No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GLEN TORRES,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The Appellate Court Of Illinois, Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment guarantees criminal defendants 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." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989). Mr. Torres is indigent, so his lead counsel at trial was appointed by the court. A second attorney entered her appearance as co-counsel without being appointed by the court. The trial court disqualified that second attorney over Mr. Torres' objection that doing so would violate his right to be represented by his counsel of choice. The Illinois Appellate Court held that Mr. Torres' constitutional right to representation by counsel of choice did not apply to co-counsel. The Question Presented, upon which the federal circuits and state courts of last resort are divided, is:

Does the Sixth Amendment right to choose one's attorney apply to private and *pro bono* co-counsel?

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OPINION BELOW

The decision of the Illinois Appellate Court is reported at 2022 IL App (4th) 190585-U. (Pet. App. 1a-17a). It is not published, but it is citable as persuasive authority under Illinois Supreme Court Rule 23(e). The order of the Illinois Supreme Court denying leave to appeal has not yet been published, but it is reported at 2022 WL 1739109 (Table). (Pet. App. 18a).

JURISDICTION

On February 7, 2022, the Illinois Appellate Court issued its decision. No petition for rehearing was filed. The Illinois Supreme Court denied a timely filed petition for leave to appeal on May 25, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in relevant part that no State shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Trial Court Proceedings

On October 26, 2015, the circuit court appointed then-public defender Jacqueline Lacy to represent Glen Torres. (C 48, 68, 74). The State had charged Mr. Torres with the first-degree murders of Theodore Hill and Zarra Strickland. (C 42, 57-64). Ms. Lacy subsequently filed a motion to withdraw as counsel due to a conflict of interest. (C 75). The trial court granted her motion to withdraw and appointed a private attorney, Leon Parker, to represent Mr. Torres. (C 83; R 23). Then, on March 23, 2018, private attorney Hallie Bezner entered her appearance as co-counsel on Mr. Torres' behalf. (C 221). The trial court did not appoint Ms. Bezner. (R 200-01).

The State filed a motion to disqualify Ms. Bezner as Mr. Torres' counsel on June 19, 2018. (C 237). It argued that a conflict existed because of Ms. Bezner's previous representation of a man named Terlandon Givens. (R 237). The defense team argued that disqualifying Ms. Bezner would violate Mr. Torres' right to be represented by his counsel of choice. (R 170, 176). Ms. Bezner also explained that Mr. Torres wanted to

waive any potential conflict of interest and that he understood that he would not later be able to complain about the conflict on appeal if he waived it. (R 188-89). Additionally, Mr. Givens was made aware of Bezner's representation of Mr. Torres, and he did not object to her representation of Mr. Torres. (R 173, 187). Ms. Bezner never represented Mr. Givens in any matters related to Mr. Torres' prosecution. (R 173-74).

The trial court acknowledged that Mr. Torres wanted Bezner to remain on his case, and that Mr. Torres was willing to waive any potential conflict. (R 196). Nonetheless, the trial court granted the State's motion to disqualify Ms. Bezner as co-counsel. (R 202). It found that Mr. Torres' Sixth Amendment right to be represented by his counsel of choice applied to Ms. Bezner, but determined that the "potential" of a conflict of interest outweighed that right. (R 197, 201-02). The trial court appointed a different private attorney, Dan Brown, to represent Mr. Torres as Mr. Parker's co-counsel. (C 395). The case proceeded to trial, and Mr. Torres was found guilty of the murders. (C 34-35, 526-27; R 2020).

In his motion for new trial, Mr. Torres again argued that the trial court had erred in disqualifying Ms. Bezner as co-counsel. (C 535). The trial court denied the motion for new trial. (R 2072). Then, on August 15, 2019, the trial court sentenced Mr. Torres to spend the remainder of his natural life in prison as required by 730 ILCS 5/5-8(a(a)(1)(c)(2). (R 2089, 2098).

B. Appellate Court and Illinois Supreme Court Proceedings

After Mr. Torres was convicted, he appealed, arguing in part that the trial court had violated his right to be represented by his counsel of choice when it disqualified Ms. Bezner as co-counsel. (Pet. App. 14a-15a). However, the Appellate Court chose not

to rule on the propriety of the lower court's decision to disqualify Ms. Bezner based on the conflict-of-interest alleged by the State. (Pet. App. 14a-15a). Instead, the Appellate Court held that the Sixth Amendment does not guarantee an indigent defendant who has been appointed counsel the right to choose co-counsel to assist appointed counsel. (Pet. App. 15a). It based this ruling on the portion of this Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) that says, "[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." (Pet. App. 15a). The Appellate Court did not address the part of the *Gonzalez-Lopez* opinion that says "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." *Gonzalez-Lopez*, 548 U.S. at 144, citing *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624-25 (1989). (Pet. App. 15a). The Appellate Court affirmed Mr. Torres' convictions and sentences. (Pet. App. 17a).

