No. _____

IN THE

Supreme Court of the United States

PAYMAN BORHAN

Petitioner,

v.

RON DAVIS

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment guarantees a criminal defendant the right to be represented by an attorney who the defendant can afford to hire. Before his trial began, Petitioner Payman Borhan asked the trial court to substitute his appointed counsel for a private retained lawyer who was sitting in the courtroom ready to assist as Borhan's lawyer. The trial court denied Borhan's request and refused to listen to his reasons for making it. As a result, Borhan was assisted by appointed counsel who presented no witnesses, opening argument, evidence, or viable defense.

The questions presented are these:

(1) Under the modest standard for a certificate of appealability, is it at least debatable that the state court unreasonably ignored both Borhan's justifications for seeking retained counsel and the critical fact that counsel was waiting in the courtroom ready to assist as Mr. Borhan's lawyer?

(2) Is Borhan's claim worthy of proceeding to an appeal because the trial court's refusal to allow him retained counsel of his choice deprived him of his right—as set forth in *McCoy v. Louisiana*—to choose the fundamental direction of his case?

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OPINIONS BELOW

The order of the Ninth Circuit Court of Appeals denying a COA was not published; the opinion is attached as Appendix B and the order denying a motion for reconsideration is attached as Appendix A.[1] The district court's entry of judgment and order adopting the magistrate judge's report and recommendation are attached as Appendix E and D, respectively. The magistrate judge's report and recommendation to dismiss the petition is attached as Appendix F, and the district court's denial of a COA is attached as Appendix C.

The unreasoned summary denial by the California Supreme Court of Borhan's petition for writ of habeas corpus is attached as Appendix G. The California Court of Appeal's opinion affirming judgment, which is the last reasoned opinion addressing the claim at issue in this petition, is attached as Appendix H.

JURISDICTION

The Ninth Circuit denied a COA in *Borhan v. Davis*, Case No. 17-55736, on March 12, 2018. Pet. App. B. The Court denied Borhan's motion for

[1] Cites to the Petitioner's Appendix begin with the document letter followed by the bates number of where in the overall appendix the specific citation can be found.

reconsideration on April 23, 2018. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Cons. Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 28 U.S.C. § 2253(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Title 28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Borhan was convicted of two counts of committing a lewd act upon a child under the age of fourteen in violation of California Penal Code § 288(a). Because the offenses were committed against more than one person at the same time and in the same course of conduct, Borhan was convicted of a special allegation pursuant to California Penal Code § 667.61(b) (referred to as the "one strike" law). (CT 149-53.)[2] The court sentenced Borhan to fifteen years to life in prison. (CT 187-88.)

A. Borhan's attempt to retain his own lawyer

Retained counsel, Steve Blanchfill, represented Borhan at the August 12, 2002 preliminary hearing. Blanchfill was removed from the case and, on August 26, 2002, the public defender's office began representing Borhan. Pet. App. K-106. Deputy Public Defender Wenzyl was assigned as Borhan's trial counsel on September 4, 2002. Pet. App. K-107.

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[2] "CT" refers to the Clerk's Transcript on Appeal and "RT" Refers to the Reporter's Transcript on Appeal. Only the most material portions of each transcript are included in the Appendix.

The court held readiness hearings on October 17, 2002, November 15, 19, and 26, 2002, and December 3, 2002. Borhan was present in court for only the October 17, 2002 hearing; he was absent or in lock-up for the other hearings. Pet. App. K108-11. Trial began on December 4, 2002. Pet. App. K-113.

On December 4, 2002—the first date that Borhan was present in court since October 17, 2002—Borhan explained to the court that Wenzyl had not visited him and that his family was ready to retain a private attorney. Pet. App. J-95. He asked to replace Wenzyl with retained counsel. The trial court held a Marsden hearing, after which it denied Borhan's request to remove Wenzyl and to allow Borhan to have a private lawyer retained. The court denied Borhan's request to substitute counsel, threatened to remove him from the proceedings if he continued to try to explain himself, and began jury selection. Pet. App. J-101-02.

