No. 24-

In the Supreme Court of the United States

ROBERT JAMES RAINEY,

Petitioner,

v.

COLORADO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, once counsel has been appointed for an indigent defendant, the Sixth Amendment guarantees the defendant the same right to continued representation by that counsel as is enjoyed by defendants affluent enough to retain counsel.

The same question is presented in *Davis v. Colorado*, No. 23-1096, pet. for cert. filed Apr. 5, 2024.

RELATED PROCEEDINGS

Colorado Supreme Court:

People v. Rainey, No. 21SC285 (Apr. 10, 2023)

Colorado Court of Appeals:

People v. Rainey, No. 17CA641 (Mar. 18, 2021)

El Paso County (Colo.) District Court:

People v. Rainey, No. 16CR3477 (May 10, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Robert James Rainey respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is published at 527 P.3d 387 (Colo. 2023). The opinion of the Colorado Court of Appeals is published at 491 P.3d 531 (Colo. Ct. App. 2021).

JURISDICTION

The Colorado Supreme Court entered its final judgment on June 10, 2024. On July 18, 2024, Justice Gorsuch extended the time to file this certiorari petition to October 8, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence."

STATEMENT

This case is the companion case to *Davis v. Colorado*, No. 23-1096, pet. for cert. filed Apr. 5, 2024. The two cases involve the same issue and were decided on the same day by the Colorado Supreme Court. *See* App. 2a-40a; *People v. Davis*, 527 P.3d 380 (Colo. 2023). This case arrives at the Court several months after *Davis* because both cases required further litigation in the state courts before there was

a final judgment, and because the state courts decided *Davis* more quickly than they decided this case.

If the Court grants certiorari in *Davis*, the Court should hold this petition until *Davis* has been decided and then dispose of this petition as appropriate.

1. Robert James Rainey was charged with nine offenses relating to a single incident of domestic violence. App. 3a. Trial was set for January 9, 2017. *Id.* It was postponed to January 10 because a storm damaged the courthouse, and then again (over Rainey's objection) to February 2 because the victim did not appear, and then again to February 23 because the jury commissioner failed to have jurors available. *Id.* at 3a-4a.

On February 23, the prosecution moved for another continuance because one of state's witnesses was unavailable. *Id.* at 4a. The trial court granted the continuance over Rainey's objection. *Id.* Trial was set for Monday, March 6. *Id.*

On Friday, March 3, defense counsel Neil DeVoogd, a public defender, requested a continuance because he had a long-planned vacation scheduled for the following week. *Id.* He explained that he had not objected to the March 6 trial date because had not expected the case to go to trial. *Id.* DeVoogd argued that forcing Rainey to change counsel on the eve of trial would deny Rainey his right to counsel of choice. DeVoogd offered to waive the speedy trial deadline to allow him to continue representing Rainey. *Id.*

The trial court acknowledged that each of the prior delays was attributable to the prosecution or the court, and that none were attributable to the de-

fense. *Id.* at 43a. The trial court found that DeVoogd's request for a continuance was not a dilatory tactic. *Id.* The court noted that it "felt terrible for Mr. Rainey in the midst of all this" and that it was "sympathetic" to the request. *Id.*

The trial court nevertheless denied the continuance. *Id.* at 4a-5a. At trial on March 6, Rainey was represented by two new lawyers from the public defender's office. *Id.* at 5a. Rainey was convicted on two of the nine counts. *Id.*

2. The Colorado Court of Appeals reversed. *Id.* at 41a-54a.

The Court of Appeals rejected the state's argument "that because Rainey, as an indigent defendant, had no constitutional right to choose his lawyer, he also had no right to continued representation by his appointed lawyer." *Id.* at 45a. The court explained instead that "once counsel is appointed, the attorney-client relationship is no less inviolable than if the counsel had been retained by the defendant." *Id.* at 45a-46a (citation, brackets, and internal quotation marks omitted). The court accordingly held that once a lawyer has been appointed for an indigent defendant, the defendant "has a right to proceed with his specific appointed lawyer, not just any appointed lawyer from the public defender's office." *Id.* at 47a.

