No. _____

In the
Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,
v.
THOMAS ROBERT LANE,
Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

(Capital Case)

Whether a criminal defendant, to whom the Sixth Amendment grants no right to choose which lawyer a court will appoint to represent him in the first instance, nevertheless has a Sixth Amendment right to choose continued representation by that appointed lawyer, such that a court's erroneous replacement of that lawyer is structural error requiring automatic reversal, even when substitute counsel provides effective representation and the defendant is not otherwise prejudiced.

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INTRODUCTION

The Alabama courts have widened a deep and entrenched split about the scope of the Sixth Amendment right to counsel. Although defendants who can afford to pay their lawyers have a Sixth Amendment right to choose which lawyers will represent them, this "right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). It follows, then, that "[t]here is no constitutional right to continuity of appointed counsel." *United States v. Parker*, 469 F.3d 57, 61 (2d Cir. 2006) (Sotomayor, J.). This means that "[w]hile the criminal defendant does of course retain some interest in continuous representation, courts are afforded considerable latitude in their decisions to replace appointed counsel, and may do so where a potential conflict of interest exists, and in the interests of justice, among other circumstances." *Id.* (internal quotation marks and citations omitted).

The split at issue here concerns what happens when a trial court replaces appointed counsel for one of these reasons—and, as it turns out, the replacement was erroneous. Two federal circuits and two state supreme courts have correctly held that because a criminal defendant has no right to choose the particular lawyer who will be appointed in the first place, such an error does not violate that defendant's Sixth Amendment rights so long as replacement counsel provides effective assistance. But in the decision under review, the Alabama Court of Criminal Appeals, following a substantial line of

contrary decisions from eight other States, erroneously held that the "unjustified removal" of counsel and replacement with another lawyer violates what the court declared to be the defendant's Sixth Amendment "right to continued representation by his counsel of choice." Pet. App. 4a, 37a-39a.

The rule on the Alabama side of the split, under which a defendant effectively has a right to counsel of choice to his initial court-appointed lawyer, is contrary to this Court's jurisprudence. And the practical consequences are significant. The violation of a criminal defendant's Sixth Amendment right to retain his counsel of choice is generally understood to be a structural error, which requires reversal regardless of whether the defendant was prejudiced by the replacement. In accordance with that principle, the courts on Alabama's side of the split have held that an erroneous but good-faith replacement of court-appointed counsel requires reversal even if the replacement lawyer provided the client with effective assistance. The result, in this case and others, is a plethora of unnecessary reversals and remands for new trials—even when there is no serious concern that substitute counsel was ineffective in the first trial.

The lower courts' interpretation of the Sixth Amendment unnecessarily intrudes upon the prerogatives of state and federal trial judges. And the system is not well served by the status quo, in which criminal defendants have a Sixth Amendment right to choose continuous representation by court-appointed counsel in some jurisdictions but not in

others. This Court should grant certiorari, eliminate the split, and reaffirm that States fulfill criminal defendants' Sixth Amendment rights so long as they appoint them competent counsel—even when that competent counsel is not the same one the courts initially appointed for them.

OPINIONS BELOW

The Alabama Court of Criminal Appeals' decision is reported at *Lane v. State*, --- So. 3d ---, No. CR-05-1443, 2010 WL 415248 (Ala. Crim. App. Feb. 5, 2010), and reproduced at Pet. App. 1a. The Alabama Supreme Court's decision granting certiorari is unpublished but reproduced at Pet. App. 77a. The Alabama Supreme Court's decision reversing the Court of Criminal Appeals' decision on the merits has been withdrawn and is thus not reported, but it is reproduced at Pet. App.54a. The Alabama Supreme Court's order withdrawing its earlier decision and quashing certiorari is reported at *Lane v. State*, --- So. 3d ---, No. 1091045, 2011 WL 3632076 (Ala. Aug. 19, 2011), and reproduced at Pet. App. 52a.