B. The Trial

Trial spanned less than two court days: December 6 and 9, 2002.

1. The prosecution's case

a. The 1998 conviction offense

The prosecution began its case by presenting the two girls with whom Borhan was charged with engaging in lewd acts. Valene was thirteen years old when she testified, but the incident occurred when she was ten, in 1998. She testified that she met Borhan when he came to her father's house to install a water tank. (RT 642-44.) Borhan told her that he wanted her to audition for a commercial. She got permission from her parents to participate in the audition. (*Id.*) A couple days

later, Borhan met Valene at her mother's house for that audition. (RT 617-20; 642-44.)

Valene's mother and sixteen-year-old sister Vanessa were in the house from the outset of the audition, and her cousin Gelesia later showed up. (RT 621.) Valene testified that the entire audition lasted about twenty minutes. (RT 649.) The audition began in a room with Valene, Vanessa and Borhan. Her mother was present for about half of the audition and her cousin, Gelesia, was there for about ten to fifteen minutes. (RT 648-49.) According to Valene, when she and Vanessa were in the room, Borhan asked her to do a cheerleading routine, and he called her over to dance with him. As they were dancing, his leg went in between her legs—like a old-fashioned "dipping" routine—and his knee touched the area of her clothing over her "private" area. Borhan needed to lean over with her to avoid dropping her during the dip. (RT 650.)

Valene testified that her cousin Gelesia joined the audition after that initial dance routine. At some point, Borhan asked both Valene and Gelesia to stand up straight. He then put his hands, palms outward, underneath each girls' chests and pushed upward. According to Valene, this contact lasted about six to seven seconds. (RT 631-35.) Valene testified that Borhan was smiling during the contact. (RT 635-37.)

Gelesia also testified. She was ten years old when the incident occurred. Her aunt, Valene's mother, urged her to join the audition. (RT 667-69.) Valene's mother was in the kitchen with Borhan and the girls for about fifteen minutes. (RT 684-

85.) The dancing and audition took place while Valene's mother was in the room. (RT 691.)

Gelesia testified that she saw Borhan placing his hands under her cousin's breasts, which lasted four seconds. (RT 670-72.) She also described a portion of the audition that was a "skit" where Borhan was the father and had Valene say "oh daddy" as if she was his daughter. (RT 673-76.) She described the "dip" routine as Borhan standing up with his knee between Valene's legs for about four seconds. (*Id.*) She testified on cross-examination that Borhan did not, in fact, dance with either of them, but rather only briefly showed them what to do. (RT 690.) Gelesia testified that she thought Borhan's touching was intentional because he looked like he was enjoying himself. (RT 681.)

Vanessa, Valene's sister, also testified. She was sixteen at the time of the audition. She saw Borhan place one hand underneath her sister's breasts for about three to five seconds; Borhan looked happy during the audition. (RT 698-703.) Vanessa did not see Borhan touch Gelesia. (RT 707-08.)

Jose Gonzalez testified that he is the president of Continental Water Company and that Borhan was a subcontractor for that company; Borhan was essentially a salesman. (RT 901-04.) Gonzalez denied that the company authorized Borhan to audition anyone for commercials. (RT 905.) On cross, Gonzalez acknowledged that Borhan was not an actual employee, that Borhan had his own business cards, and that there was no non-competition clause in his contract with

Gonzalez so Borhan could have been working with another company or for himself. Gonzalez did not know much about Borhan's other businesses. (RT 906-08.)

b. Borhan's prior conduct

Three women—Song Lor, Cynthia Tejeda, and Brenda Castillo—testified about prior conduct by Borhan. Lor was twenty-one when, in 1998, Borhan auditioned her and engaged in inappropriate touching. (RT 911-18.) Tejeda was twenty-three when, in 1998, Borhan held a similar commercial audition with her that lasted five to ten minutes. He touched Tejeda in similar manner as he did with Valene and Gelesia. (RT 921-27.)

