IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 05-352

CUAUHTEMOC GONZALEZ-LOPEZ. :

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Washington, D.C.

Tuesday, April 18, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JEFFREY L. FISHER, ESQ., Seattle, Washington; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in United States v. Gonzalez-Lopez.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

This Court has made clear in its jurisprudence concerning the Sixth Amendment right to the assistance of counsel that the core purpose of that right is to secure a fair trial conducted in accordance with adversary procedures.

As a result of the Court's analysis of that purpose, this Court has required in its Sixth Amendment assistance of counsel cases either a showing that prejudice be demonstrated in a particular case to show that a fair trial has not been guaranteed or that there is a basis for presuming prejudice.

JUSTICE SCALIA: When did -- when did we first hold that the State had to provide counsel if -- if the defendant could not afford his own counsel?

MR. DREEBEN: I believe that Gideon was decided in 1963, Justice Scalia.

JUSTICE SCALIA: And that's what we generally mean nowadays by the right -- by -- by the right to counsel. And when you talk about fairness being its objective, you're talking about the objective of that newly discovered right to have counsel appointed.

But I don't know that fairness was the -- was the object of the original right to counsel in the -- in the Bill of Rights, which -- which only applied to -- to your ability to hire your own counsel, and if you couldn't afford counsel, you didn't get one. I hardly think that -- that fairness is the object of that.

MR. DREEBEN: Well, Justice Scalia, in fact, this Court has recognized that under the Sixth Amendment, as applied to the Federal Government, even before the Sixth Amendment was made applicable to the States through the Fourteenth Amendment, that it did guarantee the right to appointed counsel if the defendant --

JUSTICE SCALIA: When -- when was our first holding to that effect?

MR. DREEBEN: Johnson v. Zerbst, I believe, was in the '30s.

JUSTICE SCALIA: In the '30s. Gee, that's --

MR. DREEBEN: The -- the fact --

JUSTICE SCALIA: -- that's hardly -- that's hardly the original purpose and meaning of the Sixth Amendment, and -- and you come here and say that its fundamental purpose is something that is only the purpose of the newly evolved Sixth Amendment and not of the original one.

MR. DREEBEN: Justice Scalia, our position on what the purpose of the Assistance of Counsel Clause is -- is drawn from what this Court has said that purpose is in the way that it's elaborated it. And I think that if the Court looks at the spectrum of contexts in which the Court has applied the Sixth Amendment right to counsel, it's apparent that the most fundamental aspect of the guarantee and the one that is most indispensable to protecting the fairness of a trial, which is the overarching goal of the Sixth Amendment, is that the defendant have counsel by his side at all.

JUSTICE SCALIA: I don't think that's the overarching goal of the original. I think it's -- it's very fundamental, that if you have funds with which you can hire someone to speak for you, you should be able to use all of your -- I mean, your -- no. Your -- your freedom is at stake. You should be able to use all of your money to get the best spokesman for you as possible. That's the element of fairness that I think

is there.

MR. DREEBEN: Well, I -- I think that this Court has made clear that the core element of fairness is protecting the defendant's ability to have a lawyer there at all, and if the lawyer is not there, the essential fairness of the trial is in jeopardy. And it's for that reason --

JUSTICE SCALIA: But until the 1930s that element didn't exist.

MR. DREEBEN: There were --

JUSTICE SCALIA: Until the 1930s, if you didn't have the money, you didn't have counsel.

MR. DREEBEN: That's not entirely true, Justice Scalia, because there certainly were many jurisdictions, even at the time of the founding, that provided for the appointment of counsel if the defendant was not able to retain his own counsel.

JUSTICE SCALIA: Well, excuse me. As far as the Constitution is concerned, if you didn't have the money, you didn't have counsel.

MR. DREEBEN: What this Court has done I think, in the course of the 20th century jurisprudence that has examined the right to counsel, is establish a hierarchy of the critical rights that are necessary for a fair trial. The first, of course, is that --

CHIEF JUSTICE ROBERTS: Well, but what if -- just to take an example, let's suppose there are two possible defenses you could raise, entrapment and that you didn't do it. And one lawyer wants to argue entrapment and the other wants to, you know -- the one that you want is the one who said we'll argue you didn't do it. Don't you have a right to have a lawyer present the defense along the lines you want presented as opposed to having to take another lawyer that is different than your choice?

MR. DREEBEN: Well, within limits, I think that that's certainly true, Mr. Chief Justice. But, of course, this case and many of the cases that raise this issue do not involve a situation in which the defendant is deprived of retained counsel with whom he can consult and whose strategic decisions he can control through his role as the client.

JUSTICE KENNEDY: Well, that was my -- even in the Chief Justice's hypothetical, I -- I take it the client has a right to direct the attorney what defense to present, or am I wrong about it?

MR. DREEBEN: I think within limits, that's absolutely right, Justice Kennedy. And the right of counsel of choice, as this Court has articulated it in its Wheat decision, is far from an absolute right.

It's a qualified right that does yield to interests that are designed to protect the fairness of the trial.

JUSTICE GINSBURG: But in this -- in this case, Mr. Dreeben, we have a defendant ready, willing, and able to pay for an experienced lawyer in whom he has great trust. He's instead stuck with a younger, rather inexperienced lawyer, and he says, that doesn't fit within my Sixth Amendment right. I have a right to choose the counsel that I want and not the one that the court forces on me.

MR. DREEBEN: Well, Justice Ginsburg, I think it's critical in this case that it -- the court never forced a lawyer on Respondent in this case.

JUSTICE GINSBURG: But it was a junior counsel. As I understand it, the counsel that represented him finally, when the judge wrongfully refused to allow his chosen counsel to proceed, was one chosen as a junior by the more senior counsel, the one that defendant wanted.

MR. DREEBEN: And the Respondent had months after that disqualification was made clear and the court of appeals denied mandamus to retain a different counsel if he chose to retain a different counsel. There's no showing in this record that the Respondent didn't consult with the lawyer who was disqualified and

with the lawyer who he elected to have represent him at trial and not determine that that was in his best interest at that time.

JUSTICE SCALIA: So he was just disabled from -- from his first choice.

MR. DREEBEN: He was disabled --

JUSTICE SCALIA: The court told him you can't have the counsel you want. Go find somebody else.

MR. DREEBEN: That's right, and that's why we are not disagreeing in this case that there's been an infringement of his constitutionally protected interest in having counsel of choice.

But the question for this Court is how should that be defined as a denial of a Sixth Amendment right. Should it be something that is automatically reversible so that even if Respondent had --

JUSTICE STEVENS: How do you reconcile your position with the right to self-representation, if somebody doesn't want a lawyer at all? And I guess if the judge insists on him taking a lawyer, that could be reversible error.

