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

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GREGG COSTA
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
800 Main Street, # 3000
Houston, TX 77002
(346) 718-6600
gcosta@gibsondunn.com

RYAN AZAD
MUDIT BUCH
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

JEFFREY T. GREEN
Co-Chair, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L. Street N.W.
Washington, D.C. 20036

HAYLEY LAWRENCE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Amicus Curiae

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.

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many *amicus* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

Professionals are not fungible. They have their own techniques, approaches, and personalities. And they become even more distinctive once they begin assisting a particular individual and learn about that person's needs, goals, and desires. That is why a sick patient typically wishes to see *her* doctor—even if many physicians are available. And it is why a couple planning to sell their first home often reaches out to *their* realtor—not another who advertises their service in the area.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* notified all parties of its intention to file this brief more than 10 days prior to its due date. *See* Sup. Ct. R. 37.2.

Criminal defendants—rich and poor alike—are no different. After establishing a relationship with an attorney, many defendants wish to continue being represented by *that* attorney—not another they could have initially retained or been assigned. After all, defendants confide in their counsel and form a confidential relationship with the person who represents them. And from the beginning of the proceeding, defendants and their attorneys work closely to prepare the defense.

Yet under the Colorado Supreme Court's view, only defendants who can afford an attorney enjoy a Sixth Amendment right to continuity of counsel. Indigent defendants enjoy no such right to continued representation by the attorney assigned to represent them. This gives trial courts, in jurisdictions such as Colorado, tremendous power to force an indigent defendant to change lawyers during their proceedings—whether a defendant has been represented by their attorney for days or years.

That the Colorado Supreme Court's decision deepens an entrenched split on this issue of significant importance is reason alone to grant certiorari. Pet. 7–17. But two additional reasons further the need for review.

First, the decision below is in tension with the Sixth Amendment right to counsel guaranteed to all defendants. The right to effective assistance of counsel often requires the right to continuity of counsel, as forced substitutions by the court impair the attorney-client relationship and the ability of lawyers to thoroughly prepare. The right to continuity of counsel is also essential to guarantee criminal defendants their Sixth Amendment right to counsel at all critical

stages of their proceedings and the right to control their defense.

Second, review is warranted because the question presented is of national and practical importance. It affects the vast majority of criminal defendants—upwards of 95%—who cannot afford to retain an attorney. This Court should not let stand a two-class interpretation of the Sixth Amendment that results in defendants not receiving the right to continued representation to which they are entitled.

ARGUMENT

I. THE RIGHT TO CONTINUITY OF COUNSEL IS INHERENT IN OTHER RIGHTS GUARANTEED BY THE SIXTH AMENDMENT.

A. The Right to Continuity of Counsel Is Intrinsic to the Sixth Amendment Right to Effective Assistance of Counsel.

The Sixth Amendment right to counsel is "indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977). As this Court has recognized, all defendants—including those "too poor to hire a lawyer"—"require[] the guiding hand of counsel at every step in the proceedings against [them]." *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963). That right is not to counsel in title alone: Defendants require "access to counsel's skill and knowledge" so they have "ample opportunity to meet the case of the prosecution." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

The right to continuity of counsel is necessary for defendants to receive an effective "guiding hand" throughout their proceedings. *Gideon*, 372 U.S. at 345. Defendants necessarily establish a "close

working relationship [with their lawyer]," fostering "confidence" and "trust" in their tactics and decisions. *Luis v. United States*, 578 U.S. 5, 11 (2016); ABA Standard 4-3.1(a), p. 147 ("[D]efense counsel should work to establish a relationship of trust and confidence with each client."). Because the client has "the ultimate authority to determine the purposes to be served by legal representation," attorneys must often invest significant time understanding their client's objectives and developing an appropriate strategy for their defense. Model Rules of Prof'l Conduct r. 1.2 cmt. 1; *see State v. McKinley*, 860 N.W.2d 874, 880 (Iowa 2015) ("opportunities for establishing trust and effective communication are generally enhanced over time through interpersonal contact"). Yet without any assurance that their current attorney will continue to represent them throughout the proceedings, defendants will have less incentive to invest the necessary trust and time to form this close relationship with their appointed counsel.