2. The defense

Borhan's trial counsel declined to give an opening statement. (RT 613.) The defense rested without presenting any evidence or witnesses. (RT 950.) In closing, however, counsel argued that Borhan's smiling did not indicate sexual intent. (RT 988-90.) Counsel suggested—without supporting evidence—that Borhan had a legitimate reason for the audition. He argued that based on counsel's own experience in "marching band" sometimes people "need to be touched to be put in the right position. And a person who's doing the audition . . . that would be his job." (RT 990.) Thus, Borhan's knee touching the girl was "just part of a dance move," (RT 994) and the touching under the breast area had a "legitimate purpose" to "straighten them out." (RT 996.)

3. Jury Deliberations

The jury was sent to deliberate on Monday, December 9, 2002. (RT 1015.) The next day, the jurors asked the court for the definition of "lascivious" and for

confirmation that Borhan must commit a lewd and lascivious act to be convicted. The court instructed the jury that Borhan could be committed for lewd or lascivious conduct. (RT 1201-02.) That same day the jury returned its verdict finding Borhan guilty of two counts of lewd acts on a child under the age fourteen.

C. Relevant Postconviction Proceedings

Borhan filed a timely appeal raising the claim at issue in this petition regarding the trial court's failure to substitute counsel. On May 26, 2004, the California Court of Appeal denied the claim in a reasoned decision. Pet. App. H. The California Supreme Court denied review on July 28, 2004. Borhan subsequently re-alleged the substitution-of-counsel claim to the California Supreme Court in a petition for writ of habeas corpus, which was summarily denied. Pet. App. G. Borhan then raised, *inter alia*, the same substitution-of-counsel claim in a a federal petition for writ of habeas corpus, which was eventually denied on the merits. Pet. App. D, F. The district court and Ninth Circuit denied a COA on all claims. Pet. App. B, C.

REASONS FOR GRANTING THE WRIT

Borhan is seeking the opportunity to appeal the denial of his choice of counsel claim asserting that he had a right to replace his court-appointed trial lawyer with his own choice of retained, private counsel. That private lawyer represented Borhan at the arraignment and preliminary hearing, and he was waiting in the in courtroom to be substituted in. But the trial court refused to listen to Borhan's justifications to retain private counsel and it denied his request. Because the erroneous denial of a defendant's right to choice of counsel has been held to be a

structural error, Borhan is entitled to a new trial without having to show prejudice; but, regardless, the inadequate assistance of counsel Borhan received from his appointed counsel demonstrates the harmfulness of the trial court's decision.

This Court's recent decision in *McCoy v. Louisiana* further demonstrates why this case should, at the very least, proceed further by way of an appeal. The trial court's erroneous denial of Borhan's right to choose his own lawyer cuts at the heart of an individual's autonomy by foreclosing the ability to *choose* what counsel assists him when he can afford to do so. Instead, Borhan was left with a lawyer who refused to even make an opening argument, much less present a single exhibit or witness on Borhan's behalf.

In sum, this Court should issue a writ of certiorari and remand with instructions to issue a COA because, under the modest standard involved, the Ninth Circuit's refusal to grant a COA on his two Sixth Amendment claims "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. The COA Standard is Modest.

To successfully obtain a COA on any issue, Borhan must make "a substantial showing of the denial of a constitutional right." 28 U.S.C § 2253(c)(2). To make this showing, a petitioner must merely "demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues [in a different manner], or that the questions are adequate to deserve encouragement to proceed

further."[3] *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473 (2000). Borhan need not show that he should prevail on the merits. To the contrary, "[u]ntil the petitioner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). Furthermore, "[t]hat a [petitioner] has failed to make the ultimate showing that his claim is meritorious does not. . . mean he failed to make a preliminary showing that his claim was debatable." *Id.* at 774.

