



Summer 6-1-2017

In Their Defense: Conflict Between the Criminal Defendant's Right to Counsel of Choice and the Right to Appointed Counsel

Kit Thomas

Washington and Lee University School of Law

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Kit Thomas, *In Their Defense: Conflict Between the Criminal Defendant's Right to Counsel of Choice and the Right to Appointed Counsel*, 74 Wash. & Lee L. Rev. 1743 (2017).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol74/iss3/10>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

In Their Defense: Conflict Between the Criminal Defendant’s Right to Counsel of Choice and the Right to Appointed Counsel

Kit Thomas*

Table of Contents

I. Introduction	1744
II. The Historical Sixth Amendment Right to Counsel	1747
A. English Common Law	1749
B. The Beginnings of the American Tradition.....	1753
C. The Right to Court-Appointed Counsel.....	1755
1. <i>Powell v. Alabama</i>	1756
2. <i>Johnson v. Zerbst</i>	1758
3. <i>Betts v. Brady</i>	1759
4. <i>Gideon</i> and Its Progeny	1760
D. The Right to Counsel of Choice	1764
III. The Conflict of Multiple Rights’ Assertion	1767
A. <i>United States v. Mota-Santana</i>	1769
B. <i>United States v. Brown</i>	1774
C. <i>United States v. Jimenez-Antunez</i>	1780
IV. Argument for Adopting a Two-Part Motions Analysis: Highlighting the Importance of the Sixth Amendment Guarantees.....	1784

* J.D. Candidate May 2018, Washington and Lee University School of Law. Special thanks to J.D. King for his patience, insight, and continual feedback on this Note. I would also like to extend my gratitude to the following professors: Rick Axtell, Jonathan Shapiro, David Bruck, and Timothy MacDonnell. These individuals have shown me the value of committed educators and have provided me examples of how to be an effective advocate. Lastly, I would like to dedicate this Note to my mother and father, Judith Thomas and Steven Thomas, for sharing with me a passion for the law.

V. Conclusion.....	1794
--------------------	------

I. Introduction

Consider the following hypothetical: William Defendant is charged with first degree murder. William and his mother scrape together \$15,000, deplete their life savings, and hire an attorney to represent William in the early stages of his criminal trial before his bail hearing.¹ Prior to the beginning of jury selection, however, William becomes dissatisfied with his attorney's minimal communication and trial strategy and wishes to fire him. William's hired attorney files a motion to withdraw from the case. The court is aware that if it permits William's attorney to withdraw from the case it will be required to either appoint William a new lawyer or find that he is able to proceed *pro se* before proceeding with jury selection due to William's inability to pay for future representation. The court is presented with a dilemma: does William have to satisfy a good cause showing to dismiss his retained counsel and have the court appoint counsel? If the answer to the first question is yes, what does that good cause showing require William to prove?

As American jurisprudence currently stands, this question is in a state of flux. The Ninth² and Eleventh Circuits³ do not require any showing for a criminal defendant to dismiss retained counsel and seek court-appointed counsel, while the First Circuit⁴ requires a showing of good cause for a criminal defendant to dismiss retained counsel and seek court-appointed counsel.⁵ The question

1. See *Dixon v. Owens*, 865 P.2d 1250, 1251 (Okla. Crim. App. 1993) (basing the hypothetical on the facts of the denial of Mr. Dixon's motion to substitute appointed counsel for retained counsel).

2. *United States v. Brown*, 785 F.3d 1337 (9th Cir. 2015).

3. *United States v. Jimenez-Antunez*, 820 F.3d 1267 (11th Cir. 2016).

4. *United States v. Mota-Santana*, 391 F.3d 42 (1st Cir. 2004).

5. Compare *Brown*, 785 F.3d at 1344 (finding that a criminal defendant is entitled to the Sixth Amendment right to discharge his retained counsel and to proceed with different, court-appointed attorney instead), and *Jimenez-Antunez*, 820 F.3d at 1271 ("A defendant exercises the right to counsel of choice when he moves to dismiss retained counsel, *regardless* of the type of counsel he wishes to engage afterward.") (emphasis added), with *Mota-Santana*, 391 F.3d at 46–47 ("[T]here are two actions of the court at issue: its refusal to allow Sanchez to withdraw and its refusal to appoint substitute counsel [A] defendant is not

presented by these conflicting requirements—one that this Note seeks to resolve—is whether a criminal defendant who qualifies for appointed counsel under 18 U.S.C. § 3006A and wishes to dismiss currently retained counsel and seek appointed counsel must show “good cause” to dismiss their retained counsel. Good cause in this context refers to “a fundamental problem, ‘such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict.’”⁶

Suppose William is required to make a good cause showing to dismiss his currently retained counsel—why should this matter? Legally, such a showing prohibits William from asserting two of the rights protected under the Sixth Amendment—the right to counsel of choice and the right to court-appointed counsel—unless he can satisfy the required showing.⁷ Practically, unless William can make this good cause showing, he will be forced to proceed with the counsel who he wishes to fire or to represent himself in his criminal trial. An appellate court should treat this denial as a structural error warranting reversal of the criminal proceeding.⁸ This denial of William’s fundamental right to the assistance of counsel will now require a new criminal trial in which William will be granted his right to counsel of choice. The prospect of a new trial may raise concerns of economic cost and general efficiency, the likely motivators for requiring a showing of good cause in the first instance.⁹ The question of whether William should be required to

ordinarily dependent on the court’s permission to replace retained counsel. But here the two actions merge . . .”).

6. *United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir. 2008) (quoting *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973)).

7. *See Mota-Santana*, 391 F.3d at 46–47 (describing the court’s requirement that the defendant satisfy a showing of good cause to replace counsel with court-appointed counsel).

8. *See United States v. Davila*, 133 S. Ct. 2139, 2142 (2013) (“[S]tructural errors [such as] denial of counsel of choice . . . trigger automatic reversal because they undermine the fairness of the entire criminal proceeding.”).

9. *See State v. Cromwell*, 119 P.3d 448, 454 (Ariz. 2005) (“[W]hen considering a motion to substitute counsel, the judge evaluates several factors designed specifically to balance the rights and interests of the defendant against the public interest in judicial economy, efficiency and fairness.” (citing *State v. Moody*, 968 P.2d 578, 580 (Ariz. 1998))).

satisfy an initial good cause showing has produced different answers from courts across the country.

If William Defendant finds himself in the First Circuit as he moves to fire his retained counsel and seek court-appointed counsel, he had better be sure he has the evidence to satisfy a good cause showing.¹⁰ Alternatively, if William Defendant finds himself in the Ninth or Eleventh Circuits, then he does not need to make any showing and the court must grant his motion unless a denial is “compelled by ‘purposes inherent in the fair, efficient and orderly administration of justice.’”¹¹ This Note seeks to resolve these disparate results.¹² Conditioning William’s right to fire retained counsel on his ability to show good cause imposes a burden on this fundamental right recognized by the Supreme Court.¹³ This quasi-denial violates William’s fundamental right to counsel expressly guaranteed by the Sixth Amendment.

Part II of this Note addresses the history and evolution of the right to counsel.¹⁴ Part III examines the different approaches employed by the federal circuit courts for handling a criminal defendant’s request to substitute appointed counsel for retained counsel and to thus assert both the right to counsel of choice and

10. See *Mota-Santana*, 391 F.3d at 47 (requiring a showing of good cause prior to the court’s grant of a defendant’s motion to dismiss retained counsel and seek court appointment of new counsel).

11. *United States v. Brown*, 785 F.3d 1337, 1347 (9th Cir. 2015) (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010)).

12. See discussion *infra* Part IV (discussing the necessity of treating a criminal defendant’s motion to discharge retained counsel and seek court-appointed counsel as two separate actions). To allow these actions to merge, as the First Circuit does in *United States v. Mota-Santana*, creates confusion and may lead to the conclusion that such a criminal defendant must show good cause before being permitted to substitute court-appointed counsel for retained counsel. *Id.*

13. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (“The right to select counsel of one’s choice . . . has been regarded as the root meaning of the constitutional guarantee [of the Sixth Amendment].”); see also *Kaley v. United States*, 134 S. Ct. 1090, 1107 (2014) (Roberts, C.J., dissenting) (“An individual’s right to counsel of choice is violated ‘whenever the defendant’s choice is wrongfully denied,’ and such error ‘pervades the entire trial.’” (quoting *Gonzalez-Lopez*, 548 U.S. at 150)).

14. See discussion *infra* Part II (laying the groundwork for the American tradition, discussing the inception of the American right to the assistance of counsel, and addressing the eventual adoption, and later evolution of the Sixth Amendment).

right to court-appointed counsel.¹⁵ In Part IV, this Note advocates that an indigent criminal defendant's motion to discharge retained counsel and thereafter seek court-appointed counsel ought to be treated as two distinct and independent actions.¹⁶ Part V discusses the practical implications of the proposed judicial framework and concludes that such a treatment is necessary to enable indigent criminal defendants the full enjoyment of their Sixth Amendment rights.¹⁷

II. *The Historical Sixth Amendment Right to Counsel*

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁸ The Counsel Clause,¹⁹ as it is aptly named, has evolved considerably since its ratification in the Bill of Rights and now encompasses five distinct rights: (1) the right to counsel of choice;²⁰ (2) the right to court-appointed counsel;²¹ (3) the right to conflict-free counsel;²² (4) the right to the

15. See discussion *infra* Part III (detailing the cases that present the circuit split, explaining their holdings, and discussing their impact on criminal defendants).

16. See discussion *infra* Part IV (arguing that independent treatment of the actions included in a defendant's motion allows for a fuller realization and enjoyment of their Sixth Amendment rights, a necessary treatment due to the absence of a remedy for violations of the right to counsel of choice).

17. See discussion *infra* Part V (acknowledging the limitations of the proposed treatment and concluding that such a treatment is necessary to fulfill the court's obligation under the Sixth Amendment).

18. U.S. CONST. amend. VI.

19. See Laurie S. Fulton, *The Right to Counsel Clause of the Sixth Amendment*, 26 AM. CRIM. L. REV. 1599, 1605 (1989) (“The responsibility for determining the scope of the right to counsel clause has fallen to the courts in the United States as it had in historical England.”).

20. See *Gonzalez-Lopez*, 548 U.S. at 147–48 (“The right to select counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee [of the Sixth Amendment].”).

21. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

22. See *Bonin v. California*, 494 U.S. 1039, 1044 (1990) (“[A] defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial.” (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980))); see also *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (“The mere

effective assistance of counsel;²³ and (5) the right to represent oneself *pro se*.²⁴ Accordingly, rights now firmly understood to be a part of the guarantee to assistance of counsel, although previously not recognized, have developed and become of central importance to Sixth Amendment jurisprudence.²⁵ In a concurring opinion in *Argersinger v. Hamlin*,²⁶ Chief Justice Burger concluded that “[t]he right to counsel has historically been an evolving concept.”²⁷ Understanding this full evolution of the Sixth Amendment guarantee, from its inception to its current state, is critical to determining how courts ought to respond when a defendant asserts a right that conflicts with another protected by the amendment or other legal requirement.²⁸

physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate’s conflicting obligations have effectively sealed his lips on crucial matters.”).

23. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“[T]he purpose of the effective assistance guarantee of the Sixth Amendment is . . . to ensure that criminal defendants receive a fair trial.”).

24. See *Faretta v. California*, 422 U.S. 806, 819 (1975)

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment.

25. See John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 6 (2013) (“[S]ubsequent interpreters of the Sixth Amendment have found a right to counsel much broader than that foreseen by the Framers, and one more consonant with the values of a changing cultural context.”).

26. 407 U.S. 25 (1972).

27. *Id.* at 44 (Burger, C.J., concurring).

28. See Margaret J. Ryan, *The Sixth Amendment Right to Counsel: A Criminal Defendant’s Right to Counsel of Choice v. the Courts’ Interest in Conflict-Free Representation*, 14 S. ILL. U. L.J. 657, 658 (1989) (disputing the Supreme Court’s decision in *Wheat v. United States*, 486 U.S. 153 (1988) to allow substantial latitude to lower courts in refusing waiver of conflict of interest by a criminal defendant seeking their right to counsel in cases where a conflict may exist).

A. English Common Law

Considering the broad Sixth Amendment rights to counsel that defendants enjoy today, it may be surprising that the right to counsel had a very narrow beginning.²⁹ The evolution and expansion of the Counsel Clause reflects the development of the American criminal justice system and the importance of protections for criminal defendants within this system.³⁰ Specifically, the growth of the Sixth Amendment has furthered the notion that criminal defendants are entitled to heightened protections and privileges within a criminal trial because of what is at stake.³¹ Consequently, it is important to note the critical differences between what a criminal trial involved during early

29. See JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 1 (2002) (“Originally, only those accused of minor offenses could be represented by counsel; those charged with serious offenses were denied the opportunity for legal representation.”).

30. See Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 545 (2008) (“Since the United States Supreme Court first began to evaluate the parameters of the constitutional right to counsel in criminal cases, it has underscored the essential role of the ‘guiding hand of counsel’ in enforcing the principles of justice enunciated and elevated in the Constitution.”).

31. See *Wilcher v. State*, 697 So. 2d 1087, 1117 (Miss. 1997) (Sullivan, J., dissenting) (“[C]riminal law requires more than an equal playing field. Criminal defendants are entitled to heightened protection in criminal law, such as the Eighth Amendment right to allow all mitigating evidence at the sentencing stage, or as reflected in the rules of evidence”); see also Michael M. Raeber, *Toward an Integrated Rule Prohibiting all Race-Based Peremptory Challenges: Some Considerations on Georgia v. McCollum*, 26 GA. L. REV. 503, 529 (1992)

Professor Goldwasser . . . contends that criminal defendants deserve preferential treatment in the use of peremptory challenges for two reasons: first, disparate treatment is *justified* because such asymmetry is inherent in the constitutional protections afforded criminal defendants; second, criminal defendants are *entitled* to differential treatment because what is at stake for a criminal defendant is “intensely personal.”

English common law³² and what exists in the American system today.³³

Under English common law, criminal charges were typically brought by the afflicted party, or their hired representation, and trials were quick and informal.³⁴ The jurors, the defendant, and the prosecutor actively engaged with the evidence, asking questions by simply blurting them out in open court.³⁵ The judge served more as a referee, adding an element of supervision to an otherwise disorderly proceeding.³⁶ A criminal defendant experienced a number of severe obstacles to presenting an effective defense,³⁷ but none more sweeping than the prohibition of the accused from employing counsel.³⁸

32. See TOMKOVICZ, *supra* note 29, at 1

[E]arly English law reveals that the right to counsel had surprisingly modest beginnings The monarch's refusal to permit counsel for those who stood to lose the most was rooted in a fear that lawyers would prevent the successful prosecution and punishment of those whose acts most threatened the state's survival.

33. See *id.* at 2 (discussing the American evolution of the right to the assistance of counsel after the initial rejection of England's restrictive approach).

34. See *id.* at 1–2 (explaining the nature of criminal defense trials in late-seventeenth and early-eighteenth-century England).

