No. 11-627

In the Supreme Court of the United States

STATE OF ALABAMA, PETITIONER

v.

THOMAS ROBERT LANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF FOR TEXAS, ARKANSAS, COLORADO, AND FLORIDA AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Alabama joins amici curiae Texas, Arkansas, Colorado, and Florida on the wrong side of an entrenched split over whether a criminal defendant enjoys a Sixth Amendment right to choose continued representation by a particular court-appointed lawyer. The courts of these and other States have concocted a federal constitutional right that cannot be squared with this Court's precedent. Even the wake-up call in *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 151 (2006)—which reaffirmed that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"—has not resolved the division of lower-court

[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici curiae's intent to file this brief, and consented to it.

authority. Amici States have an interest in seeing the petition granted, because it appears that their courts' shared misapprehension of federal law can only be corrected by direct review in this Court.

DISCUSSION

The decision below is the latest to hold that when a court appoints a lawyer to represent a criminal defendant, as required by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), that defendant gains a "Sixth Amendment right to continued representation by his counsel of choice." Pet. App. 46a. On this reading of the Sixth Amendment, an unjustified substitution of appointed counsel automatically voids a conviction—even if the substitution causes no prejudice within the meaning of *Strickland* v. *Washington*, 466 U.S. 668 (1984). See Pet. App. 27a-50a. This view is unsound in both its premise and its conclusion.

A. Courts end up on the wrong side of the split because they recognize "no difference between retained counsel and appointed counsel when it comes to the right to continued representation by counsel of choice." Pet. App. 50a. Their reasoning is easy to follow, easier still to refute.

These courts begin by observing that a defendant who retains counsel has a Sixth Amendment right to continued representation by the particular lawyer he has chosen. *E.g.*, Pet. App. 28a. It is then assumed that this constitutional right exists to protect the attorney-client relationship that the defendant forms with his retained lawyer. *E.g.*, Pet. App. 39a-40a ("[B]ecause of the Sixth Amendment implications, a trial court should be cautious in removing a criminal defendant's chosen counsel. 'Once the attorney-client

relationship is established, any potential disruption of the relationship is subject to careful scrutiny.' " (quoting *Buntion* v. *Harmon*, 827 S.W.2d 945, 948 n.3 (Tex. Crim. App. 1992))); see also *Weaver* v. *State*, 894 So. 2d 178, 187-189 (Fla. 2004); *Clements* v. *State*, 817 S.W.2d 194, 198-200 (Ark. 1991); *Harling* v. *United States*, 387 A.2d 1101, 1105-1106 (D.C. 1978); *McKinnon* v. *State*, 526 P.2d 18, 21-25 (Alaska 1974). Reasoning that the attorney-client relationship is equally important whether counsel is appointed or retained, these courts conclude that a defendant with appointed counsel therefore enjoys a comparable Sixth Amendment right to continued representation by the particular lawyer who has been chosen for him. *E.g.*, Pet. App. 30a-38a. In the words of a leading case,

> Once counsel has been validly appointed to represent an indigent defendant and the parties enter into an attorney-client relationship it is no less inviolate than if counsel is retained. * * * [A] defendant has the right to retain counsel of his choice and establish an attorney-client relationship. It logically follows * * * that once an attorney is appointed the same attorney-client relationship is established and it should be protected.

Stearnes v. *Clinton*, 780 S.W.2d 216, 221-222 (Tex. Crim. App. 1989).

The premise is flawed: Protection of attorney-client relationships cannot be the object of the Sixth Amendment right to continued representation by retained counsel. To the contrary, the Court has explicitly "reject[ed] the claim that the Sixth

Amendment guarantees a 'meaningful relationship' between an accused and his counsel." *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983); see also *Wheat* v. *United States*, 486 U.S. 153, 159 (1988) ("[I]n evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.' " (quoting *United States* v. *Cronic*, 466 U.S. 648, 657 n.21 (1984))). A defendant's right to continued representation by a retained lawyer is not a function of the depth of their relationship, so it is immaterial that retained and appointed counsel forge equally strong attorney-client relationships.

What, then, is the basis for the Sixth Amendment right to continued representation by retained counsel? It is the right to retain counsel of one's choice, set in a time frame.[2] At the outset of representation, a defendant can choose to hire any qualified lawyer whose services he can afford. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (acknowledging "the right of a defendant who does not require appointed counsel to choose who will represent him"); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624-625 (1989) ("[T]he 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."); but see *Wheat*, 486 U.S. at 159

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[2] Cf. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973) (describing mootness as "the doctrine of standing set in a time frame").

("The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects."). Every subsequent moment of the ongoing representation reflects a similar exercise of the defendant's Sixth Amendment right to choose the identity of his retained counsel.

This understanding of the right to continued representation by *retained* counsel makes clear that a similar right does not reach *appointed* counsel. "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Gonzalez-Lopez*, 548 U.S. at 151 (citing *Wheat*, 486 U.S. at 159, and *Caplin & Drysdale*, 491 U.S. at 624, 626). For the defendant in need of appointed counsel, therefore, there is no right to choose that can be set in a time frame. Disparate treatment of continued representation by retained versus appointed counsel thus has nothing to do with differences in attorney-client relationships, and everything to do with the limited scope of the accused's "right * * * to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

As Alabama ably explains, the division among lower courts concerning this issue is entrenched and intolerable. Pet. 11-28. The faulty reasoning of the opinion below is characteristic of decisions on its side of the split, so resolving the tension will be a simple matter of granting the petition and correcting an obvious (but regrettably common) misunderstanding of this Court's Sixth Amendment precedent.