B. It is at least debatable that this Court's decisions about the right to choice of counsel entitled Borhan to retain new, private counsel

By denying a COA on Borhan's choice of counsel claim, the Ninth Circuit concluded that it is not even debatable that the trial court erred when it failed to grant Borhan's motion substitute new, retained counsel. This conclusion conflicts with the holdings in *Wheat, Caplin & Drysdale*, and *Gonzalez-Lopez* that a defendant is entitled to retain counsel of his choice, and contravenes the emphasis of the Court that judges must respect and honor a defendant's personal choices regarding how to tailor his defense in a criminal trial.

1. This Court has repeatedly held that a defendant has a right to retain his or her preferred attorney

The Sixth Amendment guarantees a criminal defendant "…the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (quoting *Caplin* &

[3] Although the COA Standards are interchangeable, for the sake of clarity, this petition will refer to the standard as whether or not the issue is "debatable" among jurists of reason.

Drysdale v. United States, 491 U.S. 617, 624–625 (1989)). To be sure, this right is not absolute and is qualified in another important respect: this Court has previously held that trial courts must be afforded "broad discretion. . . on matters of continuances" and "wide latitude in balancing the right to counsel of choice. . . against the demands of its calendar". *Morris v. Slappy*, 461 U.S. 1, 11 (1983); *see also Wheat v. United States*, 486 U.S. 153, 159-160 (1988).

Despite the latitude afforded to trial courts, the starting point of a court's balancing must "recognize a presumption in favor of the [defendant's] counsel of choice." *Wheat*, 486 U.S. at 164. This Court has also warned that the rights inhering within the Sixth Amendment are too precious to be outweighed by an "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay". *Slappy*, 461 U.S. at 11–12 (quoting Ungar v. Sarafite, 346 U.S. 575, 589) (1964)) (internal quotation marks omitted). This Court has further observed that, "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate [a defendant's rights]. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar*, 376 U.S. at 589.

The erroneous denial of a defendant's choice of counsel qualifies as "structural error". *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.") (internal quotation marks omitted). It is well-established that finding the deprivation of a right that results in a structural error or defect in the trial process is not subject to "harmless-error" analysis, and results in automatic reversal of the proceeding below. *Arizona v. Fulminante*, 499 U.S. 279, 294-295 (1991); *see also Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) ("[S]tructural defects which affec[t] the framework within which the trial proceeds. . . require automatic reversal.") (Rehnquist, C.J., concurring) (internal quotation marks omitted).

2. The California Court of Appeal's decision is, at least debatably, unworthy of § 2254(d) deference.

Borhan filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and therefore his petition is governed by the AEDPA and § 2254(d)'s constraints on the grant of habeas relief. *Woodford v. Garceau*, 538 U.S. 202 (2003).

A state court's decision is unreasonable within the meaning of § 2254(d)(2), and does not foreclose federal habeas relief, where it involved an unreasonable determination of the facts. Unreasonable fact-finding occurs where a state court has before it, yet apparently ignores, evidence that supports petitioner's claim, or where the state court misapprehends a material factual issue. *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003); *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003).

Here, the last reasoned opinion of the state court, and thus the opinion subject to review, was that of the California Court of Appeal. That court dismissed Borhan's claim by concluding that he:

- "did not demonstrate sufficient circumstances supporting his request to continue the trial",
- "waited until the jury was present to request a continuance for purposes of retaining counsel",
- "did not have the name of the lawyer or any way of verifying the attorney could go forward with the trial in a short period of time", and
- did not meet "his burden to show the trial court abused its discretion I denying his request for a continuance to secure new counsel."

Pet. App. H-83-84. The state court's decision on the foregoing bases amounted to unreasonable fact-finding and an unreasonable application of this Court's precedent.

a. The state court misapprehended the critical fact that Borhan had retained counsel ready and waiting in the courtroom.

The state court plainly misapprehended or misstated critical facts when it found that Borhan did not have the name of a lawyer or any way of verifying whether the lawyer could go forward with trial in a short period of time. In fact, attorney Steven Blanchfill was in the courtroom and ready to substitute as Borhan's lawyer. Blanchfill, who represented Borhan at the preliminary hearing, signed a declaration presented to the state habeas court indicating that at the time Borhan requested a retained lawyer, Blanchfill was present in court "to see if [he] could possibly obtain a continuance in the matter and get back into the case." Pet. App. I-92. Only after an evidentiary hearing could a court reasonably reject this factual assertion.