STATEMENT OF JURISDICTION

This Court has jurisdiction. The Alabama Court of Criminal Appeals issued an opinion reversing Lane's murder conviction and requiring a new trial. The Alabama Supreme Court then granted certiorari and reversed the Court of Criminal Appeals' decision. Pet. App. 54a, 77a. On August 19, 2011, the Alabama Supreme Court granted

rehearing, withdrew its earlier decision, and quashed the writ of certiorari it had previously granted. Pet. App. 52a. That order effectively reinstated the Court of Criminal Appeals' decision, which reversed the conviction and required a new trial. And that decision is reviewable under 28 U.S.C. § 1257. As this Court has explained, when a state appellate court requires a new trial for a criminal defendant based on a defendant's federal claim—and, as would be the case here, the State would have no right to appeal an adverse decision in the new trial—the state appellate court's decision is final and reviewable for § 1257 purposes. *See Miranda v. Arizona*, 384 U.S. 436, 497 (1966).

This petition is timely. The Alabama Supreme Court issued its order withdrawing its prior decision and quashing certiorari on August 19, 2011. Pet. App. 52a, 80a. This petition is being filed within 90 days of that date. *See* SUP. CT. R. 13.1.

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT

This case arises from Lane's capital-murder conviction; but for present purposes the facts of his crime are less significant than the facts concerning his representation. As explained below, the trial court held that the lawyer it had initially appointed for Lane had become a necessary witness, and for that reason the court replaced that lawyer with another appointed lawyer who provided Lane effective assistance. The Alabama appellate courts then held that the trial court had been wrong as a matter of state law when it found that the initially appointed attorney was a necessary witness. Those appellate courts then held that the trial court's erroneous replacement of that attorney violated what they believed to be Lane's Sixth Amendment "right to continuous counsel of choice," and concluded that the violation of this right was structural error requiring a new trial, even if the substitute was otherwise effective.

A. The murder

During the critical times in this case, Lane and his wife were separated and in the process of divorcing. Pet. App. 3a-4a. Lane retained an attorney, Buzz Jordan, to represent him in the divorce proceedings. Pet. App. 11a.

On October 12, 2003, Lane murdered his wife. Pet. App. 2a. On the same or next day, Lane retained Jordan to represent him in relation to her death and paid him a $1,000 cash retainer. Pet. App. 11a. Lane

also delivered his computer to Jordan's office that same day. Pet. App. 11a-12a. Jordan's secretary accessed the hard drive of the computer and printed certain documents. Pet. App. 12a.

B. Lane's trial

The State later indicted Lane for the murder, and Jordan appeared as Lane's counsel. Pet. App. 14a-15a, 55a. Lane became indigent, and the trial court elected to appoint Jordan as Lane's counsel. Pet. App. 55a, 27a.

The State filed a motion to disqualify Jordan from representing Lane on the ground that Jordan had become a necessary witness at the trial. Pet. App. 55a-56a. The State argued as much for three reasons: (1) to establish the chain of custody for Lane's computer; (2) to establish that Lane paid Jordan $1,000 in cash on the same day Lane murdered his wife; and (3) to establish that certain documents found in Lane's home were falsified. Pet. App. 17a. Lane opposed the motion, but did so on state-law grounds rather than any consideration based on the Sixth Amendment. Pet. App. 25a. The court then entered an order removing Jordan. Pet. App. 20a-21a. The court appointed new counsel to replace Jordan and continued the trial for several months to give new counsel adequate time to prepare. Pet. App. 25a-26a.

After the trial, a jury convicted Lane and recommended, by an 8-4 advisory verdict, a life sentence without the possibility of parole. Pet. App.

2a. The trial court, exercising its independent judgment, sentenced Lane to death. Pet. App. 2a.

C. The Court of Criminal Appeals' opinion

Although Lane had challenged the trial court's replacement of Jordan on state-law grounds at the trial, on direct appeal he argued, for the first time, that the replacement also had violated his Sixth Amendment rights. Pet. App. 15a, 47a. The Alabama Court of Criminal Appeals agreed and, in the opinion ultimately under review here, reversed on the theory that the Sixth Amendment violation was a structural error requiring automatic reversal without showing prejudice and despite Lane's failure to raise the claim previously. *See* Pet. App. 15a, 47a-50a.

The Court of Criminal Appeals began by holding that the trial court had erroneously disqualified Lane's counsel as a matter of Alabama law. In the court's view, Jordan was not a necessary witness. Pet. App. 40a-46a. Citing several decisions from other States, the court concluded that this error of state law gave rise to a constitutional claim because as a result of the error, "Lane was wrongly denied his right to counsel of choice under the Sixth Amendment." Pet. App. 50a, 46a.