35. See *id.* at 3 (“The private prosecutor—the victim or a representative—would present his testimony and the testimony of other witnesses, and the accused, unaided by counsel, would respond to the evidence. The defendant, like the jurors, could ask questions of witnesses at any time simply by blurting them out.”).

36. See *id.* (stating that the chaotic trial environment was supervised by a judge who sat to make sure illegal procedures were not used by the parties).

37. Felony criminal defendants were typically confined until the time of trial. *Id.* (citing J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW. & HIS. REV. 221, 223 (1991)). Further, a criminal defendant did not receive a copy of his indictment, was not informed of the prosecution's evidence against him, and had no set procedures for compelling a witness to testify. *Id.* (citing Francis H. Heller, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 10 (Univ. of Kan. Press 1951); J.M. Beattie, *CRIMES AND THE COURTS IN ENGLAND, 1660–1800* 271 (Princeton Univ. Press 1986); J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW. & HIS. REV. 221, 223 (1991)).

38. See *id.* (“[A] common law rule . . . prohibited those accused of . . . serious offenses from employing lawyers to assist in their defense.” (citing JAMES FITZGERALD STEPHENS, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 397 (1883))).

Under early English common law, the criminal defendant's right to counsel varied based upon the alleged offense.³⁹ In general, "[f]or less serious crimes classified as trespasses or misdemeanors—offenses that could be punished only by incarceration or pecuniary loss—a defendant could employ a lawyer to present his defense."⁴⁰ In contrast, until the middle of the eighteenth century, a criminal defendant charged with a more serious crime, "such as murder, manslaughter, larceny, robbery, or rape, or treason or misprision of treason," was prohibited from employing counsel to aid in their defense.⁴¹ British courts were well aware of the potential cost of providing counsel for sweeping groups of criminal defendants and consequently were interested in avoiding it.⁴²

There were several rationales behind the prohibition of lawyers for criminal defendants accused of serious crimes. For the courts to provide counsel, society must bear the financial cost of paying for these lawyers.⁴³ Additionally, courts perceived criminal defense lawyers as strains on society, further frustrating the jobs of police and prosecutors.⁴⁴ Therefore, a policy against providing counsel to defendants accused of a serious crime was justified by self-preservation: "The assistance of counsel was seen as an impediment to efficient and successful prosecution and punishment."⁴⁵ Further, the state suggested "that the assistance

39. *See id.* (explaining that at English common law criminal defendants charged with less serious offenses were better able to retain counsel while those charged with felonies could not).

40. *Id.* (citing WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8 (Univ. Mich. Publ'ns 1955)).

41. *See id.* (stating the English common law policy concerning representation for criminal defendants accused of serious crimes).

42. *See King, supra* note 25, at 7 (stating the cost to British society of providing counsel for broad groups of defendants).

43. *See id.* (stating the inevitable financial cost imposed on society as a result of paying lawyers for defendants entitled to counsel).

44. *See id.* ("[T]he additional lawyers can be seen as imposing a cost on society by making the job of the police and prosecution more difficult.").

45. TOMKOVICZ, *supra* note 29, at 4. Several rationalizations supported a total prohibition of the assistance of counsel for defendants charged with serious crimes, such as the belief that individuals brought to trial were assumed guilty and considered threats to the state. *See id.* (stating the assumption that defendants were presumed guilty and considered a danger to the state thus necessitating a quick and successful prosecution). Further, allowing the accused

of counsel was ‘hardly necessary’ because criminal proceedings were sufficiently simple for an accused—at least an innocent accused—to cope with by himself.”⁴⁶ At this point in English common law, even if a criminal defendant was permitted to retain counsel, there was no *right* to the assistance of counsel.⁴⁷

The prohibition on engaging defense counsel in serious cases slowly diminished with the emergence of professional prosecutors and a strengthened police force.⁴⁸ This development occurred at a point when the English government was more stable and no longer necessitated an emphasis on self-preservation.⁴⁹ Beginning at the end of the seventeenth Century and continuing throughout the eighteenth Century, criminal defendants accused of a broad spectrum of crimes retained counsel more frequently.⁵⁰ In fact, “[b]y the end of the eighteenth century, judges were frequently permitting those accused of felonies to be assisted by counsel, and defense lawyers were being allowed to perform most defense functions”⁵¹ Yet, this transformation was not as broad as it may seem—judges exercised considerable discretion as to whether to allow defense counsel and, if so, the degree to which the attorney could participate in the proceedings.⁵² There were no “codified or

to retain counsel would threaten self-preservation efforts necessary to protect the state. For example, the weak police force meant less evidence could be collected against the accused and consequently a greater possibility of counsel preventing convictions. *See id.* (“By obstructing the criminal process and sometimes preventing convictions, counsel could interfere with the state’s self-protective efforts.”).

46. *Id.* (citing THEODORE F. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 410 (1948)).

47. *See King, supra* note 25, at 7 (“Those charged with less serious crimes (generally, those not punishable by death) were entitled to retain counsel, but no *right* to the assistance of counsel existed beyond the right to retain one’s own counsel at personal expense.” (emphasis added)).

48. *See id.* (explaining the cause of the decline of the prohibition on defense counsel participation in serious criminal trials).

49. *See TOMKOVICZ, supra* note 29, at 7 (“An additional reason that the courts were willing to depart from the restrictive common law rule was that the government had grown much more stable in the late seventeenth century. The increased security of the state diminished the concern with self-preservation.”).

50. *See id.* at 6 (describing the development of a criminal defendant’s right to counsel in the English common law).

51. *Id.*

52. *See id.* at 7 (stating that although criminal defendants were more frequently permitted to retain counsel, this right and its scope depended entirely

uniform rules that dictated the scope of counsel's involvement in each case."⁵³ The lack of codified rules concerning the assistance of counsel resulted in an uneven distribution of the right and led to concerns about the integrity of, what was perceived as, an arbitrary system.⁵⁴

Despite William Blackstone's urging that the need for counsel's assistance was "worthy [of] the imposition of the legislature," British criminal proceedings persisted without legislative guarantees of the right to counsel.⁵⁵ In fact, while the Sixth Amendment was in the process of drafting and ratification in the United States, "England still only guaranteed the right to retain counsel to defendants charged with misdemeanors, and even then only at their own expense."⁵⁶ Even prior to the adoption of the Sixth Amendment, however, American colonies began to recognize the importance of this issue and developed a much broader (though uncoded) concept of the right to counsel than the English courts.⁵⁷

B. The Beginnings of the American Tradition

Similar to the development of criminal defendants' right to counsel in English common law, the American colonies experienced an evolution of the right to the assistance of counsel prior to the adoption of the Sixth Amendment.⁵⁸ In the early colonial period, the criminal justice system resembled England's under the common law regime; criminal trials were informal and private

on the judge's discretion).

53. *Id.*

54. See WILLIAM H. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 10 (Univ. Mich. Publ'ns 1955) (noting that the absence of a statutory basis for counsel's assistance resulted in a wide variety of applications).

55. *Id.* at 8.

56. King, *supra* note 25, at 7 (citing JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 8 (2002)).

57. See *id.* at 8. (stating the early development of the criminal defendant's right to counsel in the American colonies).

58. See TOMKOVICZ, *supra* note 29, at 9 ("[M]ost of the colonies departed dramatically from the restrictive approach to counsel of the British common law.").

parties prosecuted the crimes.⁵⁹ Criminal defendants, on the other hand, typically represented themselves due to a lack of well-trained attorneys and a general distrust for the legal profession.⁶⁰ However, at the time the Sixth Amendment was ratified and recognized a federal right to the assistance of counsel, “at least eleven of the thirteen states had enacted, either by constitution or statute, a general right to be represented by counsel”⁶¹ This amendment responded to the threat to an accused’s rights and interests stemming from a criminal prosecution in an adversarial system by recognizing the necessity of defense counsel.⁶²

The development of this right in the United States paralleled its development in the British courts. By the time of the American Revolution, professional prosecutors in every colony were handling criminal cases.⁶³ The number of trained lawyers similarly increased steadily, which made it easier for a criminal defendant to retain legal assistance.⁶⁴ Further, the public attitude concerning lawyers changed “as the colonists came to recognize the critical roles that counsel could play in protecting individual rights and liberties against oppressive or overreaching government authorities.”⁶⁵ Each of these changes in the American colonies helped further develop and expand the right to counsel.⁶⁶

Even so, when the Constitution was signed in September of 1787, there was no mention of the criminal defendant’s right to

59. *See id.* (analogizing the early American colonial criminal justice processes to the system that operated in the English common law).

60. *See id.* (stating why criminal defendants in American colonies chose to proceed without retaining counsel).

61. *Id.*

62. *See id.* at 10 (explaining that the denial of representation to a criminal defendant was unfair due to the implications and stigmas associated with a criminal prosecution and the critical role that defense counsel can play).

63. *See id.* at 9 (stating that by the American revolution every colony employed professionally trained and funded lawyers to prosecute criminal charges).

64. *See id.* (explaining the development of the colonial right to counsel by showing the increased availability of trained legal representation).

65. *Id.* at 10.

66. *See id.* (stating that the culmination of the changes that occurred in the colonial period allowed for the development of the right to counsel).

assistance of counsel—or any liberty interests for that matter.⁶⁷ The delegates quickly rejected the proposed articulation of liberties to be protected from government intrusion, including, for example, the right to assistance of counsel.⁶⁸ It later became clear during the “ratification debates that the Constitution would not be ratified in the state conventions without a bill of rights.”⁶⁹ James Madison proposed an initial draft of the amendments in June of 1789, which included the text of what would become the Sixth Amendment right to counsel.⁷⁰ The proposed amendment “includ[ed] in its declaration that ‘[i]n all criminal prosecutions, the accused shall enjoy . . . the right to assistance of counsel for his defence.’”⁷¹ The delegates agreed to this construction and in 1791 it became the Sixth Amendment to the Constitution.⁷²

C. The Right to Court-Appointed Counsel

Following the ratification of the Sixth Amendment in 1791, the right to counsel expanded to eventually encompass a critical

67. We can attribute the inattention to criminal defendants’ rights in the Constitution to two distinct reasons. First, the states maintained a wide variety of processes and it seemed unlikely that the convention would be able to reach an acceptable consensus on a uniform set of federal rights. *See id.* at 15 (“[T]he wide variation in procedures among the states made it seem unlikely that consensus could be reached regarding the rights that should be included in the national charter.”). Second, the Framers believed that the state criminal justice systems would be responsible for the majority of the criminal prosecutions. *See id.* (stating that state criminal justice systems were the presumed outlet for criminal prosecutions, thus making the discussion of the rights of federal defendants seem unnecessary). With this assumption, it did not make sense to spend time developing the rights for federal criminal defendants. *See id.* (explaining why the Framers seemingly ignored the rights of criminal defendants in drafting the Constitution).

68. *See id.* (stating that George Mason’s motion to include a Bill of Rights to the Constitution was immediately rejected without debate or comment).

69. *Id.* at 17.

70. *See id.* at 19 (detailing Madison’s efforts and proposed draft of amendments to Congress, including the fourth proposition which would later become part of the Sixth Amendment).

71. *Id.* at 20 (quoting U.S. CONST. amend. VI).

72. *See id.* (“In 1791, that provision became the Sixth Amendment to the United States Constitution.”).

right for criminal defendants—the right of indigent criminal defendants to court-appointed counsel.⁷³

1. Powell v. Alabama

In 1932, the Supreme Court issued its opinion in *Powell v. Alabama*⁷⁴ and first established the constitutional right to court-appointed counsel.⁷⁵ The Court was faced with the case of the “Scottsboro Boys,” as it has become known in the years since the decision.⁷⁶ In March of 1931, nine black youths found themselves sitting in the Scottsboro jail charged with the rape of two white girls they claimed to have never seen before.⁷⁷ The trials began just twelve days after their arrest and the Scottsboro Boys did not have much in terms of counsel.⁷⁸ Unsurprisingly, “[f]our juries, trying the defendants two or three at a time, quickly concluded that the Scottsboro Boys were guilty.”⁷⁹ On appeal, the defendants contended they had been denied their right to counsel and were entitled to a new trial.⁸⁰ In response to the seminal question of

73. See King, *supra* note 25, at 8 (expressing the development of the right to counsel in the United States after the adoption of the Sixth Amendment).

74. 287 U.S. 45 (1932).

75. See *id.* at 71 (finding the constitutional right to appointed counsel in specific circumstances of capital cases).

76. See Douglas O. Linder, *Without Fear or Favor: Judge James Edwin Horton and the Trial of the Scottsboro Boys*, 68 UMKC L. REV. 549, 549 (1999) (describing the lasting impact of *Powell*).

77. See *id.* (describing the charges brought against the group of men who later became known as the Scottsboro Boys).

78. See *id.* at 552 (describing the counsel for the criminal defendants as the initial appointment of the entire local bar and later an out of town lawyer accompanied by an old and unreliable local lawyer). Stephen Roddy and Milo Moody served as counsel for the Scottsboro defendants. *Id.* “Roddy was an out-of-state real estate attorney who, on the first day of trial, ‘was so stewed he could scarcely walk straight,’ while sixty-nine-year-old Moody was a ‘doddering, extremely unreliable, senile individual’ who was ‘losing whatever ability he once had.’” *Id.* In addition to the general inability to meet the task at bar, the attorneys had less than a half-hour to interview their clients prior to trial. See *id.* (discussing the attorneys’ ability to prepare the case before the trials began). Further, the defense lawyers “offered no cross-examination of the state’s medical evidence, made nothing of differences between the accounts of [the alleged victims], and presented no closing argument.” *Id.*

79. *Id.*

80. See *Powell v. Alabama*, 287 U.S. 45, 50 (1932) (considering the issues on

whether the Scottsboro Boys were constitutionally entitled to court-appointed counsel, the Court articulated a narrow class of defendants entitled to appointed counsel, but extended the right no further.⁸¹ The Court stated:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.⁸²

The Court reasoned that “[t]o hold otherwise would be to ignore the fundamental postulate . . . ‘that there are certain immutable principles of justice which inhere in the very idea of free government’”⁸³ The Supreme Court’s opinion in *Powell* also included a statement that acknowledged the importance of defense counsel and the connection to the reliability of the evidence:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.⁸⁴

In *Powell*, however, the Court intentionally narrowed the scope of its holding and left open questions about how this right would apply in cases involving less serious charges and less compelling circumstances.⁸⁵ The narrow holding and fact-specific nature of *Powell* were flexible, but did not provide a definite framework for

appeal before the Supreme Court and discussing only the supposed denial of the right to counsel).

81. *See id.* at 71 (discussing the necessity of deciding the case before the Court today and the need to go no further).

82. *Id.*

83. *Id.* at 71–72 (citing *Holden v. Hardy*, 169 U.S. 366, 389 (1898)).

84. *Id.* at 68–69.