Switching lawyers midstream or on the brink of trial can also undermine a defendant's right to competent and effective representation. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000). When a defendant is represented by "multiple attorneys during the progression of a case, files get lost, motions are not filed, and discovery does not get examined." Katy Bosse, *A Price Tag on Constitutional Rights:* Georgia v. Weis *and Indigent Right to Continued Counsel*, 6 Mod. Am. 43, 47 (2010); *see* Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 Cardozo L. Rev. 1213, 1255 (2006) ("Passing a defendant's case through multiple attorneys interferes with defense representation and makes it more likely that the defendant will receive inadequate representation."). And because "[d]ifferent 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," replacing counsel in the middle of a case can result in delays and the lack of a meaningful opportunity for substitute counsel to pursue a thorough and zealous defense. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

The right to continuity of counsel, in contrast, promotes effective representation. Having a right to the same attorney throughout one's proceedings fosters the attorney-client relationship, encourages accountability, and provides attorneys with a better opportunity to effectively manage their clients' cases.

Continuity of counsel "allow[s] for more effective representation" by fostering trust and communication between an attorney and her client. Bosse, 6 Mod. Am. at 47; *see Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968) ("[T]he attorney-client relationship . . . 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."). When an attorney expects that representation will continue through the end of the case, the attorney is more likely to "keep the client reasonably and currently informed about developments" with "sufficient[] detail[] so that the client can meaningfully participate in the representation." ABA Standard 4-3.9(a). And assuring defendants that the first-appointed attorney will continue to assist makes defendants more likely to "collaboratively answer many of the essential questions that are presented during a criminal trial, such as how to plead, whether to proceed to trial, and whether

or not the client should testify." Bosse, 6 Mod. Am. at 47. Continuity likewise promotes lawyer accountability. When one attorney is the sole master of the case, the client—who "does not understand the legal process"—knows whom to "hold accountable" for mistakes. *Id.* And continuity serves as a safeguard against case mismanagement and confusion: Keeping the same counsel ensures that another attorney does not need to investigate and cram the facts of a case at the last minute.

The right to continuity of counsel is particularly important for indigent defendants—who are at the mercy of overworked public defenders and court-appointed attorneys—to receive their Sixth Amendment "right to have an attorney" who is "zealous for the[ir] interests" throughout the proceedings. *Smith v. Robbins*, 528 U.S. 259, 278 n.10 (2000).

Many public defenders already lack the resources to mount a zealous defense of their clients. The "vast majority of jurisdictions cannot or do not fully fund their public defense counsel." William S. Moreau, *Desperate Measures: Protecting the Right to Counsel in Times of Political Antipathy*, 48 Stetson L. Rev. 427, 429 (2019). "Nearly forty percent of county-based public defense offices cannot afford vital investigators." *Id.* at 430. While public defender offices suffer from this lack of funding, prosecutors benefit from "the tools of an office that is better funded and well-staffed with paralegals and legal assistants" as well as resources such as "police department investigators and laboratory technicians." Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 Ind. Int'l & Comp. L. Rev. 237, 243 (2015). As a result, prosecutors "have the resources to put on stronger and more technical cases than the defense."

Amanda Myra Hornung, *The Paper Tiger of* Gideon v. Wainwright *and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 Cardozo Pub. L. Pol'y & Ethics J. 495, 528 (2005).

In addition to the lack of funding, public defenders are saddled with extraordinarily high caseloads. In 1999, "[i]ndigent defense programs in the largest one-hundred counties handled an estimated 4.2 million cases." Hornung, 3 Cardozo Pub. L. Pol'y & Ethics J. at 529–30. And the public defender caseload has only grown since. *Id.* at 530 (noting that the caseload of public defenders in Wyoming has "more than doubled in the last ten years"). Many public defenders take on more than 500 cases each year, with many "trying to handle over 1,600 cases annually." *Id.*; *see also* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 686–87 (2007) ("On average, public defenders in Baltimore, for example, have been forced to handle as many as 1,163 misdemeanor cases per year"). As a result, "three-quarters" of public defenders "exceed the American Bar Association's . . . maximum recommended caseload standards." Moreau, 48 Stetson L. Rev. at 430.