In so doing, the court acknowledged that under this Court's jurisprudence, a criminal defendant "who requires counsel appointed by the court at the State's expense has no right to choose the counsel to be appointed." Pet. App. 30a. But the

court noted that defendants have a right to choose retained counsel, and as other state courts had found, "with respect to *continued* representation" by counsel, "there is no distinction between indigent defendants and nonindigent defendants." Pet. App. 30a (emphasis added) (internal citations omitted). Although the Court of Criminal appeals noted contrary authority from the Sixth Circuit, Fourth Circuit, and the Louisiana Supreme Court, the Court of Criminal Appeals held that "the arbitrary, unjustified removal of a defendant's appointed counsel by the trial court during a critical stage in the proceedings, over the objection of the defendant, violates the defendant's Sixth Amendment right to counsel." Pet. App. 36a, *quoting People v. Johnson*, 547 N.W.2d 65, 69 (Mich. App. 1996).

The court then found that the purported Sixth Amendment violation "require[d] reversal of Lane's convictions and sentence." Pet. App. 15a. Based on this Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the Court of Criminal Appeals held that the denial of Lane's right to counsel of choice was structural and required automatic reversal, even if replacement counsel had been effective for Sixth Amendment purposes. Pet. App. 50a.

D. The Alabama Supreme Court's decision

The Alabama Supreme Court initially granted certiorari and, in a fractured opinion, reversed. But

the court eventually withdrew the opinion and quashed certiorari.

In the opinion announcing the Court's initial judgment, three of the seven justices sitting on the panel rejected the Court of Criminal Appeals' finding that the Sixth Amendment guarantees criminal defendants a qualified right to choose to continue to be represented by appointed counsel. Those three justices noted that several courts had rejected the jurisprudence, on which the Court of Criminal Appeals had relied, finding that a criminal defendant has a Sixth Amendment right to continuous representation by his court-appointed counsel of choice. Pet. App. 63a-70a (citing *United States v. Basham*, 561 F.3d 302 (4th Cir. 2009); *Daniels v. Lafler*, 501 F.3d 735 (6th Cir. 2007); and *State v. Reeves*, 11 So. 3d 1031 (La. 2009)). Those three justices concluded that under this better-reasoned authority, "[a]n indigent defendant may be able to show that the removal of court-appointed counsel with whom the defendant had developed an attorney-client relationship has caused prejudice, resulting in the reversal of his or her conviction, but the mere removal of the court-appointed attorney, even if erroneous, is not structural error." Pet. App. 71a.

Although Justice Houston cast the deciding vote to reverse, he concurred only in the result advocated by the other three justices, and expressly disagreed with those justices on the question on which the Alabama Supreme Court had granted certiorari. Pet. App. 73a. He endorsed the Court of Criminal Appeals' view that a trial court's erroneous

replacement of appointed counsel amounts to structural error under the Sixth Amendment. Pet. App. 73a. But he concluded that the Court of Criminal Appeals' decision was due to be reversed because, in his view, the trial court had not erred in concluding that Lane's initially appointed attorney was a necessary witness. Pet. App. 73a-74a.

Three justices dissented. Citing the cases from other jurisdictions on which the Court of Criminal Appeals had relied, and other cases, they fully agreed with the Court of Criminal Appeals' Sixth Amendment analysis. Pet. App. 74a-75a (citing *Weaver v. State*, 894 So. 2d 178, 189 (Fla. 2004), *State v. Huskey,* 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002), *McKinnon v. State*, 526 P.2d 18, 24 (Alaska 1974)).

The Alabama Supreme Court withdrew this fractured opinion after Lane filed a timely rehearing application. Pet. App. 52a, 82a. In that application, Lane observed that Justice Houston's concurrence in the result had rested on an issue outside the scope of the order granting certiorari and had in fact agreed with the Court of Criminal Appeals' reasoning on the core Sixth Amendment question. Accordingly, Lane explained, a majority of the Supreme Court actually had affirmed the Court of Criminal Appeal's decision on the question presented. Pet. App. 83a, 85a. Presumably for that reason, the court granted Lane's application, withdrew its opinion, and quashed the writ of certiorari. Pet. App. 52a, 80a. As a result, the Court of Criminal Appeals' opinion, reversing Lane's

conviction and requiring a new trial, is where this case currently stands.