85. *See King, supra* note 25, at 9 (explaining the narrow holding of the Supreme Court’s 1932 decision providing a criminal defendant with the right to court-appointed counsel).

future courts to follow.⁸⁶ Further, the holding did not ensure future defendants the same constitutional protection because the decision defined a narrow subset of criminal defendants entitled to counsel, but extended the right no further.⁸⁷

2. Johnson v. Zerbst

In 1938, six years later, the Supreme Court heard *Johnson v. Zerbst*⁸⁸ and considered whether the relevant Sixth Amendment guarantee included a categorical right to court-appointed counsel for indigent federal defendants.⁸⁹ In *Zerbst*, the petitioner was indicted for possession of counterfeit money. While the petitioner was represented at his preliminary hearing, he was unable to further afford counsel and thus proceeded to his criminal trial without counsel where he was convicted and sentenced.⁹⁰ The evidence showed that petitioner made a request to the District Attorney to have counsel appointed, but was quickly denied and told he had no right to counsel.⁹¹

The *Zerbst* Court proceeded to highlight the critical importance that the right to counsel plays for a federal defendant facing criminal prosecution.⁹² The Court decided against a case-by-case analysis in concluding that “[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty

86. *See id.* (articulating the shortcomings of the *Powell* decision).

87. *See id.* (stating the subsequent implications of the Supreme Court’s narrow holding in *Powell*).

88. 304 U.S. 458 (1938).

89. *See id.* at 459 (considering whether in all federal criminal prosecutions an indigent defendant is entitled to assistance of counsel).

90. *See id.* at 460 (discussing the procedural history of the case before the Court).

91. *See id.* (“[P]etitioner’s evidence . . . [showed] that [a] request was made to the District Attorney . . . [who] had indicated petitioner had no right to counsel.”).

92. *See id.* at 462–63 (“[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”).

unless he has or waives the assistance of counsel.”⁹³ Notably however, the Court once again narrowed the holding by declining to extend this categorical grant to state court criminal proceedings.⁹⁴ The decision not to extend this right to state criminal defendants ensured that such defendants continued to have no constitutional right to demand counsel if they were unable to personally afford a lawyer.⁹⁵

3. *Betts v. Brady*

Just four years later, in *Betts v. Brady*,⁹⁶ the Supreme Court declined to recognize a categorical right to court-appointed counsel for state-court indigent defendants.⁹⁷ The Court addressed a state court’s denial of counsel to a defendant charged with robbery after the state court informed the defendant that counsel would only be appointed for rape and murder prosecutions.⁹⁸ The Court stated that the right to assistance of counsel was “not a fundamental right, essential to a fair trial” and the states were not obligated under the Due Process Clause to provide a categorical right of counsel to criminal defendants.⁹⁹ The Supreme Court’s express declaration that the right to court-appointed counsel was not fundamental lent credence to each state court’s denial of counsel to criminal defendants.¹⁰⁰ States could have a policy of appointing

93. *Id.* at 463.

94. *See* King, *supra* note 25, at 9 (stating the Court’s decision to narrow the holding of *Zerbst* to apply only to federal indigent criminal defendants).

95. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (“The Sixth Amendment withholds from *federal courts* . . . the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.” (emphasis added)).

96. 316 U.S. 455 (1942).

97. *See id.* at 473 (stating the decision not to extend the holding of *Zerbst* to state court criminal proceedings).

98. *See id.* at 456–57 (describing the facts of the case).

99. *See id.* at 471 (“This material demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.”).

100. *See id.* at 471–72 (“[W]e are unable to say that . . . due process . . . obligates the states, whatever may be their own views, to furnish counsel in every . . . case. Every court has power, if it deems proper, to appoint

counsel in cases of rape or murder, but they were under no constitutional obligation to supply any criminal defendant with counsel.¹⁰¹

It was not until 1963, over twenty years after the *Betts* decision, that the Supreme Court overruled *Betts* in *Gideon v. Wainwright*,¹⁰² upon a finding that Sixth Amendment, through the Fourteenth Amendment Due Process Clause, entitles state court indigent defendants to court-appointed counsel.¹⁰³ *Gideon* would become the seminal case on the right to court-appointed counsel.¹⁰⁴

4. *Gideon and Its Progeny*

Clarence Earl Gideon was charged with the felony of breaking and entering with the intent to commit a misdemeanor.¹⁰⁵ He appeared in court and requested that the court appoint him a lawyer because he was unable to afford counsel.¹⁰⁶ The judge presiding over Mr. Gideon's case denied his request and stated that Florida law only required the court to appoint counsel for an indigent criminal defendant in capital cases.¹⁰⁷ Mr. Gideon was convicted and sentenced, but the Supreme Court granted review to reconsider the holding of *Betts*.¹⁰⁸ The Supreme Court noted the significant similarities between Mr. Gideon's case and the *Betts* case in 1942, and concluded that to uphold *Betts* "would require

counsel where that course seems to be required in the interest of fairness.").

101. See *id.* at 471 ("[T]he matter [of appointment of counsel] has generally been deemed one of legislative policy.").

102. 372 U.S. 335 (1963).

103. See *id.* at 345 ("The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested . . . [I]t should now be overruled.").

104. See King, *supra* note 25, at 9 ("[T]he Court . . . eventually establish[ed] the categorical right to court-appointed counsel in any serious case in *Gideon v. Wainwright*.").

105. See TOMKOVICZ, *supra* note 29, at 32 (stating the charges brought against Mr. Gideon in the Florida courts).

106. See *id.* (detailing Mr. Gideon's initial request for the court to appoint him counsel).

107. See *id.* (detailing the Florida judge's response when Mr. Gideon requested that he be appointed counsel for his felony charge).

108. See *id.* (stating the procedural history of Mr. Gideon's case and the reason that the Supreme Court granted his writ of certiorari).

rejection of Gideon's contention that he had a due process entitlement to appointed counsel."¹⁰⁹ Instead, the Supreme Court held that the *Betts* Court made a significant error in determining that the guarantee of counsel was not a fundamental right made obligatory on the states by the Due Process Clause of the Fourteenth Amendment.¹¹⁰ In fact, the Court stated that the fundamental nature of this right had been first decided years earlier in *Powell v. Alabama*, despite the previous Court's decision to limit the holding.¹¹¹ The Court chose to ground its argument on the basis of comparison: why would governments choose to spend vast amounts of money to employ professional prosecutors, unless the presence of counsel "was necessary for the proper functioning of the legal system?"¹¹²

Gideon marked a further extension of the categorical right of indigent criminal defendants to the assistance of counsel and returned to the path forged by *Powell* prior to the Court's decision in *Betts*.¹¹³ Additionally, the Court emphasized that defense counsel plays a critical role in ensuring a fair trial for all criminal defendants.¹¹⁴ While the *Gideon* decision marked an important turn in the tide for criminal defendants facing serious charges, the Court declined to further define when this right could be asserted by criminal defendants by failing to specify what constituted a "serious criminal charge" entitling a defendant to court-appointed counsel.¹¹⁵

109. *Id.*

110. *See id.* (stating that the *Betts* Court erred when it determined that the Sixth Amendment guarantee of assistance of counsel was not a fundamental right).

111. *See id.* ("According to the *Gideon* Court, the fundamental nature of the right to counsel had been established in *Powell v. Alabama*—ten years before *Betts* was decided. Although the *Powell* Court limited its holding . . . its conclusions about the fundamental nature of the right of counsel [were] unmistakable." (quoting *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963))).

112. King, *supra* note 25, at 10.

113. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.").

114. *See id.* ("Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

115. *See King, supra* note 25, at 10 ("Although the Court again left open the

In the absence of clear instructions on how to apply the right to court-appointed counsel, state courts and legislatures diverged regarding what constituted a “serious crime,” thereby entitling a defendant to counsel.¹¹⁶ Later cases defined the contours of the right and limited the right to appointed counsel in non-felony prosecutions.¹¹⁷

*Argersinger v. Hamlin*¹¹⁸ was the Supreme Court’s first attempt at refining this right to court-appointed counsel.¹¹⁹ Petitioner had been charged with carrying a concealed weapon, “an offense punishable by imprisonment up to six months, a \$1,000 fine, or both.”¹²⁰ Petitioner proceeded to trial unrepresented by an attorney, was sentenced to serve ninety days in jail, and brought his appeal alleging he was deprived of his right to be represented by counsel.¹²¹ The Court agreed that the trial court denied petitioner his Sixth Amendment right and “for the first time explicitly expanded the *Gideon* rule beyond the felony arena.”¹²² The Court rationalized this expansion by stating that in almost every other context, the guarantees of the Sixth Amendment apply to all criminal cases regardless of the seriousness of the charged

precise contours of the right, the Court held that it was an ‘obvious truth’ that fairness required that counsel be appointed for any indigent defendant facing a serious criminal charge.” (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963))).

116. *See id.* at 11 (“[S]tate courts and legislatures came to different conclusions regarding whether the right was limited to felonies, serious crimes (defined in some other way), cases involving the potential for incarceration, cases involving actual incarceration, or all criminal cases.” (citing John F. Decker & Thomas J. Lorigan, Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103, 119–24 (1970) (describing the post-*Gideon* landscape in which thirty-one states had extended the holding of *Gideon* to cover nonfelonies, in some cases including even traffic offenses, but in others only involving “serious misdemeanors”)).

117. *See id.* (stating that post-*Gideon* cases began to refine the application of the newly defined constitutional right).

118. 407 U.S. 25 (1972).

119. *See id.* at 31 (“In *Gideon v. Wainwright* we dealt with a felony trial. But we did not so limit the need of the accused for a lawyer.”).

120. *Id.* at 26.

121. *See id.* at 26 (detailing the facts and procedural history that led to the writ being issued).

122. King, *supra* note 25, at 11 (citing *Argersinger*, 407 U.S. at 36–40).

crime.¹²³ Yet, despite the broad language of the majority opinion,¹²⁴ the Court stopped short of declaring a categorical right to appointed counsel in all criminal cases.¹²⁵ Although many believed that the Court would soon recognize such a categorical grant, the Court instead halted the expansion of the Counsel Clause seven years later in *Scott v. Illinois*.¹²⁶

In *Scott*, the petitioner, charged and convicted of shoplifting merchandise valued at less than \$150, was fined \$50 after a bench trial in which he was not represented by counsel.¹²⁷ The maximum penalty that the petitioner faced was “a \$500 fine or one year in jail, or both.”¹²⁸ On appeal, the petitioner argued that Supreme Court jurisprudence required the state of Illinois to provide him with counsel.¹²⁹ In affirming the conviction, the Supreme Court held “that counsel need only be appointed in ‘serious cases,’ which the Court defined as those cases that resulted in actual incarceration.”¹³⁰ The opinion evidences the Court’s belief that actual incarceration is a punishment different in kind from authorized imprisonment or fines, and thus, only a defendant facing the former is entitled to the Sixth Amendment’s guarantee of the assistance of counsel.¹³¹

123. See *id.* (explaining the Supreme Court’s decision to expand the right to court-appointed counsel beyond felony cases) (citing *Argersinger v. Hamlin*, 407 U.S. 25, 27–29 (1972)).

124. See *Argersinger*, 407 U.S. at 33

The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.

125. See *King*, *supra* note 25, at 12 (stating the Supreme Court’s decision not to grant an all-encompassing right to counsel in criminal case).

126. 440 U.S. 367 (1979); see also *King*, *supra* note 25, at 13 (describing the post-*Argersinger* environment and the Court’s decision to limit the Counsel Clause’s reach).

127. See *Scott*, 440 U.S. at 368 (detailing the factual background of the case).

128. *Id.*

129. See *id.* (stating the grounds for the petitioner’s appeal).

130. *King*, *supra* note 25, at 13.

131. See *Scott*, 440 U.S. at 373 (“[W]e believe that . . . actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . [thus] warrant[ing] adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.”).

As American jurisprudence currently stands, an indigent state-court criminal defendant is entitled to counsel only if actual imprisonment were to follow conviction.¹³² Every indigent defendant facing felony prosecution, “regardless of whether or not the defendant is sentenced to incarceration,” must be provided counsel.¹³³ Each state has different criteria for determining who qualifies as an indigent criminal defendant entitled to court-appointed counsel.¹³⁴

D. The Right to Counsel of Choice

In *Wheat v. United States*,¹³⁵ the Court expressly recognized that the Sixth Amendment also protects a criminal defendant’s choice of counsel.¹³⁶ As Eugene Shapiro aptly stated, “[w]hen, in May of 1988, the Supreme Court acknowledged that the Sixth Amendment encompassed a criminal defendant’s interest in retaining counsel of the defendant’s choice, it did so with a tone often reserved for statements of the obvious.”¹³⁷ The petitioner, charged with participating in a conspiracy to distribute drugs, sought to be represented by his co-defendants’ attorney.¹³⁸ At a hearing for consideration of the issue, the government argued that the attorney’s prior representation created a serious conflict of interest, and, as a result, the petitioner’s request must be

132. See *id.* at 374 (“[T]he Sixth and Fourteenth Amendments . . . require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”).

133. King, *supra* note 25, at 11 n.64 (citing *Whorton v. Bockting*, 549 U.S. 406, 419 (2007)).

134. See 18 U.S.C. § 3006(A) (2012) (“Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.”).

135. 486 U.S. 153 (1988).

136. See *id.* at 164 (“The District Court must recognize a presumption in favor of petitioner’s counsel of choice.”).

137. Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: An Exercise in the Weighing of Unarticulated Values*, 43 S.C. L. REV. 345, 345 (1991).

138. See *Wheat*, 486 U.S. at 155 (detailing the factual background and petitioner’s request that Eugene Iredale, attorney for petitioner’s co-defendants, represent him as well).

denied.¹³⁹ The trial court denied the petitioner's request for counsel.¹⁴⁰ The petitioner then proceeded to trial, where he was convicted and thereafter appealed his conviction on the ground that he was denied his counsel of choice.¹⁴¹ The Court accepted the petitioner's claim that the Sixth Amendment provides for the disqualification of a retained attorney because of a possible conflict of interest.¹⁴² The Court devoted little time to discussing the acceptance of such a right, and instead focused on the scope of that right "and the process by which the presumption in favor of defendant's counsel of choice might be outweighed."¹⁴³

The Court stated that this right was "circumscribed" and proceeded to discuss the ways in which this right could be overcome by other interests.¹⁴⁴ For example, the presumption in favor of counsel of choice is overcome if a defendant seeks an attorney who is not admitted by the bar, who he cannot afford, or who declines to represent him.¹⁴⁵ Additionally, "a defendant [may not] insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government."¹⁴⁶ The opinion articulated a list of limitations on the right to counsel that evolved into a balancing test for determining what types of interferences would be permissible.¹⁴⁷ *Wheat* requires courts to weigh the particular facts and interests in each case to determine the strength of a

139. See Shapiro, *supra* note 137, at 349 (detailing the government's position on petitioner's request for Eugene Iredale's counsel).

140. See *Wheat*, 486 U.S. at 157 (stating the trial court's denial of petitioner's request of counsel).

141. See *id.* (detailing the procedural history of petitioner's claim that he was denied his Sixth Amendment right to counsel of choice).

