No._____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES SENKE,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

The Third Circuit panel majority, deepening an acknowledged and entrenched circuit split, ruled that the district court's failure to inquire into Senke's well-grounded motion for substitution of trial counsel (a failure that the Panel unanimously found) is not cognizable on direct appeal, because Senke is an indigent defendant and must therefore raise the issue on collateral review as a *Strickland v. Washington*, 466 U.S. 668 (1984) ineffectiveness claim, with a showing of *Strickland* prejudice. By contrast, seven Circuits—the First, Second, Fifth, Sixth, Eighth, Ninth and Tenth—apply abuse-of-discretion review to a district court's denial of, or failure to properly inquire into, a defendant's substitution motion, without distinguishing between indigent and non-indigent defendants and without requiring a demonstration of prejudice. Besides the Third Circuit panel majority in the instant case, only two circuits, the D.C. and Seventh, have consistently treated this issue as one of *Strickland* ineffectiveness for indigent defendants.

The question presented is whether a district court's failure to inquire into an indigent defendant's colorable motion for substitution of counsel is cognizable on direct appeal, or whether it must instead be raised on collateral review as a *Strickland* ineffectiveness claim.

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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES SENKE,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Charles Senke respectfully prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 25, 2021, in *United States v. Charles Senke*, Third Circuit No. 19-1287, and as to which that court denied a petition for rehearing and rehearing en banc on March 23, 2021.

OPINION BELOW

The Third Circuit's precedential decision (Fuentes, Bibas, and McKee, JJ. (the latter concurring in part and dissenting in part)) was filed on January 25, 2021.[1] The judgment is attached at Appendix ("App'x") A. The opinion of the Third Circuit is attached at App'x B and is available at 986 F.3d 300 (3d Cir. 2021). Application for en banc rehearing was denied by order dated March 23, 2031, a copy of which is attached at App'x C.

[1] Judge McKee dissented with respect to the issue raised in this petition and concurred with the panel majority's determination that the district court imposed improper conditions of supervised release relating to Senke's computer and internet usage.

JURISDICTIONAL GROUNDS

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties, namely, petitioner Charles Senke and respondent United States.

FEDERAL STATUTE INVOLVED

18 U.S.C. § 3006A(c) provides in relevant part:

The United States magistrate judge or the district court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

STATEMENT OF THE CASE

This petition presents a recurring and important question that has deeply divided the federal courts of appeals: whether a district court's failure to inquire into an indigent defendant's colorable motion for substitution of counsel is cognizable on direct appeal, without any requirement of prejudice, as a majority of the circuits have held, or whether it must instead be raised on collateral review as a *Strickland v. Washington*, 466 U.S. 668 (1984) ineffectiveness claim. The Third Circuit panel majority joined two other minority circuits, holding that the district court's failure to address Senke's motion, which presented substantial grounds for the removal of his court-appointed counsel, could not be raised on direct appeal and that any issues Senke had with respect to his attorney should instead be raised as a *Strickland* claim on collateral review.

But as Judge McKee recognized in his dissenting opinion, the majority's decision, in addition to diverging from most of the other circuits, is also in conflict with two of this Court's decisions: *Martel v. Clair*, 565 U.S. 648 (2012) and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). And, as Judge McKee further recognized, the ramifications of the Panel majority's decision are profound: While non-indigent defendants may obtain direct appellate review of a district court's erroneous denial of a substitution of counsel motion—a "structural error" that requires no showing of prejudice, *Gonzalez-Lopez*, 548 U.S. at 150—indigent defendants, by contrast, are foreclosed from bringing such a claim on direct appeal, even where as here good cause existed for the removal of appointed counsel. Instead, they must initiate collateral proceedings, with no right to counsel, and establish not only that good cause existed for counsel's removal, but that the attorney provided ineffective assistance under *Strickland v. Washington* that was prejudicial. This disparate treatment of indigent and non-indigent defendants is contrary to this Court's precedents and fundamental notions of fairness.