The Court of Appeals recognized that "the right to counsel of choice, including the right to continued representation, is not absolute." *Id.* at 49a. The court remanded the case to the trial court to reassess Rainey's request for continued representation by

DeVoogd under the proper Sixth Amendment standard. *Id.* at 52a-54a.

Because the Court of Appeals reversed Rainey's convictions on this ground, it did not address the other claims of error he raised on appeal. *Id.* at 54a n.4.

3. The Colorado Supreme Court reversed. *Id.* at 2a-40a.

The court held that an indigent defendant has no Sixth Amendment right to continued representation by the lawyer appointed to represent him. *Id.* at 3a. "It is well settled," the court began, "that the right to counsel of choice does not extend to defendants for whom the court appoints counsel." *Id.* at 8a. The court reasoned that "[t]he only way that a right to continued representation by a specific attorney can derive from the Sixth Amendment is as a corollary of the right to counsel of choice." *Id.* at 11a. "But since defendants who receive court-appointed counsel do not have a right to choose their attorneys," the court concluded, "they do not have a constitutional right to continued representation by any particular appointed attorney." *Id.*

The Colorado Supreme Court recognized that "other state courts … have found a constitutional right to continuity of counsel." *Id.* at 11a n.3. But the court declined to follow these decisions. *Id.*

Justice Gabriel dissented. *Id.* at 20a. He explained that "treating parties differently at the appointment of counsel stage makes practical sense—indeed, is a practical necessity—because allowing indigent defendants to choose who from the public defender's or alternate defense counsel's offices will represent

them would simply be unworkable for both of those offices and for courts alike." *Id.* at 26a. "The same concerns do not apply, however, to the scenario presented here, where defendants wish to *retain* their appointed counsel." *Id.* Justice Gabriel concluded that "there is no reason to treat defendants with means differently from indigent defendants when it comes to the right to the continuity of counsel." *Id.*

Justice Gabriel noted that his view was "the majority rule among the state courts." *Id.* at 29a.

The Colorado Supreme Court remanded the case to the Court of Appeals to consider the other claims of error Rainey had raised. *Id.* at 20a. The Court of Appeals rejected these other claims. *Id.* at 56a-65a. The Colorado Supreme Court denied review. *Id.* at 55a.

REASONS FOR GRANTING THE WRIT

In the decision below, the Colorado Supreme Court joined the smaller side of a lower court conflict over whether indigent defendants enjoy the same Sixth Amendment right to continuity of representation that affluent defendants enjoy. The Colorado Supreme Court's decision is wrong, and it will have significant practical consequences.

The same question is presented in *Davis v. Colorado*, No. 23-1096, the companion case to this case. The Court should hold this petition until it has decided *Davis*. If the Court grants certiorari and reverses in *Davis*, it should grant this petition, vacate the judgment below, and remand this case to the state courts.

I. The lower courts are divided over whether indigent defendants enjoy the same Sixth Amendment right to continuity of counsel that affluent defendants enjoy.

This issue has arisen in many jurisdictions. Most courts have held that all defendants, no matter how rich or poor, enjoy the same Sixth Amendment right to continued representation by the attorney who is already representing them. These courts recognize that while indigent defendants have no right to choose their lawyers at the outset, matters are different once an attorney has been appointed and has started working on the case. At that point, when a defendant already has a confidential relationship with his or her counsel, the Sixth Amendment guarantees the same right of continued representation to all defendants.

By contrast, courts in a few jurisdictions, now including Colorado, have held that indigent defendants enjoy no such right. These courts have reasoned that the right to continued representation derives entirely from the right to choose one's attorney at the outset, and that since indigent defendants have no right to choose any particular lawyer at the moment of appointment, they can't have any right to continue being represented by a lawyer who has already been appointed.

A. Most courts hold that once counsel has been appointed, indigent defendants enjoy the same Sixth Amendment right to continued representation as affluent defendants.