142. See Shapiro, *supra* note 137, at 345 (discussing the Supreme Court's acceptance of a right to counsel of choice under the Sixth Amendment).

143. *Id.*

144. See *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects.").

145. See Shapiro, *supra* note 137, at 347–48 (stating the ways in which a criminal defendant may not be entitled to his choice of counsel).

146. *Wheat*, 486 U.S. at 159.

147. See Shapiro, *supra* note 137, at 348 (explaining the practical effect of the Court's decision to limit a defendant's right to choice of counsel in circumstances where other interests are implicated).

defendant's claim for their choice of counsel.¹⁴⁸ Consequently, the trial court retains discretion to disqualify a defendant's counsel if the circumstances warrant it.¹⁴⁹ Although *Wheat* requires a balancing in favor of a defendant's choice of counsel against competing interests, the Court provided little instruction on the strength of that presumption or how government interests should be viewed in light of the presumption.¹⁵⁰

As counsel of choice jurisprudence currently stands, there is a presumption in favor of a criminal defendant's choice that can be overcome by the interests of fairness or other conflicting government interests.¹⁵¹ The Court has recognized the demands of the court's calendar as one such relevant government interest.¹⁵² This interest is potentially implicated by an indigent criminal defendant's motion to fire currently retained counsel and seek court-appointed counsel as it could require a continuance of previously scheduled hearings or trial. Additionally, although not explicitly stated in the counsel of choice cases, the Government could attempt to assert an interest in lowering costs when a criminal defendant who has already personally retained counsel moves to dismiss said counsel and have the government pay for a court-appointed attorney.

An important and large subset of criminal defendants do not enjoy the same right to counsel of choice as do other criminal defendants: indigent defendants represented by court-appointed

148. *See id.* (“*Wheat* seems to require a careful weighing of the particularized facts and interests in each case.”).

149. *See id.* (“This weighing process led the *Wheat* Court to conclude that the disqualification of counsel was within the trial court's discretion.”).

150. *See id.* at 350 (stating the limited instruction provided by the Court in *Wheat* regarding how to balance the presumption in favor of the defendant's choice and the Government's interests).

151. *See* *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (“[T]he right to counsel of choice ‘is circumscribed in several important respects.’” (quoting *Wheat*, 486 U.S. at 159)).

152. *See id.* at 152 (“We have recognized a trial court's wide latitude in balancing the right to counsel of choice against . . . the demands of its calendar.” (citing *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983))).

counsel from the outset.¹⁵³ In *Morris v. Slappy*¹⁵⁴ the Court rejected the claim that “the Sixth Amendment guarantees a ‘meaningful relationship’ between an accused and his counsel.”¹⁵⁵ This decision was in response to a defendant’s desire to substitute his court-appointed counsel after the two had become “embroiled in irreconcilable conflict.”¹⁵⁶ The Court stated that effective assistance of counsel is all that is required by the Sixth Amendment and found that Mr. Slappy was assisted by an effective attorney.¹⁵⁷ In short, as the Court later explained, “the appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client’s evaluation of his performance.”¹⁵⁸

III. *The Conflict of Multiple Rights’ Assertion*

The right to hire and fire retained counsel¹⁵⁹ as well as the right to court-appointed counsel for qualifying indigent defendants¹⁶⁰ are protected by the Sixth Amendment’s guarantee

153. See Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 545, 528 (2007) (“For indigent defendants, since they have no right to counsel of choice, a trial court can deny a defendant’s motion to continue the trial in order to allow his appointed counsel to stay on the case, thereby serving an ongoing attorney relationship.”). A more recent and particularly pertinent Supreme Court decision, *Gonzalez-Lopez*, explicitly states 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.

154. 461 U.S. 1 (1983).

155. *Id.* at 14.

156. *Id.* at 4.

157. See *id.* at 14

The Court of Appeals’ conclusion that the Sixth Amendment right to counsel “would be without substance if it did not include the right to a meaningful attorney-client relationship,” is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be.

(citations omitted).

158. *United States v. Cronin*, 466 U.S. 648, 657 n.21 (1984).

159. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (“The right to select counsel of one’s choice . . . has been regarded as the root meaning of the constitutional guarantee [of the Sixth Amendment].”).

160. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[I]n our adversary

of assistance of counsel.¹⁶¹ Because both rights, as well as several others, are constitutionally protected under the Sixth Amendment, courts must know the proper procedure for handling a case when these two rights are simultaneously asserted by a criminal defendant.

In 2004, the First Circuit addressed the issue of a criminal defendant wishing to fire retained counsel and seek court-appointed counsel.¹⁶² The First Circuit articulated a standard which required a defendant to show good cause in order to substitute retained counsel for court-appointed counsel and thus to enjoy both of their Sixth Amendment rights.¹⁶³ Eleven years later, and without reference to the First Circuit's opinion, the Ninth Circuit stated that a criminal defendant has the right to discharge retained counsel for any reason or for no reason at all and that the court is then obligated by § 3006A(b) to appoint the defendant a new attorney to represent the defendant.¹⁶⁴ Shortly thereafter, the Eleventh Circuit followed the Ninth Circuit's lead by expressly rejecting the good cause showing required by the First Circuit.¹⁶⁵ In order to understand the differing circuits' justifications, it is necessary to take a closer look at each case contributing to the split, beginning with the First Circuit's decision.

system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

161. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

162. See *United States v. Mota-Santana*, 391 F.3d 42, 45 (1st Cir. 2004) (stating the defendant's motion to dismiss personally retained counsel and to then have the court appoint new counsel).

163. See *id.* at 48 (“A defendant ‘must show that the conflict between lawyer and client was so profound as to cause a total breakdown in communication,’ preventing an adequate defense.” (quoting *United States v. Myers*, 294 F.3d 203, 208 (1st Cir. 2002))).

164. See *United States v. Brown*, 785 F.3d 1337, 1344–46 (9th Cir. 2015) (stating that a financially qualified criminal defendant has the right to fire retained counsel and that the court is then obligated by federal law to appoint the defendant counsel).

165. See *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1271–72 (11th Cir. 2016) (“We agree with those courts that have held that a defendant may discharge his retained counsel without regard to whether he will later request appointed counsel We reject the view of the First Circuit, which applied the standard of good cause in this circumstance.”).

A. United States v. Mota-Santana

On July 31, 2002, Enrique Mota-Santana was indicted for “conspiring with two co-defendants to import cocaine and heroin into the United States in violation of 21 U.S.C. § 963 over a two year period, beginning in late 2000.”¹⁶⁶ Initially, Mr. Mota-Santana refused court-appointed counsel and employed counsel retained by his family.¹⁶⁷ On December 4, 2002, Mr. Mota-Santana and his counsel, Raymond Sanchez, reviewed and accepted a plea agreement offered by the government for him to plead guilty to Count One of his indictment; the government would then recommend a particular sentence and dismiss the second charge.¹⁶⁸

On December 6, 2002, Mr. Mota-Santana submitted a motion for change of plea and six days later his counsel filed a request to withdraw as counsel.¹⁶⁹ Mr. Sanchez’s request detailed his conversations with Mr. Mota-Santana following the entry of the plea and Mr. Mota-Santana’s dissatisfaction with his lawyer’s failure to negotiate a better plea.¹⁷⁰ Following a change of plea hearing on December 16, 2002, Mr. Mota-Santana once again told the court he wished to plead guilty to Count One and that he was satisfied with his attorney’s services.¹⁷¹ At this time, “the court concluded that he was acting ‘voluntarily and with full knowledge

166. *Mota-Santana*, 391 F.3d at 43.

167. *See id.* at 44 (discussing the defendant’s history with counsel following his indictment). Mr. Mota-Santana later replaced his initial lawyer with newly retained counsel, Raymond Sanchez-Maceira. *Id.*

168. *See id.* (stating the details of the December 4, 2002 plea agreement offered to Mr. Mota-Santana by the government). The plea agreement stipulated that Mr. Mota-Santana was “satisfied with counsel, that he was familiar with the rights he was surrendering, that his agreement was voluntary, and that he had reviewed every part of the agreement with his attorney and understood it.” *Id.*

169. *See id.* (stating the events following the accepted plea deal which culminated in Mr. Sanchez’s request to withdraw as counsel for Mr. Mota-Santana).

170. *See id.* (stating Mr. Sanchez’s request to withdraw as counsel and describing the interactions between himself and Mr. Mota-Santana following the entry of the plea deal).

171. *See id.* (“On resumption of the hearing, defendant told the court he had enough time to consult with his attorney, that he wished to enter a plea of guilty to Count One, and that he was satisfied with his services.”).

of the consequences.”¹⁷² In January 2003, Mr. Mota-Santana filed a *pro se* motion to appoint counsel asserting that his family could no longer afford to pay his counsel’s fees and further detailing his displeasure with Mr. Sanchez’s services.¹⁷³

On February 14, 2003, Mr. Sanchez filed a response to Mr. Mota-Santana’s motion.¹⁷⁴ However, Mr. Sanchez also stated “that the breakdown in communication between him and his client threatened the latter’s Sixth Amendment rights and that new counsel should be appointed.”¹⁷⁵ On February 26, 2003, the district court denied Mr. Mota-Santana’s motion to appoint counsel.¹⁷⁶ At the sentencing hearing on April 3, 2003, Mr. Mota-Santana was sentenced to 120 months in prison.¹⁷⁷

On appeal, Mr. Mota-Santana challenged the court’s failure to determine if a conflict of interest existed between himself and Mr. Sanchez after he asked Mr. Sanchez to withdraw and requested the court appoint new counsel.¹⁷⁸ Mr. Mota-Santana contended

172. *Id.* at 45 (citation omitted).

173. *See id.* (“[Mr. Mota-Santana stated] that on December 30 and 31 he had tried unsuccessfully to call Sanchez, that Sanchez had ‘deceived’ him into signing a plea agreement that was not fully explained to him, and that he had lost all confidence in Sanchez.”).

174. *See id.*

[Mr. Sanchez detailed] that he said paid several visits to defendant; that he had requested and received considerable discovery; that he had filed a motion to suppress a tape and had participated in a hearing to determine its acceptability; that plea negotiations had been complicated by three factors—defendant’s role, drug amounts, and another case in which supervised release might be jeopardized; and that defendant was well aware of the plea provisions and had not been deceived.

Mr. Sanchez stated that his fees had been fully paid and that no further fees were being charged and further described his efforts in the case and contacts with Mr. Mota-Santana. *See id.* (detailing Mr. Sanchez’s required response to Mr. Mota-Santana’s *pro se* motion). Mr. Sanchez also explained that he had visited defendant several times and that the defendant was fully aware of the plea provisions and had not been deceived. *Id.*

175. *Id.*

176. *See id.* (“On February 26, the court endorsed an order denying the motion to appoint counsel.”).

177. *See id.* (detailing the events of Mr. Mota-Santana’s sentencing hearing). Additionally, at this hearing Mr. Mota-Santana declined the court’s invitation when asked if there was anything he would like to state to the court. *See id.* (describing the events of the sentencing hearing).

178. *See id.* (articulating the question presented to the First Circuit on

that this case involved “a *per se* denial of [his] Sixth Amendment rights and requires reversal without any obligation to show prejudice.”¹⁷⁹ Mr. Mota-Santana was unable to persuade the First Circuit, which found the alleged conflict to be minimal.¹⁸⁰ The court stated that Mr. Mota-Santana attempted to stretch the concept of “conflict of interests” beyond its permissible bounds, when in actuality his relationship with Mr. Sanchez implicated no more than a mere, unremarkable disagreement.¹⁸¹ The court also took issue with Mr. Mota-Santana’s claim that he was entitled to reversal without an obligation to show prejudice.¹⁸² Consequently,

appeal). Mr. Mota-Santana argues that he accused Mr. Sanchez of failing to properly represent him and that there had been a complete breakdown in communications between the two. *See id.* (describing Mr. Mota-Santana’s appellate argument). Mr. Mota-Santana further argued that the case contained a conflict of interest which requires an inquiry to resolve the issue and that the district court failed to hold such an inquiry, but instead proceeded with the change of plea hearing. *See id.* (explaining Mr. Mota-Santana’s argument on appeal).

179. *Id.*

180. *See id.* at 46 (“The alleged conflict . . . was not [an] uncommon type of disagreement between client and counsel, exacerbated by regret that a more favorable plea agreement could not somehow have been made.”).

181. *See id.* (describing the concept of “conflict of interests” and stating that all relevant cases deal with multiple representation situations where a lawyer has two or more clients in the same event or transaction).

182. *See id.* (discussing Mr. Mota-Santana’s reliance on *Holloway v. Arkansas*, clarified by *Mickens v. Taylor*, 535 U.S. 162 (2002), as requiring reversal “only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict” (quoting *Mickens v. Taylor*, 535 U.S. 162, 168 (2002))). In 2002, the Supreme Court stated that “a defendant must show a defective, though not necessarily outcome-affecting, performance by counsel.” *Id.* The Court also addressed courts of appeal that have applied the required judicial inquiry for conflict of interest cases to situations in which representation of the defendant implicates counsel’s person or financial interests rather than joint representation. *See id.* (stating the Court’s policy with regard to judicial inquiries in varying cases of conflict of interests). The Court noted that such an expansive application of the inquiry requirement is not expressly required by applicable case law. *See id.* (noting that the language of *Cuyler v. Sullivan*, 446 U.S. 335, (1980), which requires judicial inquiry into conflicts of interest cases, does not require or even support such a broad understanding of conflict). The First Circuit explained that if it were to treat disagreements between attorney and client in the same manner as conflicts arising from multiple representation, any unsuccessful criminal defendants would likely attempt to produce some disagreement with their counsel. *See id.* (considering the practical implications of permitting automatic reversal for criminal defendants who can show that their counsel’s representation of them implicates counsel’s personal or financial interests).

the court declined Mr. Mota-Santana's proposal to treat this case as presenting notice of a potential conflict of interest necessitating a special inquiry and potential reversal.¹⁸³

The court framed Mr. Mota-Santana's case as presenting two distinct actions of the court: "its refusal to allow Sanchez to withdraw and its refusal to appoint substitute counsel."¹⁸⁴ The court stated that if Mr. Mota-Santana's only argument was the appropriateness of the district court's refusal to permit Mr. Sanchez to withdraw, then there might have been a legitimate question.¹⁸⁵ "But here the two actions merge," as Mr. Mota-Santana was unable to pay to retain other private counsel, but still sought court-appointed counsel.¹⁸⁶ In evaluating the sufficiency of the district court's inquiry, the First Circuit stipulated that judicial inquiries need not amount to a formal hearing, but instead merely require satisfaction of a number of stated objectives.¹⁸⁷ The court analogized this case to *United States v. Allen*¹⁸⁸ and stated that "[g]ood cause for substitution of counsel cannot be determined solely according to the subjective standard

183. *See id.* (stating the court's refusal to treat Mr. Mota-Santana's case as one containing a legitimate notice of conflicts of interest). The court further stated that differences between a client and their counsel can be so deep and pervasive that effective legal assistance would be impaired to require relief from the court, but that this is not one of those cases. *See id.* (qualifying Mr. Mota-Santana's claim of conflict of interests in the grander scheme of client-attorney conflict).