MR. DREEBEN: This Court has made clear that the right to self-representation is unique.

JUSTICE STEVENS: Is even a greater right than the right to pick your own lawyer.

MR. DREEBEN: It is a much greater right because it protects autonomy interests that are --

JUSTICE STEVENS: Why doesn't the choice of counsel protect autonomy too?

MR. DREEBEN: It protects it, but in a much --

JUSTICE STEVENS: You have a lawyer. After 30 years, you trust him completely. You want him to represent you. Isn't that a -- an element of autonomy?

MR. DREEBEN: There's a modest element of autonomy in the right of counsel of choice, but the right of self-representation is complete autonomy. There is no substitute for the individual defendant's voice in the courtroom. There is no representative that could give him that right.

And this Court has also recognized that the right to self-representation is usually a right that redounds negatively for the defendant. It tends to produce worse trial outcomes for the defendant. And in recognition of the autonomy as independent of fair trial interests that are protected by the right of self-representation, this Court has placed it in that very small group of rights in which automatic reversal is appropriate.

JUSTICE KENNEDY: What would the Government's

position be if the disappointed client whose choice of counsel was rejected by the court applied for mandate review in the court of appeals?

MR. DREEBEN: Our position is that if there were a clear abuse of discretion, in accordance with the ordinary mandamus standards --

JUSTICE KENNEDY: Well, we don't know -- we don't know if that's the case. He -- he wants to go immediately to the court of appeals. What would the Government's position be?

MR. DREEBEN: The Government's position is that he could seek a writ of mandamus, and if he qualified under the standards for mandamus, then he could obtain relief. This Court has already held in the Flanagan decision that there's no automatic right of interlocutory review from the denial of counsel of choice, and the Court did that in recognition of the fact that either the right could be vindicated at the end of the trial or it's not totally separable from the merits.

JUSTICE KENNEDY: But the Government always acquiesces in the propriety of seeking mandate from the court of appeals?

MR. DREEBEN: I don't think it's really up to the Government. The defendant can seek mandamus, and

if the --

JUSTICE KENNEDY: Well, I mean, I suppose the Government can object that it's improper or that it's unnecessary or a waste of time. I'm asking what the Government's position is.

MR. DREEBEN: The Government's position is that it would depend on whether the defendant could satisfy the high standards required for mandamus. And certainly if the Government believed that the disqualification was --

JUSTICE KENNEDY: Well, if -- if the question is fairness, as you -- as you propose, then it would seem to me that there would be no need for the extraordinary proceeding.

MR. DREEBEN: The Government doesn't dispute that as in this -- as this Court held in Wheat, there's a presumption in favor of counsel of choice. Every court has rules that govern how lawyers are to enter their appearances and represent defendants, and district courts can make --

JUSTICE KENNEDY: Would you say that presumption is sufficient so that mandate should be entertained by a court of appeals anytime this question comes up?

MR. DREEBEN: Not anytime, Justice Kennedy.

I think that would effectively overturn this Court's holding in Flanagan, that there's no right of taking a collateral order appeal in every single case involving the disqualification of counsel.

But what's critical here, I think, is to compare the position of a defendant who has no counsel at all, the position of a defendant who has counsel who's laboring under a conflict of interest, the position of a defendant who has a counsel who's not performing competently, who's making professionally unreasonable decisions. Only in the first of those instances has this Court held that automatic reversal without any showing of prejudice at all is warranted.

JUSTICE SCALIA: Did Flanagan, the case that denied mandamus on this issue -- did it assume any resolution of the question whether if -- if you can't have counsel of your choice, in order to get your conviction reversed, you have to show -- you have to show that the error was not harmless?

MR. DREEBEN: Justice Scalia, Flanagan held that there was no collateral order appeal. It didn't address the mandamus question.

JUSTICE SCALIA: No, I understand, but --

MR. DREEBEN: In rejecting --

JUSTICE SCALIA: -- but I would certainly

think that it's relevant to the question of whether you allow immediate appeal, what the consequences of not allowing immediate appeal are. If you're totally deprived of your right, you -- you might allow it and --

MR. DREEBEN: What this Court said in Flanagan is that if the defendant, at the end of the day -- and if was the operative word -- could obtain automatic reversal, then the defendant's interests could be vindicated at the end of trial. And if, alternatively, the defendant had to establish prejudice, then the interlocutory appeal would fail the requirement that the issue be totally separate from the merits, and therefore, there was no collateral order appeal.

And Flanagan didn't address this issue, but in addressing it, I suggest that this Court should look at the way that it has protected other criminal defendants' rights under the Sixth Amendment.

CHIEF JUSTICE ROBERTS: Mr. Dreeben, did I understand your brief to suggest that the -- I understand your main burden is to overturn the idea of automatic reversal.

MR. DREEBEN: Correct.

CHIEF JUSTICE ROBERTS: But if there were a

standard, is your standard of prejudice the same as under Strickland, or is it a different standard?

MR. DREEBEN: Our -- our standard of prejudice, our preferred standard of prejudice, is the same as under Strickland. We would not require the defendant to show that his second-choice retained counsel performed incompetently. Second-choice retained counsel can perform fully competently and have made a significantly different strategic course of action than the counsel who actually went to trial, and that could easily be established by having an affidavit or testimony submitted. It's actually easier than conducting a Strickland inquiry because in Strickland, you're looking at the way counsel performed and your hypothesizing how a competent counsel would perform.

JUSTICE ALITO: Well, why would it be easier than in Strickland? In the -- in the case of ineffective assistance of counsel, you have a very focused inquiry, but in this situation, how are you going to -- how can a judge assess, after the fact, whether the strategy that was pursued was inferior to another strategy that's -- that -- that allegedly would have been pursued if the first-choice attorney had been selected? Or maybe even more difficult, how can a judge assess whether the attorney who ended up

representing the defendant was in some way less skillful than the attorney that the -- the defendant preferred to have? That seems like a very difficult determination to make.

MR. DREEBEN: Justice Alito, I don't think that it is that difficult. I think, in fact, it's easier than Strickland because in Strickland, you have to look at one lawyer and decide whether his performance was not competent and then hypothesize what a competent lawyer would have done, and then conduct the counter-factual inquiry of how it would have affected the trial.

JUSTICE STEVENS: Yes, but isn't it almost essential, in one of these inquiries, to -- to invade the attorney-client privilege over and over again to find out what they might have done with a different lawyer?

MR. DREEBEN: This almost invariably occurs in every Strickland case. And my fundamental submission here is that a defendant who is saddled with a lawyer who performs in an unprofessionally incompetent manner cannot overturn his conviction without --

JUSTICE SCALIA: I don't -- I don't want -- I don't want a competent lawyer. I want a lawyer who's

going to get me off.

(Laughter.)