B. Courts that recognize a right to continued representation by appointed counsel compound their error by concluding that a violation of this fanciful Sixth Amendment right is complete without any

demonstration of prejudice. See, *e.g.*, *Harling*, 387 A.2d at 1106 ("Reversal is required even though no prejudice is shown."). If the opinion below is any indication, this Court's recent decision in *Gonzalez-Lopez* will exacerbate this aspect of the lower-court split. The Alabama court relied on *Gonzalez-Lopez* for the proposition that a prejudice inquiry was unnecessary here, erroneously noting that "[a]lthough *Gonzalez-Lopez* involved retained counsel, * * * there is no difference between retained counsel and appointed counsel when it comes to the right to continued representation by counsel of choice." Pet. App. 47a-50a (citing *Gonzalez-Lopez*, 548 U.S. at 147-148). Review is warranted to clear up this misunderstanding of *Gonzalez-Lopez*.

In *Gonzalez-Lopez*, the Court rejected the Solicitor General's argument that a defendant must show prejudice to invoke the Sixth Amendment right to retain counsel of choice. See 548 U.S. at 144-148. The Court acknowledged that prejudice is a prerequisite to declaring a deprivation of the right to effective assistance of counsel. *Id.* at 146-147 (citing *Strickland*, 466 U.S. at 694). But it attributed this prejudice requirement to the provenance of the right in question: "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." *Id.* at 147. The Court then distinguished the right to retain counsel of choice, explaining that such a right was not "derived from the Sixth Amendment's purpose of ensuring a fair trial," but was instead "the root meaning of the constitutional guarantee." *Id.* at 147-148; see also *Bullcoming* v. *New Mexico*, 131 S.

Ct. 2705, 2716 (2011) (explaining that *Gonzalez-Lopez* required no prejudice because "a 'particular guarantee' of the Sixth Amendment" was there in issue (quoting *Gonzalez-Lopez*, 548 U.S. at 146)). Reasoning that "the right at stake here is the right to counsel of choice, not the right to a fair trial," the Court held that "[n]o additional showing of prejudice is required to make the violation 'complete.' " *Gonzalez-Lopez*, 548 U.S. at 146.

The decision below purports to follow *Gonzalez-Lopez* but fails in the attempt. See Pet. App. 47a-50a. A demonstration of prejudice was deemed unnecessary in *Gonzalez-Lopez* because the right at issue in that case—the right to retain one's counsel of choice—was "regarded as the root meaning of" the Sixth Amendment. 548 U.S. at 147-148. That particular right is not in play in this case, however, because "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Id.* at 151.

The putative right that is at issue here—the right to choose continued representation by appointed counsel—is merely "derived from the Sixth Amendment's purpose of ensuring a fair trial." *Gonzalez-Lopez*, 548 U.S. at 147. A defendant who objects to substitution of his appointed counsel does not grab hold of *Gonzalez-Lopez*'s Sixth Amendment "root." *Id.* "The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1495 (2010) (Scalia, J., dissenting) (citing *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891)); see also *Scott* v. *Illinois*, 440 U.S. 367, 370

(1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."); *Turner* v. *Rogers*, 131 S. Ct. 2507, 2521 (2011) (Thomas, J., dissenting) (noting that the Sixth Amendment, as originally understood, "did not require the court to appoint counsel in any circumstance"); *Gonzalez-Lopez*, 548 U.S. at 154 (Alito, J., dissenting) ("At the time of the adoption of the Bill of Rights, * * * [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."). The Court has since created a right to have counsel appointed in criminal cases, but this was done to promote the Sixth Amendment's overarching purpose of ensuring fair trials.[3] If the right to appointed

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[3] See, *e.g.*, *Gideon*, 372 U.S. at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); *Wheat*, 486 U.S. at 159 ("[T]he purpose of providing assistance of counsel [under *Gideon*] 'is simply to ensure that criminal defendants receive a fair trial' * * *." (quoting *Strickland*, 466 U.S. at 689)); *Faretta* v. *California*, 422 U.S. 806, 832-833 (1975) ("[T]he basic thesis of [*Gideon*] is that the help of a lawyer is essential to assure the defendant a fair trial."); *Argersinger* v. *Hamlin*, 407 U.S. 25, 36-37 (1972) ("[P]roblems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial." (footnote omitted)); Transcript of Oral Argument at 3-5, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) (No. 05-352) (Scalia, J.) (noting that "fairness" is "the objective of [*Gideon*'s] newly discovered right to have counsel appointed").

counsel is only a means of ensuring fair trials, then any subsidiary right to control the identity of that appointed counsel must be similarly classified under the *Gonzalez-Lopez* framework.

Accordingly, *Gonzalez-Lopez* dictates that a showing of prejudice must be made before a constitutional violation can be found in the matter at hand. Assuming for argument's sake that there is a right to choose continued representation by a particular court-appointed lawyer, that right is "derived from the Sixth Amendment's purpose of ensuring a fair trial" but cannot be "regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lopez*, 548 U.S. at 147-148. Such a right necessarily entails a prejudice requirement. See *id.* at 147 ("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."). If a defendant claims that the substitution of appointed counsel deprived him of a fair trial, then let him show that his trial—which will still be undertaken with effective assistance from *an* appointed lawyer, just not *the* appointed lawyer of defendant's choice—was somehow unfair.

The decision below overlooked this point because it neglected to distinguish the supposed right at issue in this case from the actual right at issue in *Gonzalez-Lopez*. As other courts make similar mistakes in interpreting *Gonzalez-Lopez*, the split identified in Alabama's petition will only get worse. Amici States agree that "the time to grant certiorari is now." Pet. 28.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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