The district court found it "questionable" that Blanchfill was waiting in the courtroom when Borhan made his request based on Blanchfill's declaration stating that he arrived as "the jury was already impaneled." Pet. App. F-37-38. Absent an evidentiary hearing to resolve this dispute, the district court's conclusion is debatable. Indeed, while the jury may not have been technically "impaneled," it is clear from the record that prospective jury panels were present in the courtroom awaiting voir dire when Borhan made his request. Pet. App. J-94-95; (2 RT 301-02.)

Further, Blanchfill's declaration states that he was asked to go to court the day before trial and he, in fact, "went to court *the next day* to see if [he] could possibly obtain a continuance in the matter and get back into the case." Pet. App. I-92 (emphasis added). The "next day" would have been December 4, 2002, the day Borhan made his request. Accordingly, the state and district courts engaged in unreasonable fact-finding by concluding—without an evidentiary hearing—that Borhan did not have retained counsel readily available to assist him.

b. The state court's fact-finding was unreasonable because Borhan was never afforded a fair hearing to develop the facts and state his justifications for his substitution motion.

The state court's fact finding was also unreasonable because it failed to hold a full and fair hearing on Borhan's justifications for seeking retained counsel, leading to the Court of Appeal's unreasonable factual determinations. The trial court's purported hearing was a farce. Before Borhan was able to muster a coherent argument, the trial court made its intention known: "Sir, we're going to try this lawsuit in this courtroom. Today. And I don't want you to say another word while

the jurors are in the courtroom. Not one more word." Pet. App. J-94-95. When Borhan persisted in explaining his position, the trial court declared that it was "not going to accept any comments from you on the date of trial about the ineffective assistance of your lawyer." Pet. App. J-96-97.

The trial court threatened to remove Borhan during his own trial by "putting [him] in a room somewhere, having a sound system set up so you can hear the proceedings." Pet. App. J-97. The hearing continued outside the presence of the prosecutor, but the trial court was no less hostile. Borhan, whose first language is Farsi, attempted to state his reasons but the trial court cut him off, quipping "You just keep rambling. What is it you want me to do." Pet. App. L-118. The trial court pretended to not understand the substance of Borhan's complaints: "I don't know anything about this case. I don't know anything about the witnesses. I don't know anything about the facts. It was sent to me for trial. I'm going to select a jury, and we're going to try the lawsuit, and there isn't anything you can do to delay it. Nothing. Pet. App. L-121. The hearing concluded with the court instructing its "reporter to not report anything else that Mr. Borhan says." Pet. App. L-124. The failure to hold a meaningful hearing resulted in an unreasonable evidentiary factual finding by the appellate court when it faulted Borhan for the lack of verification that an attorney could go forward in a short period of time.

It is also worth noting that Borhan was blameless for making his motion for new counsel at a late hour: as he stated to the trial judge and as the record reflects, Borhan had been present in "lock up" and thus physically unable to attend pre-trial

hearings for 48 days leading up to the trial. Pet. App. K-106-13; *see also* Pet. App. F-27-28. It would be cruel and perverse to hold Borhan accountable for a lack of timeliness when state-imposed restraints on his liberty prevented him from being in court to make a motion to replace his counsel at an earlier time.

As Borhan also pointed out prior to his trial, he had no opportunity to realize the level of his dissatisfaction with his appointed counsel at a prior date: before the day of trial, his attorney had not visited him for almost two months. Pet. App. J-98. Indeed, because of his attorney's failure to communicate with or visit him, Borhan had no idea that he was going to trial until the eve of the trial itself. *Id.* To hold, as the California Court of Appeals did, that Borhan "did not demonstrate sufficient circumstances supporting his request to continue the trial" is simply not grounded in the record and amounts to an unreasonable determination of facts. Pet. App. H-84.