JUSTICE SCALIA: I want a lawyer who will invent the Twinkie defense. I would -- I would not -- I would not consider the Twinkie defense an invention of a competent lawyer. But -- but I want a lawyer who's going to win for me. And -- and there's no way to predict what lawyer has a charming way with the jury or -- or brings in some -- some side matters that maybe shouldn't be brought in but the judge is silly enough to let them in. I want to win. And -- and the criterion for winning is not how competent is the lawyer necessarily.

MR. DREEBEN: No, but I think that -- that Your Honor's question reveals that different lawyers will make different strategic judgments and assessing the impact of those on the trial --

JUSTICE KENNEDY: Well, in -- in hindsight, you've always made a mistake if your client is found guilty.

I -- I'm just not sure how this inquiry would proceed. It seems to me that there ought to be either automatic reversal on one -- on one hand, or the other rule ought to be incompetency of counsel. But you're -- you're going to have satellite litigation with

speculation, and it seems -- it seems to me not a good remedy.

MR. DREEBEN: Well, the -- the remedy that -- that this Court has chosen when counsel is not competent requires I think a -- a systematic inquiry. I wouldn't call it entirely speculative. It's a focused inquiry into what the impact would have been had counsel performed differently.

JUSTICE SOUTER: The only issue in that case is competent performance, and it seems to me that the -- the difficulty behind a number of our questions this morning is that you are trying to draw an analogy from -- from counsel issues that don't involve an autonomy interest to a counsel issue that does involve an autonomy interest, maybe in theory not as greatly as self-representation, but as -- as everybody agrees, as you've said, it involves some autonomy interest. And if we're going to import the rule of prejudice from non-autonomy cases as the -- as the necessary condition in autonomy cases, then it seems to me the autonomy interest is devalued to the point of almost of disappearance. It becomes not much more than -- a little bit, but not much more than an ineffective assistance case.

MR. DREEBEN: Well, I think it becomes

considerably more than an ineffective assistance case. And the autonomy interest that's being protected here needs to be viewed in relation to the fact that the defendant can still retain his counsel. It's not that he's denied all choice of counsel. He's denied his first-choice counsel which --

JUSTICE SOUTER: No, but you say he's -- he's not denied all choice. He is denied the choice that he wants to make.

MR. DREEBEN: He may very well be denied that choice, Justice Souter, if he tries to retain that lawyer and that lawyer has a conflict of interest.

JUSTICE SOUTER: That's not the State's problem. We're talking about the State standing in the way of it. In this case the State through the court system stood in the way of it because it made an error that denied him his right.

But the -- the -- it seems to me the autonomy interest is not merely an interest in choosing second-best. It's an interest in choosing the one you want.

MR. DREEBEN: Well, it isn't necessarily second-best. And the irony of Respondent --

JUSTICE SOUTER: It's second-best to the guy who wants somebody else.

MR. DREEBEN: Well, if -- if he retains

somebody else and that person obtains a complete acquittal, that -- that individual is, no doubt, going to be very satisfied. And the historical example --

JUSTICE SOUTER: But what good is that as -- as an answer to our question? Sure, no harm, no foul. But that can't be the -- that can't be the criterion for a court and that can't be our criterion in deciding whether he really has a right to his first choice or not.

MR. DREEBEN: Justice Souter, I think what it illustrates is that the right to choose counsel is connected with the desirability, as Justice Scalia pointed out, of a favorable outcome. And it is not complete --

JUSTICE SOUTER: It's -- it's basically -- in -- in Justice Scalia's question, it is connected with what the -- the client believes will be a favorable outcome by using the lawyer he wants. It's his judgment about what will probably be a favorable outcome, and his judgment about the lawyer who is most likely to bring that about.

MR. DREEBEN: There's --

JUSTICE SOUTER: I mean, all -- all I'm getting it, is that's a different -- that is a very different criterion from what we apply in Strickland.

MR. DREEBEN: Yes, and I'm not suggesting that the Court apply the criteria in Strickland. And this Court has a variety of other standards that it could choose if it concluded that the Eighth Circuit's rule of automatic reversal provides an unjustified windfall for a defendant when it's considered that defendants who -- this would basically be equating the right of counsel of choice, which is available only to about 10 percent of our defendants in the criminal justice system, because the other 90 percent don't have the funds. Therefore, they're not hiring anyone.

JUSTICE SOUTER: Why -- why take it away from the 10 percent?

MR. DREEBEN: I'm not suggesting that it be taken away. I think that it needs to be protected.

JUSTICE SOUTER: You're -- because you're saying they don't have it.

MR. DREEBEN: I'm saying that they have it, but in order for this Court to conclude that reversal of a trial that can be presumed fundamentally fair, because the defendant, in fact, went to trial with counsel who he had chosen, albeit as his second choice, should not occur with all of the societal impacts that that has, the potential for victims to have to go through a retrial.

JUSTICE SCALIA: It's a fair trial. Nobody is saying it wasn't a fair trial, but he didn't have the lawyer he wanted. I mean, we could assure everybody a fair trial by allowing nobody to pick their lawyers and assigning lawyers to everybody. That would -- that would accomplish fair trials throughout the United States, but that's not the system we have. You're -- you're entitled to the lawyer that you want.

MR. DREEBEN: And -- and we're not disputing that that entitlement exists. The question is whether it should be remedied automatically, which puts it in a --

JUSTICE STEVENS: But, Mr. Dreeben, I think you're underestimating the importance of the autonomy interest because going through a criminal trial for a defendant is a very traumatic experience, not just what happens in the courtroom, but during the entire process. He has a lawyer of his own choice who's going to advise him on what he should do and how he should react to possible changes in his own condition and everything else. The -- the autonomy interest is powerful in that situation.

MR. DREEBEN: I think the autonomy interest is deserving of protection, as this Court has held, but --

JUSTICE STEVENS: Totally independently of the trial strategy --

MR. DREEBEN: No, I -- I don't agree that it's -- that it really has a function in the Sixth Amendment that's independent of what the Sixth Amendment itself says, which is the assistance of counsel for his defense. And this Court has made clear that in the context in which it's looked at and involving conflicted counsel, involving ineffective counsel, involving total denial of counsel, involving appointment of counsel or even the retention of counsel in a situation where no lawyer could be expected to perform in a competent manner and protect the defendant's rights, that all of those rights and interests are tied to the basic purpose of the Assistance of Counsel Clause. It is not a expressive clause in the middle of the Constitution. It is not a mini First Amendment. It is a right that is tied to the purpose of the Sixth Amendment guarantee in helping assure fair trial outcomes.

JUSTICE ALITO: Well --

CHIEF JUSTICE ROBERTS: That's the right of assistance of counsel for his defense. Right?

MR. DREEBEN: That's right.