A. Proceedings before the district court

The facts relevant to this petition are undisputed. Senke was charged in indictment No. 16-CR-00373 with attempting to entice a minor into engaging in sex, in violation of 18 U.S.C. § 2422(b), and travel for purposes of illicit sex, in violation of 18 U.S.C. § 2423(b).[2]

On September 18, 2017, the district court appointed Matthew Comerford to represent Senke, who had been representing himself for several months.[3] Seven months later, Senke filed

[2] The case did not concern an actual minor, but rather an agent who posed as an eighteen-year old on Gay.com, a dating website for adults, and then claimed to be fourteen after Senke contacted him. (A413-18).

[3] Senke was initially represented by an assistant federal public defender who withdrew after several weeks upon her own motion.

a *pro se* motion entitled "Inadequate Representation," stating that Comerford was not answering or returning his phone calls, reading his mail, or preparing for trial. (A316-17). The motion also asserted that Comerford refused to review the evidence, calling it "to[o] disgusting." (A316). This lack of diligence and failure to communicate, Senke argued, "severely inhibits [Comerford's] ability to execute his responsibilities and duties," and as a result, "I cannot get a fair and just trial." (A317). The court took no action in response to this motion.[4]

Four months later, on August 8, 2019, the court held a pretrial conference attended by the prosecutor and Comerford, but not Senke, during which Comerford effectively corroborated Senke's assertions. Complaining about his client's desire for pre-trial motions, Comerford represented that he had advised Senke, erroneously, that he was not permitted to file motions on Senke's behalf, because the time for filing motions had passed while Senke was representing himself. (A338).[5] Comerford also unwittingly revealed that he had not even reviewed the motions that Senke had filed *pro se* to see whether any of them might warrant the attention of a trained lawyer and a motion to either renew or to reconsider. (A337).[6] Worst of all, Comerford then proposed a plan directly against his client's interests, suggesting that he "cover the record" by filing a motion ostensibly asking for leave to file additional motions, but with the true intent of obtaining an order from the court precluding it. App'x B, dissent at 4 n.16.

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[4] The Panel was unanimous that the motion should have been construed by the district court as being for substitution of counsel. App'x B at 13-14.

[5] Comerford, in fact, could have filed motions on Senke's behalf. Upon appointing Comerford, the district court issued a scheduling order extending the time for the filing of counseled pretrial motions. Docket 98.

[6] Comerford inquired of the prosecutor, "Michelle, what pretrial motions were filed? He filed them pro se, am I right." (A337). At the time of the conference, Comerford had been appointed for seven months.

Hearing these representations, the prosecutor questioned Comerford whether Senke was "trying to fire [him]." (A339). Comerford's response was equivocal: "Not that I know of." (A339). The court's reaction, however, was to assure Comerford that he was not going to be removed: "He doesn't have much of a chance of losing you, right. You're the second or third guy on this deal." (A338).[7]

The case eventually proceeded to trial with Comerford and one of his associates as counsel. They presented no evidence on Senke's behalf, relying on an entrapment defense. The court had permitted that defense prior to trial, holding that "ample evidence exists that the government induced the defendant to commit a crime that he was not predisposed to commit." Docket 80 at 22.[8] Nevertheless, the jury returned a verdict of guilty on both counts. Senke was sentenced to ten-years' imprisonment.

B. The Decision Below

The Majority Opinion

While the Panel majority correctly ruled that the district court abused its discretion by failing to inquire into Senke's motion for substitute counsel, the majority held that Senke was required to establish that his attorney provided ineffective assistance (i.e., prejudicial deficient performance) and that the claim should therefore be brought on collateral rather than on direct review. App'x B at 23. Underlying the majority's decision was its assessment that Senke, as an indigent defendant, does not possess a Sixth Amendment right to counsel of choice and that only

[7] As noted above, Comerford was actually Senke's second appointed attorney. The assistant federal public defender, who previously represented Senke, withdrew after having represented him for several weeks.

