No. 23-1096

In the Supreme Court of the United States

WILLIAM ALLEN DAVIS,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Everyone agrees that the Sixth Amendment right to counsel limits a trial court's power to force a defendant to change lawyers against his will—at least where the defendant is paying the bill. The question in this case is whether the same is true where the defendant is too poor to hire his own lawyer. As Colorado concedes, the lower courts are deeply divided on this question. On one side, most courts hold that lawyers for poor defendants are no more fungible than lawyers for rich defendants, and that the Sixth Amendment accordingly protects rich and poor alike. On the other side, a few courts, including the Colorado Supreme Court below, hold that the Sixth Amendment affords less protection to the poor.

Colorado spends most of its brief in opposition defending the decision below, BIO 8-22, but its argument rests on a misunderstanding of this Court's cases. The state is no more successful in its attempt to minimize the importance of the conflict among the lower courts. *Id.* at 22-33. This issue is one that recurs often, it is one the Court has never addressed, and it has been percolating in the lower courts for decades. The Court should grant certiorari.

I. Colorado's defense of the decision below rests on a misunderstanding of this Court's cases.

Colorado offers six arguments, all unsound, in defense of the decision below.

The state begins with what it calls a textual argument. *Id.* at 8-9. Colorado notes that before *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Sixth Amendment was not understood to require the gov-

ernment to provide counsel for indigent defendants. BIO 8-9. Now that indigent defendants do have that right, however, the text of the Sixth Amendment provides no basis for distinguishing between rich defendants and poor ones. It provides the same right to counsel for everyone. Unless the Court is prepared to overrule *Gideon*, a measure that Colorado does not propose, the decision below is difficult to reconcile with the Sixth Amendment's text.

Second, Colorado erroneously suggests that the decision below is compelled by *Morris v. Slappy*, 461 U.S. 1 (1983). BIO 10-12. As we explained in our certiorari petition, Pet. 25-26, *Slappy* did not address our issue. The question in *Slappy* was whether the Sixth Amendment guarantees a "meaningful relationship" with counsel rather than merely the assistance of counsel. 461 U.S. at 13. The Court held that it does not. *Id.* at 13-14.

Slappy thus has no bearing on whether rich and poor defendants should be treated identically when a trial court wants to force a defendant to switch lawyers. In this situation, a poor defendant is not claiming a right to a *meaningful relationship* with his counsel. He is only claiming that he has the same right to continue *being represented* by his counsel as is enjoyed by a rich defendant.

Third, Colorado argues that the Sixth Amendment does not restrict a trial court's power to force any defendant to change lawyers, even a defendant who has hired his own counsel. BIO 12-14. Here, Colorado is simply mistaken. The Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be

best." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). Before a trial court can compel a rich defendant to change lawyers against his will, the court needs a good reason at the very least. This is the unanimous view of the lower courts on both sides of the conflict on the question presented, including the courts below. Pet. App. 8a, 18a-19a. The conflict is over whether the same rule applies to poor defendants.

Fourth, Colorado repeats the argument erroneously adopted below by the Colorado Supreme Court, *People v. Rainey*, 527 P.3d 387, 393 (Colo. 2023)—that the right to continue being represented by a specific attorney is entirely derivative of the right to choose that attorney in the first place. BIO 14-18. As we explained in our certiorari petition, this argument is incorrect. Pet. 24-25. At the beginning of a case, indigent defendants must accept the attorneys assigned to them, because there is no other practical way to provide lawyers to all the defendants who need them. Once defense counsel has begun working on a case, however, there is no longer any reason for treating poor defendants differently from rich ones. At that point, all defendants are in the same position, so the Sixth Amendment should apply equally to all of them.

Fifth, Colorado suggests that the Sixth Amendment need not protect poor defendants as much as rich ones, because weaker protection is good enough. BIO 18-19. This suggestion misapprehends the question presented, which asks whether rich and poor defendants should be treated equally, not whether any specific level of protection is adequate.