CHIEF JUSTICE ROBERTS: Not for the fuller

expression of his autonomy.

MR. DREEBEN: That is correct. And that is why this Court, in construing this right, in the context of what I think is probably the most critical aspect of the right, once you have a lawyer in the criminal justice system, namely the right to the effective assistance of counsel, the Court has looked to the impact on the fairness of the trial.

Now, this Court --

JUSTICE GINSBURG: May I, Mr. Dreeben --

JUSTICE SCALIA: I mean, you -- you could say the -- you could say the same thing, counsel, about his right to self-representation, that he has the right to self-representation for his defense or for his --

MR. DREEBEN: No, you could not say that, Justice Scalia. This Court did not infer the right of self-representation from the Assistance of Counsel Clause. It inferred it from the network of rights that are provided in the Sixth Amendment --

JUSTICE SCALIA: Yes, but it is limited to the right of self-representation for his defense, just as his choice of counsel is limited to his choice of counsel for his defense.

MR. DREEBEN: I don't think that's accurate, Justice Scalia, because what the Court made clear in

its self-representation cases is that there was an important historical tradition that was being protected, and it's being protected independent of the defendant's interest in a successful outcome. It's allowing the defendant to speak to the jury in his own voice because there's something deemed fundamentally unfair about a system in which a defendant needs to go to prison without ever having been able to speak in his own voice to a courtroom.

JUSTICE SOUTER: Why is there a less worthy historical tradition to be honored in a defendant's choice of his own counsel?

MR. DREEBEN: I don't deny that there's a historical tradition, Justice Souter.

JUSTICE SOUTER: But -- but you --

MR. DREEBEN: But it's a very qualified one.

JUSTICE SOUTER: But you concede that if -- if it's a historical tradition to speak in one's own voice, it gets -- for practical purposes, it gets a kind of absolute respect. Whereas, if it's a historical tradition to choose one's own counsel, it does not get that -- I mean, it's very -- that seems to me a -- a kind of historical dissonance.

MR. DREEBEN: There -- the point that the Court relied on in concluding that automatic reversal

was appropriate for denial of the right to self-representation included the critical fact that this is not a right that proceeds in connection with the fairness of the trial. Its -- its sole existence is --

JUSTICE SOUTER: Right, and the question is he -- I mean, the -- the whole point here isn't the -- isn't the interest in autonomy a separate interest which should be recognized by some means other than merely looking to the fairness of the trial.

MR. DREEBEN: I think that it is a right that should be -- an interest that should be recognized, and it is, of course, recognized in Wheat by saying that it's comprehended within the Sixth Amendment. There is a qualified interest that a defendant has in retaining counsel of choice. But should it be elevated to be equated with the total denial of counsel?

JUSTICE GINSBURG: But compared to what? You haven't fully stated what you would replace the automatic new trial with. And you said -- you started to say something about if the defendant could show that his preferred counsel would have pursued a different strategy. Is that it? Or would he have to go beyond that and show that that different strategy would have a greater chance of success than the strategy that was in fact pursued?

MR. DREEBEN: Justice Ginsburg, I think the Court has before it three options for some standard that would not consist of an automatic reversal standard.

The first, and the Government's preferred position, is that the defendant should come in and show what counsel of first choice would have done as a matter of strategy and show that if he had pursued that, it would create a reasonable probability of a different outcome, the same test as in Strickland.

JUSTICE GINSBURG: Does different outcome mean --

MR. DREEBEN: More favorable --

JUSTICE GINSBURG: -- if the defendant is found guilty, he would have been acquitted?

MR. DREEBEN: That's right. The same -- same test as in Strickland. It doesn't require proof that more likely than not the defendant would have been acquitted, but it undermines confidence in the outcome.

JUSTICE SCALIA: How do you think that would work with the Twinkie defense?

MR. DREEBEN: I think, Justice Scalia, you'd have to actually look at the specific facts of the case and make a determination.

JUSTICE SCALIA: I don't think any court

would conceivably reverse the -- the disqualification of counsel on the ground that he would have come up with that defense and win.

MR. DREEBEN: And if that's because any court would conclude that that defense was not likely to prevail, then I would submit that the proper accommodation of the societal interest in respecting a final judgment and protecting the interest -- the qualified interest in counsel of choice is properly resolved.

JUSTICE SOUTER: Let me ask --

JUSTICE GINSBURG: You said you had -- you said you had -- your first preference would be --

MR. DREEBEN: Correct.

JUSTICE GINSBURG: -- different strategy and would have been acquitted with that strategy. What's your other --

MR. DREEBEN: The second option would be the standard that the Seventh Circuit selected in Rodriguez v. Chandler, which requires a showing that the second-choice lawyer was deficient in some important qualification or would -- pursued a different strategic interest and a different strategic approach than first-choice counsel, and that's it. More analogous to this Court's conflicts jurisprudence where, when there is

simultaneous multiple representation, it's sufficient for the defendant to show a different strategic approach that was not taken because the conflict caused the -- the lawyer not to do that, and there's no requirement of outcome determinativeness that goes along with that.

And the third alternative would simply be to provide a harmless error standard, instead of deeming this to be structural error, equating it with a biased judge, total denial of counsel, racial discrimination in the grand jury. This Court could provide a standard in which it's the Government's burden to show that the error was harmless beyond a reasonable doubt, which in cases of overwhelming evidence, the Government could establish.

And although, I acknowledge, Justice Souter, that the autonomy interest would be, to a certain extent, lost in that instance, there are many rights, many interests that are sacrificed and not deemed remediable when the error is found harmless.

JUSTICE SOUTER: But isn't the sacrifice sort of egregious here? Because in the case of self-representation, we give virtually absolute respect to it, knowing perfectly well that the decision to represent one's self is usually crazy. Whereas, in

this case, when the decision may very well be sound, we give -- we would, on your view, give a -- a much reduced respect to it. That does not seem consistent.

MR. DREEBEN: Justice Souter, I -- I do want to reserve the remainder of my time, but the point is that a defendant who has his second-choice opportunity of counsel is able to express his autonomy interests in a much more significant way than a defendant who is denied the right to self-representation.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

MR. DREEBEN: I'd like to reserve my time.

CHIEF JUSTICE ROBERTS: Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE RESPONDENT

MR. FISHER: Mr. Chief Justice, and may it please the Court:

At the moment a trial court impermissibly disqualifies a defendant's retained counsel of choice, it violates the Sixth Amendment. It is not necessary to wait and see what happens at any trial that follows, and indeed, in our view --

JUSTICE KENNEDY: Well, it's not just disqualify. Suppose he denies a motion for continuance. The counsel is in another trial and he

said, I can't be here for another 10 days. And the court says, I -- I deny that. I -- I assume if it's an abuse of discretion, the result would be the same under your view.

