

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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LUCAS ALAN NEWNAM,

*Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The Superior Court Of Pennsylvania**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

In every jurisdiction in the United States- both federal and state- there is a balancing test for deciding whether a court's decision to deny a continuance request so that a criminal defendant may secure counsel of his choice violates that defendant's right to counsel under the Sixth Amendment to the United States Constitution.

On one hand, a criminal defendant's right to counsel of his choice is important only if exercising it is satisfactory according to a number of extraneous considerations, but on the other hand is so important that its denial in certain circumstances automatically requires a new trial. The dissonance in the perception of the right to counsel of one's choice is the crux of the matter in this Petition. Newnam thus posits this question:

Should this Court establish a bright-line test for determining whether a criminal defendant's right to retained counsel of his choice is violated, wherein the only inquiry should be whether he or she has intentionally attempted to delay trial in bad faith?

## **PARTIES TO THE PROCEEDINGS**

The Petitioner is Lucas Alan Newnam, who is represented by the undersigned. The Respondent is the Commonwealth of Pennsylvania.

## **RELATED CASES**

- *Commonwealth v. Newnam*, No. 3420-2016, Court of Common Pleas of Bucks County, Pennsylvania, Judgement entered August 9, 2017.
- *Commonwealth v. Newnam*, No. 1504 MDA 2017, Superior Court of Pennsylvania (Middle District), Judgement of Sentence affirmed on January 25, 2019.
- *Commonwealth v. Newnam*, No. 115 MAL 2019, Pennsylvania Supreme Court, Petition for Allowance of Appeal denied.

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**PETITION FOR WRIT OF CERTIORARI**

Newnam respectfully petitions for a writ of *certiorari* to review the judgement of the Superior Court of Pennsylvania, of which a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on June 26, 2019.

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**OPINIONS BELOW**

The decision of the Pennsylvania Supreme Court denying Newnam's Petition for Allowance of Appeal is reprinted in the Appendix at App. 90. The decision and opinion of the Superior Court of Pennsylvania is

reprinted in the Appendix at App. 1. The trial court's opinion is reprinted in the Appendix at App. 22. The trial court's final judgement, reflected in its sentencing order, is reprinted in the Appendix at App. 81.

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## **JURISDICTION**

The Pennsylvania Supreme Court denied discretionary review on June 26, 2019. An application for an extension of time to file this petition for writ of *certiorari* was presented to Justice Alito, who on September 17, 2019, extended the time for filing to and including October 25, 2019. This Court's jurisdiction is thus invoked under 28 U.S.C. §1257(a).

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## **CONSTITUTIONAL PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

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## **STATEMENT OF THE CASE**

### **A. Facts**

This matter arises from Julius Dale's decisions to: load a handgun with hollow point bullets; take meth-amphetamines; make it known that he was going to kill Newnam; unlawfully enter Newnam's residence

where he had been previously evicted from; wake Newnam up and aggressively argue with him; refuse to leave when asked to do so; poke Newnam in the chest while showing a visible firearm on his hip; and reach for his gun. After Dale reached for his gun, Newnam picked up a nearby shotgun and shot Dale, killing him.

Newnam was charged with, *inter alia*, first degree murder. Randolph Miller, Esquire, was court-appointed to represent Newnam, and commenced doing so in a vigorous and aggressive fashion. Newnam and his family were extremely pleased with Miller's efforts over eleven months of representation, which included filing a 180-paragraph omnibus pre-trial motion.

On April 27, 2017 Mr. Miller advised the trial court that he would not be able to continue as counsel for Mr. Newnam due to a medical condition. The trial court then appointed Mr. Edwin Pfursich to represent Appellant. Even with the change in counsel, Mr. Newnam's jury trial was scheduled to begin on May 22, 2017 – less than one month away.

On May 1, 2017 Mr. Miller met with Newnam and informed him that he had to withdraw as his attorney and another attorney had been appointed.

On May 5, 2017 Appellant met his newly appointed attorney Mr. Pfursich. Appellant's homicide trial was still scheduled to begin in two-and-one-half weeks.