184. *Id.* at 46–47.

185. *See id.* (articulating the court's primary problem with Mr. Mota-Santana's appellate claim). The court explained that if Mr. Mota-Santana challenged only the district court's refusal to allow Mr. Sanchez to withdraw then it would be controlled by *United States v. Woodard*, 291 F.3d 95 (1st Cir. 2002). *See id.* ("As we said in *United States v. Woodard* . . . a defendant is not ordinarily dependent on the court's permission to replace retained counsel.").

186. *Id.*

187. *See id.*

The appellate court should consider several factors, including the timeliness of the motion, the adequacy of the court's inquiry into the defendant's complaint, and whether the conflict between the defendant and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense.

The court set aside the timeliness issue as not having been advanced as a challenge and proceeded with the suggested analysis. *See id.* (disregarding the consideration of timeliness and proceeding with evaluating Mr. Mota-Santana's reason for dissatisfaction).

188. 789 F.2d 90 (1st Cir. 1986).

of what the defendant perceives,” thus articulating the requirement of an objective “good cause” showing.¹⁸⁹ In its analysis the court noted Mr. Mota-Santana’s initial reason for dissatisfaction, but qualified that reason as being inadequate for purposes of determining that new counsel ought to be appointed.¹⁹⁰ The court further responded to each of Mr. Mota-Santana’s complaints and accusations by discounting or disproving each.¹⁹¹

Following its analysis the court concluded that if there was a breakdown in communication between Mr. Mota-Santana and Mr. Sanchez then it was the doing of the defendant.¹⁹² The court explained that “a defendant cannot compel a change to [sic] counsel by the device of refusing to talk with his lawyer,” and thus Mr. Mota-Santana did not have a valid claim concerning breakdown in communication.¹⁹³ Finally, the court addressed whether the disagreements at issue were likely to preclude effective legal assistance in the defense.¹⁹⁴ The court concluded that the work of Mr. Sanchez was practically at its end and the only remaining work would be that of appellate work, a service beyond the scope of the request for substitute counsel.¹⁹⁵

189. *United States v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004) (quoting *Allen*, 789 F.2d at 93).

190. *See id.*

[T]he initial reason for dissatisfaction [was] . . . that he thought counsel should have obtained a more favorable plea agreement offer from the government . . . [but] “[t]he mere fact that a defense attorney and his client disagreed about the advisability of a plea does not justify appointing new counsel.”

(quoting *United States v. Genao*, 281 F.3d 305, 313 (1st Cir. 2002)).

191. *See id.* at 47–48. (discounting Mr. Mota-Santana’s accusation that Mr. Sanchez deceived him, the complaint that Mr. Sanchez was unavailable and unreachable, and the assertion that Mr. Mota-Santana and Mr. Sanchez experienced a total breakdown in communication). The court stated that to prove a complete breakdown in communication “a defendant ‘must show that the conflict between lawyer and client was so profound as to cause a total breakdown in communication,’ preventing an adequate defense.” *Id.* at 48.

192. *See id.* (stating the court’s belief that if a breakdown occurred, it was the doing of Mr. Mota-Santana).

193. *Id.*

194. *See id.* (introducing the court’s final inquiry into Mr. Mota-Santana’s appellate case).

195. *See id.* (concluding that Mr. Mota-Santana was not deprived of effective legal assistance because Mr. Sanchez had already finished all the legal work he needed to complete).

In conclusion, the First Circuit determined that the district court gave adequate attention to Mr. Mota-Santana's motions, made appropriate inquiries into the causes and merits of the complaints, and "was well within its discretion in refusing to appoint new counsel."¹⁹⁶ Due to Mr. Mota-Santana's inability to supply a good cause rationale for his request to terminate retained counsel and seek court-appointed counsel, he was denied reversal of his conviction and the opportunity to have his counsel of choice.

B. *United States v. Brown*

Eleven years later, in *United States v. Brown*,¹⁹⁷ the Ninth Circuit addressed an indigent criminal defendant's request to substitute retained counsel for court-appointed counsel, and the court decided the case without reference to the First Circuit's decision in *United States v. Mota-Santana*.¹⁹⁸ In fact, the court began its opinion directly contradicting the First Circuit's decision by stating: "*United States v. Rivera-Corona* . . . held that an indigent criminal defendant need not establish a conflict with his attorney amounting to the constructive denial of counsel as a prerequisite to substituting appointed counsel for his retained attorney."¹⁹⁹

The defendant, Mr. Brown, was charged with one count each of advertising child pornography, receiving child pornography, and possessing child pornography.²⁰⁰ Two and a half weeks prior to the start of trial, Mr. Brown's retained counsel filed a motion to withdraw and for the court to substitute a court-appointed public defender to the case.²⁰¹ Subsequently, the district court held a

196. *Id.*

197. 785 F.3d 1337 (9th Cir. 2015).

198. *Id.*; *United States v. Mota-Santana*, 391 F.3d 42 (1st Cir. 2004).

199. *Brown*, F.3d at 1340 (citing *United States v. Rivera-Corona*, 618 F.3d 976, 1115 (9th Cir. 2010)).

200. *See id.* (describing the charges against Mr. Brown).

201. *See id.* at 1341 (stating the retained defense counsel's motion to withdraw from the case prior to trial). Mr. Brown's lawyer stated there were "'strained' communications and an 'actual conflict of interest' with Brown." *Id.* Mr. Brown's counsel further informed the court that Mr. Brown wished for counsel to withdraw and attached an email in which Mr. Brown had specifically requested the withdrawal and stated his intention to seek appointed counsel. *See*

hearing on Mr. Brown's counsel's motion to withdraw.²⁰² Following conversations with both Mr. Brown and his counsel, the court denied the motion.²⁰³ Mr. Brown was convicted at trial and "filed a motion for judgment of acquittal or for a new trial, based in part on the court's denial of his attorney's motion to withdraw."²⁰⁴

The Ninth Circuit began its analysis of the appeal by distinguishing Mr. Brown's case from that of an indigent criminal defendant seeking substitute counsel for his current court-appointed counsel.²⁰⁵ Mr. Brown, "who has hired his own

id. (detailing Mr. Brown's lawyer's motion to withdraw from representation).

202. *Id.* The hearing began when Mr. Brown's counsel informed the court of the extreme difference in opinion as to how to handle the case between himself and Mr. Brown. *Id.* The trial judge asked Mr. Brown if he had an objection to his lawyer's motion to withdrawal and he indicated that he did not. *Id.* The judge proceeded to explain that if it decided to appoint a public defender then it would require a continuance of the trial so that the new counsel could be brought up to speed. *Id.* The judge further stated that he found fault with counsel's late filing of the motion and the faulty base of the motion, specifically the disagreement over payment and an inability, or unwillingness, of counsel to prepare for trial. *Id.* Counsel responded that the disagreement was not over payment and he was ready to proceed to trial, at which time the judge engaged Mr. Brown. *Id.* Mr. Brown advised the judge that defense counsel was never receptive to Mr. Brown's desire to present a defense, but instead focused on a potential plea deal. *Id.* at 1342. The judge again addressed Mr. Brown's counsel and reminded him of Mr. Brown's control of the defense, restricted by counsel's ethical duties. *Id.*

203. *See id.* at 1343 (denying Mr. Brown's counsel's motion to withdraw). The judge explained to Mr. Brown that his lawyer was well qualified, that the case was prepared for trial, and that the court would permit the defense extra time before trial if need be. *Id.* Further, the judge explained to Mr. Brown that having paid counsel \$50,000, he could not expect nearly as good a defense if the court were to appoint a public defender. *Id.*

204. *Id.* The appeal followed Mr. Brown's sentencing, during which he was sentenced to "concurrent 180-month sentences on each of the advertising, transportation, and receipt counts, and a concurrent 180-month sentence for the possession account." *Id.*

205. *See id.* (stating that when the court has appointed an attorney for an indigent criminal defendant, the defendant does not have a right to any specific lawyer appointed and paid for by the court, but rather a right to effective counsel). The court further explained that when an indigent defendant represented by counsel seeks appointment of new counsel the inquiry is "when the conflict between client and counsel is so extreme as to constitute a 'constructive denial of counsel' altogether." *Id.* (quoting *United States v. River-Corona*, 618 F.3d 976, 979 (9th Cir. 2010)). Such an inquiry involves consideration of the timeliness of the motion and the extent of resulting inconvenience or delay, the adequacy of the district court's inquiry into the motion, and whether the conflict between the counsel and client was so great that it impaired an adequate defense (good cause); these are the inquiries that the district court made in Mr. Brown's case. *Id.*

attorney ‘has a different right, independent and distinct from the right to effective counsel, to be represented by the attorney of his choice.’²⁰⁶ The court stated that Mr. Brown’s right to counsel of his choice is the core of the Sixth Amendment’s guarantee and denial of this right does not depend on the quality of representation that Mr. Brown received.²⁰⁷ Although the right to counsel of choice is not absolute, generally a defendant will be permitted to have counsel of his choice unless a different result is necessitated by “‘purposes inherent in the fair, efficient, and orderly administration of justice.’”²⁰⁸ The court clarified that the degree of conflict analysis employed by the district court is inappropriate when the court considers a defendant’s motion to discharge his retained counsel and to be represented by court-appointed counsel.²⁰⁹ Instead, this right implicates Mr. Brown’s right to counsel of choice.²¹⁰ To be sure, this is not the same right to counsel of choice that a defendant enjoys if they seek to replace retained counsel with different retained counsel, but rather the right to a court-appointed lawyer in lieu of currently retained counsel.²¹¹ In this context, Mr. Brown’s right to counsel of choice meant that he had a right to fire his retained lawyer for any or no reason.²¹²

206. *Id.* (quoting *United States v. Mendez-Sanchez*, 563 F.3d 935, 979 (9th Cir. 2009)).

207. *See id.* at 1344 (describing the importance of the Sixth Amendment right to counsel of choice stated in *Gonzalez-Lopez*).

208. *Id.* (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010)).

209. *See id.* (stating that a defendant’s motion to substitute court-appointed counsel for retained counsel does not require an inquiry into conflict between the counsel and their defendant).

210. *See id.* (stating that Mr. Brown’s motion to substitute counsel implicates his qualified right to counsel of choice protected by the Sixth Amendment).

211. *See id.* (qualifying the right to counsel of choice for indigent defendants seeking court-appointed counsel as substitute counsel for retained counsel).

212. *See id.* (explaining that an indigent criminal defendant has discretion to fire their retained counsel based on the right to counsel of choice). The Government argued that *United States v. Rivera-Corona*, 618 F.3d 976 (9th Cir. 2010) did not control this case because the defense attorney there involved had demanded additional legal fees. *Id.* The court corrected the Government: “[*Rivera-Corona*] considered, *in general*, ‘the standard for considering a criminal defendant’s motion to discharge his privately retained counsel and to proceed with a different, court-appointed lawyer instead,’ and concluded that, under those circumstances, the defendant enjoys a Sixth Amendment right to discharge his retained counsel.” *Id.* (quoting *Rivera-Corona*, 618 F.3d at 977–81).

The court separated the actions implicated in Mr. Brown's case:

When a court denies a motion to substitute appointed for retained counsel, as the district court did in this case, it is really deciding two issues. The first, whether the defendant may *discharge* the attorney whom he retained, implicates the Sixth Amendment right to counsel of choice, as discussed above. But the court ruling on such a motion is, at the same time, also considering a request for *appointment* of counsel. And, while a criminal defendant's right to appointed counsel of course does have a constitutional aspect, in federal court the question whether counsel should be appointed is governed, first and foremost, by the [Criminal Justice Act], 18 U.S.C. § 3006A.²¹³

Clearly Mr. Brown's case involved intertwined issues, the crux of which was whether he would be permitted to fire retained counsel.²¹⁴ If the Ninth Circuit permits Mr. Brown to fire his retained counsel then the Criminal Justice Act requires that the court appoint him counsel unless he wishes to proceed *pro se*.²¹⁵ The government maintained that the court needed to consider several factors, including the magnitude of the conflict or break in communication between the lawyer and client.²¹⁶ The court framed this proposal as the government seeking to add a prerequisite to Mr. Brown's constitutional right to discharge his retained counsel—the court rejected the prerequisite.²¹⁷ The Ninth Circuit

213. *Id.* at 1344–45 (citations omitted).

214. *See id.* at 1345 (explaining the primary issue implicating Mr. Brown's constitutional rights).

215. *See id.* (stating that if Mr. Brown is permitted to discharge his retained counsel, 18 U.S.C. § 3006A(b) requires the court to appoint counsel unless he wishes to exercise his right to represent himself). The Criminal Justice Act provides that “[i]n every case in which a person entitled to representation . . . appears without counsel . . . the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him’ unless that right is waived.” *Id.* (quoting 18 U.S.C. § 3006A(b) (2012)).

216. *See id.* (stating the Government's proposed factors for consideration in determining whether a defendant may substitute appointed for retained counsel).

217. *See id.* at 1346 (“[T]he government would have us hold that, notwithstanding Brown's constitutional right to discharge his lawyer, the restrictive extent-of-conflict analysis governs whether a replacement is appointed. We disagree.”). The court further stated that the proposed relevant factors were “essentially identical to the extent-of-conflict analysis applicable to

again referred to *Rivera-Corona* and stated: “[w]here, as here, the right to retained counsel of choice is implicated, *Rivera-Corona* specifically held that ‘the extent-of-conflict review is inappropriate.’”²¹⁸ Instead, *Rivera-Corona* answers the constitutional question of how and when an indigent defendant may fire retained counsel and substitute court-appointed counsel: “‘for any reason,’ subject to only the orderly administration of justice qualification.”²¹⁹ Mr. Brown is not required to make any showing or comply with judicially-created requirements in order to discharge retained counsel and then receive court-appointed counsel required by the Criminal Justice Act.²²⁰

The Ninth Circuit supported its holding that the district court abused its discretion in denying Mr. Brown’s motion to discharge his retained counsel by reframing the issue as one of criminal defendants’ rights.²²¹ The district court focused on the attorney’s reasons for the motion to withdraw, but this motion was primarily about Mr. Brown trying to fire his lawyer.²²² Instead, “where, as here, it is apparent that the defendant, not the attorney, instigated the withdrawal motion, the defendant’s Sixth Amendment rights should trump whatever concerns the court has about the lawyer’s motives.”²²³ Mr. Brown’s complaints about his counsel concerned:

replacement of one appointed counsel by another” as in *Martel v. Clair*, 132 S. Ct. 1276 (2012). *Id.* (citing *Martel*, 132 S. Ct. at 1287).

218. *Id.* (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 981 (9th Cir. 2010)).

219. *Id.* (quoting *Rivera-Corona*, 618 F.3d at 980).

220. *See id.* (stating that Mr. Brown need not satisfy a showing before receiving permission to discharge retain counsel and be appointed counsel under 18 U.S.C. § 3006(A)).