MR. FISHER: Well, this Court already has a body of jurisprudence, beginning with Powell against Alabama, that decides when a judge acts within his discretion in denying a continuance, for example, to allow the defendant to get the retained counsel of his choice. We'll -- we'll leave that jurisprudence where we found it when we showed up today because here, it's undisputed in the record, and the -- and the United States does not dispute in this Court, that the denial was impermissible --

JUSTICE KENNEDY: Well, you may leave the jurisprudence where you found it, but other attorneys might not. And I'm -- I'm concerned with the consequences of your rule. There are many reasons, it seems to me, why a counsel may not be able to represent the -- the client that has chosen him as -- as the first choice.

MR. FISHER: But --

JUSTICE KENNEDY: And if -- if you prevail here, it seems to me that counsel can come in and say, now, Judge, I've looked at your calendar, and you can

certainly wait for another 2 weeks, and the judge has to do it.

MR. FISHER: We don't -- we don't believe that's the --

JUSTICE KENNEDY: And I don't know why he wouldn't.

MR. FISHER: We don't think that's the case, Justice Kennedy. In this Court's jurisprudence, you've already recognized that trial judges have substantial discretion, both in terms of calendaring and efficiency concerns, and in the Wheat case, for things like conflicts in interest to regulate when the defendant is able to proceed with the defendant -- I'm sorry -- with the lawyer he's chosen.

As I said, we're not asking to change the status quo in any respect here because here it's undisputed that the trial judge had no legitimate reason to deny the defendant --

CHIEF JUSTICE ROBERTS: You would require -- if -- if a defendant is on his second choice and he's filed an affidavit saying, you know, the guy did a great job. I can't think of a way he would have done anything differently. I was convicted. I'm perfectly happy with his strategy, but I didn't get my first choice. You would still require reversal of the

conviction in that case.

MR. FISHER: Well, it seems -- you know, perhaps we could imagine a scenario, Mr. Chief Justice, where the defendant effectively waives his right, and if he came out and said so much to the court. But certainly it is our position that if he's denied the first-choice counsel against his wishes and without any legitimate justification, a Sixth Amendment violation occurs right then and there.

CHIEF JUSTICE ROBERTS: And -- and if -- if he were not able to afford a -- afford an attorney and one were appointed for him and that lawyer were incompetent, that client would still have to show prejudice. But in your case, you don't have to show anything at all.

MR. FISHER: That's right. And that goes to the heart of the kind of right that we're talking about today, and this is the critical difference between the counsel of choice right and the Strickland right. And the difference is in -- in the counsel of choice right, the Government has affirmatively acted to interfere with the way the defendant wants to conduct his defense and has every right to conduct his defense --

CHIEF JUSTICE ROBERTS: Does a -- someone relying on appointed counsel have the same right? Why

can't he say to the first person who comes through the door, you know, I've got a -- I'd like to see the others before I make a choice?

MR. FISHER: No, he doesn't, Your Honor. The --

CHIEF JUSTICE ROBERTS: Why not?

MR. FISHER: -- the defendant who has counsel of his -- who's -- who's appointed counsel does have a limited right to control certain fundamental decisions in his defense such as whether he testifies, whether he accepts a plea offer. So there is even some autonomy that resides in the defendant who has appointed counsel.

But the critical distinction --

JUSTICE SCALIA: Well, I think he can also reject an appointed counsel. Can't he go to the court and say, I -- you know, I don't like this counsel?

MR. FISHER: Certainly that happens, Justice Scalia.

JUSTICE SCALIA: Yes, I know it happens.

MR. FISHER: You know, there are -- there are certain instances where a defendant may be so -- have so little basis for doing so or may be -- you know, may be asking too much of the court --

JUSTICE KENNEDY: But it seems to me that

would happen if there's an autonomous, structural right of the kind you -- you urge.

MR. FISHER: The -- the autonomy interest in this case is the defendant's right to control his defense. It's the defendant's right, as this Court put it in Faretta and later in McKaskle, to control the way his case --

JUSTICE KENNEDY: So I want to control the case by having a different appointed counsel.

MR. FISHER: Well, this Court -- I mean, in numerous areas of this Court's jurisprudence, not just in criminal procedure, this Court recognizes that there -- people have certain rights, but if they have the means to effectuate those rights, they're in a better position than people that don't. Take the First Amendment. The First Amendment protects people with printing presses, but the Government doesn't have to go around giving other people printing presses in order to -- to say what they want to say.

So what we're talking about here is the 10 percent, or whatever number we want to ascribe to it, of defendants who have the -- the ability and the means to hire retained counsel. And at the moment a trial court tells them, for no legitimate reason, you cannot go forward with this person, that's what we submit

constitutes a Sixth Amendment violation. And in --

CHIEF JUSTICE ROBERTS: How many lawyers -- you're talking about a very refined assertion of a constitutional right. I mean there are hundreds and hundreds of thousands of lawyers, and what you're saying is that if he doesn't get choice one, choice two is just not going to do, no matter how close, no matter how similar their approaches are going to be. It's not like he's, you know, wants a Rolls Royce and he gets a -- you know, whatever -- a Yugo or something. He could choose, you know, the next best out of hundreds and hundreds of thousands.

MR. FISHER: In some cases, that's true, Mr. Chief Justice, although I would hasten to -- to tell you that even in the context of defendants who can retain counsel, very often, if their retained counsel is disqualified, they're forced, as in this case -- they're simply out of money and have to go forward with local counsel. So as practical terms, I'm not quite sure that's right.

But, yes, we are talking about a small universe of people, but it's an important universe of people. It's people that come into court and they say this is how I want to conduct my defense. In McKaskle, talking about the self-representation right, this Court

said that oftentimes the messenger is as important as the message in -- in a criminal defendant's case.

JUSTICE ALITO: Well, can there not be a case where it's clear beyond a reasonable doubt that the -- the judge's mistaken ruling on a disqualification motion didn't have any effect on the outcome?

MR. FISHER: I think only in the case of an acquittal. And -- and there -- and there, of course, we don't have an appeal. But, Justice Alito, I think this goes back --

CHIEF JUSTICE ROBERTS: Well, why not?

MR. FISHER: -- to the Twinkie --

CHIEF JUSTICE ROBERTS: Well, why not in the case of an acquittal? There's still a violation of the Sixth Amendment. Maybe you don't have an appeal, but you have a 1983 action. Right? Because your constitutional rights have been violated because, although you won, you didn't win with the counsel of your choice. And if -- your personal autonomy interests have been quashed.

MR. FISHER: I think you'd have a constitutional violation, but it would, in fact, be harmless, and I don't think you'd have a 1983 action because --

CHIEF JUSTICE ROBERTS: It wouldn't be

harmless under your theory because your theory is that this is giving expression to your personal autonomy. It's not simply for your defense. If it were harmless, it would say that it's totally wrapped up in the defense. But there's another constitutional interest under your theory.

