet with her?

15 A In the Pierce County Jail.

16 Q Why was she in the Pierce County Jail?

17 A They brought her over from another location so that she
18 could testify in this trial.

19 Q Do you recall your discussion with her with
20 specificity?

21 A Yes, I do.

22 Q Do you recall discussing the state of Mr. Solis's
23 vehicle at the time of the incident?

24 A Yes, I do.

25 Q Did you ask her or did she tell you about the vehicle?

1 A I asked her about the vehicle; however, she provided
2 the information about the vehicle. She responded to my
3 question.

4 Q What was your question?

5 A My question was specifically that in her statement to
6 the police she had said that she was looking down at
7 the CD's on the floor, and I wanted to know what got
8 her attention and what caused her to look up and at
9 what point did she look up and when she did, what did
10 she see. And I said, What can you tell me about the
11 car?

12 Q And did she have an answer?

13 A Yes, she did.

14 Q What did she tell you at that time?

15 A When I asked her were the lights on or off, and I
16 didn't specify what lights -- I said, Were the lights
17 on or off? And she said, The little yellow lights on
18 the side where the turn signal is were on. And I said,
19 That would be the running lights?

20 Yes.

21 I said, What about the headlights?

22 She said they were off.

23 Q Did she have anything else?

24 A Not on that subject.

25 MR. SCHOENBERGER: Thank you. I have nothing

1 further.

2 THE COURT: Mr. Greer, any questions?

3 MR. GREER: Yes, sir.

4 CROSS-EXAMINATION

5 BY MR. GREER:

6 Q Mr. Berneburg, you said she said the headlights were
7 off?

8 A Mm-hmm.

9 Q You had read two prior statements that she had given to
10 law enforcement?

11 A Mm-hmm.

12 Q You have to say yes, sir.

13 A Yes. I'm sorry.

14 Q In both those statements she made it real clear to the
15 detectives that she didn't see the headlights, correct?

16 A No, that's not what I recall. What I recall is that
17 that subject was never discussed.

18 Q Mr. Berneburg, you put in a brief, did you not,
19 regarding this issue and attached a copy of a
20 transcript?

21 A Correct.

22 Q And I believe your original is with the Court. I'm
23 going to hand you what's been marked as Plaintiff's
24 Exhibit 156. Do you recognize that?

25 A Yes, I do.

1 Q What I would like you to do is turn to your attachment
2 in there, the transcript, and I've got on the bottom
3 two pages marked, bent pages. That's the one that you
4 were just passed. And there's portions in there either
5 highlighted or bracketed. Would you read that to
6 yourself?

7 A Are you referring to page 424?

8 Q Correct. Would you read that to yourself?

9 A (Reading.) Okay.

10 Q And there's another passage a couple of pages later.
11 Would you read that to yourself?

12 THE COURT: What page is the second?

13 THE WITNESS: 427.

14 A (Reading.) Okay.

15 Q Had you read those passages prior to talking to
16 Ms. Hernandez?

17 A Absolutely.

18 Q And it's true, is it not, that the detective asked her
19 what she saw of that car, correct?

20 A That is correct.

21 Q And she said she was looking down at CD's, that the
22 defendant saw the car, that the first thing she knew
23 was gunfire; she was listening to gunfire. She looked
24 up. She saw the defendant's gun and she looked in the
25 rearview mirror and saw brake lights. Isn't that fair

1 and accurate?

2 A That's what's in the report, yes.

3 Q I want to also hand you Plaintiff's 156, and I want to
4 ask you before I do: Did you look at anything in that
5 transcript before talking to Ms. Hernandez?

6 A I don't recall that day, although I had completely read
7 the discovery prior to talking to Ms. Hernandez, yes.

8 Q You completely read the discovery?

9 A As far as I know, yes.

10 Q Every bit of it?

11 A Mm-hmm.

12 Q Now I want to hand you Plaintiff's 155. Let me find
13 the specific area first. First, if you can identify it
14 and then I'll have you turn to page 8 of 8, the second
15 full paragraph.

16 A This is a police incident report, dot 21, making it the
17 21st report logged into the system by the police,
18 written by Officer Bradley Graham. At which paragraph?

19 Q The second paragraph on the last page, if you would
20 read it to yourself.

21 A (Reading.) Okay.

22 Q Have you read that before?

23 A Yes, I have.

24 Q And that is also a statement given at this time to
25 Detective Graham regarding what she saw at the time of

1 the shooting, correct?