These enormous strains on the public defender system demonstrate why a right to continuity of counsel is necessary for public defenders to have any meaningful shot at zealously representing their indigent clients. Public defenders—like all attorneys—need enough time to prepare a case. Due to their bloated caseloads, public defenders struggle to regularly communicate with their clients, let alone become acquainted with the relevant facts of their cases. Moreau, 48 Stetson L. Rev. at 429 (describing the inability of public defenders "to spend any time

communicating with most of their clients"). A lawyer thrown into court at the last minute with a new client, who can be one among hundreds, will often not have enough time to effectively prepare a case. The right to continuity of counsel gives indigent defendants a better shot at receiving an attorney who can invest the necessary time and effort to zealously represent them.

Continuity is also important for indigent defendants represented by court-appointed private attorneys. Hornung, 3 Cardozo Pub. L. Pol'y & Ethics J. at 530 (finding that, in 1999, "court-appointed private attorneys handled fifteen percent" of indigent cases). Court-appointed lawyers suffer from the same excessive caseloads and lack of resources as public defenders. Mark C. Milton, *Why Fools Choose to Be Fools: A Look at What Compels Indigent Criminal Defendants to Choose Self-Representation*, 54 St. Louis U. L.J. 385, 405 (2009) ("[M]any court-appointed attorneys believe that budget cuts and soaring case loads have pushed them to the brink."); *see also* Cory Isaacson, *How Resource Disparity Makes the Death Penalty Unconstitutional: An Eighth Amendment Argument Against Structurally Imbalanced Capital Trials*, 17 Berkeley J. Crim. L. 297, 311 (2012) ("[A]ppointed capital defense attorneys are often paid well below market rate and at times not even enough to cover overhead costs."). The right to continuity of counsel thus lowers the chances that a court-appointed attorney will be substituted into a case with insufficient time to adequately prepare for her client's defense.

The lack of a right to continuity of counsel can also chill the advocacy of court-appointed attorneys. These attorneys can have conflicting interests because they are "being paid by the state rather than the client." Erica J. Hashimoto, *Resurrecting Autonomy: The*

Criminal Defendant's Right to Control the Case, 90 B.U. L. Rev. 1147, 1181 (2010). The risk of this conflict is "exacerbated" for court-appointed attorneys because "judges decide who is appointed to represent indigent defendants," and court-appointed attorneys "rely on those court appointments for their livelihood." *Id.* at 1181–82. In these situations, a court-appointed attorney has "a personal interest—the viability of his practice—in assuring that the judge, rather than the client, is pleased with the representation." *Id.* at 1182.

Such dual loyalties can materially and tangibly impact the decisions of a court-appointed attorney. If indigent clients lack the right to continuity of counsel–and if they are at the mercy of the court for their employment—court-appointed attorneys may be more hesitant to advocate for their client in ways that might annoy the trial judge, such as challenging the judge's rulings or moving for relief that the judge might think is unwarranted. The right to continuity of counsel would enable court-appointed attorneys to make the best decisions for their client without balancing those decisions against the risk of hurting their own prospects of future employment. *See Smith*, 528 U.S. at 278 n.10.

B. The Right to Continuity of Counsel Helps Guarantee Defendants Their Sixth Amendment Right to Counsel at Critical Stages of Proceedings.