MR. FISHER: Okay. Well, I -- I think what I'll say is then we have an immunity problem with bringing the 1983 case.

JUSTICE ALITO: Well, let's say the defendant wanted to be represented by a relative whose -- whose specialty is real estate, and for some reason, that lawyer is wrongfully disqualified. And so then the defendant ends up with a very experienced criminal practitioner with a national representation -- a national reputation, and still the defendant is convicted. Could that not be harmless beyond a reasonable doubt?

MR. FISHER: Let me say two things to that, Justice Alito. The first is that's akin to the hypotheticals in the United States' brief. We've -- we're not aware of that situation ever having occurred. But if it did, yes, you would have a violation.

And it's important to separate the right from the remedy here. We would unquestionably have a Sixth

Amendment violation when the trial court, for no legitimate reason, said, you cannot go forward with the counsel of choice. Now, the only question I think you're framing is whether we'd have a Chapman case there. But this just brings up, Justice Scalia's Twinkie case, and to take away --

JUSTICE SCALIA: Or -- or my Uncle Vinnie. What about the real -- the real case of my Uncle Vinnie? There's --

MR. FISHER: Well --

JUSTICE SCALIA: I don't know -- I don't know whether he was a real estate lawyer or not.

(Laughter.)

MR. FISHER: Well, I'll try to do even better than Uncle Vinnie, and say in our brief we talk about a case, the Euel Lee case, which is a case where a black defendant wanted to go forward with his counsel of choice in -- in the District of Maryland, and he was forced to go ahead with a more experienced, establishment-type counsel and -- and to his detriment. So -- so we proceed at our peril where we say that the defendant doesn't have the right to decide what's best for him.

The core right, which this Court recognized in Wheat -- we would submit to the Court that this

Court saying in Wheat there's a presumption that the defendants have the right to proceed with counsel of choice really can't be explained in any other way than saying that the right -- the Sixth Amendment right here goes beyond simply a fair trial and does encompass an autonomy interest. And to conceptualize that autonomy interest within the Sixth Amendment the way that Wheat does is simply to say that the right to counsel of choice is like any number of other Sixth Amendment rights, which is to say, trial judges have the power to curtail it or qualify it when they have legitimate reasons for things like the integrity of the courts, for things like the efficiency of the docket, Justice Kennedy, and lots of other things.

The same is true of self-representation. A defendant does not have an unqualified right to self-representation. A defendant can be forced to have standby counsel. The defendant can even have his right to self-representation taken away if he's too -- too disruptive in the courtroom. So the same kinds of concerns --

JUSTICE KENNEDY: Well, but -- but this is all subject challenge as an abuse of discretion.

MR. FISHER: That's right. And there is -- the United States raises in its brief the -- the

supposed danger that courts and prosecutors will be too hesitant to challenge selected counsel of choice, but you've already taken that fully in consideration in your Wheat decision. I mean, that's the basis for this Wheat decision is to say these are decisions that have to be made at the outset of trial. And so, therefore, we're going to give trial judges substantial latitude and broad discretion to decide when -- when the defendant has to accept a different lawyer.

CHIEF JUSTICE ROBERTS: Counsel, I suppose this -- this right applies on appeal as well. Right? Somebody says, I want Mr. Fisher to argue my case in the Supreme Court. I don't want anybody else. And -- and yet -- and we get motions for admission to our bar pro hac vice. If we deny one of those, does that violate the Sixth Amendment?

MR. FISHER: Well, it's not contested in this case that the -- that the pro hac vice denial did violate the Sixth Amendment. So I'm not sure -- this isn't something you have to deal with in this case.

But, yes, this would be a right that would -- that would go forward on appeal, provided the defendant walked into court and said this is the person who I want to go forward with me, and the court, under its rules and practices and in the substantial discretion

that court has in Wheat, if the trial court simply went -- if the court simply went off the reservation and said, no, you can't have this person for no reason, there would be.

JUSTICE GINSBURG: Are you saying that this -- trial is -- is one thing. Appeal -- but you say he would do the appeal over? He'd do the appellate argument over? Do the petition for cert over with counsel of choice? There's a different stage involved.

MR. FISHER: It might, Justice Ginsburg. And to be frank with you, I haven't thought all the way through the consequences --

JUSTICE SCALIA: Are you entitled to represent yourself on appeal?

MR. FISHER: No, you're not.

JUSTICE SCALIA: So --

MR. FISHER: So there is a difference, of course, this Court has recognized in its Martinez case, that takes place.

But to bring the point home, in -- in Wheat, simply saying that the defendant has the right to counsel of choice unless the trial court has a good reason for saying no, would make this right just like lots of other rights in the Sixth Amendment, the right to self-representation, the right to cross-examination,

all the other rights in the Sixth Amendment that can give way for efficiency or integrity concerns.

But what the United States is suggesting is something radically different that we submit doesn't exist anywhere else in constitutional law, which is to say that this Court recognizes that a certain right exists, but when it's arbitrarily denied, the defendant simply has no remedy unless he can affirmatively show his own prejudice.

CHIEF JUSTICE ROBERTS: That -- that happens all the time. That happens, for example, in the case of incompetent counsel. There's a right to -- to competent counsel. If you -- if that right is violated, the defendant still has to show prejudice --

MR. FISHER: It --

CHIEF JUSTICE ROBERTS: -- before he'll get relief.

MR. FISHER: I'm sorry, Mr. Chief Justice.

The critical difference between this and the right to effective assistance of counsel is the affirmative action by the court. And in Strickland itself at page 686, this Court recognized the Geders -- the Geders decision, the Brooks decision, the Herring decision, which are all accepted by the Solicitor General in footnote 3 of its brief. And the core

holding of those cases is when the court interferes with what the defendant wants to do, then a Sixth Amendment violation takes place right then and there, and we don't look at all to whether prejudice took place.

JUSTICE GINSBURG: Are you -- are you relying at all on the effect that you want the Court's decision to have on trial judges and prosecutors, that is, a judge who knows if he disqualifies a lawyer who shouldn't be disqualified, that there will be an automatic new trial? And the prosecutor who's standing by -- by the way, what did the prosecutor -- did the prosecutor take the position in this case when the judge says, I don't want that lawyer to be in my courtroom?

MR. FISHER: Let me answer it both on the facts and on the law. On the facts of this case, there was a pretrial sanction hearing in which the prosecutor showed up unannounced to the defense and actually submitted witnesses and evidence to support the disqualification of Mr. Low. So, yes, the prosecutor did play a part and support the disqualification in this case.