On May 15, 2017, one week before the beginning of trial, Mr. Pfursich requested and was granted an additional sixty days to prepare for Appellant's murder trial. Trial was rescheduled to begin on July 29, 2017.

During the next two months, Appellant became increasingly dissatisfied with Mr. Pfursich's representation and disagreed with counsel's strategy. Mr. Newnam began to meet with other attorneys and raise the resources to hire alternate counsel. On July 19, 2017, ten days before trial, Appellant retained Michael Marinaro, Esquire who then entered his appearance and requested a two-month continuance as Mr. Pfursich had previously done.

The trial court held a hearing the next day. At the hearing, Appellant informed the trial court of his dissatisfaction with Mr. Pfursich's representation and that if he had his choice, he would have already had his trial with Mr. Miller as his attorney in May. Since Mr. Newnam's decision to retain new counsel was clearly not an intentional delay tactic, the district attorney was not completely opposed to a continuance if Mr. Marinaro was granted permission to enter.<sup>1</sup>

The trial court denied Mr. Marinaro's continuance request and forced Newnam to defend himself in a

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<sup>1</sup> The Commonwealth responded that it was not opposed to a continuance if Mr. Marinaro was permitted to enter, and that it would not want to have to "try the case a second time." However, the Commonwealth then voiced an objection to having appointed counsel, Mr. Pfursich, leaving the case if that would result in a continuance. The trial court failed to conduct any clarifying examination.

first-degree murder trial with a lawyer whom he fundamentally disagreed with.

Trial commenced on July 27, 2017. Five days later Newnam was convicted of first-degree murder and related offenses and sentenced to life imprisonment. He timely appealed, and one issue raised on appeal was whether the lower court erred by denying his request for a continuance so that his retained lawyer of choice could represent him.

The Superior Court rejected this issue and affirmed Newnam's judgement of sentence in an unpublished Memorandum opinion on January 25, 2019. With respect to the counsel of choice issue, the Superior Court acknowledged that “[a]dmittedly, this is a close case,” and stated:

We do not find that Newnam was intentionally trying to delay trial in bad faith, or that he *unreasonably* clogged the machinery of justice by his request.

App. at 11. Nevertheless, the Court concluded that the lower court's denial of Newnam's continuance request did not rise to the level of a manifestly unreasonable judgement, a result of prejudice, bias, or ill-will, or a misapplication of the law. The Pennsylvania Supreme Court denied discretionary review on June 26, 2019. This timely Petition follows.

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## REASONS FOR GRANTING THE WRIT

A compelling reason to grant the instant petition exists because courts in this country are routinely querying whether a criminal defendant's right to retained counsel of his choice should only be vindicated if a number of extraneous factors are decided in his or her favor. That inquiry unfairly diminishes a defendant's Sixth Amendment right to counsel.

For example, in Pennsylvania, the courts examine: (i) whether the court conducted an "extensive inquiry" into the underlying defendant's dissatisfaction with current counsel; (ii) whether the defendant's dissatisfaction with current counsel amounted to "irreconcilable differences;" (iii) the number of prior continuances; (iv) the "timing of the motion" for continuance; (v) whether private counsel had actually been retained; and (vi) the readiness of private counsel to proceed in a reasonable amount of time. *See, Commonwealth v. Prysock*, 972 A.2d 539, 541 (Pa. Super. 2009). The underlying inquiry is whether a criminal defendant is intentionally trying to delay trial in bad faith, or unreasonably clog the machinery of justice by his request. *Id.*

Most of the Circuit Courts have also established factors to consider when reviewing a request for continuance to engage new counsel. The following are representative of these factors:

- 1) The length of the delay;
- 2) The inconvenience to witnesses, the court, counsel or the parties;

- 3) Whether other continuances have been granted;
- 4) Whether legitimate reasons exist for the delay;
- 5) Whether the delay is the defendant's fault;
- 6) Whether the denial would prejudice the defendant;
- 7) Any other unique factors.