[8] The court so held in denying the government's motion to preclude an entrapment defense, a motion which Senke litigated *pro se* prior to Comerford's appointment.

a violation of that particular constitutional right constitutes structural error under this Court's decision in *Gonzalez-Lopez*. *Id*. at 19-22. As an indigent defendant, the Panel majority held, Senke possesses only a Sixth Amendment right to "effective counsel," and the issue of whether Senke's attorney provided ineffective assistance is properly the subject of collateral review, not direct appeal. *Id*. at 20-23.

The Dissenting Opinion

Judge McKee dissented. In his view, the Panel majority's decision conflicts not only with prior Third Circuit precedent[9] and the majority of the other circuits, but this Court's decisions in *Gonzalez-Lopez* and *Clair*. In *Clair*, Judge McKee observed, this "Court recognized a statutory right [18 U.S.C. § 3006A(c)] to substitute counsel where an indigent defendant shows that substitution is 'in the interests of justice,'" App'x B at 10 (dissent) (citing *Clair*, 565 U.S. at 658), and this Court instructed that "where a district court abuses its discretion in failing to inquire into a defendant's complaints about counsel . . . the appropriate remedy is to remand to the district court for a hearing to determine whether substitution was warranted." *Id*. at 19 (citing *Clair*, 565 U.S. at 666 n.4) ("The way to cure that error [is] to remand to the district court to decide whether substitution was appropriate at the time" substitution was requested.).[10]

[9] *See United States v. Welty*, 674 F.2d 185, 187-90(3d Cir. 1982); *McMahon v. Fulcomer*, 821 F.2d 934, 944 (3d Cir. 1987); *United States v. Diaz*, 951 F.3d 148, 154-55 (3d Cir. 2019).

[10] As Judge McKee also recognized, this Court in *Clair* rejected the "functional equivalent" of a *Strickland* ineffectiveness requirement. *Id*. at 19, n.66. The respondent in *Clair* argued that no relief was warranted because Clair had a "functioning lawyer," who was "acting as an advocate." *Clair* 565 U.S. at 661. "But the Court rejected that argument[,]" concluding that under the interests of justice standard of § 3006A(c), relief may be granted on appeal even if the attorney in question was a functioning advocate. App'x B at 19 n.66 (dissent) (citing *Clair,* 565 U.S. at 663).

As to *Gonzalez-Lopez*, Judge McKee observed that this Court's structural error analysis there "is equally applicable" to indigent defendants who are able to make the required showing of "good cause" under 18 U.S.C. § 3006A(c):

> '[T]he erroneous denial of counsel bears directly on the framework within which the trial proceeds . . . . It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those choices on the outcome of the proceedings.' Accordingly, where 'the deprivation of counsel [i]s erroneous[,] [n]o additional showing of prejudice is required to make the violation complete.'

Id. at 14 (quoting *Gonzalez-Lopez*, 548 U.S. at 146).

As Judge Mckee recognized, "[t]his is true whether a defendant can pay for an attorney or not." *Id*. ("'Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternative universe.'") (quoting *Gozalez-Lopez*, 548 U.S. at 150).

REASONS FOR GRANTING THE PETITION

The split between the majority and dissent in this case highlights the wider and longstanding split among the circuits on the question of whether an indigent defendant may take a direct appeal from a district court's erroneous denial of, or failure to properly inquire into, a substitution of counsel motion. As discussed further below, seven circuits apply abuse-of-discretion review to such claims, without distinguishing between indigent and non-indigent defendants and without subjecting such claims to any sort of prejudice analysis. By contrast, three circuits, including the Third Circuit panel in the instant case, hold that such claims are not cognizable on direct appeal and must instead be brought on collateral review as a *Strickland* ineffectiveness claim.[11]

[11] As recognized by Judge McKee, the Panel majority's holding conflicts with prior Third Circuit decisions. *See supra* at n.9.