Mr. Torres filed a timely petition for leave to appeal in the Illinois Supreme Court on February 18, 2022. In that petition he argued, in part, that the Illinois Supreme Court should grant review to address an important constitutional question: "When a defendant is represented by appointed counsel, and a *pro bono* attorney agrees to enter her appearance as co-counsel without being appointed, does the defendant's constitutional right to his counsel of choice apply to that *pro bono* attorney?" (PLA 2). The Illinois Supreme Court denied the petition for leave to appeal on May 25, 2022. (Pet. App. 18a).

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantees a defendant's right to choose an individual attorney "willing to represent [the defendant] even though he is without funds." *Caplin & Drysdale*, 491 U.S. 617, 624-25 (1989), see also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Yet, the Illinois Appellate Court held that the Sixth Amendment does not protect an indigent defendant represented by appointed counsel's right to be represented by willing *pro bono* counsel of his choosing as co-counsel. (Pet. App. 15a). This Court has not directly addressed whether the right to be represented by counsel of choice applies to co-counsel, and state and federal courts have split on the issue. This case provides an ideal vehicle for this Court to resolve that split.

I. The federal circuits and state courts have split on the question of whether the Sixth Amendment right to counsel of choice applies to co-counsel.

None of this Court's precedent, including *Ganzalez-Lopez,* "squarely addresses the scope of the right to counsel of choice in the multiple-counsel context." *Abby v. Howe*, 742 F.3d 221, 227 (6th Cir. 2014). In the absence of such precedent, federal and state courts have split on the issue of whether the Sixth Amendment right to counsel of choice, applicable to the states through the Fourteenth Amendment, applies to co-counsel. At least three states have agreed with the Illinois Appellate Court and held that the right to counsel of choice does not apply to co-counsel. Meanwhile, at least four other states have agreed with the Second, Third, and Seventh Circuits and held that the right to counsel of choice does apply to co-counsel.

A. The Illinois Appellate Court's decision joins Indiana, Michigan, and Texas in holding that the right to counsel of choice does not apply to co-counsel.

Illinois is not the first state to hold that the right to counsel of choice only applies to a single attorney. The first state supreme court to come down on this side of the issue was Indiana in *Sparks v. State*, 537 N.E. 2d 1179, 1181 (1989). The defendant in *Sparks* was initially represented by a licensed Indiana attorney. 537 N.E. 2d at 1181. Then a lawyer licensed in Illinois sought to appear *pro hoc vice* as co-counsel with the defendant's Indiana counsel. *Id.* The trial court ruled that the Illinois attorney could sit at counsel table and confer with lead counsel and the defendant, but he could not examine witnesses or argue to the court. *Id.* The defendant argued on appeal that this ruling violated his rights under the Sixth and Fourteenth Amendments to retain the attorney of his choice. The Indiana Supreme Court rejected this claim, ruling that neither the Sixth nor the Fourteenth Amendment "gives the accused the right to as many lawyers as he desires." *Id.*

Michigan followed Indiana's lead in *People v. Fett*, 469 Mich. 913 (2003). In *Fett*, a defendant retained local counsel and out-of-state counsel who sought to enter an appearance *pro hoc vice* to represent the defendant as co-counsel. *Fett*, 469 Mich. at 913. The Michigan Supreme Court stated that it was not aware of any authority holding that the Sixth Amendment is violated "where a defendant is represented by her attorney of choice, but is denied a second attorney of choice." *Id.* The court then concluded that there was no basis for finding that the Sixth Amendment had been violated when the trial court denied co-counsel's request to appear *pro hoc vice. Id.*

Texas courts have also addressed this issue. Back in 1982, the Texas high court held that, once the trial "court has appointed an attorney to represent the indigent

defendant, the defendant has been accorded the protections provided under the Sixth and Fourteenth Amendments and [state law] regarding counsel." *Malcom v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982). The intermediate courts of Texas have regularly interpreted this language to mean that the Sixth Amendment does not guarantee indigent defendants the right to representation by willing *pro bono* co-counsel of choice. *Trammell v. State*, 287 S.W. 3d 336, 342-44 (Tex. App. 2009); see also *Whitney v. State*, 396 S.W. 3d 696, 701 (Tex. App. 2013)(holding "that the trial court did not violate the Sixth Amendment when it excluded" *pro bono* co-counsel "from actively participating as co-counsel alongside Appellant's court-appointed counsel").

B. Maryland, Mississippi, New York, and Ohio agree with the Second, Third, and Seventh District's holdings that the right to counsel of choice applies to co-counsel.