221. *See id.* at 1347 (stating the court’s holding that the district court abused its discretion in denying Mr. Brown’s motion).

222. *See id.* (describing the district court’s error in dedicating the motions hearing to the attorney’s reasons for withdrawing from the case when it ought to have focused on Mr. Brown’s rights). The court stated that when the district court considered the motion to withdraw their “responsibility was *not* to ensure a fair attorney-client relationship or to supervise the conduct of the lawyer,” and stated that those considerations “are relevant and important . . . when a court considers a lawyer’s motion to withdraw.” *Id.* (citing *Brandon v. Blech*, 560 F.3d 536, 537–39 (6th Cir. 2009)).

223. *Id.* The district court was aware that Mr. Brown initiated the withdrawal motion based on the email attached to the motion, from Mr. Brown to his counsel regarding his desire to discharge counsel, and the subsequent statements made by Mr. Brown during the motions hearing. *Id.*

(1) a difference in opinion as to how the case should be handled and a lack of trust; (2) dissatisfaction with the infrequent contact between the two; and (3) financial tensions resulting from Mr. Brown's difficulty collecting money for the last payment.²²⁴

The court stated that any one of these reasons was more than sufficient to support Mr. Brown's desire to discharge retained counsel.²²⁵ In fact, Mr. Brown's reasons for wishing to discharge his retained counsel were not the court's concern at all—" [h]e had the right to 'fire his retained . . . lawyer . . . for any reason or [for] no reason.'"²²⁶ The court further states that "[o]nly affirmative interference with the 'fair, efficient and orderly administration of justice,' could have justified an order that Brown could *not* discharge his lawyer."²²⁷ The court concluded, after review of the district court's record concerning reasons to deny Mr. Brown's motion to promote the administration of justice, that no such reasons existed.²²⁸ The court further concluded that "[Mr.] Brown's motion to discharge his retained counsel should have been granted," and "[a]s [Mr.] Brown met the financial requirements for an appointed lawyer, he was entitled to one . . ."²²⁹

224. See *id.* at 1348 (summarizing Mr. Brown's complaints addressed briefly at the district court's motions hearing).

225. See *id.* ("In the context of the constitutional right to discharge a retained lawyer, any of these concerns was more than sufficient.")

226. *Id.* (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 980 (9th Cir. 2010) (alteration in original omitted) (emphasis added)).

227. *Id.* (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010) (citation omitted)). The Government suggested in its briefing that the district court denied Mr. Brown's motion because of the possibility of delay associated with allowing discharge and appointment of new counsel, a rationale relevant to the "fair, efficient and orderly administration of justice." *Id.* at 1349. The court conceded that the district court has broad discretion to balance the right to discharge retained counsel with the demands of the court calendar. *Id.* Despite this discretion, the court found that the district court in this case did not deny the motion based on time constraint nor would that rationale qualify as an "administration-of-justice" basis for the denial of Mr. Brown's right to discharge retained counsel. *Id.* The court offered three reasons for this finding: (1) the district court never justified its denial of the motion by concern for its calendar; (2) the district court's offer to continue the case directly contradicts the suggestion that it was denied to avoid delay; and (3) the district court did not attempt to determine how long newly appointed counsel would need to be prepared for trial. *Id.*

228. See *id.* at 1350 (concluding that the district court did not have any administration-of-justice rationale for denying Mr. Brown's motion).

229. *Id.*

In terms of remedy, the court stated that the denial of Mr. Brown's right to counsel of choice qualified as a structural error, "requiring that convictions be vacated even without a showing of prejudice."²³⁰ Therefore, the denial of Mr. Brown's motion constituted denial of his right to counsel of choice and the court vacated his convictions.²³¹ The Ninth Circuit's decision in *Brown* not to require indigent criminal defendants to satisfy an objective good cause showing prior to dismissal of retained counsel provided the foundation for the Eleventh Circuit's decision in *United States v. Jimenez-Antunez*²³² just one year later.²³³ The Eleventh Circuit relied heavily on *Brown*, in addition to several lower court decisions, in concluding that Mr. Jimenez-Antunez did not need to show good cause in order to substitute appointed counsel for his retained counsel.²³⁴

C. United States v. Jimenez-Antunez

On June 4, 2013, Gabriel Jimenez-Antunez was indicted for conspiracy to distribute and possess with intent to distribute 500 grams of methamphetamine, possession of 500 grams of methamphetamine with intent to distribute, conspiracy to commit money laundering, and illegal reentry after deportation.²³⁵ Following the indictment, Mr. Joshi entered a notice of appearance as Mr. Jimenez-Antunez's retained counsel.²³⁶ On October 24,

230. *Id.* (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)).

231. *See id.* ("Accordingly, because Brown's motion to substitute counsel should have been granted, Brown was denied his right to counsel of choice and we must vacate his convictions.").

232. 820 F.3d 1267 (11th Cir. 2016).

233. *See id.* at 1271 (citing affirmatively *Brown* as support for the court's decision not to require a good cause showing).

234. *See id.* (stating that an indigent criminal defendant, while not seeking *counsel of choice* is constitutionally permitted to fire his retained counsel for any reason or for no reason at all).

235. *See id.* at 1269 (stating the grand jury's indictments of Mr. Jimenez-Antunez).

236. *See id.* (describing the inception of Mr. Joshi and Mr. Jimenez-Antunez's relationship). With the help of Mr. Joshi, Mr. Jimenez-Antunez "negotiated a plea agreement with the government and pleaded guilty to the two conspiracy charges." *Id.* Mr. Jimenez-Antunez's sentencing hearing was set for January 6, 2015. *Id.* at 1270.

2014, Mr. Jimenez-Antunez sent a letter to Mr. Joshi expressing his desire to discharge Mr. Joshi and intention to seek court-appointed counsel.²³⁷ Thereafter, Mr. Joshi filed a motion to withdraw as defense counsel and advised the court of Mr. Jimenez-Antunez's intention to substitute court-appointed counsel.²³⁸ Upon hearing Mr. Jimenez-Antunez's complaints in court, "[t]he district court concluded that [Mr. Jimenez-Antunez] '[had] been afforded effective counsel' and denied the motion."²³⁹ Mr. Jimenez-Antunez was sentenced to two terms—one 300-month sentence and one 240-month sentence—to be served concurrently and thereafter appealed.²⁴⁰

Mr. Jimenez-Antunez's appeal presented a question of first impression for the Eleventh Circuit: "whether a criminal defendant must show good cause to dismiss retained counsel if the defendant intends to seek appointed counsel."²⁴¹ The court specified that it was reviewing the district court's denial of the motion to withdraw as counsel for abuse of discretion.²⁴²

237. *See id.* at 1269–70 ("[Mr. Jimenez-Antunez] wrote, 'I do not want your services anymore, and I do not want you to represent me anymore; so the Judge can appoint another counsel for me, and so the Judge may know my reasons and my motives why I am asking for this change.'").

238. *See id.* at 1270 (detailing Mr. Joshi's motion to withdraw as defense counsel). In response to Mr. Joshi's motion to withdraw, the district court rescheduled the sentencing hearing for December 14, 2014. *Id.* At the beginning of the hearing, the district court reviewed Mr. Joshi's motion to withdraw and heard statements from Mr. Jimenez-Antunez about the disagreement over how to handle the case, feelings of coercion, and lack of communication between himself and the lawyer. *Id.* The district court responded to each of Mr. Jimenez-Antunez's complaints in turn: (1) it suspected that Mr. Jimenez-Antunez was disappointed with the guideline range, not the way the case was handled; (2) there was no evidence that Mr. Joshi had coerced Mr. Jimenez-Antunez into pleading guilty; and (3) Mr. Joshi must have had more recent contact with his client than Mr. Jimenez-Antunez was giving him credit considering they had reviewed the presentence investigation report together just three months before. *Id.*

239. *Id.*

240. *See id.* (stating the sentencing outcome that led to the appeal to the Eleventh Circuit).

241. *Id.* at 1269.

242. *See id.* at 1270 (stating the standard of review (quoting *Brown v. United States*, 720 F.3d 1316, 1325 (11th Cir. 2013))). The court further stipulated that "[a] district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly

The court began its analysis by distinguishing between the standards that apply to indigent criminal defendants' requests to substitute appointed counsel—requiring a showing of good cause—and those that apply to criminal defendants who do not require appointed counsel—a near-absolute right.²⁴³ Mr. Jimenez-Antunez's appeal required the court to determine which of these two standards applied to a defendant who moves to replace retained counsel with appointed counsel.²⁴⁴ The court addressed the issue by considering the timeline of requests; Mr. Jimenez-Antunez *first* requested to discharge his retained counsel.²⁴⁵ The court stated that Mr. Jimenez-Antunez's "right to choose counsel is incomplete if it does not include the right to discharge counsel that [he] no longer chooses."²⁴⁶ This is true even if the indigent defendant's decision to discharge retained counsel requires the court to appoint counsel to take his place.²⁴⁷

erroneous." *Id.* (quoting *United States v. Toll*, 804 F.3d 1344, 1353 (11th Cir. 2015)).

243. *See id.* at 1270–71 (distinguishing standards that apply to different subsets of criminal defendants). In doing so, the court recognized the importance of the Sixth Amendment guarantee to counsel of choice. *Id.* (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006)). For criminal defendants who do not require appointed counsel, they may substitute different retained counsel "regardless of the quality of the representation he received," qualified only by not interfering with the "fair, orderly and effective administration of the courts." *Id.* at 1271 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006); *United States v. Koblit*, 803 F.2d 1523, 1528 (11th Cir. 1986)). Alternatively, "[a]n indigent criminal defendant who seeks appointed counsel 'does not have a right to have a particular lawyer represent him nor to demand a different appointed lawyer except for good cause.'" *Id.* (quoting *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985)). Good cause exists where the attorney and client experience "a fundamental problem, 'such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict.'" *Id.* (quoting *United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir. 2008)).

244. *See id.* (stating the root of the issue presented to the court).

245. *See id.* ("This appeal requires that we decide which standard applies when a defendant moves to replace retained counsel with appointed counsel. And the order of that sequence supplies the answer.").

246. *Id.*

247. *See id.* ("[W]hen an indigent defendant has exercised the right to dispense with a retained lawyer, the right to effective representation . . . might require that appointed counsel take his place."). The court elaborated, "[b]ecause a defendant who moves to dismiss his retained counsel maintains the right to counsel of choice, a district court cannot require the defendant to show good cause." *Id.*

The court proceeded to expressly affirm the Ninth Circuit's decision in *United States v. Brown*.²⁴⁸ Additionally, the court cited several other lower court decisions that have held that an indigent criminal defendant “who seeks to discharge retained counsel and have the court appoint counsel may do so unless the substitution would delay court proceedings, prejudice the parties, or disrupt ‘the orderly process of justice.’”²⁴⁹ Rejecting the view of the First Circuit, the court stated that the First Circuit incorrectly conflated the right to counsel of choice and the right to effective counsel when in actuality the rights are distinct.²⁵⁰

The court explained the correct procedure for addressing a motion to withdraw:

[B]efore granting a motion to dismiss retained counsel, a district court must determine that the criminal defendant either will be represented by counsel or had made a knowing and voluntary waiver of the right to counsel. If a defendant intends to move the court to appoint counsel, the court should determine whether the defendant is eligible for appointed counsel. Even when a district court is assured that a defendant

248. *United States v. Brown*, 785 F.3d 1337 (9th Cir. 2015). The court cited favorably the Ninth Circuit's conclusion that such a request, to dismiss retained counsel and substitute appointed counsel, implicates the Sixth Amendment right to counsel of choice and therefore, courts cannot require a defendant to meet an additional threshold showing of good cause. *Id.*

249. *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1271–72 (11th Cir. 2016) (quoting *Dixon v. Owens*, 865 P.2d 1250, 1252 (Okla. Crim. App. 1993); accord *People v. Ortiz*, 800 P.2d 547, 555 (Cal. 1990)). The court in *Jimenez-Antunez* further cited several state intermediate courts that have adopted similar approaches to an indigent criminal defendant's motion of this sort. See *People v. Abernathy*, 926 N.E.2d 435, 440–44 (Ill. App. Ct. 2010) (discussing the denial of Mr. Abernathy's motion to discharge retained counsel and seek court-appointed counsel and concluding that the trial court erred by denying the defendant's right to counsel of choice); *People v. Munsey*, 232 P.3d 113, 126–27 (Colo. App. 2009) (detailing the denial of Ms. Munsey's motion to discharge retained counsel, distinguishing her situation from that of an indigent defendant dissatisfied with appointed counsel, and concluding that the trial court erred in denying her right to counsel of choice); *State v. Barber*, 206 P.3d 1223, 1234–36 (Utah Ct. App. 2009) (identifying the unique situation presented by a request to discharge retained counsel and seek appointed counsel and determining that Mr. Barber was not required to offer any explanation for his motion to dismiss privately retained counsel and seek appointed counsel).

250. See *id.* at 1272 (“[The First Circuit's] decision conflates the two rights at issue, contrary to the later explanation by the Supreme Court of the United States in *Gonzalez-Lopez* that the rights are distinct.” (citing *United States v. Gonzalez-Lopez*, 540 U.S. 140, 148 (2006))).

will have representation or has waived the assistance of counsel, a court may still deny a motion to substitute retained counsel if it will interfere with the “fair, orderly, and effective administration of the courts.”²⁵¹

Here, the appellate court found that the district court incorrectly considered Mr. Joshi’s performance, an inquiry relevant only to Mr. Jimenez-Antunez’s right to effective assistance of counsel, not his right to counsel of choice.²⁵² Further, the district court provided no reason why granting the motion would have interfered with the effective administration of the courts.²⁵³ The court concluded that the district court’s denial of the motion after application of the incorrect standard was reversible error, vacated Mr. Jimenez-Antunez’s convictions, and remanded the case for further proceedings.²⁵⁴ The Eleventh Circuit’s express support of the Ninth Circuit’s procedure—and condemnation of the First Circuit’s procedure—demonstrates a clear disagreement regarding how the constitutional right to counsel of choice should be treated and how such motions ought to be handled.

*IV. Argument for Adopting a Two-Part Motions Analysis:
Highlighting the Importance of the Sixth Amendment Guarantees*

These conflicting standards for addressing motions to substitute retained counsel for appointed counsel create confusion and uncertainty for indigent criminal defendants, who are among the most vulnerable individuals in society.²⁵⁵ Aside from the importance of providing a clear protocol for the benefit of these

251. *Id.* (quoting *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir. 1986)) (internal citations omitted).

252. *See id.* (stating the error of the district court in considering Mr. Joshi’s performance in the motion to withdraw).

253. *See id.* (“The district court offered no reasons why granting the motion would have interfered with the fair, orderly, and effective administration of the courts . . .”). The court further explained that it could infer no such reason from the record. *Id.* at 1273.

254. *See id.* at 1273 (detailing the court’s conclusion).

