

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 05-352

6 CUAUHTEMOC GONZALEZ-LOPEZ. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, April 18, 2006

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

13 APPEARANCES:

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

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

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1 P R O C E E D I N G S

2 (10:02 a.m.)

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

5 Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

23 JUSTICE SCALIA: In the '30s. Gee, that's  
24 --

25 MR. DREEBEN: The -- the fact --

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

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

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

1 is there.

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

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

10 MR. DREEBEN: There were --

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

6 MR. DREEBEN: He was disabled --

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

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

13 But the question for this Court is how should  
14 that be defined as a denial of a Sixth Amendment right.

15 Should it be something that is automatically  
16 reversible so that even if Respondent had --

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

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

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

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

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

5           MR. DREEBEN: It protects it, but in a much  
6 --

7           JUSTICE STEVENS: You have a lawyer. After  
8 30 years, you trust him completely. You want him to  
9 represent you. Isn't that a -- an element of autonomy?

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

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

25          JUSTICE KENNEDY: What would the Government's

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

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

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

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

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

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

1 if the --

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

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

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

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

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

25 MR. DREEBEN: Not anytime, Justice Kennedy.

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

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

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

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

23 JUSTICE SCALIA: No, I understand, but --

24 MR. DREEBEN: In rejecting --

25 JUSTICE SCALIA: -- but I would certainly

1 think that it's relevant to the question of whether you  
2 allow immediate appeal, what the consequences of not  
3 allowing immediate appeal are. If you're totally  
4 deprived of your right, you -- you might allow it and  
5 --

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

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

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

24 MR. DREEBEN: Correct.

25 CHIEF JUSTICE ROBERTS: But if there were a

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

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

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

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

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

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

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

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



1 going to get me off.

2 (Laughter.)

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

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

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

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

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

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

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

25 MR. DREEBEN: Well, I think it becomes

1 considerably more than an ineffective assistance case.

2 And the autonomy interest that's being protected here  
3 needs to be viewed in relation to the fact that the  
4 defendant can still retain his counsel. It's not that  
5 he's denied all choice of counsel. He's denied his  
6 first-choice counsel which --

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

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

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

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

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

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

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

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

4 JUSTICE SOUTER: But what good is that as --  
5 as an answer to our question? Sure, no harm, no foul.

6 But that can't be the -- that can't be the criterion  
7 for a court and that can't be our criterion in deciding  
8 whether he really has a right to his first choice or  
9 not.

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

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

22 MR. DREEBEN: There's --

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

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

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

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

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

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

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

9                   MR. DREEBEN:  And -- and we're not disputing  
10  that that entitlement exists.  The question is whether  
11  it should be remedied automatically, which puts it in a  
12  --

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

23                  MR. DREEBEN:  I think the autonomy interest  
24  is deserving of protection, as this Court has held, but  
25  --

1 JUSTICE STEVENS: Totally independently of  
2 the trial strategy --

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

21 JUSTICE ALITO: Well --

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

24 MR. DREEBEN: That's right.

25 CHIEF JUSTICE ROBERTS: Not for the fuller

1 expression of his autonomy.

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

9 Now, this Court --

10 JUSTICE GINSBURG: May I, Mr. Dreeben --

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

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

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

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



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

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

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

15 JUSTICE SOUTER: But -- but you --

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

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

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

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

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

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

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

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

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

11           JUSTICE GINSBURG: Does different outcome  
12 mean --

13           MR. DREEBEN: More favorable --

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

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

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

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

25           JUSTICE SCALIA: I don't think any court

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

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

11 JUSTICE SOUTER: Let me ask --

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

14 MR. DREEBEN: Correct.

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

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

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

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
11 Dreeben.

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

13 CHIEF JUSTICE ROBERTS: Mr. Fisher.

14 ORAL ARGUMENT OF JEFFREY L. FISHER

15 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

22 MR. FISHER: But --

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

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

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

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

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

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

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



1 conviction in that case.

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

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

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

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

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

4 MR. FISHER: No, he doesn't, Your Honor. The  
5 --

6 CHIEF JUSTICE ROBERTS: Why not?

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

14 But the critical distinction --

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

18 MR. FISHER: Certainly that happens, Justice  
19 Scalia.

20 JUSTICE SCALIA: Yes, I know it happens.

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

25 JUSTICE KENNEDY: But it seems to me that

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

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

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

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

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

1 constitutes a Sixth Amendment violation. And in --

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

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Well, why not?

12 MR. FISHER: -- to the Twinkie --

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

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

25 CHIEF JUSTICE ROBERTS: It wouldn't be

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

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

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

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

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

1 Amendment violation when the trial court, for no  
2 legitimate reason, said, you cannot go forward with the  
3 counsel of choice. Now, the only question I think  
4 you're framing is whether we'd have a Chapman case there.

5 But this just brings up, Justice Scalia's Twinkie  
6 case, and to take away --

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

10 MR. FISHER: Well --

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

13 (Laughter.)

14 MR. FISHER: Well, I'll try to do even better  
15 than Uncle Vinnie, and say in our brief we talk about a  
16 case, the Euel Lee case, which is a case where a black  
17 defendant wanted to go forward with his counsel of  
18 choice in -- in the District of Maryland, and he was  
19 forced to go ahead with a more experienced,  
20 establishment-type counsel and -- and to his detriment.

21 So -- so we proceed at our peril where we say that the  
22 defendant doesn't have the right to decide what's best  
23 for him.

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

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

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

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

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



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

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

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

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

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

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

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

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

15 MR. FISHER: No, you're not.

16 JUSTICE SCALIA: So --

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

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

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

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

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

15 MR. FISHER: It --

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

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

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

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

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

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

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

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

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

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

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

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

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

5 JUSTICE ALITO: Would your -- would your rule  
6 --

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

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

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

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

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

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

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

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

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



1 prosecutor. Was that not so?

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

12 CHIEF JUSTICE ROBERTS: Some of the --

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

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

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

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

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

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

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

1 appeals by writ of mandate?

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. FISHER: He may well be.

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

19 JUSTICE STEVENS: That's right.

20 MR. FISHER: Well, because --

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

25 MR. FISHER: I think in the ordinary case,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 JUSTICE ALITO: In this case.

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

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



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

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

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

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

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
12 Fisher.

13 Mr. Dreeben, you have 2 minutes remaining.

14 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

15 ON BEHALF OF THE PETITIONER

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

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

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

1 no lawyer at all.

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

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

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

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

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

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

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

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