REASONS FOR GRANTING THE PETITION

This case possesses all the necessary qualifications for certiorari. It implicates an entrenched split involving published decisions by federal courts of appeals, state supreme courts, and state intermediate criminal courts. It implicates an important question about the federal constitution. The Alabama courts' erroneous answer to that question will have adverse consequences both in the immediate future and in the long term. And the case presents an excellent vehicle for clarifying this area of the law. This Court should grant plenary review.

I. The lower courts are split on the question presented.

This case presents a deep and entrenched split that only this Court can resolve. Although this Court's precedents make clear that the Sixth Amendment grants criminal defendants the right to effective assistance by court-appointed counsel, this Court's precedents also make clear that a defendant has no Sixth Amendment right to choose which court-appointed counsel will represent him. The lower courts are divided on what these principles mean for a trial-court order that erroneously replaces a criminal defendant's initial appointed counsel with a different, but effective, substitute counsel. As explained below, the better-reasoned view, adopted by two federal courts of appeals and two state

supreme courts, is that because a criminal defendant has no right to choice of court-appointed counsel, these circumstances do not implicate the defendant's Sixth Amendment right to counsel. But several other state courts, joined now by the Alabama court below, have held that the trial court's replacement of appointed counsel in these circumstances amounts to Sixth Amendment error.

A. Two federal courts of appeals and two state supreme courts have held that erroneous replacement of appointed counsel is not Sixth Amendment error.

Two federal courts of appeals and two state supreme courts are on the right side of this split.

Sixth Circuit. On federal habeas review, the Sixth Circuit has held that a state court did not violate a criminal defendant's Sixth Amendment rights when it removed his appointed attorney without cause because "a defendant relying on court-appointed counsel has no constitutional right to counsel of his choice." *Daniels v. Lafler*, 501 F.3d 735, 740 (6th Cir. 2007), *cert denied*, 552 U.S. 1261 (2008).

Fourth Circuit. Two years later, in a direct appeal from a federal conviction, the Fourth Circuit explicitly adopted the Sixth Circuit's rationale from *Daniels*. The court affirmed a district court's disqualification of appointed counsel on direct appeal, holding that even if the disqualification had

been erroneous, an indigent defendant has a Sixth Amendment "right to effective assistance of counsel, but not to counsel of his own choosing." *United States v. Basham*, 561 F.3d 302, 324-25 (4th Cir. 2009). The court explained that "the only right implicated by the district court's disqualification of [the appointed attorneys] was the right to effective assistance of counsel." *Id.* at 324.

California. Similarly, the California Supreme Court has held that a trial court's erroneous replacement of a criminal defendant's appointed counsel did not violate a Sixth Amendment right to continuation of counsel. *People v. Noriega*, 229 P.3d 1, 4-5 (Cal. 2010), *cert. denied*, 131 S.Ct. 897 (Jan. 10, 2011). That court endorsed the lower state court's rationale "that defendant had no right under the federal Constitution's Sixth Amendment to choose which attorney would represent him at taxpayers' expense." *Id.*

Louisiana. The Louisiana Supreme Court has likewise held that the erroneous removal of a criminal defendant's appointed counsel is not a structural error under the Sixth Amendment. The Court explained that, while criminal defendants with retained counsel have a Sixth Amendment right to choose their counsel that may be abridged by an erroneous removal, "there is nothing in either the federal or state constitutions which would provide [the defendant] with the right to maintain a particular attorney-client relationship in the absence of a right to counsel of choice." *State v. Reeves*, 11 So. 3d 1031, 1067 (La. 2009), *cert. denied*, 130 S.Ct. 637

(2009). Instead, the Louisiana Supreme Court held, "[a] criminal defendant who has been appointed counsel, whether a private attorney or a public defender, only has the right under the federal constitution to effective representation." *Id*. at 1056.