2 A No, that's not correct. What is written here is
3 Detective Graham's restatement of what he believed she
4 said to him, and I don't think it's accurate.

5 Q Were you there?

6 A I'm going based on the transcript.

7 Q Mr. Berneburg --

8 A I'm reading the transcript, Mr. Greer, and based on
9 what is in this transcript, that is not an accurate
10 statement.

11 Q Mr. Berneburg, were you there?

12 A No.

13 Q So you say that it's not accurate as to what Detective
14 Graham put down that she said?

15 A I'm reading the transcript. It's not an accurate
16 reflection of what's in the transcript.

17 Q The paragraph that you just read says exactly what the
18 transcript says?

19 A No, it doesn't.

20 Q Mr. Berneburg, read the paragraph out loud.

21 A "Once back in Luis's car she said she was going through
22 her CD case when they pulled away. Luis saw another
23 car and slowed down."

24 At that point, Mr. Greer, that is never in the
25 transcript.

1 Q It doesn't say "Mr. Greer," does it? Read the
2 paragraph, please.

3 A She said, quote, It was right after we left Yessica's
4 house, end quote. As they passed it, Luis grabbed his
5 gun and leaned out the window and started shooting.
6 She didn't know how many times he shot or who he was
7 shooting at. She said she turned back to see its brake
8 lights. She didn't see any heads in the car. She said
9 he told her, quote, Man, I smoked that fool, end quote.
10 She asked him why he did that and he didn't say
11 anything.

12 Q Now, reviewing that paragraph, does it not say that
13 it's the defendant who saw the car? Is that what it
14 says?

15 A That's what Bradley Graham says that Regina Hernandez
16 told him.

17 Q So the answer is yes, that's what it says?

18 A That's what it says.

19 Q And then the next thing is, When the car is passing,
20 the defendant starts shooting. Isn't that what it
21 says?

22 A That's what it says.

23 Q And then the next thing it says is: Then she looks and
24 she sees brake lights. Isn't that what it says?

25 A That's what it says.

1 Q And in the transcript, in the two points that you read,
2 that's what they say, correct?

3 A These statements are not in agreement --

4 Q Is that what --

5 A No, it's not.

6 Q Read the transcript.

7 A To myself or out loud?

8 Q Out loud, the part that is highlighted.

9 A Out of context or do you want me to read the whole
10 statement?

11 Q Read the parts that are highlighted. You're the
12 witness, not the attorney.

13 MR. SCHOENBERGER: Objection. I don't know
14 what's highlighted.

15 THE COURT: Show it to Mr. Schoenberger.
16 This is on page 424 or 427?

17 MR. GREER: 424, Your Honor, is the first
18 one, page 6 of 13 at the end of this transcript.

19 MR. SCHOENBERGER: Thank you.

20 Q (By Mr. Greer) The highlighted portion, and what I
21 mean is the bracketed.

22 A "Graham: Okay. Can you tell us how that came about?
23 What happened?

24 "Hernandez: Uhm, we were leaving at Yessica's
25 house and the car was rolling past us and I was looking

1 Q Now, the jury will decide whether those statements are
2 different or not, but since you already testified that
3 they're different, and remember the issue is on what
4 she saw regarding the car's headlights, those
5 statements are completely consistent, aren't they?

6 A I'll say that, yeah.

7 Q And the only lights she ever said that she saw and in
8 context the only thing she ever saw was when the shots
9 started happening, she looked up, she saw the defendant
10 with a gun in his hand, yelled at him, grabbed at him,
11 and then turned around and saw brake lights, correct?

12 A That is what's in the interview, correct.

13 Q And in the transcript?

14 A That's what's in the transcript.

15 Q And all the statements that she gave, because that's
16 the entirety of the statements she gave to law
17 enforcement, correct? You read the discovery?

18 A That is correct.

19 Q And that is what she said, right?

20 A Correct.

21 Q Now, did you read all the discovery, as you said you
22 did?

23 A I believe so, yes.

24 Q Did you read the police reports where the first witness
25 on the scene, Kim Say, say the headlights were on the

1 car?

2 A That's correct.

3 Q Did you read the first officer's police report where he
4 says the lights were on?

5 A Yes.

6 Q And all the other witnesses that would have seen
7 something, meaning Mr. Kelley and Mr. Solis, they also
8 indicated that they were driving down the street and
9 nothing brought their attention to anything until they
10 heard gunfire, correct?