The Sixth Amendment right to counsel attaches during "the initiation of adversary judicial criminal proceedings," *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008), and extends to "all critical stages of the criminal process," *Iowa v. Tovar*, 541 U.S. 77, 80–81 (2004). These "critical stages" encompass "any

pretrial confrontation of the accused" where "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial." *United States v. Wade*, 388 U.S. 218, 227 (1967). A defendant thus has a right to counsel during arraignments, post-indictment interrogations, post-indictment lineups, plea bargain negotiations, the entry of guilty pleas, *Missouri v. Frye*, 566 U.S. 134, 140 (2012), and suppression hearings, *United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981)—in addition to during trial and sentencing, *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

While all these stages are "critical," "the period from arraignment to trial [is] 'perhaps the *most critical* period of the proceedings.'" *Wade*, 388 U.S. at 225 (emphasis added). It is then that a defendant is most in need of "the guiding hand of counsel" if the Sixth Amendment "is not to prove an empty right." *Id.* Without this "guiding hand," defendants face a deck stacked against them: The government, with "its vastly superior resources," has an inherent advantage in its resources, information, and power. *United States v. Scott*, 437 U.S. 82, 91 (1978); *see* Bidish J. Sarma et al., *Interrogations and the Guiding Hand of Counsel:* Montejo, Ventris*, and the Sixth Amendment's Continued Vitality*, 103 Nw. U. L. Rev. Colloquy 456, 462 (2009) (the right to counsel should protect against the state "exploit[ing] its structural advantages to pressure or manipulate the defendant into acting against his best interest" (footnote omitted)). Guaranteeing the assistance of counsel helps to level the playing field and diminish the disparities in strength and bargaining power between the powerful state and indigent defendant, thereby realizing the Sixth Amendment's purpose of "assur[ing] fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364 (1981).

The right to counsel attaches when the government assumes an adversarial posture against the defendant, *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009), and a defendant is entitled to counsel "within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself," *Rothgery v. Gillespie County*, 554 U.S. 191, 211–12 (2008). As a result, counsel must be present and engaged throughout each critical stage of the case, during which she can learn the facts of the case, develop legal theories, and consult with her client about their objectives. It is the accumulation of this knowledge about the case *over time* that allows her to be an effective advocate. *See McKinley*, 860 N.W.2d at 880. Yet if indigent defendants lack the right to continued representation by the same attorney, a court can force a defendant to change attorneys anytime during the proceedings—even if that attorney has represented their client throughout the critical stages of the case. And because they lack longitudinal knowledge and context about the case, substitute counsel is necessarily inhibited in their ability to mount a zealous defense on behalf of their client.

This is especially true because many critical pretrial proceedings are related and require knowledge of the underlying facts and procedural history of a case. In federal courts, for example, effective representation at a suppression hearing requires knowledge of the case discovery process (i.e., what documents the government produced and intends to rely on at trial, as well as exculpatory and impeachment evidence), the government's theory of the case, and the evidence presented by the government at the preliminary hearing. An attorney representing an indigent defendant from the start naturally has this information. But an attorney substituted into a case midway through the

proceedings may very well lack this information—knowledge is inevitably lost in the transition of counsel, and attorneys and their clients alike would lack the incentive to invest the time to gather the information necessary only for new counsel to be appointed the next day. The right to continuity of counsel prevents these adverse results and helps ensure that indigent defendants receive effective representation at all critical stages of their proceedings.

C. The Right to Continuity of Counsel Is a Necessary Part of the Defendant's Right to Control His Defense.

A defendant retains the "ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Inherent in the Sixth Amendment is the principle that an accused retains the autonomy to decide issues grounded in inherently personal rights. *Gonzalez v. United States*, 553 U.S. 242, 250 (2008). Although counsel is entrusted with making strategic choices, key decisions such as whether to plead guilty, waive a trial by jury, waive counsel, testify, or appeal are "so important that an attorney must seek the client's consent in order to waive the right." *Id.* This is because the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense." *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979).

A defendant may also choose to waive his right to counsel and represent himself. *Faretta v. California*, 422 U.S. 806, 834–36 (1975). As this Court has explained, "[t]he right to defend is personal," and a defendant's choice in exercising that right "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v.*

Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)). The Sixth Amendment right to self-representation stems from the notion that defendants have "the right to make and act upon [their] own decisions free from government intervention." Hashimoto, 90 B.U. L. Rev. at 1154–55. Indeed, "[t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused." *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984).