Because these courts have held that there is no Sixth Amendment right to choose continued representation by court-appointed counsel, each of these courts also has reasoned that when a trial court erroneously replaces court-appointed counsel, the defendant must prove that he has been *prejudiced* by that erroneous removal in order to obtain reversal of his conviction. *See Daniels*, 501 F.3d at 740 ("The replacement of court-appointed counsel might violate a defendant's Sixth Amendment right to adequate representation or his Fourteenth Amendment right to due process if the replacement prejudices the defendant."); *Basham*, 561 F.3d at 325 ("[The defendant] must point to some type of prejudice suffered because of the removal of the court-appointed attorneys."); *Noriega*, 229 P.3d at 7 ("[A]s defendant in this case has not shown a reasonable probability that the trial court's erroneous replacement of the public defender altered the outcome of the trial he is not entitled to reversal of his conviction." (citation omitted)); *Reeves*, 11 So. 3d at 1064 ("We hold that the district court's actions . . . did not result in structural error in Reeves' retrial.").

B. Nine jurisdictions hold that indigent defendants have a Sixth Amendment right to choose continued representation by appointed counsel.

Meanwhile, the Alabama courts have joined courts from eight other jurisdictions on the other side of the split. All those jurisdictions have held that the Sixth Amendment grants criminal defendants a right to continuous representation by their court-appointed counsel. And when those courts have considered whether a violation of that right is structural error, those courts have uniformly answered that question in the affirmative.

District of Columbia. The equivalent of the state supreme court for the District of Columbia, the D.C. Court of Appeals, has held that "once counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial." *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. App. 1978). That court held that erroneous disqualification of appointed counsel is a structural Sixth Amendment error requiring automatic reversal. *See id.* at 1106. In so doing, the court rejected the government's argument that "even assuming the court erred in removing appellant's court-appointed attorney, reversal is not required since appellant eventually received a competent defense through substituted counsel." *Id.*

Alaska. Likewise, the Alaska Supreme Court has held that after a trial court appoints counsel and

the defendant "has reposed his trust and confidence" in that attorney, "the trial judge may not, consistent with the United States and Alaska constitutions, rend that relationship by dismissing the originally appointed attorney and then thrusting unfamiliar and unwelcome counsel upon the defendant." *McKinnon v. State*, 526 P.2d 18, 22-23 (Alaska 1974), *overruled on other grounds, Kvasnikoff v. State*, 535 P.2d 464 (Alaska 1975). The Alaska court also held that the erroneous replacement of appointed counsel requires reversal whether or not the defendant was prejudiced. *Id.* at 24.

Arkansas. Though it did not reach the structural-error question, the Arkansas Supreme Court agreed with the D.C. and Alaska courts that the Sixth Amendment creates a right to continued representation by appointed counsel. The Arkansas court therefore held that a trial court violates a defendant's Sixth Amendment "right to particular counsel" when it "terminates the representation of an attorney, either private or appointed, over the defendant's objection and under circumstances which do not justify the lawyer's removal and which are not necessary for the efficient administration of justice." *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991).

Colorado. Stating the same holding in slightly different language, the Colorado Supreme Court has held that "[w]hile there is no Sixth Amendment right for an indigent defendant to choose his appointed counsel, that defendant is entitled to continued and effective representation by court-appointed counsel in the absence of a demonstrable basis in fact and

law to terminate that appointment." *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002) (en banc).

Texas. Along the same lines, Texas's highest criminal appeals court has held that constitutional interests protect a defendant from the erroneous removal of his court-appointed attorney. *Stearnes v. Clinton*, 780 S.W.2d 216, 223-25 (Tex. Crim. App. 1989) (en banc) (citing *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

Florida. More recently, the Florida Supreme Court endorsed the holdings of the D.C., Alaska, Colorado, and Texas courts. *Weaver v. State*, 894 So. 2d 178, 189 (Fla. 2004), cert. denied 125 S.Ct. 2297 (2005). It thereby "reject[ed] the argument that because a defendant does not pay his fee, he has no ground to complain about his counsel's removal by the court as long as the replacement attorney handles the case competently." *Id.*

In addition to those decisions from states' highest criminal courts, two intermediate appellate courts with statewide jurisdiction have adopted the same rule:

Michigan. The Michigan Court of Appeals has held that a trial court's improper "removal of defendant's appointed trial counsel during a critical stage in the proceedings, over the objection of the defendant, violates the defendant's Sixth amendment right to counsel." *People v. Johnson*, 547 N.W.2d 65, 69 (Mich. App. 1996). Like the Alabama courts here, the Michigan courts hold that "reversal is required"

whether or not the defendant can establish prejudice. *People v. Durfee*, 547 N.W. 2d 344, 347 (Mich. App. 1996).