11 A Correct.

12 Q So there's no witness in this case, none, at the time
13 that you go over to that jail the night before you give
14 your opening statement, there is no witness, no piece
15 of evidence in this case that says the headlights were
16 off; is that accurate?

17 A Nothing in the discovery, correct.

18 Q Nothing anywhere?

★ 19 A I'm talking about my client, having conversations with
20 my client, but yeah.

21 Q And then you're on this case. How many witnesses did
22 you interview prior to this case started?

23 THE COURT: Ladies and gentlemen, I'm going
24 to ask the jurors to step out just for a minute.

25 Again, please don't discuss the case among yourselves

1 or with each other. We'll get you back in here in a
2 couple of minutes. Thank you.

3 (After the jury left the courtroom,
4 the following proceedings were
5 had:)

6 THE COURT: I'm a bit concerned, Mr. Greer,
7 that you're arguing your case. Mr. Schoenberger hasn't
8 objected to these questions. What does this have to do
9 with the very limited issue of Mr. Berneburg?

10 MR. GREER: The issue is the credibility of
11 the witness.

12 THE COURT: Well, do you mention Ms. Say?

13 MR. GREER: Because all the evidence, Your
14 Honor, as I pointed out, says the lights were on.

★ 15 THE COURT: What does that have to do with
16 the credibility of Hernandez and what Berneburg talked
17 to her in the jail? It seems to me you're creating
18 some problems here. Mr. Schoenberger is not objecting.
19 Maybe that's tactical on his part. I don't know.

20 MR. GREER: Correct. It means who's telling
21 the truth.

22 THE COURT: Ms. Say has nothing to do with
23 Ms. Hernandez. Please refer to the limiting
24 instruction. I just told the jury this is the limited
25 issue of credibility of Regina Hernandez. Why do we

1 need to mention Ms. Say, for example? And that's final
2 argument when we get to argument.

3 MR. GREER: No, Your Honor, what's important
4 is what's in his mind when he goes to the jail. That's
5 what I'm asking. The discovery is provided to him. He
6 reads it. He knows that the responding officer and all
7 the witnesses in this case say the lights are on. He's
8 trying to convince the witness to say differently.
9 That's the point. This is all information that he has.

10 THE COURT: You honestly don't think you're
11 arguing with Mr. Berneburg?

12 MR. GREER: Arguing with him?

13 THE COURT: Yes.

14 MR. GREER: Well, I don't know the term
15 "arguing" is right. He's a witness. I'm doing a
16 cross-examination and asking leading questions, and he
17 may be arguing with me, but the problem is, I need to
18 show the jury what he had in his mind, how many
19 witnesses he talked to. Judge, the truth of the matter
20 is, as I've said, he gets on this case and he does one
21 thing --

★ 22 THE COURT: We're creating more potential
23 problems, it appears to me.

24 Mr. Schoenberger, anything else you want to add?

25 MR. SCHOENBERGER: No, Your Honor.

APPENDIX

H

1 WEDNESDAY, JANUARY 24, 2007; MORNING SESSION

2 (All parties present.)

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5
6 (Jury not present.)

7 THE COURT: Good morning. You can all be
8 seated. We're back on the case of State vs. Adrian
9 Contreras-Rebollar. I would like to get the jury in
10 here as soon as possible. Mr. Kelley is the next
11 witness?

12 MR. GREER: Yes, sir. He's in CDPJ, ready to
13 go. The issue with Mr. Berneburg that was addressed
14 yesterday afternoon, I would like to resolve, Your
15 Honor, if I can.

16 I spoke with our appellate unit, and Ms. Proctor,
17 representing them, is concerned about the issues just
18 like the Court and everybody else, I think. I've
19 proposed a limiting instruction that I passed to the
20 Court, and I would also request that the Court exclude
21 Mr. Berneburg from the rest of the proceedings. It's
22 my understanding that the defense didn't plan on him
23 being here anyway, and in talking to them this morning
24 off the record, that's still the plan.

★ 25 I think this way would, at least minus any sort of

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1 prejudice that could be brought to the defendant by
2 virtue of Ms. Hernandez's testimony about Mr.
3 Berneburg.

4 THE COURT: Well, Mr. Schoenberger?

5 MR.SCHOENBERGER: Your Honor, I don't have
6 any objections. As I stated yesterday, Mr. Berneburg
7 is associated on this case, retained by the family, and
8 his role is limited. It was not to take over, it was
9 not to substitute for me, so his role, as anticipated
10 by agreement and discussion with him recently, would be
11 in the background.