If the Sixth Amendment guarantees an indigent defendant the right to *waive* his counsel, it should likewise confer the right to *keep* his counsel, after that relationship has begun. After all, both rights arise out of the Sixth Amendment's guarantee that the defendant is the master of his defense. *Faretta*, 422 U.S. at 819. And a court impermissibly interferes with that right when it replaces a defendant's attorney (who has represented the defendant throughout the "critical stages," knows key information about the case, and with whom the defendant has developed trust) midway through a case. The autonomy values inherent in the Sixth Amendment require that all defendants are entitled to keep their attorney after one has been retained or assigned.

The Sixth Amendment safeguards these rights because "[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." *Faretta*, 422 U.S. at 834. This is no less true for indigent defendants than it is for wealthy ones. Even a defendant who cannot afford his own counsel may control his own defense by deciding whether to represent himself, accepting a plea offer, or waiving a jury. *See Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969). The Court has never suggested that by accepting appointed

counsel, the accused cedes all control over his defense. And one fundamental way the indigent defendant can exercise this control is by choosing to *keep* his appointed counsel once that relationship has begun.

The text and history of the Sixth Amendment demonstrate that the Founders intended to grant all defendants—rich and poor alike—this right. The language guarantees the "*Assistance* of Counsel"—meaning that the defendant, and not the lawyer, sits in the driver's seat in defending against his prosecution. U.S. Const. amend. VI (emphasis added); s*ee also McCoy v. Louisiana*, 584 U.S. 414, 421 (2018) ("[T]he Sixth Amendment, in 'grant[ing] to the accused personally the right to make his defense,' 'speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.'" (quoting *Faretta*, 422 U.S. at 819–20)). This language "reflects the Framers' understanding that the defendant, not counsel, was to be in charge of the defense." Hashimoto, 90 B.U. L. Rev. at 1149.

Historical context informs this understanding of the Sixth Amendment. English defendants facing felony charges were *prohibited* from appearing with counsel before 1730; after 1730, they were allowed an attorney if they could afford one, but counsel still played a *very* circumscribed role in the proceedings. Hashimoto, 90 B.U. L. Rev. at 1164–65; *see also* Laura I. Appleman, *The Community Right to Counsel*, 17 Berkeley J. Crim. L. 1, 6 (2012) ("[I]n the sixteenth and seventeenth centuries, the entirety of the criminal trial was a 'lawyer-free contest of amateurs,' with neither prosecution nor defense represented by counsel." (citing John H. Langbein, *The Origins of Adversary Criminal Trial* 11 (2003))). This choice was based on "the prevailing view at the time" that the judge

"should serve as de facto defense counsel," rendering other counsel unnecessary. Hashimoto, 90 B.U. L. Rev. at 1165; *cf.* Kit Thomas, *In Their Defense: Conflict Between the Criminal Defendant's Right to Counsel of Choice and the Right to Appointed Counsel*, 74 Wash. & Lee L. Rev. 1743, 1750 (2017) ("The judge served more as a referee, adding an element of supervision to an otherwise disorder[ly] proceeding.").

The Sixth Amendment was ratified to change that practice. The Founders did not trust judges to "adequately 'represent' defendants in criminal cases" or to be impartial in criminal prosecutions. Hashimoto, 90 B.U. L. Rev. at 1167–68. By guaranteeing all defendants the right to counsel, the Sixth Amendment demonstrates the Founders' belief that the interests of criminal defendants were best served by their own advocates, not by the government. *Id.* at 1168.

These constitutional values demonstrate why all defendants should have the right to continuity of counsel. Because "the concept of governmental intervention in the defendant's case would have been entirely foreign" at the Founding, judges ought not have unbridled discretion to replace a defendant's attorney during the proceedings. Hashimoto, 90 B.U. L. Rev. at 1163. Because defendants have the Sixth Amendment right to exercise control over their case, they must necessarily have the right to keep their counsel once one has been appointed.

D. Post-trial Ineffective Assistance of Counsel Claims Are an Insufficient Remedy for Defendants Who Receive Ineffective Representation from Substitute Counsel.