Tennessee. The Tennessee Court of Criminal Appeals, without addressing the structural-error issue, has agreed that a trial court's erroneous removal of counsel "violate[s] the defendant's right to counsel and exceed[s] its discretion." *State v. Huskey*, 82 S.W.3d 297, 302 (Tenn. Crim. App. 2002).

* * *

The split is thus real, and it is meaningful. As one commentator has recently put it, this "continued counsel split" serves as a prime example of current "disparities in state systems." Key Bosse, *Price Tag on Constitutional Rights:* Georgia v. Weis *and Indigent Right to Continued Counsel*, 6 MODERN AMER. 43, 43, 45 (2010). As things currently stand, if a court erroneously replaces a defendant's appointed counsel, the constitutional and practical consequences for the defendant will turn on where he or she happens to be tried. In two federal circuits and two states, no Sixth Amendment violation will have occurred, and the defendant's conviction will be upheld, so long as substitute counsel was constitutionally effective. Yet in numerous other states, the courts will deem the defendant to have suffered a Sixth Amendment violation, and they will require the conviction to be reversed, no matter how brilliantly substitute counsel may have performed. It is thus no surprise that one justice of Texas's highest criminal court has noted that "there is confusion

among some of our trial judges as to when their authority to determine who will represent an indigent defendant begins and ends." *Stotts v. Wisser*, 894 S.W.2d 366, 368 (Tex. Crim. App. 1995) (Bard, J., concurring).

This confusion surrounds an issue that is of substantial importance. The DOJ Bureau of Justice Statistics has concluded that "[p]ublicly-financed counsel" represent between 60 percent and 80 percent of felony defendants. *See Two of Three Felony Defendants Represented by Publicly-Financed Counsel*, Nov. 29, 2000 (available at http://bjs.ojp.usdoj.gov/content/pub/press/iddc.pr (last visited Nov. 10, 2011)). No split should linger on an issue that conceivably affects so many criminal trials, and this Court should eliminate the split now.

II. The decision below is on the wrong side of the split.

It is particularly important for this Court to resolve the split in this particular case, for the courts that have found a violation of the Sixth Amendment in these circumstances have reached the wrong conclusion on the merits. Although this Court has not squarely addressed the question, one commentator recently observed that "the thrust of the Court's opinions suggest that the indigent defendant has no constitutionally protected interest other than to receive effective assistance of counsel." Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1252 (2007). As explained below, that

assessment is right. The courts on the wrong side of the split have effectively extended the right to counsel of choice to include appointed counsel—even though this Court has repeatedly and emphatically stated that "the 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. In so doing, those courts have necessarily held that a court's good-faith mistake in replacing appointed counsel amounts to structural error requiring automatic reversal. That reading of the Sixth Amendment imposes substantial costs on the justice system without any corresponding benefit .

A. The decision below conflicts with this Court's precedents.

Courts finding a constitutional violation in these circumstances have extended the Sixth Amendment beyond the limits of this Court's jurisprudence. As this Court has explained, the Sixth Amendment right to counsel encompasses two distinct components: the "right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—[and] the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Gonzalez-Lopez*, 548 U.S. at 148. The second, "effective counsel" component of the right extends to all defendants, and is designed to ensure fundamental fairness for defendants with retained and appointed counsel alike. But the first, "counsel of choice" component of the Sixth Amendment right "does not extend to defendants

who require counsel to be appointed for them" by the court. *Id*. at 151 (citing *Wheat*, 486 U.S. at 159; *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 626 (1989)). That is so because "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale*, 491 U.S. at 624. Thus, while the Sixth Amendment justifiably requires the government to bear the costs of providing competent counsel to indigent defendants, nothing in its history or logic suggests that once the government undertakes the burden of doing so, the Constitution guarantees the defendant that he or she will always be represented by that particular court-appointed lawyer.