12 THE COURT: Well, Mr. Greer is also proposing
13 a limiting instruction here based on WPIC 4.64.

14 MR. GREER: And, Your Honor, I should point
15 out that I did modify the WPIC.

16 MR.SCHOENBERGER: I looked at the
17 instruction, Your Honor, I've not looked at the WPIC.
18 I question whether I even need to draw attention to it
19 at this point in time. I would like to go back and
20 look at the WPIC and any notes or comments.

21 THE COURT: So you want me to give them this
22 instruction when? Now?

23 MR. GREER: I think it's appropriate now, as
24 well as with the packet that the Court reads to them in
25 closing.

An unimportant morass here: Schoenberger stating Mr. Berneburg's role is limited and his role would be in the background. (RP5 452) However, all co-counsel's roles are limited. You're either lead-counsel on a case, or co-counsel, and that's precisely what Schoenberger was referring to. Even do Berneburg's role was to be in the background, his role there was to subsidize and advocate critical functions to Mr. Contreras' defense.

Berneburg was in charge of 4 crucial witnesses for the defense, including that of Benito Cervantes. (RP6.793, 795; AP-C 1-2) As well as the jury instructions on Petitioner's case. (RP5 452 at 10; 456 at 13)

Authority Petitioner relies on for his argument is in United States v. Laura, 607 F.2d 52 (3rd Cir. 1979)., along (Cases cited therein). Stated in Laura, "a judge cannot dismiss local counsel because of counsel's participation was, in the eyes of the judges, modest or miniscule. Laura, 607 F.2d at 45.⁴

⁴ Research conducted for U.S. v. Laura, 607 F.2d 52 (3rd Cir. 1979) case is derived from the VersusLaw, Inc. computer "Law Search Engine" program. At ## being the numbered paragraph of language and/or law provided therein.

1 admitting he's a gang member or something to that
2 effect, no objection, but any sort of specific
3 instances of conduct or character evidence is
4 inadmissible. And we get back to the issue of the
5 defendant. If we're going to sling mud and portray
6 Mr. Solis as a bad guy and the defendant had all this
7 previous knowledge, then, as the Court, I think, said
8 at the beginning of this trial, the issue of him being
9 a felon in possession of a firearm, in all fairness,
10 needs to come in.

11 THE COURT: Who's the investigator?

12 MR. GREER: His name is Bernito Cervantes.

13 THE COURT: What do you anticipate him
14 testifying about, Mr. Schoenberger?

15 MR. SCHOENBERGER: It's my understanding, and
16 I have not yet met with him, that he is a private
★ 17 investigator, and in a previous case in which Mr.
18 Berneburg was involved he was attempting to serve
19 Mr. Solis as a witness with a subpoena for his
20 testimony, and in tracking him down he learned about
21 his gang affiliation and his reputation in the
22 community for violence. And it certainly should come
23 in when we have a self-defense claim. It certainly
24 does come in that he had a reputation in the community
25 for being a violent person.

1 objection, but my Officer Ringer isn't an expert of
2 Sureños. As I understand it, Mr. Schoenberger is
3 trying to contact Sgt. Davidson to have him testify,
4 and I have no objection to that, but, again --

5 MR. SCHOENBERGER: I don't know the substance
6 of what he's going to be offering. I haven't talked to
7 Sgt. Davidson about his knowledge of Sureños.

8 THE COURT: Well, Davidson was the fact
9 witness on the scene; the sergeant in charge.

10 MR. GREER: He did do some things, but more
11 or less along the lines of he's the lead detective in
12 the homicide division, in charge of the detectives in
13 the homicide division.

14 THE COURT: Why do you want to call him?

15 MR. SCHOENBERGER: For facts about Nick
16 Solis. I would like to ask him: Do you know Nick
17 Solis to be a member of a gang; do you know that gang;
18 and tell me about the gang and their proclivity towards
19 extreme violence.

20 THE COURT: What are you going to anticipate
21 him saying?

★ [22 MR. SCHOENBERGER: Once again, this was a
23 task that I delegated for Mr. Berneburg and I don't
24 have the answers for you yet.

25 THE COURT: Can you communicate at least a

AFFIDAVIT OF

Adrian Contreras-Rebollar

STATE OF WASHINGTON

County of Grays Harbor

ss.