Most of the courts to address this question have held that the Sixth Amendment right to continuity of representation is the same for all defendants, whether indigent or affluent. These courts include the highest courts of Alaska, Arkansas, Arizona, California, the District of Columbia, Florida, Iowa, South Carolina, and Texas, as well as intermediate appellate courts in Connecticut, Illinois, Massachusetts, Maryland, Michigan, Minnesota, New York, and Tennessee.

For instance, in *State v. McKinley*, 860 N.W.2d 874, 879 (Iowa 2015), the Iowa Supreme Court noted that "[c]ourts are split on the importance of continuity of the relationship between indigent defendants and their appointed attorneys. Some have concluded there is no right to continuity of appointed counsel," while "[o]n the other hand, several courts have concluded once an attorney is appointed, the court should be just as hesitant to remove them as it would be to remove a privately-retained attorney." The Iowa Supreme Court declared: "We adopt the latter view." *Id.* at 880. The court explained:

> Trust and good communication are crucial features of an attorney-client relationship. This is true when a client has resources and privately retains a lawyer; and it is no less true when a client is indigent and obtains counsel appointed by the court. In both instances, opportunities

> for establishing trust and effective communication are generally enhanced over time through interpersonal contact. Once established, the interest in maintaining a relationship of trust with counsel is of no less importance to an indigent client than to one with ample resources to hire counsel.

Id.

The Florida Supreme Court reached the same holding in *Weaver v. State*, 894 So. 2d 178 (Fla. 2004). "[A]n indigent defendant is not entitled to choose a particular court-appointed attorney," the court reasoned, but "once counsel is appointed, an attorney-client relationship is established and is no less inviolable than if counsel had been retained by the defendant himself." *Id.* at 187-88 (internal quotation marks omitted). The court observed that "the attorney-client relationship is independent of the source of compensation because an attorney's responsibility is to the person he represents rather than the individual or entity paying for his services." *Id.* at 188-89. The court added that "to allow trial courts to remove an indigent defendant's court-appointed counsel with greater ease than a non-indigent defendant's retained counsel would stratify attorney-client relationships based on defendants' economic backgrounds." *Id.* at 189.

See also McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974) ("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.") (brackets and citation omitted); *State v. Madrid*, 468 P.2d 561, 563 (Ariz. 1970) (same); *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991) ("where, as here, a trial court terminates the representation of an attorney, *either private or appointed*, over the defendant's objection and under circumstances which do not justify the lawyer's removal and which are not necessary for the efficient administration of justice, a violation of the accused's right to particular counsel occurs") (emphasis added); *Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968) ("[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 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.");[1] *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. Ct. App. 1978) (citing *McKinnon* and

[1] Below, the Colorado Supreme Court erroneously suggested that the California Supreme Court has since changed its view. App. 11a n.3 (citing *People v. Jones*, 91 P.3d 939, 945 (Cal. 2004)). In *Jones*, however, the court merely noted that its opinion in *Smith* is not clear as to whether the court was relying on the federal or state constitution. The court did not modify or overrule the holding of *Smith*.

Smith for the proposition that "once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not arbitrarily remove the attorney, over the objections of both the defendant and his counsel"); *State v. Cottrell*, 809 S.E.2d 423, 430 (S.C. 2017) ("We agree with Cottrell's argument that his relationship with appointed attorneys, once established, should be afforded the same level of deference as that which is afforded to clients with retained counsel."); *Stearnes v. Clinton*, 780 S.W.2d 216, 222 (Tex. Ct. Crim. App. 1989) ("[O]nce an attorney is appointed the same attorney-client relationship is established [as when an attorney is retained] and it should be protected. Any effort to distinguish between the two will be premised upon a fallacy because the attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service.") (citation and internal quotation marks omitted).