In any event, weaker protection is not good enough. Under the decision below, a trial court can force a defendant to change lawyers at any time, for any reason or no reason, so long as the defendant cannot show prejudice—that is, so long as the defendant cannot show that he would have been acquitted if he had been allowed to stick with his original attorney. Pet. App. 11a; *Rainey*, 527 P.3d at 396. As amicus NACDL demonstrates, this is scant protection indeed. NACDL Br. 16-21. Appointed counsel must constantly worry about annoying the trial judge with motions or objections, for fear of being replaced with a new attorney. Lawyers for the rich have no such worries. Unlike lawyers for the poor, they are free to advocate zealously for their clients.

Sixth, and finally, Colorado contends that the decision below does not establish a two-tier system of justice. BIO 20-22. It does. Colorado law now explicitly provides two different standards to govern whether the trial court may force the defendant to change lawyers mid-case, one standard for rich defendants and another for poor defendants. The standard for rich defendants is a multi-factor test that values the attorney-client relationship for its own sake, a test that can produce a reversal even where the defendant cannot show prejudice from being forced to change lawyers. *Rainey*, 527 P.3d at 393 & n.2. Poor defendants, by contrast, must show prejudice, under a test that does not place any value on the attorney-client relationship. *Id.* at 394.

The practical effect of this two-class system can be seen in our case. On the eve of trial, the trial judge revoked the appointment of William Davis's lawyer, who had been working on the case for several

months, because the judge was irritated that the case was being tried at all. Pet. 4. If Davis had been a wealthy man who was paying his own lawyer, there is little chance the trial court would have forced a new lawyer upon him. If it had, his conviction would have been reversed. We know this for certain because Davis's conviction *was* reversed by the Court of Appeals, which held that the Sixth Amendment applies equally to the rich and the poor. Pet. App. 13a-21a.

The same two-class system can also be seen in the other cases making up the lower court conflict. Trial courts have, in effect, fired appointed counsel for sins like requesting continuances, *Daniels v. Lafler*, 501 F.3d 735, 738-40 (6th Cir. 2007); *Clements v. State*, 817 S.W.2d 194, 194-200 (Ark. 1991); *People v. Espinal*, 781 N.Y.S.2d 99, 100-02 (N.Y. App. Div. 2004), disagreeing with the court, *Harling v. United States*, 387 A.2d 1101, 1103-06 (D.C. Ct. App. 1978); *People v. Johnson*, 547 N.W.2d 65, 67-71 (Mich. Ct. App. 1996); *In re Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987), and filing more motions than the court thinks necessary, *State v. Huskey*, 82 S.W.3d 297, 302-11 (Tenn. Ct. Crim. App. 2002). It is hard to imagine trial courts forcing wealthy defendants to change lawyers in such circumstances. If they did, the resulting convictions would have been reversed, as can be seen in the outcomes of nearly all these cases.

II. Colorado errs in minimizing the importance of the conflict.

Colorado recognizes that the lower courts are deeply divided over the question presented, and in-

deed the state illustrates the conflict with a helpful chart. BIO 32. As the Indiana Supreme Court recently observed, "[c]ourts around the country are divided over whether the Sixth Amendment guarantees criminal defendants the continuity of court-appointed counsel." *State ex rel. Allen v. Carroll Circuit Ct.*, 226 N.E.3d 206, 214 (Ind. 2024).

Colorado provides three reasons for letting the conflict fester, but there is no merit to any of them.

First, Colorado errs in suggesting that the Court has put the issue to rest. BIO 25-26. The state cites four of this Court's decisions, but none even addressed the issue. In *Gonzalez-Lopez*, the Court merely noted that indigent defendants have no right to choose a particular appointed attorney at the beginning of a case. 548 U.S. at 144. The Court had no occasion to discuss whether, once counsel has begun working on the case, the Sixth Amendment treats rich and poor defendants differently. The same is true of *Caplan & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989). In *Wheat v. United States*, 486 U.S. 153, 159-62 (1983), the Court held that *all* defense lawyers, whether retained or appointed, may be replaced if the trial court has a good enough reason. Again, the Court had no occasion to address whether there are two different standards, one for retained counsel and another for appointed counsel. Finally, as we have already seen, *Slappy* merely held that defendants, whether rich or poor, have no constitutional right to a "meaningful relationship" with their attorneys. 461 U.S. at 13-14. The Court did not address whether the Sixth Amendment gives more protection to rich defendants

than to poor ones. The question presented is one that this Court has never addressed.