When a defendant's attorney is removed against their will and replaced by another attorney who renders ineffective assistance of counsel, a defendant may seek a remedy by filing a post-conviction ineffective assistance claim. *See Strickland*, 466 U.S. at 687. The mere availability of such claims is hardly a reason for this Court to decline to recognize a constitutional right that ought to protect indigent defendants just as much as their wealthier counterparts.

For starters, claims of ineffective assistance of counsel are "nearly impossible to win" on the merits. Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1585 (2020). To prevail, a defendant must show not only that their counsel's performance was deficient, but also that the defendant was prejudiced by the defense—that their counsel's performance was outcome-determinative to the defendant's conviction. *Strickland*, 466 U.S. at 687. In addition to this formidably high bar, defendants must navigate through a labyrinth of procedural barriers before properly presenting ineffective assistance of counsel claims on appeal. *See, e.g.*, Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving* Padilla *and* Frye, 51 Duq. L. Rev. 647, 656 & nn.29–30 (2013) (prosecutors extract and courts enforce waivers of the right to claim ineffective trial attorney representation during plea bargaining); Gray Proctor & Nancy King, *Post* Padilla*:* Padilla*'s Puzzles for Review in State and*

Federal Courts, 23 Fed. Sent'g. Rep. 239, 240-43 (2011) (discussing retroactivity barriers, statutes of limitations, the prohibition on second or successive petitions, and procedural default doctrines as restrictions). In effect, therefore, ineffective assistance of counsel claims "afford[] criminal defendants little, if any, constitutional protection from bad lawyering." Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. Rev. 1, 19 (2002).

The timing of ineffective assistance of counsel claims also undermines their effectiveness. "Most defendants are unable to challenge their trial attorneys' performance on direct appeal." Eve Brensike Primus, 92 Cornell L. Rev. at 680, 689 ("[T]he vast majority of jurisdictions do not allow defendants to open or supplement the trial court record to support these claims."). As a result, defendants typically have to "first complete their [direct] appeals—a process that often takes four years or more—before they can present ineffective assistance of trial counsel claims." *Id.* at 680 (footnote omitted). Because "most convicted defendants have served their full sentences" by this time, many are unable to receive meaningful relief from ineffective assistance claims. *Id.*

The Sixth Amendment guarantees the same right to counsel for all criminal defendants. Those who can retain their own attorney should not receive different rights from those who receive appointed counsel. And the fact that defendants have one avenue through which to seek relief for subpar performance of their counsel—decades after their conviction, and with an extraordinarily high burden of proof—should not change that conclusion.

II. WHETHER THE SIXTH AMENDMENT GUARANTEES THE RIGHT TO CONTINUITY OF COUNSEL IS OF PRACTICAL AND NATIONAL SIGNIFICANCE.

The Colorado Supreme Court's flawed interpretation of the Sixth Amendment will harm a great number of indigent criminal defendants. This Court's review is warranted to determine whether those defendants enjoy the same Sixth Amendment right to continued representation by an attorney who is already representing them as is enjoyed by affluent defendants who retain their own counsel.

The question presented affects the vast majority—and a steadily rising number—of criminal cases. When this Court decided *Gideon*, 372 U.S. 335, 43 percent of defendants were indigent. Lee Silverstein, *Defense of the Poor in Criminal Cases in American State Courts: A Field Study and Report* 7-8 (1965). By 1998, however, that number had risen to 82 percent of felony defendants prosecuted in state courts in the 75 largest urban counties. Caroline Wolf Harlow, U.S. Dep't of Just., *Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases* 1 (2000), https://bit.ly/3QU9zkc; *see* Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 84 (2009) (statement of Robin L. Dahlberg, Senior Staff Attorney, ACLU) ("[B]etween 80 and 90 percent of all of those accused of criminal wrongdoing by state prosecutors must rely upon state indigent defense programs"). Today, "ninety-five percent of criminal defendants nationwide" are "represented by assigned counsel." Moreau, 48 Stetson L. Rev. at 428–31 (citing Laurence A. Benner, *Eliminating Excessive Public*

Defender Workloads, 26 Crim. Just. 24, 25 (2011)). It is thus unsurprising that scholars have characterized the issue presented as imposing "significant costs" on criminal defendants. Keith Swisher, *Disqualifying Defense Counsel: The Curse of the Sixth Amendment*, 4 St. Mary's J. Legal Mal. & Ethics 374, 390 (2014).