For decisions to the same effect from intermediate appellate courts, see *Lane v. State*, 80 So. 3d 280, 297 (Ala. Ct. Crim. App. 2010) ("Although an indigent defendant does not have the right to force a trial court to appoint counsel of his or her own choosing, once counsel is appointed, the trial judge is obliged to respect the attorney-client relationship created through the appointment.... The attorney-client relationship between appointed counsel and an indigent defendant is no less inviolate than if counsel is retained.") (citation and internal quotation marks omitted); *State v. Taylor*, 171 A.3d 1061, 1075 (Conn. Ct. App. 2017) ("We agree with the California Supreme Court, which stated: '[O]nce counsel is ap-

pointed 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.'") (citation omitted); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. App. Ct. 1983) (holding that "for purposes of removal by the trial court, a court-appointed attorney may not be treated differently than privately retained counsel," because the contrary view would "give rise to an impermissible distinction between indigent and nonindigent defendants"); *English v. State*, 259 A.2d 822, 825-26 (Md. Ct. Spec. App. 1969) ("The only distinction between appointed counsel and privately employed counsel, in the frame of reference of this discussion, is as to choice of a particular attorney. The court makes the choice as to appointed counsel; the accused has the choice as to privately employed counsel. … But once counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial. … So the accused cannot be forced to be heard at trial through counsel other than the one employed by him or appointed by the court, as the case may be.") (citations omitted); *Commonwealth v. Jordan*, 733 N.E.2d 147, 152 (Mass. App. Ct. 2000) ("Since the right to appointed counsel does not include the right to dictate who shall be appointed, the defendant, in the view of the Commonwealth, has no legal basis for urging error in the judge's disqualification of counsel. We disagree."); *People v. Johnson*, 547 N.W.2d 65, 69 (Mich. Ct. App. 1996) (holding that "it is irrelevant for pur-

poses of the Sixth Amendment whether a trial court improperly removes retained or appointed counsel" because "once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the trial court may not arbitrarily remove the attorney over the objection of both the defendant and counsel"); *In re Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987) (citing *Harling* for the proposition that "once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not arbitrarily remove the attorney over the objection of both the defendant and counsel"); *People v. Espinal*, 781 N.Y.S.2d 99, 101 (N.Y. App. Div. 2004) ("Once an attorney-client relationship has formed between assigned counsel and an indigent defendant, the defendant enjoys a right to continue to be represented by that attorney as counsel of his own choosing.") (citation and internal quotation marks omitted); *State v. Huskey*, 82 S.W.3d 297, 305-06 (Tenn. Ct. Crim. App. 2002) ("[A]ny meaningful distinction between indigent and non-indigent defendants' right to representation by counsel ends once a valid appointment of counsel has been made. … Thus, we will view the defendant's right to lead counsel's continuing representation through appointment in the same manner as if he were retained by the defendant.").

B. A few courts hold that indigent defendants do not enjoy the same Sixth Amendment right to continued representation that affluent defendants enjoy.

The other side of the split is much smaller. It includes five courts—the Second, Fourth, and Sixth Circuits, the Louisiana Supreme Court, and now the Colorado Supreme Court. In these jurisdictions, the Sixth Amendment guarantees a right to continued representation only for defendants who can afford to retain their own attorneys. Where an attorney is appointed, by contrast, these courts hold that the Sixth Amendment does not guarantee the defendant any right to continued representation by that attorney.

In *Daniels v. Lafler*, 501 F.3d 735 (6th Cir. 2007), for example, the Sixth Circuit held that an indigent defendant has no Sixth Amendment right to challenge the trial court's replacement of his appointed attorney with a different one. The court reasoned:

> In *Powell v. Alabama,* 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932), the Supreme Court stated that a criminal defendant who hires, and pays for, an attorney has the right to select that attorney. More recently, in *United States v. Gonzalez–Lopez,* —— U.S. ——, 126 S.Ct. 2557, 2563, 165 L.Ed.2d 409 (2006), it held that a defendant could obtain a new trial without showing prejudice when the trial court arbitrarily denied him the services of his retained counsel—in that case, by erroneously refusing to grant the chosen attorney admission *pro hac vice.* If they applied to Daniels, the rights at is-

> sue in *Powell* and *Gonzalez–Lopez* might very well entitle him to relief.
>
> Yet neither *Powell* nor *Gonzalez–Lopez* suggests that the choice-of-counsel right at issue is universal to all defendants. The *Gonzalez–Lopez* Court explicitly stated that the basis for its decision was "the right of a defendant *who does not require appointed counsel* to choose who will represent him," indicating that the erroneous or arbitrary exclusion of court-appointed counsel might not trigger the same constitutional scrutiny. *Id.* at 2561 (emphasis added). In *Caplin & Drysdale v. United States,* 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989), the Court was even more direct: "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." Although this language from *Gonzalez–Lopez* and *Caplin & Drysdale* is dicta, its import is clear: Daniels, an indigent defendant forced to rely on court-appointed counsel, has no choice-of-counsel right. Thus, he is not entitled to relief.