I Adrian Contreras-Rebollar, declare under penalty of perjury and on oath state the following:

When my Family first hired Jay Berneburg WSBA 27165, I spoke with him and he explained that I will be hiring him as CO-counsel and that his role would thus be somewhat limited compared to lead-counsel and the decisions to be taken at trial. He then explained to me, that nonetheless, his limited role will offer much needed help on my case because he would be handling the 'background' duties such as: the drafting and filing of motions, the jury instructions, Solis' gang affiliation, and the testimony of Benito Cervantes, on and in my case. He also told me, that because a previous client of his was involved with Solis, he was intricately familiar with Solis' gang ties, as well as his propensity towards violence. Upon agreement and meetings with Berneburg, these were his exclusive delegated tasks on my case. However, upon his exclusion from and by the trial court on my case,

I called him (Berneburg) and he then frustratedly told me he could no longer directly nor adequately help me because of the court's exclusion order on my case. He mentioned if he did, he would potentially run the risk of violating the court's order and disciplined thereby. I did not speak with him again until trial was adjudicated on my case.

I certify that when the prosecution asked me if I knew Solis to be in a gang, I stated that I did not, as I was not informed by either Schoenberger or Berneburg that. My not doing so, would prevent Benito Cervantes' testimony to be allowed on my case. I instead thought that because Mr. Cervantes would be testifying after me concerning Solis' gang affiliations and propensity towards violence, I didn't need to.

Because Benito Cervantes' testimony as well as the evidence concerning Solis' bad character in the community were tasks to be handled and deligated by Berneburg. I certainly and reasonably believe that, that evidence was not able to come in due to the trial court exclusion of Berneburg from my case.

And, should Berneburg had not been excluded, this evidence would have come in. For he would have certainly informed me that only through my direct knowledge of Solis being a gangmember would such evidence be allowed. To wit, I did indeed know of his gangmembership, but was missinformed that somebody else (Cervantes) would be attesting to said matter.

Affidavit pursuant to 28 U.S.C. § 1746 and DICKINSON V. WAINWRIGHT, 626 F.2d 1184 (1980) sworn as true and correct under penalty of perjury has full force of law and does not have to be verified by notary public.

I, Adrian Contreras-Rebollar am a U.S. citizen competent to testify and herein attest under penalty of perjury that all statements contained herein is the absolute truth.

Respectfully submitted on this 27 day of October, 2011.


Signature

Adrian Contreras-Rebollar
Print Name

APPENDIX

I

1 with Mr. Greer that we have a morass. We have a
2 situation that I believe is not on the edge. In fact,
3 I think it's over the edge. The jury has reason to
4 believe or suspect based upon a witness's testimony
5 that Mr. Rebollar's counsel have done something wrong,
6 and we can't let that stand. We just can't give them
7 an instruction to ignore the allegations that
8 Mr. Rebollar's counsel may have done something wrong.
9 We can't do that. We have to correct that.

10 We have to let the jurors know that this man's
11 attorneys have not done anything wrong. Now, that kind
12 of cuts against us. Regina Hernandez' testimony, for
13 the most part, was beneficial to this man.

14 THE COURT: So what if I allowed Berneburg to
15 testify on this very limited issue, whether he told her
16 to say this in the interview in the jail and leave it
17 at that? Why do I have to declare a mistrial?

18 MR. SCHOENBERGER: Well, because I think both
19 Mr. Berneburg and I need to testify, both of us, not
20 just one of us, and that if we are testifying on a
21 material issue like this, we must be disqualified under
22 RPC 3.7.

23 THE COURT: Is this a material issue? It's
24 kind of collateral.

★ 25 MR. SCHOENBERGER: Whether defense has

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committed a felony?

THE COURT: No. The material issue, it seems to me, is Ms. Hernandez and her credibility and what she saw. That's what's material. I don't think anybody is accusing Mr. Berneburg. Nothing has been filed, I assume, for committing a felony. That's kind of a nonissue.

Well, I'm going to deny the motion at this point and we can take this up later. I know Mr. Greer indicated he didn't really have time to respond, that he just got this. So I'm going to deny it at this time. We'll readdress it later and give Mr. Greer time to respond. My understanding is the defense isn't planning on calling anybody until Monday. So anything else on this issue?

MR. GREER: No.

MR. SCHOENBERGER: Can I have a moment, Your Honor?

THE COURT: Yes.

(Mr. Schoenberger confers with Mr. Berneburg.)

MR. SCHOENBERGER: I'm reminded, Your Honor, by Mr. Berneburg that should you allow him to testify pursuant to our supplemental witness list, that we would also like to preserve my testimony by way of an