The decision of the Alabama court below, like the decisions of the courts on which it relied, conflicts with these precedents. The Court of Criminal Appeals reasoned that a defendant with appointed counsel has what the court styled a "Sixth Amendment right to continued representation by his counsel of choice" because a defendant with retained counsel necessarily has a right to continued representation by the counsel he or she originally chose to retain. Pet. App. 46a. But a defendant's right to continued representation by retained counsel is grounded in his or her right to counsel of choice—a right that simply does not apply to court-appointed counsel. *See Gonzalez-Lopez*, 548 U.S. at 151; *Caplin & Drysdale*, 491 U.S. at 624; *Morris*, 461 U.S. at 13-14. It is no response to say that it is necessary to recognize this new right out of concern that a

defendant might be prejudiced by the erroneous replacement of his originally appointed counsel. That concern can be addressed, simply and in accord with this Court's precedents, by scrutinizing whether the substitute counsel satisfied the "baseline requirement of competence" that the Sixth Amendment guarantees the defendant. *Gonzalez-Lopez*, 548 U.S. at 148. So long as the State appoints effective counsel to the defendant throughout the proceedings, a court's erroneous replacement of the initially appointed counsel—whom the defendant had no right to select in the first place—cannot implicate any Sixth Amendment concerns.

There are compelling practical grounds for avoiding a contrary result. A rule granting a defendant the right to choose continued representation by his appointed lawyer could interfere with the ability of courts to replace appointed counsel whom they believe to be performing inadequately. *Cf. People v. Davis*, 449 N.E.2d 237, 241-42 (1st Dist. Ill App. 1983) (reversing trial court for replacing appointed attorney even though the judge "concluded that she was inexperienced and could not competently conduct a defense"). Such a rule could hamstring the ability of court systems to make reasonable and necessary policy choices about the way in which their indigent-defense resources will be mobilized—whether through newly developed programs that necessarily require counsel to be replaced, or by providing different counsel to serve at different stages of the case. *Cf. Gonzalez v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008) (finding no Sixth

Amendment violation in court's decision to appoint new counsel to defendant on remand, even though defendant wished to continue to be represented by counsel who had won his appeal); *Reeves*, 11 So. 3d at 1056 (new counsel necessary because special state program that provided payment for appointed counsel in capital cases was discontinued); Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 891, 909-10 (explaining that resource constraints required metropolitan public defenders to develop "a system of stage (or horizontal or zone) representation" in which "defendants were represented by different Society staff attorneys as their cases moved from one phase of the criminal process to another."). Those impracticalities are neither mandated by nor consistent with this Court's jurisprudence.

B. The right's structural nature exacerbates the error.

The impracticalities at issue are made worse by the structural nature of the right these courts have announced. Because this Court has held that the violation of a defendant's Sixth Amendment right to counsel of choice is structural error, *see Gonzalez-Lopez*, 548 U.S. at 152, the Alabama Court of Criminal Appeals reasoned that the violation of a defendant's purported right to choose continuous representation by appointed counsel must require automatic reversal as well, *see* Pet. App. 47a-50a. When other courts on this side of the split have considered that same question, they have reached

that same conclusion. *See Harling*, 387 A.2d at 1106; *McKinnon*, 526 P.2d 18 at 24; *Durfee*, 547 N.W. 2d at 347. The result, in these jurisdictions, will be pronounced and unnecessary costs to the system.

Consider what will happen if the lower court's decision is allowed to stand in this case. Lane has already been tried once, at substantial cost to the State. He was represented by effective counsel, and no court has held that his trial did not comport with due process. He has gone through both guilt-phase and penalty-phase proceedings. The judge and jury have carefully considered his arguments and rendered a judgment that was accurate and fair. He had no right to choose his appointed counsel in the first place, and he was not deprived of effective assistance. But if the Court of Criminal Appeals' decision stands, he will get a new trial regardless.

The justice system will gain nothing, and lose a great deal, if lower courts are forced to conduct needless retrials in these circumstances. That is so for at least three reasons.