The Third Circuit addressed the application of the Sixth Amendment to co-counsel over forty years ago in *United States v. Laura*, 607 F.2d 52, 55 (3d Cir. 1979). In addressing the issue, the Third Circuit recognized that attorneys "are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues." *Laura*, 607 F.2d at 56. The court went on to explain that it found "no basis in law to distinguish treatment of local counsel from primary or lead counsel." *Id.* at 57. It held that the dismissal of one of a defendant's multiple attorneys could violate the Sixth Amendment. *Id.* at 58.

The Second Circuit also addressed this issue in *Lainfiesta v. Artuz*, 253 F.3d 151, 156 (2d Cir. 2001). In *Lainfiesta* the "trial judge . . . ruled that a defendant in a criminal case had to settle on just one of his lawyers to examine all the witnesses." 253 F.3d at 152.

The Second Circuit noted that"[t]he record [was] devoid of any indication that the trial judge weighed [the defendant's] Sixth Amendment rights against any countervailing factors which might overcome the qualified right to counsel." *Lainfiesta*, 253 F.3d at 156. The court concluded that, "so stringent a limitation of the right to counsel violated the defendant's rights under the Sixth Amendment[.]" *Id*. at 152.

Notably, Illinois's home circuit, the Seventh Circuit, has sided with the Second and Third circuits. In *Rodriguez v. Chandler*, 492 F.3d 863, 864 (7th Cir. 2007), the Seventh Circuit held that a district court's "disqualifi[cation] [of] one of the two lawyers representing [the defendant] . . . . violated the sixth amendment (applied to the states by the fourteenth) by depriving him of his chosen counsel[.]"

State courts of last resort have agreed with these federal courts and interpreted the Sixth Amendment to apply to co-counsel. Maryland's highest court did so in *State v. Goldberry*, 419 Md. 100, 103 (2011). In *Goldberry*, the defendant hired three lawyers from three different law firms to represent him as co-counsel. 419 Md. at 104. The trial court barred one of those three attorneys from counsel table during the defendant's trial. *Id.* at 107. Maryland's highest court held that "disqualifying one of [the defendant's] three privately retained attorneys" violated the defendant's Sixth Amendment right to representation by his counsel of choice. *Id.* at 103. The highest courts in Mississippi and New York have reached similar conclusions. See *Copes v. Mississippi*, 333 So.3d 1, ¶¶ 5-17 (2022) (analyzing a limitation on co-counsel's participation in a trial as potential Sixth Amendment violation but ultimately that the partial disqualification based on counsel's conduct was proper); *People v. Knowles,* 88 N.Y.2d 763, 769 (1996) (holding "that in exercising its discretion to manage the courtroom, the court's interference with the defendant's established relationship with counsel must be justified by overriding

concerns of fairness or efficiency—regardless of whether counsel is assigned or retained and regardless of whether defendant is represented by more than one attorney).

This issue was also addressed by the Court of Appeals of Ohio in *State v. Bair,* 2021-Ohio-1257, ¶ 20. In *Bair* the reviewing court held that a trial court's decision to only allow one of a defendant's two attorneys to be present at counsel table due to COVID-19 precautions violated the defendant's right to be represented by his counsel of choice. *Bair*, 2021-Ohio-1257, ¶ 20. In so holding, the Ohio court relied on the Third Circuit's decision in *Laura* and the Seventh Circuit's decision in *Rodriguez. Id.* at ¶ 15.

II. This case presents an ideal vehicle for resolving the conflict.

This case presents an especially clean opportunity for the Court to resolve the conflict that has developed in the state and federal courts.

First, the facts relevant to the question presented are simple and well-settled. It is undisputed that lead counsel, Leon Parker, was appointed by the court to represent Mr. Torres. (C 83; R 23). Ms. Bezner was not appointed counsel. The trial court explicitly noted that Ms. Bezner had not sought appointment as co-counsel and that she instead simply entered her appearance as co-counsel. (R 200-201). The trial prosecutor agreed that Ms. Bezner had filed her appearance as a private attorney. (R 152). Mr. Torres wanted Ms. Bezner to represent him as his co-counsel and was willing to waive any potential conflict of interest. (R 172). Additionally, the trial court's decision to disqualify Ms. Bezner was not based on a belief that Mr. Torres' double homicide trial did not require two attorneys. After the trial court disqualified Ms. Bezner, it appointed a different attorney to act as co-counsel with Mr. Parker. (C 395).

Second, the decision below is citable authority. While the decision was not formally published, it was issued as an order pursuant to Illinois Supreme Court Rule 23(b).

Under Illinois law, orders issued pursuant to Rule 23(b) after January 1, 2021 "may be cited for persuasive purposes." Ill. Sup. Ct. R. 23(e)(2022).