Now, to answer your question on the law and the practicalities, we're here today defending the

status quo because the rule in every Federal circuit is that on direct appeal if the right to counsel of choice is denied, it's an automatic reversal. So we're -- we're relying on the practicalities of how things work in the lower courts only to the extent to say it's working fine just now, and this Court ought not to upset that. Right now, by our count, you get probably fewer than one case a year in the Federal courts of appeals where a scenario as rare as this arises. And so we think that this Court's incentives, which are put in place by the Wheat case, as I was talking about, get it just right. They get it so that, yes, there's a little bit of hesitance, but on the other hand, trial judges have substantial discretion in making these threshold decisions. And so we submit --

JUSTICE KENNEDY: Are there cases in the records where it shows government overreaching or bad faith and so forth in trying to get rid of the counsel? That just doesn't happen?

MR. FISHER: I'm not aware of any case, Justice Kennedy, where an express finding of bad faith is placed on the record. But -- but, of course, that points out one of the -- one of the things about this kind of case is that we just have a record in many ways.

What the United States is suggesting is that we should have these satellite collateral proceedings where we have to not just investigate questions like that perhaps, but also recreate an entire trial. And this is much more difficult than the Strickland scenario because, as Justice Alito pointed out, in Strickland we can at least compare the defendant -- the defendant's lawyer's performance against an objective -- an objective counsel. And even -- and it's even easier than that because, because of the performance prong, the first prong of the Strickland test, we winnow out the decisions that lawyer made to probably just two or three. I mean, in this Court's typical Strickland case, it looks at one or two decisions a trial judge -- the trial counsel made.

In this context, we'd have to look not just at an entire trial, but at the entire attorney-client relationship from the moment the -- the counsel would have met the defendant, all of the different decisions that might have taken place in terms of investigation, negotiation, strategy before trial, strategy during trial. And what you'd be asking is for this first-choice counsel presumably to take the stand or file some sort of affidavit not saying this is the strategy that would have -- would have necessarily happened

because he didn't get to try the case. What -- what you'd be asking this person to do is sort of take the stand and hypothesize what he might have done in all these various situations --

JUSTICE ALITO: Would your -- would your rule --

MR. FISHER: -- with all the problems of hindsight.

JUSTICE ALITO: Would your rule apply in the case of a guilty plea?

MR. FISHER: Well, I mean, our rule would -- would apply in a guilty plea case, provided the defendant didn't waive it, didn't waive the -- the argument in his guilty plea.

But the problem with -- you know, to look at the other side, imagine the -- the case where the defendant's first-choice counsel is disqualified and he does plead guilty and he wants to plead guilty, which, of course, happens in over 90 percent of the criminal cases in the country. There, we have an enormous problem because how is that person supposed to show on appeal what would have happened with his first-choice lawyer?

First of all, under the -- under the United States conception, which conflates this -- this right

with Strickland, they have the problem of this Court's decision in Hill against Lockhart which holds that a defendant doesn't have an ineffective assistance type claim unless he can show that he wouldn't have pleaded guilty at all but for his counsel's advice.

And secondly, we have the problem, once again, of just the crazy kind of predictions that we have start to engage in. We -- I suppose there in a guilty plea case, we have to put the -- the first-choice lawyer on the stand to testify to all the various things he might have done. Then perhaps we have to put the prosecutor on the stand to say, oh, would you have taken the deal if this would have taken place and that would have taken place and the other would have taken place.

And -- and what we submit is that not only is -- is this fundamentally improper because once we have a constitutional violation, the only -- the only choices on appeal are Chapman error and structural error, and all of this is outside the record. So it would be impossible to do under Chapman.

JUSTICE GINSBURG: Mr. Fisher, remind me in bringing up the plea question. I thought one of the reasons why this defendant wanted this particular lawyer is that this lawyer made good bargains with the

prosecutor. Was that not so?

MR. FISHER: That is part of the record, Justice Ginsburg. The lawyer that the defendant wanted in this case had appeared in the very same court several months before before the very same judge and stepped in on the eve of trial and negotiated an extremely favorable plea agreement for the defendant in that case. And that's how Mr. Gonzalez-Lopez learned about Mr. Low and that's why he sought him out. I don't think it's a part of the record whether he wanted to plead guilty or whether he wanted to go to trial.

CHIEF JUSTICE ROBERTS: Some of the --

MR. FISHER: But that's certainly one of his considerations.

CHIEF JUSTICE ROBERTS: Some of the concerns about the evidentiary presentation were addressed by the Seventh Circuit and are the reason they adopted a -- a lesser standard than the prejudice standard in -- in Strickland. Why isn't that adequate to meet those concerns?

MR. FISHER: Well, for two reasons, Mr. Chief Justice. First of all, the Seventh Circuit, with due respect, simply misconceived the right. It's our fundamental submission here that the right is violated at the moment the trial judge impermissibly

disqualifies the counsel, and that's what the Seventh Circuit didn't understand. Once you say that that violates the right, then your only choices, under this Court's jurisprudence -- what it said in Neder was the only two choices are structural error or a Chapman review.

The Seventh Circuit, of course, was deciding a habeas case. It had an evidentiary -- it had the ability to compile an evidentiary record, but once you recognize that the Sixth Amendment right to counsel of choice is violated at the moment of the disqualification, then your only choices are Strickland -- I'm sorry -- are Chapman or structural error.

The Seventh Circuit way of doing things, which the United States to some degree embraces, of having an evidentiary hearing on collateral review proves the point why we can't say this is subject to harmless error review because we don't have the stuff in the record that we need. And that's what the Seventh Circuit didn't -- didn't -- first of all, it wasn't speaking to it because, of course, it was deciding a habeas case. But it --

JUSTICE KENNEDY: What are the -- what are the practicalities or impracticalities, as the case may be, of seeking immediate review from the court of

appeals by writ of mandate?

MR. FISHER: Oh, well, there's -- there's two big problems with what the -- with the United States' position on that point, Justice Kennedy. The first is, I -- I think as -- as came out, if mandamus became too common, it would effectively overrule this Court's Flanagan decision.

But there's an even more fundamental problem, which is to say that mandamus is only available when a defendant can show a clear violation of a right. Now, the way the United States conceives the right, there's no violation of the right until you haven't received a fair trial. So imagine the defendant going up pretrial on mandamus and saying, my right to counsel of choice has been violated. The appellate court's response would be, well, we can't decide that. We don't even know whether it's been violated until we see the record that develops in this case and the defense that your -- that your replacement counsel puts on.

JUSTICE KENNEDY: I think it would be easy for us to make a distinction between the right and the remedy.