Daniels, 501 F.3d at 739.

See also United States v. Parker, 469 F.3d 57, 61 (2d Cir. 2006) (Sotomayor, J.) ("There is no constitutional right to continuity of appointed counsel."); *United States v. Basham*, 561 F.3d 302, 324 (4th Cir. 2009) ("[A]n indigent criminal defendant has no constitutional right to have a particular lawyer represent him. Thus, the only right implicated by the district court's disqualification of [defense counsel] was the right to effective assistance of counsel.") (citation

omitted); *State v. Reeves*, 11 So. 3d 1031, 1066 (La. 2009) (holding that because an indigent defendant has no constitutional right to choose his appointed counsel, "there is nothing in either the federal or state constitutions which would provide Reeves with the right to maintain a particular attorney-client relationship in the absence of a right to counsel of choice").

Below, the Colorado Supreme Court joined this side of the split. The court concluded that "[t]he only way that a right to continued representation by a specific attorney can derive from the Sixth Amendment is as a corollary of the right to counsel of choice." App. 11a. "But since defendants who receive court-appointed counsel do not have a right to choose their attorneys, they do not have a constitutional right to continued representation by any particular appointed attorney." *Id.*

The Colorado Supreme Court recognized the existence of this conflict. *Id.* at 11a n.3 (declining "to follow the lead of other state courts that have found a constitutional right to continuity of counsel"). In its briefing in the state supreme court, Colorado also acknowledged the split and argued that most courts to address the issue had decided it incorrectly. Colo. Sup. Ct. People's Reply Br. at 2-11.

Recent cases addressing the issue have also recognized the existence of this conflict. *See State ex rel. Allen v. Carroll Circuit Ct.*, 226 N.E.3d 206, 214 (Ind. 2024) ("Courts around the country are divided over whether the Sixth Amendment guarantees criminal defendants the continuity of court-appointed counsel."); *McKinley*, 860 N.W.2d at 879-80 (discussing the split); *Lane*, 80 So. 3d at 298 (in-

cluding a "but see" cite to the cases on the minority side of the split, after canvassing the cases on the majority side).

A conflict of this magnitude will never be resolved without this Court's intervention.

C. The split produces divergent outcomes in several recurring circumstances.

This split has important practical consequences. If there is no Sixth Amendment right to continuity of appointed counsel, a trial court can force an indigent defendant to change lawyers in the middle of a case so long as the defendant cannot show prejudice from the change—that is, so long as the defendant cannot show that he would have been acquitted had he been allowed to stick with his original attorney. App. 18a. By contrast, if indigent defendants enjoy the same right to continuity of counsel as affluent defendants enjoy, the trial court is much less free to revoke a defense lawyer's appointment and to substitute a new lawyer against the defendant's will.

Robert Rainey's case exemplifies one recurring situation in which this question makes a big difference. The trial court forced Rainey to change lawyers on the eve of trial because the court did not wish to grant a continuance. App. 4a-5a. If Rainey had been wealthy enough to retain his own lawyer, the trial court could not have compelled him to change lawyers without giving great weight to Rainey's choice of counsel. *Id.* at 53a. In most jurisdictions, Rainey's poverty would not have changed this outcome. In Colorado, however, because Rainey was too poor to retain a lawyer, the trial court could force him to

change counsel merely to suit the court's own convenience, without any regard to Rainey's choice of counsel.