*See, U.S. v. Flanders*, 491 F.3d 1197 (10th Cir. 2007); *U.S. v. Studley*, 783 F.2d 934 (9th Cir. 1986); *U.S. v. Baker*, 432 F.2d 1189 (11th Cir. 2005); *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978); 947 F.2d 72 (3rd Cir. 1991) (also listing “the rights of other defendant’s awaiting trial who may be prejudiced by a continuance” as another factor to consider); *U.S. v. Cordy*, 560 F.3d 808 (8th Cir. 2009); *Abby v. Howe*, 742 F.3d 221 (6th Cir. 2014) (four factor test based on Michigan law); *U.S. v. Sellers*, 645 F.3d 830 (7th Cir. 2011); *Sampley v. Att'y General of North Carolina*, 786 F.2d 610 (4th Cir. 1986).<sup>2</sup>

Indeed, this Court has held that “[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the

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<sup>2</sup> See also, *State v. Hampton*, 361 P.3d 734 (Wash. 2015); *State v. Hamilton*, 228 Conn. 234 (Conn. 1994).

trial judge at the time the request is denied.” *See, Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

On the other hand, a criminal defendant’s right to proceed with retained counsel of his choice is so important that once it is violated, prejudice is presumed, and a new trial is required. *Accord, U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (prejudice is presumed for Sixth Amendment purposes, subsequent harmless error inquiry is improper, stating, *inter alia*, “the Sixth Amendment guarantees a 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,” *citing Caplin Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)).

“The right to select counsel of one’s choice . . . has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.” *Gonzales-Lopez*, at 174. “Deprivation of the right is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.” *Id.*

The question, then, is what constitutes an “erroneous” denial of the right to counsel of one’s choice. *Ungar, supra* should be revisited because the unique circumstances present in every case, other than whether a request for delay is a clear stall tactic, should not be a consideration.

In other cases, when prejudice is presumed in the context of the Sixth Amendment, a new trial (or appeal) is required regardless of whether the right has been infringed on for other reasons. *Accord, Penson v. Ohio*, 488 U.S. 75 (1988) (holding that where a defendant has been actually or constructively denied the assistance of appellate counsel altogether, the *Strickland* standard does not apply and prejudice is presumed); *Garza v. Idaho*, 139 S. Ct. 738, 748 (2019) (“[t]his Court has already rejected attempts to condition the restoration of a defendant’s appellate rights forfeited by ineffective counsel on proof that the defendant’s appeal had merit. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court explained that prejudice should be presumed with no further showing from the defendant of the merits of his underlying claims”).

Thus, when prejudice is presumed under the Sixth Amendment, the unique reasons for a court’s decision to infringe on that right are irrelevant. If the denial of one’s right to retained counsel of his choice constitutes “structural error,” *Gonzales-Lopez, supra*, then the reason for infringing on that right- including things like the length of the delay; the inconvenience to witnesses, the court, counsel or the parties; whether other continuances have been granted; whether legitimate reasons exist for the delay; whether the delay is the defendant’s fault; whether the denial would prejudice the defendant; and, any other unique factors- should be irrelevant. The only question should be whether a defendant is employing a stall tactic, or in other words, unreasonably attempting to delay the trial in bad faith.

Here, it is undisputed that Newnam was not trying to delay the trial in bad faith. *See*, App. 11. That should have ended the inquiry, and prejudice should have been presumed. For a court to consider other extraneous factors unnecessarily and unfairly dilutes the right to retained counsel of one's choice. Whether a defendant is employing a stall tactic is easy enough to ascertain, and as such, the inquiry should be a straightforward question that is uncomplicated by a set list of factors.

Pennsylvania itself recognizes that “[t]he right to counsel of one's own choosing is particularly significant because an individual facing criminal sanctions should have great confidence in his attorney.” *Moore v. Jamieson*, 306 A.2d 283, 288 (Pa. 1973). Newnam clearly should have been granted a continuance given the crucial nature of his right to retain counsel of his own choice *in a first degree murder case*.

Thus, Newnam respectfully requests that this Court issue a writ, and re-address whether trial courts should have as much discretion as they currently do in evaluating whether to honor one's right to retained counsel of his choice.

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## **CONCLUSION**

The Petition for a Writ of Certiorari to the Superior Court of Pennsylvania should be granted.

Respectfully submitted,

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