First, a retrial is unlikely to vindicate a defendant's interest in continuing his relationship with a particular appointed lawyer. Lane, for example, has not been represented by his original appointed counsel for several years, and the Court of Criminal Appeals did not direct the trial court to appoint Lane's original counsel on remand. For many defendants, it may not even be possible to appoint their original counsel on remand because of changes in the attorney's practice, residence, or bar

membership. Although an automatic retrial gives a defendant who chose to retain a particular lawyer a chance to exercise that choice again, a retrial may not give Lane anything of Sixth Amendment significance.

Second, even if a defendant's appointed counsel of choice could be appointed for the retrial, the administrative headaches would not necessarily end. Here, for example, Lane's first-choice appointed counsel could render ineffective assistance during the retrial. And even though Lane received effective assistance during his first trial below, if his appointed attorney at that *second* trial performs inadequately, then Lane could be entitled to yet a third trial, with new counsel appointed to replace his first-choice counsel. In other words, the third trial would be exactly the same as the first trial—conducted, again, by counsel who was not Lane's first choice—but the third trial would occur years later, after significant judicial resources had been wasted. As this Court recognized in holding that indigent defendants do not have a right to a "meaningful attorney-client relationship," the Sixth Amendment does not require anomalies like these. *Morris v. Slappy*, 461 U.S. 1 (1983). "[I]n its haste to create a novel Sixth Amendment right, the [lower] court wholly failed to take into account the interest of the victim of these crimes," the "burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources," and "the spectacle of repeated trials to establish the truth about a single criminal episode." *Id.* at 14-15.

Third, the spectre of automatic reversal may create strong incentives for trial courts to avoid the problem altogether—by routinely erring on the side of not replacing appointed counsel even when in the court's best judgment counsel should be replaced. It may be possible to stomach that result when the defendant has a right to retain his or her own counsel as an initial matter. But no logic supports this result in the case of court-appointed counsel, whose effectiveness the courts have a particular duty to monitor. *See* Jay William Burnett & Catherine Greene Burnett, ETHICAL DILEMMAS CONFRONTING A FELONY TRIAL JUDGE: TO REMOVE OR NOT TO REMOVE DEFICIENT COUNSEL, 41 S. Tex. L. Rev. 1315, 1319 (2000) (arguing for greater discretion for judges to replace underperforming counsel). There is simply no Sixth Amendment violation in circumstances like these.

III. This case is a good vehicle.

This case provides the right vehicle to resolve the split for at least two reasons.

First, this case presents the Sixth Amendment question squarely and clearly. Although the Alabama Supreme Court initially granted certiorari to consider that issue, its quashing of the writ leaves the Court of Criminal Appeals' decision as the lower courts' clear statement on this issue. In that opinion, the court squarely addressed the question presented and expressly predicated its ruling on the federal Constitution. *See* Pet. App. 50a ("Because Lane was wrongly denied his right to counsel of choice under

the Sixth Amendment, we must reverse his convictions and his sentence of death and remand this case for a new trial."). It also expressly recognized that the courts had split on the question before it. *See* Pet. App. 38a.

Second, this case arises in a context that, while typical of the cases in which this issue has arisen, demonstrates with particular clarity the constitutional values at stake. Like most of the other cases in which this question has come up, the trial court here acted in good faith, replacing Lane's counsel because the trial court believed that Lane's originally appointed counsel had become a necessary witness for the prosecution. Pet. App. 25a-26a. And the result below means that Lane will get a new trial even though he has not argued that he received a constitutionally ineffective defense from his replacement counsel. This is precisely the sort of facts against which this Court should determine, one way or the other, whether the Sixth Amendment requires automatic reversal of a defendant's conviction every time a court erroneously replaces a defendant's appointed counsel.

In recent Terms, this Court has seen petitions for certiorari in cases arising from the split. The split was not as entrenched then, and vehicle issues have made review difficult in each of those cases. *See, e.g.*, Brief in Opposition, *Noriega v. California*, No. 10-5403, at 5, 9 (explaining that defendant waived argument under state law by failing to file a pre-trial appeal). With the split now mature and no similar vehicle difficulties presented—and with the Alabama

courts coming in on precisely the other side of the split—the time to grant certiorari is now.

CONCLUSION

This Court should grant plenary review.

Respectfully submitted,

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