3. Under *de novo* review, it is at least debatable that Borhan is entitled to federal habeas relief due to the unreasonable denial of his right to retain counsel of choice

Unconstrained by § 2254, reasonable jurists could debate whether Borhan's claim entitled him to a new trial. None of the reasons provided by the California Court of Appeal provide sufficient justification for its denial of a right that this Court has held has "unquantifiable" value to criminal defendants. *Gonzalez-Lopez*, 548 U.S. at 150. This Court has held time and time again that criminal defendants have the right to retain one's counsel of choice so long as they can afford that counsel, or that counsel is willing to represent them. *Id.* at 144. The record reflects that Borhan, in spite of his lack of legal sophistication and lack of English fluency,

clearly invoked his right to counsel of his choice, that his attorney of choice was present and willing to step in on his behalf, and that the trial court denied him his right without appropriate justification.

Borhan, whose first language is Farsi and not English, clearly and explicitly asserted his right to retain private counsel to the trial court judge by stating that, "[his] family… [is] bringing a private lawyer" and that he "did not wish to go to the trial". Pet. App. J-95-96. The trial court denied the motion without further inquiry into the circumstances surrounding the request, stating flatly that he would "try this lawsuit in this courtroom. Today." *Id.* The trial judge further tried to discourage Borhan from providing any justification for his request by asserting that he didn't "want [him] to say another word… Not one more word" about his request for private counsel. *Id.* When Borhan later reiterated his request, asking if he could just "get a chance to bring a private lawyer", the trial judge immediately responded "no", with no further explanation. Pet. App. L-121.

The trial court proffered no legitimate reason to deny Borhan his right to private counsel. This was not, as the trial court seemed to think and as the California Court of Appeal implied, a ploy or bad faith scheme that Borhan was nefariously launching in an effort to prevent trial from commencing. Pet. App. H-84 ("The record does not suggest [Petitioner] made a good faith… effort to retain counsel before trial"). As detailed more in the sections below, Borhan had good reasons to try to retain a new lawyer, and good reasons to wait as long as he did before moving for a continuance.

Furthermore, the trial court uncovered no evidence that would convey that Borhan was somehow unable to afford private counsel. *Caplin & Drysdale*, 491 U.S. at 624–25. To the contrary, Borhan explicitly told the trial court (through repeated interruptions) that two members of his family were in the process of sending him funds to retain counsel. Pet. App. J-95-96; Pet. App. L-122-25. How much time it would have taken to properly secure these funds is unclear from the record below, because the trial court repeatedly interrupted Borhan and threatened to "put… [him] in a room somewhere" if he continued to persist in explaining his position. Pet. App. J-97.

Nor was it ever the case that Borhan "did not have the name of [private counsel] or any way of verifying [that private counsel] could go forward with the trial in a short period of time". Pet. App. H-84. In fact, had the trial judge been willing to let Borhan speak, he would have realized that Borhan's attorney of choice, Steven Blanchfill, was in the courtroom behind Borhan and ready to substitute as his lawyer. Pet. App. I-92. In Blanchfill's own words, he had shown up to court "to see if [he] could possibly obtain a continuance in the matter and get back into the case." *Id.* Blanchfill, who represented Borhan at previous hearings and was familiar with his case, clearly demonstrated his willingness to represent Borhan by being present in the courtroom at the time of the motion. It is, at the very least, debatable among jurists of reason that Blanchfill's presence indicated that Borhan had either secured the funds to hire Blanchfill or that Blanchfill was "willing to

represent the defendant even though he [was] without funds." *Caplin & Drysdale*, 491 U.S. at 624–25.