Several of the cases on both sides of the split involve the same situation—appointed defense counsel requests a continuance, and the question is whether the court's scheduling concerns allow the court to revoke counsel's appointment and substitute a lawyer who can commence the trial at an earlier date, without considering the defendant's preference to stick with the lawyer who has already been working on the case. In these cases, the choice of rule makes all the difference.

In jurisdictions that recognize a Sixth Amendment right to continuity of appointed counsel, courts reverse convictions on this ground. *See Clements*, 817 S.W.2d at 194-200 (reversing a conviction where the trial court revoked the appointment of defense counsel for requesting a continuance); *Espinal*, 781 N.Y.S.2d at 100-02 (reversing a conviction where the trial court revoked the appointment of defense counsel for requesting a continuance).

By contrast, in jurisdictions that do not recognize a Sixth Amendment right to continuity of appointed counsel, courts affirm convictions in these circumstances, because the defendant cannot show prejudice from the appointment of a new lawyer who satisfies the constitutional standard of effectiveness. *See Daniels*, 501 F.3d at 738-40 (affirming denial of habeas corpus, despite reviewing the state court decision *de novo*).

Another recurring situation in which this issue makes a difference is where the trial court revokes the appointment of defense counsel against the de-

fendant's wishes because the trial court believes that defense counsel has a conflict. In jurisdictions that recognize a Sixth Amendment right to continuity of appointed counsel, courts reverse convictions under these circumstances. *See McKinley*, 860 N.W.2d at 876-86; *Lane*, 80 So. 3d at 289-303. By contrast, in jurisdictions that do not recognize such a right, courts affirm convictions in these circumstances, again because the defendant cannot show prejudice from the appointment of a new lawyer who satisfies the constitutional standard of effectiveness. *See Basham*, 561 F.3d at 321-25.

Courts on the majority side of the split likewise reverse convictions and vacate orders substituting counsel where the trial court revokes the appointment of defense counsel against the defendant's wishes (1) because counsel expresses disagreement with the court, *Harling*, 387 A.2d at 1103-06; *Johnson*, 547 N.W.2d at 67-71; *M.R.S.*, 400 N.W.2d at 152, (2) because counsel files more pretrial motions than the court considers necessary, *Huskey*, 82 S.W.3d at 302-11, and (3) because the court doubts counsel's competence, *McKinnon*, 526 P.2d at 21-23; *Smith*, 440 P.2d at 66-75; *Davis*, 449 N.E.2d at 240-43. These cases would all have come out differently in Colorado and the other jurisdictions on the minority of the split, because in none of these cases was the defendant able to show that the replacement lawyer forced upon him by the trial court fell below the constitutional standard of effectiveness.

The conflict among the lower courts thus yields different results in a few recurring circumstances.

II. The decision below is wrong.

Certiorari is also warranted because the Colorado Supreme Court is mistaken. The Sixth Amendment guarantees all defendants, whether rich or poor, the same right to continuity of representation by the lawyer who has already begun working on the defendant's case.

It has long been "settled law that an indigent defendant has the same right to effective representation by an active advocate as a defendant who can afford to retain counsel of his or her choice." *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988). "Except for the source of payment," the Court has explained, the relationship between appointed counsel and the defendant is "identical to that existing between any other lawyer and client. 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.'" *Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981) (quoting ABA Standards for Criminal Justice 4–3.9 (2d ed. 1980)).

The Court has recognized only one exception to this rule. A defendant who can afford to hire his own attorney has the right to choose at the outset which attorney he retains, *Powell v. Alabama*, 287 U.S. 45, 53 (1932), but a defendant who needs appointed counsel must at the outset accept the attorney assigned to represent him. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). This narrow exception to the general principle of equality of representation rests solely on a practical concern. It would be unworkable in practice to allow each indigent defendant, at the moment he is charged, to choose

among the hundreds or thousands of lawyers in a public defender office or on a panel of attorneys available for assignment. At the beginning of a case, therefore, affluent defendants enjoy a right to counsel of choice that indigent defendants lack. *Caplan & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989).