JUSTICE SCALIA: I'm -- I'm not sure you're properly characterizing the -- the Government's position. I mean, you -- you don't have to assert that

the right is not violated until -- until there's an unfair trial in order to take the position that the Government takes. I mean, the right -- a lot of rights that are later reviewed for harmless error or for -- to see whether there was prejudice were violated at the time, and not -- not just on the basis of whether there was prejudice or not.

MR. FISHER: Justice Scalia, I think I'm fairly characterizing the Government's position when I say that as a constitutional matter, they say there's no Sixth Amendment violation until we see what happens at the trial.

JUSTICE GINSBURG: I thought they said there isn't if the question is remedied.

MR. FISHER: I don't think that's the way that they're presenting their case, Justice Ginsburg, and this is important because what the Government is saying is the right itself is not violated until we have a breakdown in the adversarial process at trial.

JUSTICE KENNEDY: Well, but in all events, we could structure the decision to make -- to make sense, and if these instances happen, as you indicate in your brief, very early, it seems to me that the answer is mandate in a court of appeals.

MR. FISHER: Well, you -- if you conceived

the right as one that you made clear there's a violation at the moment the trial court impermissibly denies counsel of choice, and then perhaps to say -- and then you went on to say there's either an automatic reversal rule or even a Chapman standard, then you could say that there would be a right for mandamus on appeal. But then you run into the same problem of Flanagan.

And then -- but if you didn't do that and he said what the United States --

CHIEF JUSTICE ROBERTS: Well, but then you wouldn't -- I'm sorry to interrupt you. But at that point, the defendant would be well advised to go ahead with trial with his second-choice lawyer. Right?

MR. FISHER: He may well be.

CHIEF JUSTICE ROBERTS: Take his chance and then if he -- if he loses, he gets automatic reversal. So why would he do mandamus?

JUSTICE STEVENS: That's right.

MR. FISHER: Well, because --

JUSTICE SCALIA: Unless you compel him to seek mandamus on pain of losing the constitutional claim, your -- every incentive is to go right ahead with the trial.

MR. FISHER: I think in the ordinary case,

yes, but let me talk about -- let me go back to the facts of this case. I mean, we have a defendant here with only very limited funds. He may decide that I only have enough money to pay one lawyer for one trial, and -- and I don't want to depend on this lawyer's good will or something. I mean, so we're getting down the line to -- to hypotheticals.

JUSTICE SCALIA: I don't think the mandamus solution works unless you compel mandamus, unless you say you lose -- you lose the claim unless you bring mandamus.

MR. FISHER: Yes. I mean, I think I'll accept that mandamus doesn't work.

And Justice Kennedy, even on -- even on this record, if you look at the rule of the Eastern District of Missouri for -- for pro hac vice admission, it's entirely discretionary on its face. And so it's hard to imagine what your mandamus argument would be. And, of course, here the Eighth Circuit just issued a one-word dismissal.

So it's our position that for -- not only for the legal reasons of the historical grounding of -- of the right to counsel of choice and the logical reasons with the differences between the government interfering with what the defendant wants to do versus the

situation that we have in Strickland where this Court has said that even if -- if the government doesn't do anything at all -- and this Court emphasized in Strickland that -- another difference between Strickland and this case is the -- is that the government is powerless in the Strickland scenario to prevent -- to prevent the constitutional violation. When we have the difference here of the government acting to interfere with the way the defendant wants to --

CHIEF JUSTICE ROBERTS: In the government, you're including the court in that.

MR. FISHER: I'm sorry. When I say the government, I mean the court or a prosecutor.

CHIEF JUSTICE ROBERTS: That's not always true in a Strickland case. It's often the court that's making the mistakes that the lawyer should have objected to and was incompetent in not doing so.

MR. FISHER: Well, but then those sorts of mistakes aren't necessarily a Sixth Amendment right to counsel arguments, I don't think, Mr. Chief Justice. Those might be different kinds of mistakes.

But here, what we're talking about is the court interfering with the right -- the Sixth Amendment right the defendant has. And in the cases that Strickland expressly distinguished and which the United

States accepts in footnote 3 of its brief and in the self-representation cases, which -- which recognized that the kernel of the defendant's right is to present -- and this is what the Court said in McKaskle. The core Faretta right is the -- is the defendant's right to present the case to the jury the way he wants to submit it.

JUSTICE ALITO: Well, your comment about the defendant running out of a funds is -- raises a good point. So the remedy would be an automatic reversal in a case like that where the defendant would be represented by appointed counsel?

MR. FISHER: What we have in -- what we have in this case is a lawyer who was retained and who's -- who is willing to go forward under that retainer and in a pro bono sense. So -- so, I mean, even under this Court's --

JUSTICE ALITO: In this case.

MR. FISHER: Even under the current -- yes, in this case. Even under the -- even under the current jurisprudence, Justice Alito, you're right. The defendant sometimes may not be able to be put all the way back into the position he -- he would have been.

But here, we submit that the lower court's rule of -- of automatic reversal is the proper rule.

It's the one that's working, and it's the one this Court should -- should refuse to change today.

JUSTICE SCALIA: How many -- how many circuits are applying that rule?

MR. FISHER: It's roughly -- roughly half the circuits have addressed this issue on direct appeal, and they've all said this is structural error, Justice Scalia.

If there are no further questions, I'll submit the case.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Fisher.

Mr. Dreeben, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

MR. DREEBEN: Thank you, Mr. Chief Justice.

Respondent's submission in the Eighth Circuit's holding in this case is fundamentally anomalous in two respects.

The first is that it is anomalous when compared to the other rights that this Court has acknowledged protection of under the Sixth Amendment because it accords to a defendant who had the full opportunity to select his counsel and to select a backup counsel the same remedy as a defendant who had

no lawyer at all.

And it's anomalous factually because a defendant who is deprived of his first-choice counsel may have selected that counsel improvidently, may select his second-choice counsel with much greater care, may obtain a lawyer who is far more competent and far more effective, and all of those things have to be discarded on Respondent's view and the Eighth Circuit's holding and automatic reversal ordered, forcing society to bear the costs of a retrial even when there is no reasonable probability or it is a beyond a reasonable doubt that no lawyer could have made a difference.

And the proper accommodation of the values that are at stake in this case is to recognize that some form of prejudice inquiry is appropriate before this Court imposes on the judicial system the extreme consequence of automatic reversal.

JUSTICE STEVENS: Well, Mr. Dreeben, do you agree with his characterization that all the courts of appeals go the other way?

MR. DREEBEN: No. The Seventh Circuit made perfectly clear in the Rodriguez case that it was rejecting on the merits the view that automatic reversal is warranted. And the view that automatic reversal is warranted largely arose from a

misunderstanding of this Court's Flanagan decision in which dictum was quoted as if it were a holding and because the courts failed to triangulate the right in question here with the right that this Court has recognized in the ineffectiveness context and in the conflicts context.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)