Third, the lower court expressly decided the question presented, and its resolution of that question was outcome-dispositive. The Illinois Appellate Court held that the Sixth Amendment right to choose one's attorney does not include the right to select private or *pro bono* co-counsel to serve as counsel along with appointed counsel. (Pet. App. 15a). It also determined that its holding regarding the Sixth Amendment was dispositive. (Pet. App. 15a-16a). Notably, the Illinois Appellate Court did not base its ruling on the details of Ms. Bezner's alleged conflict of interest. Instead, it declined to address those facts and instead held that Mr. Torres' right to counsel of choice did not apply to Ms. Bezner. (Pet. App. 15a). Answering the question presented in this petition would not require this Court to address the issue of whether or not a conflict or potential conflict of interest existed. Instead, were this Court to hold that the Sixth Amendment right to counsel of choice applies to co-counsel, Mr. Torres would ask this Court to remand this case to the Illinois Appellate Court for it to address the propriety of the trial court's disqualification of Ms. Bezner in light of that holding. As such, this case presents an appropriate vehicle to address the question presented.

III. The lower court's decision in Mr. Torres' case is wrong.

The Sixth Amendment guarantees all defendants the right to representation by a second qualified attorney of their choice if that second attorney is willing to represent the defendant as co-counsel without being appointed. For this reason, the Illinois Appellate Court's decision that Mr. Torres' constitutional right to be represented by the counsel of his choice was not implicated by Ms. Bezner's disqualification was wrong.

The Sixth Amendment right to counsel of choice is not limited to a single attorney. So long as the defendant has adequate funds, the Constitution protects his or her right to spend without limitation on the chosen attorneys. See *United States v. Clark*, 717 F.3d 790, 811 (10th Cir. 2013). *Gonzalez-Lopez*, the very case relied on by the court below, involved the district court's refusal to allow the defendant's two chosen lawyers to try his case together. See 548 U.S. at 143, see also (Pet. App. 15a). In *Gonzalez-Lopez*, neither this Court nor the Eight Circuit below suggested the Sixth Amendment analysis was somehow different based on multiple attorneys. See *United States v. Gonzalez-Lopez,* 399 F.3d 924 (8th Cir. 2004).

The Second, Third, and Seventh Circuits have applied a counsel-of-choice analysis in the multi-attorney context. In *Lainfiesta v. Artuz*, 253 F.3d 151, 152 (2d Cir. 2001), the Second Circuit confronted a situation in which the "trial judge . . . ruled that a defendant in a criminal case had to settle on just one of his lawyers to examine all the witnesses." On appeal, "[t]he record [was] devoid of any indication that the trial judge weighed [the defendant's] Sixth Amendment rights against any countervailing factors which might overcome the qualified right to counsel." *Lainfiesta*, 253 F.3d at 156. The Second Circuit concluded, "so stringent a limitation of the right to counsel violated the defendant's rights under the Sixth Amendment[.]" Id. at 152.7

Similarly, in *United States v. Laura*, 607 F.2d 52, 53 (3d Cir. 1979), the Third Circuit found a Sixth Amendment violation when the district court "dismissed one of the defendant's attorneys[.]" The court further found "no basis in law to distinguish treatment of local [secondary] counsel from primary or lead counsel." *Laura*, 607 F.2d at 57. The Seventh Circuit reached essentially the same conclusion in *Rodriguez v. Chandler*, 492 F.3d 863, 864 (7th Cir. 2007), holding the district court's "disqualifi[cation] [of] one of the two lawyers

representing [the defendant] . . . . violated the sixth amendment (applied to the states by the fourteenth) by depriving him of his chosen counsel[.]"

Accordingly, the right to counsel of choice is not limited to a single attorney. To the contrary, as this Court explained in *Gonzalez-Lopez*, "[d]ifferent attorneys will pursue different . . . style[s] of witness examination and jury argument" and one might have a "more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors." 548 U.S. at 150-151. A particular attorney may also have more or unique experience litigating a particular issue or practicing in a particular court. Such differences are precisely why a defendant has a right to a two-attorney defense strategy.

Additionally, Mr. Torres' indigence does not preclude him from choosing *pro bono* counsel to assist his appointed counsel. Not only does an indigent defendant have the right to appointed counsel selected by the court, see *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963), the Constitution also guarantees his or her ability to choose an individual attorney "willing to represent [the defendant] even though he is without funds." *Caplin & Drysdale*, 491 U.S. 617, 624-25 (1989). Read in harmony, these dual Sixth Amendment components must permit the indigent defendant, like the wealthier one, to choose *pro bono* counsel to assist with the defense. As such, the Illinois Appellate Court's decision in Mr. Torres' case was wrong.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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