255. *See* Michael S. Greco, *Court Access Should Not Be Rationed*, A.B.A.J., Dec. 2005, at 1, 6 (discussing indigent criminal defendants and stating that “[t]he importance of ensuring access to legal services and to justice for the most vulnerable in society cannot be overstated”).

indigent defendants, uniformity is critical for the integrity of the judicial system.²⁵⁶

After *Mota-Santana*, the First Circuit would require the hypothetical “William Defendant” to provide the district court with a good cause rationale to substitute appointed counsel for retained counsel.²⁵⁷ Further, the First Circuit incorrectly insists this case presents a question concerning the effectiveness of Mr. Mota-Santana’s lawyer, when in actuality it implicates a question concerning Mr. Mota-Santana’s right to counsel of choice.²⁵⁸ Mr. Sanchez’s motion to withdraw as counsel for Mr. Mota-Santana requires an analysis of the latter’s right to counsel of choice, a phrase not mentioned and a concept barely addressed in the opinion.²⁵⁹ Instead, the court continued with the district court’s analysis into conflict of interest and stated that *United States v. Allen* controlled.²⁶⁰ Yet, *Allen* is readily distinguishable from Mr. Mota-Santana’s case.²⁶¹

256. See Evan H. Caminker, *Precedents and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 40 (1994) (“[U]niform interpretation of federal law helps to secure popular respect for judicial authority. Federal courts depend on the perceived legitimacy of their enterprise for their authority over other government actors and the general public.”).

257. See *United States v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004) (requiring good cause for substitution of counsel).

258. See *id.* at 45 (stating the appellate issue and proceeding to analyze the district court’s inquiry into the alleged conflict between Mr. Mota-Santana and his lawyer).

259. See *id.* at 46

In the instant case, there are two actions of the court at issue: its refusal to allow Sanchez to withdraw and its refusal to appoint substitute counsel. Were the only issue that of the appropriateness of the court’s refusal to permit withdrawal, Sanchez having been retained privately, there might be some question. As we said in *United States v. Woodard* . . . a defendant is not ordinarily dependent on the court’s permission to replace retained counsel. But here the two actions merge

(citing *United States v. Woodard*, 291 F.3d 95, 107 (1st Cir. 2002)).

260. See *Mota-Santana*, 391 F.3d at 47 (“We find ourselves in the same situation as in *Allen*: ‘Good cause for substitution of counsel cannot be determined solely according to the subjective standard of what the defendant perceives.’” (quoting *United States v. Allen*, 789 F.2d 90, 93 (1st Cir. 1986))).

261. See *United States v. Allen*, 789 F.2d 90, 91 (1st Cir. 1986) (discussing Mr. Allen’s appeal from the district court’s denial of his motion to substitute different appointed counsel for current appointed counsel). Norman Allen appealed from a conviction on charges involving the possession of marijuana. *Id.* Mr. Allen had

The First Circuit's ill-founded reliance on *Allen* caused the court to conflate the standards to be applied to indigent criminal defendants seeking to substitute appointed counsel for current appointed counsel with that of indigent criminal defendants seeking substitute appointed counsel for retained counsel.²⁶² The Eleventh Circuit addressed the necessary distinction twelve years later in *United States v. Jimenez-Antunez*.²⁶³ The necessity of this distinction is more apparent if the requests presented in defense counsel's motion to withdraw are treated separately, instead of understood as a singular request.²⁶⁴ Had the First Circuit chosen to treat these requests separately, the first question would have been whether Mr. Mota-Santana was permitted to discharge retained counsel.²⁶⁵ The right to discharge retained counsel is an

been *initially appointed* Mr. Owen Walker, a federal defender, to serve as his counsel. *Id.* Five months following Mr. Walker's appointment, Mr. Allen wrote a letter to the court describing his dissatisfaction with his lawyer and belief that if he had a proper defense he would prove his innocence. *Id.* Mr. Allen never filed a motion for leave to withdraw or substitute counsel. *Id.* at 91–92. The court understood Mr. Allen's subsequent comments at the pre-trial colloquy to be a request for a continuance and denied the motion. *Id.* On appeal, Mr. Allen argued that his Sixth Amendment right was violated by the district court's failure to adequately inquire into his request for substitute counsel. *Id.* The First Circuit stated that “[a]s an indigent defendant, appellant did have the right to be represented by counsel, but he did not have a right to have a particular lawyer represent him, nor to demand a different appointed lawyer except for good cause.” *Id.* (citations omitted).

262. See *Mota-Santana*, 391 F.3d at 47 (1st Cir. 2004) (analogizing the case to the issue presented in *Allen*).

263. See *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1270–71 (11th Cir. 2016) (distinguishing between the standards that apply to an indigent criminal defendant who seeks alternative appointed counsel and an indigent criminal defendant who seeks substitute appointed counsel for retained counsel).

264. Compare *Mota-Santana*, 391 F.3d at 47–48 (“In the instant case, there are two actions of the course at issue . . . [b]ut here the two actions merge . . .”), with *United States v. Brown*, 785 F.3d 1337, 1343 (9th Cir. 2015) (“[A] defendant who has hired his own attorney ‘has a different right, independent and distinct from the right to effective counsel, to be represented by the attorney of his choice.’” (quoting *United States v. Mendez-Sanchez*, 563 F.3d 935, 979 (9th Cir. 2009))), and *Jimenez-Antunez*, 820 F.3d at 1271 (“This appeal requires that we decide which standard applies when a defendant moves to replace retained counsel with appointed counsel. And the order of that sequence supplies the answer.”).

265. See *United States v. Mota-Santana*, 391 F.3d 42, 47–48 (1st Cir. 2004) (stating the first action to be the district court's refusal to allow Mr. Sanchez to withdraw).

issue controlled by the Sixth Amendment.²⁶⁶ Because *United States v. Gonzalez-Lopez*²⁶⁷ had not yet been decided, *Wheat v. United States*²⁶⁸ was controlling Supreme Court law regarding a defendant's Sixth Amendment right to counsel of choice.²⁶⁹ Following *Wheat* should have led to the conclusion that such an indigent criminal defendant is permitted to dismiss retained counsel. Therefore, the only question left would be whether the defendant seeks court-appointed counsel or intends to waive the right to counsel and proceed *pro se*.²⁷⁰ If the defendant thereafter seeks the appointment of counsel, the court has a duty to determine the defendant's eligibility and appoint counsel if so required.²⁷¹

266. See Bruce J. Winick, *Forfeiture of Attorneys' Fees under RICO and CEE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 786 (1989) ("Like many fundamental constitutional rights, the right to counsel of choice is not absolute and may depend on the financial resources of the individual who seeks to exercise it. The right, however, is unquestionably an 'essential component' or 'essential element' of the sixth amendment [*sic*].").

267. 548 U.S. 140 (2006).

268. 486 U.S. 153 (1988).

269. See *id.* at 159 (accepting the premise that the right to counsel of choice is an aspect of the Sixth Amendment). The Ninth and Eleventh Circuits relied heavily on *Gonzalez-Lopez*, likely due to the clarity of the opinion concerning the right to counsel of choice for different subclasses of criminal defendants, but the fundamental nature of the right to counsel of choice was recognized in *Wheat* and controlled at the time of the *Mota-Santana* decision. See *Brown*, 785 F.3d at 1343–44 (recognizing the constitutional origins of a defendant's right to counsel of choice (citing *Gonzalez Lopez*, 548 U.S. 147–48); see also *Jimenez-Antunez*, 820 F.3d at 1270 (explaining the centrality of the right to counsel of choice in the Sixth Amendment (citing *Gonzalez-Lopez*, 548 U.S. at 147–48)). The scope of this Sixth Amendment right to counsel of choice is circumscribed by the requirement that granting such a motion not "interfere[] with the fair, orderly, and effective administration of the courts." *Jimenez-Antunez*, 820 F.3d at 1272.

270. See *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1272 (11th Cir. 2016)

[A] district court must determine that the criminal defendant either will be represented by counsel or has made a knowing and voluntary waiver of the right to counsel. If a defendant intends to move the court to appoint counsel, the court should determine whether the defendant is eligible for appointed counsel.

(citations omitted).

271. See *Brown*, 785 F.3d at 1345

[I]n federal court the question whether counsel should be appointed is governed . . . by the [Criminal Justice Act]. Of course, as a practical

Had the First Circuit treated the actions in Mr. Sanchez's motion to withdraw as defense counsel for Mr. Mota-Santana separately, the court may have been forced to address criminal defendants' constitutional right to counsel of choice and may thereafter have come to a different conclusion. It is also possible that had the First Circuit first addressed this issue post-*Gonzalez-Lopez* that it would have been compelled to confront the Supreme Court's express declaration that the "root" meaning of the Sixth Amendment is the criminal defendant's right to their counsel of choice.²⁷² As such, the First Circuit may have come to the same result regarding this issue as the Ninth and Eleventh Circuits, both decided post-*Gonzalez-Lopez*. Nonetheless, the First Circuit's decision to treat the defendant's motion as a single action has some degree of merit.

It is critical to note that the trial court's decision concerning the indigent criminal defendant's motion to dismiss retained counsel will often effectively bind the court's decision in the subsequent action.²⁷³ The fact that the former action may be determinative of the subsequent decision to appoint counsel does not make the consideration of the issues separately any less necessary. Doing so is the only way in which an indigent criminal defendant will be able to enjoy the benefit of the Sixth Amendment right to counsel of choice.²⁷⁴ Therefore, in order to properly provide constitutional protections to indigent criminal defendants, such as Mr. Mota-Santana, it is critical to first address the desire to

matter the two issues—discharge of retained counsel and appointment of CJA counsel—are intertwined, and the decisions as to them will ordinarily be considered and announced together. However, the sequence and manner in which the two issues are addressed may not leave the defendant without any counsel at all, absent a voluntary, knowing, and intelligent decision to proceed *pro se*.

(citations omitted).

272. See *Gonzalez-Lopez*, 548 U.S. at 146–47 (discussing that the defendant's right to counsel of choice is the core of the Sixth Amendment).

273. See *United States v. Brown*, 785 F.3d 1337, 1345 (9th Cir. 2015) (stating that although the two issues are separate, they are frequently intertwined, and a decision concerning the defendant's right to dismiss retained counsel will often determine how the court must subsequently proceed).

274. See *Jimenez-Antunez*, 820 F.3d at 1272 (“[W]e are not persuaded that the only relevant action is the second request to engage new counsel or that the motion to dismiss retained counsel no longer implicates the right to counsel of choice.”).

discharge counsel followed by addressing any wish to have counsel appointed or to proceed *pro se*—the procedure adopted by both the Ninth and Eleventh Circuits.²⁷⁵

Several policy rationales likely framed the First Circuit's decision, such as: excess economic costs,²⁷⁶ discouraging gamesmanship by defendants and defense counsel,²⁷⁷ and promoting effective administration of the judicial system.²⁷⁸ These policy rationales are analogous to those that framed the Supreme Court's decision to restrict counsel of choice for indigent criminal defendants with appointed counsel.²⁷⁹ Specifically, with regard to indigent criminal defendants seeking substitute court-appointed counsel, these justifications "dictate that judges should consider less severe remedies before exercising the removal option."²⁸⁰ These policy issues sufficiently justify the narrowly tailored right to counsel of choice for indigent criminal defendants. Yet, it is important to acknowledge and understand the distinction drawn between the cases of Mr. Mota-Santana, Mr. Brown, and Mr. Jimenez-Antunez and the cases of Mr. Cronin and Mr. Allen.²⁸¹ The

275. See *Brown*, 785 F.3d at 1346 ("Once a district court allows a financially qualified defendant to exercise his right to fire his retained lawyer, § 3006A(b) requires, absent a voluntary, knowing, and intelligent decision to proceed *pro se*, that the court appoint a new attorney in his place." (emphasis in original) (citations omitted)); see also *Jimenez-Antunez*, 820 F.3d at 1272 (describing the proper procedure for handling an indigent criminal defendant's desire to discharge retained counsel).

276. See Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1258 (2006) (discussing the interest in judicial economy deterring judges from appointing substitute court-appointed counsel for an indigent criminal defendant).

277. See Jay Williams Burnett & Catherine Green Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove or Not to Remove Deficient Counsel*, 41 S. TEX. L. REV. 1315, 1336 (2000) (discussing the importance of preserving democratic ideals and judicial integrity and the strain placed by the request to disqualify or replace counsel).

278. See *id.* ("A second cost factor is administrative and involves both the delay in beginning a new trial and the judicial resources that were expended throughout the course of the aborted trial.").

279. See Keith Swisher, *Disqualifying Defense Counsel: The Curse of the Sixth Amendment*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 374, 389–90 (2014) (discussing the policy rationales behind denying indigent defendants' right to counsel of choice with regard to court-appointed counsel).

280. *Id.*

281. Compare *United States v. Mota-Santana*, 391 F.3d 42, 43–45 (1st Cir. 2004) (examining the case of an indigent criminal defendant's request to

former group of defendants retained counsel and enjoy the complete Sixth Amendment right to counsel of choice.²⁸² Although the right to counsel of choice is qualified for all criminal defendants,²⁸³ generally defendants with retained counsel can fire counsel “for any reason or for no reason.”²⁸⁴

Despite numerous policy rationales pointing to the contrary, to ensure that indigent defendants receive the benefit of the “root meaning” of the Sixth Amendment,²⁸⁵ William Defendant and other similarly situated indigent criminal defendants must be permitted to discharge retained counsel and seek appointed counsel without satisfying a good cause showing through proof of a severe conflict of interest, breakdown in communication, or another problem in the attorney-client relationship. This approach is critical considering “until just last Term, no criminal defendant had ever persuaded the Court to reverse a conviction solely on counsel-of-choice grounds; many had tried in vain.”²⁸⁶

discharge *retained* counsel and seek court-appointed counsel (emphasis added), and *United States v. Brown*, 785 F.3d 1337, 1340–43 (9th Cir. 2015) (considering an indigent criminal defendant’s appeal from the denial of his motion to discharge *retained* counsel and seek court-appointed counsel (emphasis added)), and *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1269–70 (11th Cir. 2016) (considering the issue of whether an indigent criminal defendant needs to show good cause in order to discharge *retained* counsel and seek court-appointed counsel (emphasis added)), with *United States v. Cronin*, 466 U.S. 648, 657 n.21 (1984) (concluding that the proper inquiry concerning an indigent criminal defendant’s request to replace *appointed* counsel with subsequent appointed counsel is whether the attorney is a “reasonably effective advocate” (emphasis added)), and *United States v. Allen*, 789 F.2d 90, 91–92 (1st Cir. 2002) (discussing the standard required to be shown for an indigent criminal defendant to replace *appointed* counsel with subsequent appointed counsel (emphasis added)).

282. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (“Where the right to be assisted by counsel of one’s choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.”).

283. See *Jimenez-Antunez*, 820 F.3d at 1270 (discussing the criminal defendant’s right to counsel of choice as being tailored by ensuring the “effective administration of the courts”).

284. *United States v. Rivera-Corona*, 618 F.3d 976, 980 (9th Cir. 2010).

285. See *Gonzalez-Lopez*, 548 U.S. at 147–48 (“The right to select counsel of one’s choice . . . has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.”).