The lower courts certainly do not think this Court has resolved the question. The most recent of this Court's cases touted by Colorado was *Gonzalez-Lopez*, decided in 2006, but several of the lower court decisions taking our view of the issue came afterwards. *See State v. Cottrell*, 809 S.E.2d 423, 430 (S.C. 2017); *State v. Taylor*, 171 A.3d 1061, 1075 (Conn. Ct. App. 2017); *State v. McKinley*, 860 N.W.2d 874, 879-80 (Iowa 2015); *Lane v. State*, 80 So. 3d 280, 297 (Ala. Ct. Crim. App. 2010). The second-most recent case cited by Colorado was *Caplan & Drysdale*, from 1989, but many more of the lower court decisions taking our side came after that. *See Weaver v. State*, 894 So. 2d 178, 187-89 (Fla. 2004); *Espinal*, 781 N.Y.S.2d at 101; *Huskey*, 82 S.W.3d at 305-06; *Commonwealth v. Jordan*, 733 N.E.2d 147, 152 (Mass. App. Ct. 2000); *Johnson*, 547 N.W.2d at 152; *Clements*, 817 S.W.2d at 200; *Stearnes v. Clinton*, 780 S.W.2d 216, 222 (Tex. Ct. Crim. App. 1989).

Second, Colorado mistakenly contends that many of the lower court cases taking our view of the issue rest on a "repudiated rationale." BIO 27-31. The rationale is that of the California Supreme Court, which held, in one of the earliest cases to address the issue:

> [W]e must consider whether a court-appointed counsel may be dismissed, over the defendant's objection, in circumstances in which a retained counsel could not be removed. A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case

> is competent. But the attorney-client relationship is not that elementary: it involves not just the causal[1] assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. … It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Smith v. Superior Court, 440 P.2d 65, 74 (Cal. 1968). This passage would be cited by several other courts in reaching the same conclusion.

This is the rationale that Colorado claims was "repudiated." Repudiated by whom? Not by the many courts in other states that have cited it in subsequent years. Not by this Court, whose sole citation of *Smith* was with approval. *See Slappy*, 461 U.S. at 23-24 (Brennan, J., concurring). Colorado suggests that *Smith* has been repudiated by the California Supreme Court, BIO 28, but even this limited claim is not true. As we explained in our certiorari petition, Pet. 11 n.1, the California Supreme Court merely noted uncertainty as to whether its opinion

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[1] This word should perhaps be "casual," but it is "causal" in the original.

in *Smith* relies on the federal or the state constitution. *People v. Jones*, 91 P.3d 939, 945 (Cal. 2004). The California Supreme Court has never repudiated *Smith*'s rationale.

In any event, even if the California Supreme Court were to repudiate *Smith*, that would not take away the fact that so many other state courts have agreed with its rationale. California would be switched from one side of the lower court conflict to the other, but the conflict would be just as big.

Third, and finally, Colorado worries that treating rich and poor defendants equally "would have massive implications for our justice system." BIO 34. Not so. The Sixth Amendment already applies equally to rich and poor defendants in most of the states in which courts have addressed this issue—in Alabama, Alaska, Arkansas, Arizona, California, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New York, South Carolina, Tennessee, and Texas. Pet. 8-14. The sky has not fallen. The justice system in these states seems to be working as well as it does in Colorado.

The question presented in this case has divided the lower courts for a long time. It has important practical consequences, as can be seen by the differing outcomes of this case in the state court of appeals and the state supreme court. The Court should decide whether the Sixth Amendment provides different standards for rich defendants and poor defendants, or whether it applies equally to both.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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