This issue raises a question of fundamental fairness regarding the operation of the federal criminal justice system: Can the federal courts of appeals treat indigent and non-indigent defendants disparately when they raise identical claims? Consider two co-defendants, one indigent, one not, who file identical motions for substitution of counsel well in advance of trial. Both raise substantial grounds for substitution that satisfy the "interests of justice" standard of § 3006A(c).[12] The motions of both defendants are erroneously denied and each takes an appeal following conviction at trial. Under the approach of the minority circuits, the two appeals are treated completely differently and have opposite outcomes. The non-indigent defendant can obtain direct appellate review and have the district court's error treated as "structural," requiring no showing of prejudice, with the result being a vacatur of the conviction and a remand for new trial. The indigent defendant, by contrast, is denied direct review and must instead initiate *pro se* collateral proceedings and establish that his attorney's performance was constitutionally deficient with a reasonable probability that the deficient performance affected the outcome of his case.

This case presents the question in its starkest form because the Third Circuit panel unanimously found that Senke presented a well-grounded motion for substitution of counsel and that the district court abused its discretion by failing to address it. The Panel majority, however,

[12] As this Court recognized in *Clair*, the circuit courts, in applying the "interests of justice" standard of § 3006A(c), have generally considered several circumstances: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict). 565 U.S. at 663. When these circumstances warrant substitution, "good cause" for the appointment of new counsel has been established. *Welty*, 674 F.2d at 188; *United States v. Jennings*, 945 F.2d 129, 132 (6th Cir 1991); *United States v. Lott*, 310 F.3d 1231, 1250 (10th Cir. 2002).

refused to correct that error solely because of Senke's indigent status. In so doing, the panel majority has perfectly illuminated the critical need for this Court's resolution of the circuit split.

A. There is an acknowledged and entrenched circuit split regarding whether indigent defendants may raise on direct appeal a district court's denial of, or failure to address, a substitution of counsel motion.

Seven federal courts of appeals—the First, Second, Fifth, Sixth, Eighth, Ninth and Tenth—review on direct appeal an indigent defendant's claim that the district court erroneously denied, or failed to address, his substitution of counsel motion, applying abuse of discretion review without subjecting such claims to any sort of prejudice analysis. *See e.g*., *United States v. Prochilo*, 187 F.3d 221, 225-227 (1st Cir. 1999) (holding that district court abused its discretion by denying defendant's motion for substitution of appointed counsel without making inquiry into the accused's concerns, rejecting government's argument that defendant "was in fact well represented at trial and hence suffered no prejudice," and vacating defendant's conviction);[13] *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir.1972) ("If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may properly claim denial of his Sixth Amendment right."); *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973) (applying abuse-of-discretion review and agreeing with Second Circuit that "if a court refuses to inquire into a seemingly substantial

[13] While the defendant in *Prochilo* was seeking to replace his court-appointed attorney with a retained attorney, the First Circuit evaluated the issue according to the same principles that apply when a defendant seeks substitution of court-appointed counsel by a new appointment. *Id*. at 225 ("The principles applicable to cases in which a criminal defendant asks that court appointed counsel be replaced were announced by this Court in *United States v. Allen*, 789 F.2d 90, 92 (1st Cir.), *cert. denied*, 479 U.S. 846, 107 S.Ct. 164, 93 L.Ed.2d 103 (1986), and remain the governing law.").

complaint about counsel . . . or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right"); *United States v. Jennings*, 945 F.2d 129, 132 (6th Cir. 1991) (remanding for "district court to personally inquire from each defendant his dissatisfactions with counsel" and "[i]f . . . the court finds that the defendant did possess 'good cause' each would be entitled to new appointed counsel for re-trial."); *United States v. Jones*, 795 F.3d 791, 796 (8th Cir. 2015) (citing *Clair* and reviewing for abuse of discretion); *United States v. Velasquez*, 855 F.3d 1021, 1033-34 (9th Cir. 2018) (citing *Clair* and vacating defendant's conviction where record established that district court abused its discretion in denying substitution motion: "Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel . . . . [which is] not subject to prejudice analysis.") (internal quotation marks and citations omitted); *United States v. Lott*, 310 F.3d 1231, 1249-52 (10th Cir. 2002) (remanding for a hearing where defendant's post-trial motion for substitution "made a sufficient allegation of good cause to substitute counsel" and instructing district court that if good cause is established the defendant should be resentenced, unless the government can "prove beyond a reasonable doubt that the error was harmless.").