286. John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice* 1–3, 2017 SUP. CT. REV. (forthcoming 2017) (Univ. of Chi., Pub. Law Working Paper no. 611).

In *United States v. Luis*²⁸⁷ last term, the Supreme Court for the first time vacated and remanded a case after finding that the government's action undermined the defendant's fundamental right to the assistance of counsel of the defendant's choice.²⁸⁸ Professor John Rappaport contends that the reason the Supreme Court consistently denies relief for criminal defendants deprived of the right to counsel of choice is that "the doctrine treats counsel of choice not as individual right at all," but is instead masked with alternative motives.²⁸⁹ Whatever the theory may be to explain the Court's unwillingness to grant relief to defendants based solely on the denial of their right to counsel of choice, one thing is certain: it is incredibly difficult to have a conviction reversed solely on the basis of a denial of the "root meaning" of the Sixth Amendment.²⁹⁰

Professor Rappaport brings to light the significant "disjuncture between what the Court *says* about the right to counsel of choice and what it *does* when presented an asserted violation of that right."²⁹¹ Due to the difficulty and extreme unlikelihood of reversing a conviction based on the denial of a defendant's right to counsel of choice,²⁹² it is important that lower courts apply a standard to indigent criminal defendants seeking to substitute appointed counsel for retained counsel that allows enjoyment of their full Sixth Amendment right. For example, the government in *United States v. Brown* argued that several prerequisites qualified Mr. Brown's request to substitute

287. 136 S. Ct. 1083 (2016).

288. *See id.* at 1096 (stating the conclusion of the Court).

289. *See* Rappaport, *supra* note 286, at 46 ("My claim is that the Court's decisions are explicable upon the realization that the doctrine treats counsel of choice not as an individual right at all, but instead as a system-level safeguard against a socialized criminal defense bar.").

290. *See id.* at 1 (stating the Court's finding that counsel of choice is the "root meaning" of the Sixth Amendment and yet the Court has only specifically remedied such a violation once).

291. *Id.*

292. *See id.* at 46

Scholarly analysis of the Sixth Amendment right to counsel of choice is largely critical. Motivating the criticism is a sense that the Court has been getting the cases wrong. Until [*United States v.*] *Luis*, the Court consistently rejected defendants' counsel-of-choice claims, even when the balance of individual and government interests did not clearly favor the state.

appointed counsel for retained counsel.²⁹³ The court responded that “the government’s statutory interpretation would, in effect, provide Brown with *less* access to counsel than that to which he is constitutionally entitled, by potentially *denying* him *any* counsel if he exercises his constitutional right to discharge retained counsel.”²⁹⁴

To adopt the statutory interpretation advocated by the government in *Brown*²⁹⁵ would undoubtedly deny criminal defendants like Mr. Mota-Santana the right to counsel of choice.²⁹⁶ Because the Supreme Court has expressly recognized the centrality of the right to counsel of choice in Sixth Amendment jurisprudence, it is critical to apply this right to all those eligible for its protection, specifically indigent criminal defendants seeking to substitute court-appointed counsel for retained counsel.²⁹⁷

293. See *United States v. Brown*, 785 F.3d 1337, 1345 (9th Cir. 2015)

The government maintains that, in cases like this one, . . . the factors relevant to the appointment of counsel issue are “the timeliness of the motion; the adequacy of the district court’s inquiry into the defendant’s complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client’s own responsibility, if any, for that conflict).”

(quoting *Martel v. Clair*, 132 S. Ct. 1276, 1287 (2012)).

294. *Id.* at 1346.

295. See *id.* (stating the government’s position that several factors must be considered prior to granting a defendant’s motion for retained counsel to withdraw and for the court to appoint counsel).

296. See *United States v. Mota-Santana*, 391 F.3d 42, 48 (1st Cir. 2004) (“In short, we think the district court gave adequate attention to the issues raised by defendant, and made appropriate inquiry into the causes and merits of the complaints. We hold that it was well within its discretion in refusing to appoint new counsel.”) The First Circuit came to this conclusion after considering the existence of a conflict of interest between Mr. Mota-Santana and his counsel, an inquiry inappropriate in cases presenting counsel of choice issues. See *id.* at 46 (“We . . . refuse appellant’s suggestion to treat this as a case presenting notice of a potential conflict of interest requiring a special inquiry and the draconian remedy of reversal without a showing of prejudice.”); *Brown*, 785 F.3d at 1347 (“The appropriate standard must reflect the Sixth Amendment right which governs a particular case. Where, as here, the right to retained counsel of choice is implicated, *Rivera-Corona* specifically held that the ‘extent-of-conflict review is inappropriate.’” (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 981 (9th Cir. 2010))).

297. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)

Deprivation of the right [to counsel of choice] is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he

Further, due to the Supreme Court's unwillingness to remedy violations of criminal defendants' right to counsel of choice, it is essential to avoid such violations by ensuring that all criminal defendants, including those indigent defendants discussed here, are able to exercise their constitutional right without obstacles. To provide otherwise would deny these indigent criminal defendants any counsel if they choose to exercise their right to counsel of choice by discharging their retained counsel. Such action affords less access to counsel to these defendants than they are constitutionally entitled.²⁹⁸

To require that indigent criminal defendants seeking to substitute appointed counsel for retained counsel show good cause constitutes a denial of the right to counsel of choice, a structural error warranting reversal without a showing of prejudice.²⁹⁹ As previously discussed, and highlighted by Professor Rappaport, the Supreme Court is extraordinarily unlikely to rule in favor of a criminal defendant appealing solely on the basis of the denial of their right to counsel of choice, as the Court has only reversed such a conviction once.³⁰⁰ In order to ensure that indigent criminal defendants do not find themselves up against all odds submitting a writ of certiorari to the Supreme Court after continued denials of their Sixth Amendment right to counsel of choice, it is necessary to address the issue from the bottom-up.

Trial courts must not require indigent criminal defendants seeking to substitute appointed counsel for retained counsel to show good cause and engage in a conflict analysis.³⁰¹ Instead, trial courts should recognize the right to counsel of choice in these

received. To argue otherwise is to confuse the right to counsel of choice . . . with the right to effective counsel

298. See *Brown*, 785 F.3d at 1346 (describing the constitutional implications of requiring a showing of good cause prior to granting a defendant's motion to discharge retained counsel and seek court-appointed counsel).

299. See *id.* at 1350 ("The denial of a defendant's right to counsel of choice is a structural error, requiring that convictions be vacated even without a showing of prejudice." (citing *Gonzalez-Lopez*, 548 U.S. at 150)).

300. See Rappaport, *supra* note 286, at 1–3 (discussing the Supreme Court's poor history of upholding and preserving criminal defendants' right to counsel of choice).

301. See *United States v. Brown*, 785 F.3d 1337, 1346 (9th Cir. 2015) (concluding that a conflict of interest analysis is inappropriate where an indigent criminal defendant seeks to discharge retained counsel).

situations by separating the actions within a defense counsel's motion to withdraw into an issue concerning counsel of choice and an issue concerning the right to court-appointed counsel.³⁰² Doing so will safeguard these defendants' Sixth Amendment rights.³⁰³ Subsequent appellate courts must also recognize the division of actions and identify denials of defendants' right to counsel of choice. Upon recognition of the denial, appellate courts must treat such denials as structural errors and grant reversals without requiring the defendant to show prejudice.³⁰⁴

V. Conclusion

The American criminal justice system has grown and evolved, and our constitutional rights and protections have grown and evolved along with it. The Sixth Amendment rights, stemming exclusively from the Counsel Clause, that American citizens enjoy today grew out of a system where criminals accused of the most heinous crimes were strictly forbidden from the assistance of counsel out of fear of what it might do to the unstable government.³⁰⁵ The Sixth Amendment's Counsel Clause now encompasses five separate rights for criminal defendants,³⁰⁶ an

302. See *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1272 (11th Cir. 2016) (describing the court's rejection of the First Circuit's treatment of such motions as containing one merged action). While these actions are to be treated separately it is important to understand the issues are intertwined in the sense that upon a court's allowance of the defendant's motion to discharge retained counsel, it must thereafter appoint counsel or receive a waiver of the right to counsel. See *id.* ("To be sure, a district court reviewing a motion to dismiss counsel must know how the defendant wishes to proceed so that the defendant will not be left without representation in violation of the Sixth Amendment.").

303. See *Brown*, 785 F.3d at 1344 ("[T]he Sixth Amendment right to counsel of choice means that a defendant has a right to 'fire his retained . . . lawyer . . . for any reason or [for] no reason.'" (quoting *United States v. Rivera-Corona*, 618 F.3d 976, 980 (9th Cir. 2010))).

304. See *Gonzalez-Lopez*, 548 U.S. at 150 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993))).

305. See TOMKOVICZ, *supra* note 29, at 5 ("The common law rule prohibiting those charged with serious offenses from employing counsel was thought to be a necessary measure to ensure the monarch's preservation.").

306. These rights include: (1) the right to counsel of choice; (2) the right to court-appointed counsel; (3) the right to conflict-free counsel; (4) the right to the

idea that may have never crossed the minds of the Ratifiers in 1791.³⁰⁷ The development of these rights inevitably led to conflict, notably among the First Circuit and the Ninth and Eleventh Circuits, concerning the rights to counsel of choice and court-appointed counsel.³⁰⁸ This conflict between circuits creates confusion and provides for unequal enjoyment of the same constitutional right. Such unequal enjoyment of what is understood to be the “root meaning” of a constitutional amendment may also be cause for concern regarding the integrity of the judicial system.³⁰⁹

effective assistance of counsel; and (5) the right to represent oneself *pro se*. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (“The right to select counsel of one’s choice . . . has been regarded as the root meaning of the constitutional guarantee [of the Sixth Amendment].”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”); *Bonin v. California*, 494 U.S. 1039, 1044 (1990) (“[A] defendant that shows an actual conflict need not demonstrate that his counsel’s divided loyalties prejudiced the outcome of his trial.” (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980))); *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“[T]he purpose of the effective assistance guarantee of the Sixth Amendment is . . . to ensure that criminal defendants receive a fair trial.”); *Faretta v. California*, 422 U.S. 806, 819 (1975) (“The Sixth Amendment . . . grants to the accused personally the right to make his defense. Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment.”); see also *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (“The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate’s conflicting obligations have effectively sealed his lips on crucial matters.”).

307. See TOMKOVICZ, *supra* note 29, at 20 (“In 1791, that provision became the Sixth Amendment to the United States Constitution.”).

308. Compare *United States v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004) (requiring an indigent criminal defendant to show good cause in order to discharge retained counsel and seek appointed counsel), with *United States v. Brown*, 785 F.3d 1337, 1346 (9th Cir. 2015) (stating that a criminal defendant need not show good cause in order to discharge retained counsel based on the Sixth Amendment), and *Jimenez-Antunez*, 820 F.3d at 1271 (citing favorably the Ninth Circuit’s decision not to require indigent criminal defendants to satisfy a showing prior to dismissing retained counsel).

309. See *Gonzalez-Lopez*, 548 U.S. at 147–48 (concluding that the right to counsel of choice is the “root meaning” of the Sixth Amendment Counsel Clause). One legal scholar argues that circuit splits in interpreting the Federal Sentencing Guidelines are particularly undesirable due to the need for uniformity. See Seth Yohalem, *We’ll Always Have Parish: The Ninth Circuit Decision and Its Implications for Enforcement of the Federal Sentencing Guidelines*, 37 COLUM. J.L. & SOC. PROBS. 525, 545 (2004). The need for uniformity is even more

At present, if William Defendant finds himself in the First Circuit, he will be required to show a significant conflict of interest or other extraordinary circumstance in order to dismiss his retained counsel and receive court-appointed counsel.³¹⁰ Conversely, if William Defendant finds himself in the Ninth or Eleventh Circuits, he will be permitted to dismiss his retained counsel and then decide whether to seek court-appointed counsel or proceed *pro se*.³¹¹ Between these two standards, the Ninth and Eleventh Circuits more fully realize and apply the constitutional command set forth in *Gonzalez-Lopez*.³¹² William Defendant's motion to substitute appointed counsel for retained counsel should be treated as including two separate actions: (1) the desire to discharge retained counsel and (2) the desire to subsequently be represented by court-appointed counsel.³¹³ By treating these as separate actions, and not merging them as did the First Circuit, courts will necessarily have to apply the defendant's Sixth Amendment right to counsel of choice to the first action and thereafter determine whether they are eligible for appointed counsel under 18 U.S.C. § 3006A(b).³¹⁴

important when discussing enjoyment of a constitutional right to the same class of citizens in different circuits.

310. See *Mota-Santana*, 391 F.3d at 48 (“[A] defendant ‘must show that the conflict between lawyer and client was so profound as to cause a total breakdown in communication,’ preventing an adequate defense.” (quoting *United States v. Myers*, 294 F.3d 203, 208 (1st Cir. 2002))).

311. See *Brown*, 785 F.3d at 1348 (“[G]iven Brown’s right to discharge his retained attorney if he chose to do so, it did not matter whether the court considered Brown’s current lawyer well qualified, or prepared for trial, or . . . better than the alternative.”); see also *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1270 (11th Cir. 2016) (“A defendant exercises the right to counsel of choice when he moves to dismiss retained counsel, regardless of the type of counsel he wishes to engage afterward.”).

312. See *Gonzalez-Lopez*, 548 U.S. at 148–48 (finding the right to counsel of choice to be at the core of the Sixth Amendment and stating that deprivation occurs when a defendant is prevented from being represented by the lawyer he or she wants, regardless of the quality of representation received).

313. See *Jimenez-Antunez*, 820 F.3d at 1272 (finding that a defendant’s motion to dismiss retained counsel and seek court appointed counsel does not include merged actions, but rather two distinct actions).

314. See *Brown*, 785 F.3d at 1346 (stating that the proper procedure for such a motion is to apply the constitutional rule in the defendant’s favor followed by application of “the appropriate statutory rule for the appointed of counsel to an indigent defendant”).

To be clear, this proposed framework does not provide indigent criminal defendants an excuse, on the eve of trial, to seek substitution of appointed counsel for retained counsel.³¹⁵ A criminal defendant's Sixth Amendment right to counsel of choice can, and ought to be limited by "compelling purposes" such as ensuring the "fair, efficient, and orderly administration of justice."³¹⁶ Aside from this general qualification of the Sixth Amendment right to counsel of choice for criminal defendants with retained counsel, indigent defendants such as William Defendant should not be required to satisfy any further judicially qualified showing. To impose the burden of showing good cause on such defendants will inevitably lead to erroneous denials of their Sixth Amendment rights rarely corrected on appeal.³¹⁷

315. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) ("We have recognized the trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." (citations omitted)).

316. *United States v. Ensign*, 491 F.3d 1109, 1115 (9th Cir. 2007).

317. See Rappaport, *supra* note 286, at 1–3 (stating the extraordinarily infrequent relief granted to criminal defendants appealing from a stated denial of their Sixth Amendment right to counsel of choice).