These indigent defendants are "disproportionately clients of color," who "so frequently bear the brunt of our system's racial biases." Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. Legis. & Pub. Pol'y 999, 1018 (2013); *see* Steven K. Smith & Carol J. DeFrances, U.S. Dep't of Just., *Indigent Defense* 3 (1996), https://bit.ly/3JWW67A (more than half of white federal inmates hired private counsel, compared to one-third of Black federal inmates). If left in place, therefore, the Colorado Supreme Court's conclusion that poor defendants lack the right to continuity of counsel promises to heighten the disparate impacts experienced by criminal defendants of color.

The conflict among the courts of appeals and state courts will only grow deeper without this Court's intervention. Pet. 8–17. And until this Court clarifies whether there is a Sixth Amendment right to continuity of appointed counsel, courts will continue exercising their discretion in ways that deprive indigent defendants of that right.

Consider the case of Jamie Ryan Weis. After being charged with robbery and murder, Weis was assigned two private attorneys on a contractual basis. *Weis v. State*, 694 S.E.2d 350, 353 (Ga. 2010). Those attorneys filed more than 60 motions on Weis's behalf, visited his home in rural West Virginia to interview Weis's family, friends, and teachers, and developed his defense over the course of eleven months. Br. for

Appellant at 4, *Weis*, 694 S.E.2d 350, 2009 WL 4028414. But when those attorneys moved to continue the case, the court removed them, replacing them with two public defenders. *Id.* at 7. It did so despite an affidavit from Weis stating that he "trust[ed]" his attorneys "with my case and actually with my life. . . . I do not want . . . other counsel to represent me." *Id.* at 8.

The case of Terry Lynn Foreman also illustrates the harsh results that arise from the Colorado Supreme Court's conclusion. After being charged with possession of marijuana with intent and conspiracy to distribute, Foreman was provided counsel from the local Federal Public Defender's Office. *United States v. Espinosa*, 771 F.2d 1382, 1410 (10th Cir. 1985). Foreman's attorney spent "approximately two months" preparing the case, devoting "considerable time" to meeting with his client and the co-defendants' counsel, "reviewing evidence, and doing legal and factual preparation for trial." *Id.* The trial court nevertheless replaced Foreman's attorney "one day prior to a motions hearing and four days before trial," and Foreman was convicted and sentenced to fifteen years' imprisonment. *Id.* at 1389, 1409. Yet because the Tenth Circuit declined to recognize that indigent defendants have a right to continuous counsel, it held that the replacement of Foreman's attorney did not violate "his Sixth Amendment right to effective assistance of counsel" because Foreman did not "overcome the strong presumption that counsel's performance was adequate." *Id.* at 1411–12.

Such results are entirely at odds with the Sixth Amendment's guarantee of "the right to be assisted by counsel of one's choice." *Gonzalez-Lopez*, 548 U.S. at 148. This Court should reject a watered-down version

of the Sixth Amendment that permits "a public defender [to] be swapped out with a warm body on the eve of [an indigent defendant's] trial if the judge says so." Casey Krizman, Krizman Law, *In* People v. Rainey*, Colorado Supreme Court Says Beggars Can't Be Choosers* (Apr. 11, 2023), https://bit.ly/3QLLEUb.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

RYAN AZAD
MUDIT BUCH
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

JEFFREY T. GREEN
Co-Chair, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1600 L. Street N.W.
Washington, D.C. 20036

GREGG COSTA
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
800 Main Street # 3000
Houston, TX 77002
(346) 718-6600
gcosta@gibsondunn.com

HAYLEY LAWRENCE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Amicus Curiae

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