By contrast, only two circuits, the Seventh and D.C., have consistently treated this issue as one of *Strickland* ineffectiveness. *See United States v. Wallace*, 753 F.3d 671, 675 (7th Cir. 2014) (recognizing disagreement of other circuits and holding that "[i]f communications with the defendant's counsel broke down as a result of neglect or ineptitude by counsel, the defendant may have a claim or ineffective assistance of counsel, but to prove that he would have to present evidence"); *United States v. Ziliges*, 978 F.2d 369, 372 (7th Cir. 1992) (same); *United States v. Smoot*, 918 F.3d 163, 169 (D.C. Cir. 2019) ("A defendant challenging the denial of a motion to

substitute counsel must show that he was not afforded effective representation in order to show that the denial of the motion was prejudicial.") (quoting *United States v. Graham*, 91 F.3d 213, 221 (D.C. Cir. 1996)).[14]

B. The approach of the majority circuits is in accord with this Court's decisions in *Clair* and *Gonzalez-Lopez* and Congress's intent in providing for substitution of counsel in § 3006A(c).

The majority approach is in accord with this Court's decisions in *Clair* and *Gonzalez-Lopez*. The minority circuits and the panel majority in the instant case, by contrast, fail to properly analyze either of those decisions and effectively negate Congress's provision for substitution of counsel in § 3006A(c).

[14] Two Circuits, the Fourth and Eleventh, have issued conflicting decisions on this issue. *Compare United States v. Smith*, 640 F.3d 580, 590 (4th Cir. 2011) ("Agree[ing]" with the Ninth Circuit that "'to compel one charged with grievous crime to undergo trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever[,]'" and quoting *Gonzalez-Lopez* for the proposition that "the actual or constructive denial of counsel constitutes the type of 'structural defect' that 'defies analysis by harmless error standards . . . .'") (quoting *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970) & *Gonzalez-Lopez*, 548 U.S. at 148); *with United States v. Blackledge*, 751 F.3d 188, 197 (4th Cir. 2014) (holding that "[a] district court's abuse of discretion in denying a motion to substitute counsel is subject to harmless error review" and remanding for an appropriate inquiry into the substitution motion because the "representation was undoubtedly hampered by [the] lack of communication" between the defendant and his attorney); *and United States v. Horton*, 693 F.3d 463, 467 (4th Cir. 2012) (harmlessness standard not explicated but citing Seventh Circuit case applying *Strickland* prejudice review and finding error harmless where defendant twice represented under oath that "he had ample opportunity to discuss his case with his attorney" and that he was "completely and fully satisfied with his attorney's services."): *compare United States v. Davis*, 777 F. Appx 360, 365 & n.2 (11th Cir. 2019) (unpublished) *vac't on other grounds*, 140 S.Ct. 952 (2020) (citing *Clair*, reviewing District Court's failure to adequately inquire for abuse of discretion and stating that, in determining whether substitution was warranted, "[o]ur harmlessness inquiry focuses on the state of facts known at the time of substitution motion."); *with United States v. Miers*, 686 F.Appx 838, 844 (11th Cir. 2017) (applying *Strickland* prejudice standard and noting disagreement of other circuits.); *and United States v. Calderon*, 127 F.3d 1314, 1343 (11th Cir. 1997) (same).