Neither is it relevant that, as both the state trial court and federal district court observed, Borhan could not demonstrate that he was prejudiced by the denial of counsel of his choice. Pet. App. J-96 ("You happen to be represented by one of the best public defenders in our district who's been in my court for years numerous times."); Pet. App. F-38 ("Petitioner's defense [did not] suffer…. as a result of the trial court's denial of his request."). As this Court has previously observed, "structural errors" like the erroneous denial of retained counsel "pervade the entire trial [process]", and often have "consequences that are necessarily unquantifiable and indeterminate". *Gonzalez-Lopez*, 548 U.S. at 150. As a result, the lower courts' observations that Borhan's appointed lawyer was a competent and skilled advocate is beyond the point—the Constitution simply does not permit the deprivation of the right at issue in this case, and prejudice has no role to play in the analysis.[4]

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[4] It is unclear if, in the alternative, the trial court and district court used prejudice as a factor to weigh the circumstances and determine whether or not it tipped the scales in opposition of granting Borhan's motion. Even assuming *arguendo* that this was the intent of the lower courts, the holding in *Gonzalez-Lopez* relies largely on the premise that harmless-error analysis is an "impossible" and "speculative inquiry" in cases involving the right to choice of counsel. *Gonzalez-Lopez*, 548 U.S. at 140. It thus matters not if the intent of the lower courts here was to weigh the lack of prejudice against the finding of a constitutional deprivation, for the principle gleaned from *Gonzalez-Lopez* is that analyzing prejudice in cases like this is a practical impossibility. As the Court itself put it, "[i]t is one thing to conclude that the right to counsel of choice may be limited by the need for [a] fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair." *Id.* at 148 n.3.

But even if prejudice is required, Borhan can—at least debatably—show it. Because of the trial court's refusal to allow Borhan counsel of his choice, Borhan was deprived of effective assistance of counsel and the ability to choose the fundamental direction of his defense. His appointed counsel gave no opening statement, presented no witnesses, and admitted no exhibits. He offered no meaningful challenge to the charged offense and did nothing to contest the prior acts that the prosecution used in its case against Borhan.

While Borhan's counsel argued to the jury that Borhan's contact was not sexual and part of a legitimate dance routine, (4 RT 994), he presented no evidence to support that defense, despite multiple witnesses available to testify that Borhan was a trained dance instructor and his contact with the victims was legitimate. Moreover, the prosecution insisted that Borhan's audition was a ruse for lewd contact with the two girls; in fact, Borhan held the audition as a condition precedent to their father signing a water filtration contract. Appointed counsel presented no evidence, such as the girls' father, to substantiate this defense.

In sum, as fully briefed in Borhan's COA motion to the ninth circuit, Borhan was prejudiced by the court's refusal to grant him retained counsel because his appointed counsel presented (1) no evidence demonstrating that the contact with the two girls was inadvertent and reasonably part of normal dance instruction, (2) no evidence presented demonstrating that Borhan was a dance instructor and that the audition was not a ruse, (3) no evidence presented explaining his mental state at the time of his priors, and how that mental state had improved by the time of the

offense, and (4) no evidence that girl's father refused to sign a financing contract until the audition was completed.

In all, there were no present circumstances powerful enough to override the trial court's obligation to "recognize a presumption in favor" of Borhan's right to choice of counsel. *Wheat*, 486 U.S. at 164. By depriving him of his right to choose counsel, they "thrust counsel upon [him], against his considered wish… violating the logic of the [Sixth] Amendment." *Faretta*, 422 U.S. at 820. Such a deprivation elevated his counsel to "not an assistant, but a master" and "stripped [his defense] of the personal character upon which the [Sixth] Amendment insists." *Id.*

C. This Court's recent decision in *McCoy v.* Louisiana further compels a remand and an instruction to issue a COA because of the trial court's severe intrusion into Borhan's right to mount his own defense.

On May 14, 2018, after the Ninth Circuit denied Borhan a COA, this Court issued *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), in which this Court the "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty", *Id.* at 1511 (citing *Faretta*, 422 U.S. at 834), and that decisions relating to asserting a client's innocence remain exclusively in the purview of defendants' Sixth Amendment autonomy rights. *Id.* In light of *McCoy*, this Court should remand to the Ninth Circuit with instructions to grant a COA.