Apart from this single pragmatic exception, however, there is "no basis for drawing a distinction between retained and appointed counsel." *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980). There are not two Sixth Amendments, one for the rich and one for the poor. There is just one, and it guarantees the same right to counsel for all defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The practical concern that permits treating poor defendants differently from wealthy ones at the outset of a case completely disappears once counsel has been assigned and has begun working on the case. At that point, there is no longer any need to choose which public defender or which panel member will represent an indigent defendant. The choice has already been made, and now the indigent defendant is in precisely the same position with respect to his lawyer as the affluent defendant. There is no reason to treat them differently.

To be sure, no defendant has an *absolute* right to continue using the same lawyer, because there are legitimate reasons a defendant might be required to change counsel. *Wheat v. United States*, 486 U.S. 153, 159-60 (1988). But a poor defendant's right to continuity of counsel is no weaker than a rich defendant's right to continuity of counsel.

It hardly needs saying that the right to continue with the same lawyer is just as important to indigent defendants as it is to affluent ones. All defendants must place an enormous amount of trust in their attorneys. *Luis v. United States*, 578 U.S. 5, 11 (2016) (underscoring "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust"). All defendants must reveal intimate and possibly incriminating information. All defendants must allow their attorneys to make decisions that may spell the difference between incarceration and liberty. The attorney-client relationship is equally inviolate no matter how much money the defendant has. But no defendant, whether rich or poor, can confide in his counsel with any level of confidence without some assurance that the lawyer who represents him today will also represent him tomorrow. For this reason, the ABA's Criminal Justice Standards provide: "Representation of an accused establishes an inviolable attorney-client relationship. Removal of counsel from representation of an accused, therefore, should not occur over the objection of the attorney and the client." Standard 5-6.3 (3d ed. 1992).

Nor can appointed counsel represent defendants as zealously as retained counsel if they know that their appointments can be revoked at any moment. *Cf. Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000) ("an indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests"). Defense lawyers must sometimes perform tasks that annoy trial judges—they request continuances, they file pretrial motions, they lodge objections, they conduct vigorous cross-examinations,

they contest the court's rulings, and they generally try, by all fair means, to disrupt the prosecution's case. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). But no defense counsel could undertake these tasks properly if he needs to walk on eggshells for fear that the judge will revoke his appointment. This is not a far-fetched scenario. In some of the cases that make up the lower court conflict, trial courts have, in effect, fired appointed counsel for sins like filing too many motions or disagreeing with the court's rulings. If a trial court cannot force a retained attorney off a case in these circumstances, a court should not be able to force an appointed attorney off the case either.

Why, then, have some courts thought otherwise? There are two reasons.

First, some lower courts, including the Colorado Supreme Court below, have reasoned 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, and thus that an indigent defendant cannot enjoy the former because he lacks the latter. *See* App. 11a; *Daniels*, 501 F.3d at 738-39; *Basham*, 561 F.3d at 324-25. But the premise of this argument is mistaken. The right to continued representation does *not* derive from the right to choose an attorney at the outset. This Court has said nothing of the kind, and for good reason.

Rather, "the right to be assisted by counsel of one's choice," *Gonzalez-Lopez*, 548 U.S. at 148, is the

very thing that is guaranteed by the Sixth Amendment right to counsel. An indigent defendant's inability to choose a specific appointed lawyer at the beginning of a case is merely a narrow exception to this general principle, an exception that exists only because it would be utterly unworkable to run a public defender office without it. Once counsel has been appointed and has set to work, however, there is no longer any practical reason for denying indigent defendants the same right to continue being assisted by counsel of choice as is enjoyed by defendants who can afford to pay their own lawyers.

Below, the Colorado Supreme Court cited three of this Court's cases on its way to determining that the right to continuity of counsel in the middle of a case is entirely derivative of the right to choose one's counsel at the outset of a case. App. 8a-9a (citing *Gonzalez-Lopez*, *Caplin & Drysdale*, and *Wheat*). In fact, however, none of these three cases offers any support for that proposition. *Gonzalez-Lopez* and *Caplin & Drysdale* both noted that indigent defendants have no right to choose a particular appointed attorney at the outset, but neither case addressed (or had any occasion to address) whether the right to continuity of counsel is derivative of the right to choose counsel at the outset. *Gonzalez-Lopez*, 548 U.S. at 144; *Caplin & Drysdale*, 491 U.S. at 624. *Wheat* held that *all* defense lawyers, whether retained or appointed, may be replaced if the court has a sufficiently strong reason. *Wheat*, 486 U.S. at 159-62. The Court has never held or even suggested that the right to continuity of counsel in the middle of a case is derivative of the right to choose one's attorney at the start of a case.