In *Clair*, this Court specifically addressed an indigent defendant's motion to substitute appointed counsel and the proper appellate review of such a claim. While the Court in *Clair* ultimately concluded that the district court did not abuse its discretion in denying the substitution motion (because it was filed out of out of time, *id.* at 666), the decision nevertheless has four critical aspects that make clear that such claims are cognizable on direct appeal.

First, the "Court recognized a statutory right [18 U.S.C. § 3006A(c)] to substitute counsel where an indigent defendant shows that substitution is 'in the interests of justice.'" *Clair*, 565 U.S. at 658.

Second, the Court recognized that Congress, in drafting § 3006A, "declined to track the Sixth Amendment." *Id*. at 662. Accordingly, § 3006A applies "even when the Sixth Amendment does not require representation," such as, for example, a non-capital habeas petitioner who has been appointed counsel. *Id*. at 661.

Third, the Court rejected the functional equivalent of an ineffectiveness requirement. The respondent in *Clair* argued that no relief was warranted because Clair had a "functioning lawyer," who was "acting as an advocate." *Id.* at 661. But the Court rejected that argument, concluding that under the interests of justice standard of § 3006A(c), relief may be granted on appeal to an indigent defendant even if the attorney in question was a functioning advocate. *Id*.

Fourth, the Court explained that where a district court abuses its discretion in failing to inquire into an indigent defendant's complaints about counsel, the appropriate remedy is to remand to the district court for a hearing to determine whether substitution was warranted. *Id.* at 666 n.4 ("The way to cure that error [is] to remand to the district court to decide whether substitution was appropriate at the time" substitution was requested).

Accordingly, several of the majority circuits have done exactly what this Court instructed in *Clair*: remand for a determination of whether a substitution motion should have been granted. *See e.g.*, *United States v. Jennings*, 945 F.2d 129, 132 (6th Cir. 1991) (remanding for "district court to personally inquire from each defendant his dissatisfactions with counsel" and "[i]f . . . the court finds that the defendant did possess 'good cause' each would be entitled to new appointed counsel for re-trial"); *United States v. Lott*, 310 F.3d 1231, 1249-52 (10th Cir. 2002) (remanding for a hearing where defendant's post-trial motion for substitution "made a sufficient allegation of good cause to substitute counsel" and instructing district court that if good cause is established the defendant should be resentenced, unless the government can "prove beyond a reasonable doubt that the error was harmless").[15]

The Seventh and D.C. Circuits, by contrast, fail to even acknowledge this Court's decision in *Clair*. *See Wallace*, 753 F.3d 671; *Smoot*, 918 F.3d 163. And, while the panel majority in the instant case acknowledged *Clair*, it dismissed this Court's instructions there as mere "dicta." App'x B at 17 n.38. But as the circuit courts, including the Third Circuit, have recognized, this Court "uses dicta to help control and influence the many issues it cannot decide because of its limited docket" and, as such, "'[a]ppellate courts that dismiss these expressions [in dicta] and strike off on their own increase the disparity among tribunals (for other judges are likely to follow the Supreme Court's marching orders) and frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.'" *In re McDonald*, 205 F.3d 611, 612-13 (3d

[15] Alternatively, the Ninth Circuit has remanded for new proceedings with substitute counsel where the record made clear that substitution was warranted. *See Velasquez*, 855 F.3d at 1033-34 (citing *Clair* and vacating defendant's conviction where record established that district court abused its discretion in denying substitution motion).

Cir. 2010) (quoting *United States v. Bloom*, 149 F.3d 649, 653 (7th Cir. 1998)). That maxim is especially warranted here given that this Court in *Clair*, while holding that the district court did not abuse its discretion (because the substitution motion was filed out of time), nevertheless took pains to instruct the circuit courts what the proper remedy and remand would have been if the district court had abused its discretion. *Clair*, 565 U.S. at 666 n.4.[16]