It is certainly true that not all decisions to be made at trial belong to a defendant. For example, counsel is still entitled to make "trial management" decisions for their client. *Id.* at 1508. It is solely the province of the attorney to decide, generally speaking, "what arguments to pursue, what evidentiary objections

to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (internal quotation marks and citations omitted). Despite the latitude afforded to counsel in defending their clients, *McCoy* established that the autonomy guaranteed by the Sixth Amendment demands that decisions concerning "the *objective* of the defense" be left to the defendant alone. *McCoy*, 138 S. Ct. at 1508-09 (emphasis added). The removal of such decisions from the hands of a defendant is incompatible with the Sixth Amendment; such errors qualify as "structural errors", and demand immediate reversal of the lower court judgement. *Id.* at 1512.

In *McCoy*, this Court overturned the conviction of a defendant whose attorney, in the face of the defendant's explicit protest, conceded his guilt during his jury trial in an effort to avoid the death penalty. *Id.* at 1512. The Court explicitly held that asserting innocence belongs in a category of actions considered to relate directly to the "objective of the defense*".* *Id.* at 1509. The Court further held that a criminal defendant has the right to "adamantly insist… on maintaining his factual innocence" and reject a counsel's preferred course of "concession of… the commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses". *Id.* at 1510.

In the present case, Borhan explicitly explained to the trial court that his appointed counsel, Kenneth Wenzl, failed to follow up on his wish to appoint a psychologist to testify that a combination of Borhan's mental illness and medications caused him to black out during the time of the crime. The trial court,

upon having Borhan bring this to its attention, remarked that "[Wenzl]'s in charge." Pet. App. L-118. When Borhan again protested that he "want[ed] the psychologist to testify" but that Wenzl did not, the trial judge rejected Borhan's argument by simply responding that "[Wenzl] runs this case." Pet. App. L-123. Borhan, having his appeals to retain autonomy fall on deaf ears, lamented that "[t]his case is a hundred percent lose [sic], your honor… I don't remember anything as to what happened. What are we--what am I going to say, your honor?" *Id.*

The trial court here erred when it denied Borhan the right to control "the objective of his defense". If it is within the exclusive rights of a defendant to "insist… on maintaining his factual innocence", *McCoy*, 138 S. Ct. at 1510, then it is at least "debatable" that it is within the exclusive rights of a defendant to concede the commission of a crime as Borhan tried to do at his trial. Indeed, this Court's insistence that a defendant may *reject* counsel's preferred course of "concession of… the commission of criminal acts" in pursuit of affirmative defenses necessarily implies the inverse: that a defendant may himself *choose to concede* the commission of a criminal act, in an effort to "pursu[e]… diminished capacity, mental illness, or lack of premeditation defenses." *Id.*

It matters not the actual wisdom or likelihood of success of such an affirmative defense. *Id.* at 1508 ("…a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications…"). Just as it was fully within McCoy's right as a defendant to make

"all or nothing" arguments that would either result in his being sentenced to death or avoid jail time entirely, it was within Borhan's right to assume the risk of an argument that he commissioned the crime but did so involuntarily. *See Id.* ("[I]t is for the defendant to make the value judgment whether to take a minuscule chance of not being convicted and spending a life in ... prison.") (internal quotations omitted).

Having shown that Borhan was deprived of his Sixth Amendment autonomy right, he must be "accorded a new trial without any need first to show prejudice." *Id.* at 1511. His conviction should be vacated, the judgment of the California Court of Appeals reversed, and his case remanded for further proceedings. At the very least, it is "debatable among jurists of reason" that Borhan's Sixth Amendment rights were violated when the trial court denied him the ability to have retained counsel of his choice and to put forth an affirmative defense, and a COA should be granted on the issue.

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CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: 7/23/18

By: _____
JOSEPH A. TRIGILIO
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

CERTICATE OF COMPLIANCE

As required by Supreme Court Rule 33. l(h), I certify that the petition for a writ of certiorari contains 7,231 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.l(d).

I declare under penalty of perjury that the foregoing is true and correct.

JOSEPH A. TRIGILIO