Second, one lower court on the smaller side of the split has misunderstood a passage in *Morris v. Slappy*, 461 U.S. 1 (1983). In *Slappy*, the Court of Appeals had interpreted the Sixth Amendment to guarantee not just the assistance of counsel but something more amorphous—a "meaningful relationship" with counsel. *Id.* at 13. This Court held that the Court of Appeals erred. "No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel," the Court explained. *Id.* at 13-14. "Accordingly, we reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." *Id.* at 14.

The Louisiana Supreme Court reasoned that this passage in *Slappy* contradicts any argument by an indigent defendant that he has a right to continue being represented by an attorney with whom he already has a relationship. *Reeves*, 11 So. 3d at 1065-66. But this reasoning is faulty. A defendant who wants to continue being represented by his attorney is not claiming a right to a *meaningful relationship* with his counsel. He is merely claiming a right to continue *being represented* by his counsel. Moreover, *Slappy* held that no defendant has a right to a meaningful relationship with counsel, whether "privately retained or provided by the public." 461 U.S. at 13. If one were to read this passage in *Slappy* as denying a right to continuity of *appointed* counsel, one would also have to read it to deny a right to continuity of *retained* counsel. And that certainly can't be correct. *See Gonzalez-Lopez*, 548 U.S. at 144-48.

Indeed, if *Slappy* has any bearing on whether indigent defendants enjoy the same right to continuity of representation as is enjoyed by affluent defendants, the case implies that they do. Justice Brennan's concurring opinion in *Slappy*, unlike the opinion of the Court, addressed the question. Justice Brennan concluded that "the considerations that may preclude recognition of an indigent defendant's right to choose his own counsel, such as the State's interest in economy and efficiency, … should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence." *Slappy*, 461 U.S. at 23 n.5 (Brennan, J., concurring in the result). The opinion of the Court did not disagree.

III. This is an important issue, and this case is an excellent vehicle for resolving it.

This issue's importance hardly needs elaboration, in light of the frequency with which it arises and the magnitude of the lower court conflict. And few issues in criminal procedure are more fundamental than whether, once counsel has been appointed, indigent defendants enjoy only a watered-down version of the Sixth Amendment.

This case is an excellent vehicle for answering the question presented. The issue was addressed at length by both appellate courts below. It is the only issue left in the case. And we know that this Court's resolution of the issue will be outcome-determinative: The state Court of Appeals, taking one view, reversed petitioner's convictions, while the

state Supreme Court, taking the other view, reversed the reversal.

The court has denied petitions for certiorari that raised substantially the same question, but these prior cases were not proper vehicles for addressing the question. In *Montgomery v. United States*, 140 S. Ct. 2820 (2020) (No. 19-5921), the facts of the case did not give rise to the question assertedly presented, which was procedurally defaulted in any event. In *Alabama v. Lane*, 565 U.S. 1185 (2012) (No. 11-627), the petitioner failed to raise the issue in the state courts. In *Weis v. Georgia*, 562 U.S. 850 (2010) (No. 09-10175), the court below had not even addressed the issue. *See Weis v. State*, 694 S.E.2d 350 (Ga. 2010). In the ensuing years, moreover, the conflict among the lower courts has grown larger, with several new cases on both sides. Further percolation would be pointless, as there is nothing new to be said on either side. The Court is very unlikely to see a better vehicle than this one.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Davis v. Colorado*, No. 23-1096. If the Court grants certiorari and reverses in *Davis*, it should grant this petition, vacate the judgment below, and remand this case to the state courts.

Respectfully submitted,

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