The minority circuits also fail to take proper account of this Court's structural error analysis in *Gonzalez-Lopez*. This Court held there that the district court abused its discretion in denying the defendant's motion to substitute counsel and that the error was "structural." *Id*. at 148. While the defendant was able to pay for his own attorney and thus had a Sixth Amendment right to counsel of choice, a right that indigent defendants such as Senke do not possess, the Court's reasoning is nevertheless equally applicable here. Indigent defendants do have a statutory right, as *Clair* makes clear, to have their court appointed attorneys replaced when it is in the "interests of justice" and "good cause" is demonstrated. *See supra* at n.11. If such a showing is made and a district court has abused its discretion by failing to order substitution, then the error is functionally the same as in *Gonzalez-Lopez*—the defendant's attorney should have been removed and the case should have proceeded with another attorney. Indigent defendants, no less than their more well-off counterparts, have the right not to be represented by attorneys who merit removal for "good cause." The structural error analysis of *Gonzalez-Lopez*

[16] The panel majority also posits that this Court's instruction in *Clair* as to the proper remedy "suggests that the failure to inquire into dissatisfaction with counsel, without more, is not structural error." App'x B at 18 n.38. The panel majority appears confused on this point. The necessity of a remand for a "good cause" determination does not mean that the error is not structural, it means that a further record needs to be made as to the extent of the error, *i.e.*, whether there was just a failure to inquire, or actually "good cause" for counsel's removal. If the latter, then the error is indeed structural, a point made clear, as discussed further below, by *Gonzalez-Lopez*, 548 U.S. 140 (2006).

applies regardless of whether the defendant's right to substitute his attorney is based on the Sixth Amendment right to counsel of choice or a showing of "good cause" under 18 U.S.C. § 3006A(c). As this Court explained:

> [Structural defects] defy analysis by harmless error standards because they affec[t] the framework within which the trial proceeds, and are not simply an error in the trial process itself.
>
> * * *
>
> 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. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceed – or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

Id. at 149-50 (internal quotation marks and citations omitted).

This analysis is equally applicable to cases such as this where the defendant's attorney should have been removed for good cause and the district court abused its discretion by failing to do so. No less than in *Gonzalez-Lopez*, harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe with a different attorney at the helm. Because the error affects the framework within which the trial proceeds

and is not simply an error in the trial process itself, it defies harmless error analysis and constitutes a structural defect requiring reversal.[17]

The minority circuits, however, mistakenly attempt to confine the reach of *Gonzalez-Lopez* to those who can afford an attorney. In reality, however, the Court's reasoning in *Gonzalez-Lopez* makes even more sense in cases such as this where good cause exists for an attorney's removal. Whether that good cause is based on an attorney's bias, failure to communicate, or the general dereliction of his duties, it is impossible to know how the proper substitution of an attorney not suffering from any such infirmity might have affected the outcome of the proceedings. As this Court explained in *Gonzalez-Lopez*, "we rest our conclusion of structural error upon the difficulty of assessing the effect of the error." *Id*. at 150 n.4.

The approach of the minority circuits also conflicts with the text of § 3006A(c). Congress there expressly provided indigent defendants with the ability to have substitute counsel appointed when warranted by the "interests of justice." The minority circuits have effectively negated that provision, however, by conflating substitution of counsel and *Strickland* ineffectiveness claims, thereby denying indigent defendants direct appellate review even in cases such as this where the district court altogether failed to address a well-grounded motion for substitution. The fundamental problem with this conflation was discussed by the Tenth Circuit:

> [I]f we were to conflate *Strickland's* ineffective assistance inquiry with a defendant's motion to substitute counsel, we would in effect be analyzing motions to substitute counsel as ineffectiveness claims, which must always be brought on collateral attack. [citation omitted]. We would thus effectively eliminate a defendant's ability to bring a right to counsel claim on direct appeal. That we decline to do.

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[17] Of course, as discussed above, if the record is insufficiently clear on good cause for substitution, *Clair* requires remand for a determination. If good cause is shown, the error is structural and the defendant must be afforded either a new trial or sentencing depending upon when the request for substitution was made.

Lott, 310 F.3d at 1252.

In *Clair*, this Court rejected the respondent's proposed "functioning advocate" test for similar reasons. As this Court recognized, that test would "render[ ] § 3359's substitution provision superfluous." 565 U.S. at 661.[18] "Even in the absence of [§ 3559], a court would have to insure that the defendant's statutory right to counsel was satisfied throughout the litigation . . . . [s]o by confining substitution to cases in which the defendant has no counsel at all, the state's proposal effectively deletes § 3559's substitution clause." *Id*.

Similarly, here, indigent defendants such as Senke already have the Sixth Amendment right to effective representation and the ability to bring collateral proceedings to vindicate that right. Accordingly, by conflating substitution motions under § 3006A(c) with *Strickland* ineffective claims, the minority circuits effectively delete § 3006A(c)'s substitution clause. These decisions have made it impossible for indigent defendants to have the violation of their rights under § 3006A(c) remedied on appeal.

Finally, the minority circuits have also erred by depriving indigent defendants of a remedy for a district court's violation of § 3006A(c) because indigent defendants have limited Sixth Amendment rights. *See e.g.*, App'x B at 17-24; *Wallace*, 753 F.3d at 675. As discussed above, this Court recognized in *Clair* that Congress, in drafting § 3006A, "declined to track the Sixth Amendment . . . " 565 U.S. at 661; *id*. at 662 ("Section 3006A applies the interests of justice standard to substitution motions even when the Sixth Amendment does not require

[18] *Clair* concerned a capital case, which has its own substitution of counsel provision in 18 U.S.C. § 3559. *Id*. at 653. That statute, however, does not provide a standard for substitution. *Id*. at 658. This Court in *Clair* held that the "interests of justice" standard of § 3006A(c) is applicable to § 3559. *Id*. at 657-62.

representation."). Accordingly, this Court instructed that the proper remedy in *Clair* would have been a remand for a determination of whether substitution was warranted, even though Clair, as a habeas petitioner, had no Sixth Amendment right to counsel at all. *Id*. at 661-62.

C. This case is an ideal vehicle for resolving the circuit split on an important recurring issue

This case is an ideal vehicle for this Court to resolve the conflict among the circuits on this important, recurring issue.

First, the issue was preserved, fully briefed on appeal, and addressed by both the panel majority and the dissenting opinions. *See* App'x B at 13-15 (recognizing preservation of the issue). In addition, the panel majority opinion and the dissenting opinion perfectly reflect the wider circuit split. Second, the issue here is case dispositive. The panel unanimously agreed that the district court abused its discretion by failing to address or rule upon Senke's motion for substitution of counsel. The panel majority denied Senke relief solely because of his status as an indigent defendant. By contrast, under the approach taken by the majority circuits, the case would have been remanded either for new proceedings with substitute counsel, or at the very least a hearing to determine whether substitution should have been ordered at the time that Senke's motion was filed.[19]

Third, and finally, the circuit split is acknowledged and entrenched, and the issue is recurring. All of the circuits have now addressed this issue and in the Third Circuit alone there have been two cases in the past two years in which a failure by the district court to properly

[19] A remand for new proceedings with substitute counsel would appear to be warranted here given that Senke's trial counsel effectively corroborated Senke's assertions at the August 8, 2019 pretrial conference and even attempted to obtain a ruling against Senke's interests, *see supra* at 4. Under these circumstances, the record amply establishes that substitution of counsel was required.

inquire into a defendant's motion for substitution has been found. *See Diaz,* 951 F.3d 148, 155 n.2; App'x B at 13 ("[W]e are yet again presented with a claim of a district court's inaction."). The issue presented is of vital importance as it goes to the very integrity of our system of criminal justice. Accordingly, this Court's resolution of the conflict is necessary.

CONCLUSION

For the foregoing reasons, Petitioner Charles Senke respectfully requests that this Court grant a writ of certiorari.

Respectfully submitted,

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