NO. 23-1096

In the
Supreme Court of the United States

WILLIAM ALLEN DAVIS,
Petitioner,
v.
STATE OF COLORADO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Colorado's Brief in Opposition

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QUESTION PRESENTED

Whether, once a court has appointed counsel for a criminal defendant, the Sixth Amendment guarantees the right to continuous representation by the same attorney.

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INTRODUCTION

This Court need not review this case. The Colorado Supreme Court's decision below—which held that a defendant with court-appointed counsel has no Sixth Amendment right to continued representation by a particular attorney—was correct under the Sixth Amendment's text and history, as well as this Court's precedents, which foreclose the creation of such a right. Petitioner's policy-driven assertion that the decision below promotes a two-tiered justice system is based on a misreading of this Court's case law and ignores the Colorado Supreme Court's actual decision.

Petitioner argues in large part that this Court should recognize a Sixth Amendment right to continuity of counsel for defendants with appointed counsel because it has already recognized such a right for defendants with retained counsel. But this Court has done no such thing. Accordingly, no inequities follow from recognizing that defendants with appointed counsel also have no such right. To the extent Petitioner is suggesting that this Court has effectively recognized a Sixth Amendment right to continuity of privately retained counsel because it has recognized a right to choice of counsel that a defendant could exercise indefinitely, that proposition does nothing to further Petitioner's argument. This Court has repeatedly recognized, and Petitioner concedes, that there is no right to choice of *appointed* counsel. The Colorado Supreme Court was therefore correct in holding that the Sixth Amendment does not guarantee a right to continuity of appointed counsel.

In addition to being legally correct, the decision below in fact promotes equity in the justice system.

The Colorado Supreme Court recognized that a defendant with appointed counsel—just like a defendant with retained counsel—has a due process interest in a fair trial that allows for continued representation by that attorney, if he can demonstrate that substitution would prejudice his defense. Petitioner downplays that portion of the court's decision. Given Colorado's recognition of a defendant's due process interest in continuity of counsel, Petitioner fails to articulate how his case would have reached a different outcome if that were also a Sixth Amendment right.

There is no split among the federal circuit courts on this issue. The circuits that have addressed this question unanimously agree that there is no Sixth Amendment right to continuity of appointed counsel. Petitioner also overstates the split among state courts. Almost all of the state court cases Petitioner cites for a Sixth Amendment right to continuity of appointed counsel predate key decisions from this Court or rely on now-repudiated case law. By contrast, all of the cases Petitioner cites that align with Colorado were decided after this Court announced those key decisions. Those courts faithfully applied this Court's precedents. Thus, state courts are correcting previous expansions of the Sixth Amendment based on more recent decisions by this Court, and the trend is moving in Colorado's direction.

In any event, this Court need not expend resources to resolve any lingering disputes. This Court's decisions already provide sufficient guidance to courts considering (or reconsidering) this issue. Again, Colorado already recognizes a defendant's interest in continued representation by appointed counsel. Taking

this case to resolve a dispute over that interest's constitutional source is unwarranted.

STATEMENT OF THE CASE

On April 20, 2017, Petitioner was charged with vehicular eluding, reckless driving, and driving under restraint after failing to yield to a Colorado parks officer. Pet. App. 3a. The trial court appointed Garen Gervey as Petitioner's public defender. *Id.*

On October 30, Gervey moved to continue the trial, which was scheduled to begin on November 20, because (1) he had another trial set for the same day and (2) investigation was still ongoing because of a scheduling mishap. Pet. App. 3a. The trial court denied the motion. *Id.*

Four days before trial, Gervey filed a second motion for a continuance, this time asserting Petitioner's "right to continued representation by counsel of his choice." *Id.* at 4a, 15a. The motion informed the court that Petitioner did not consent to a new attorney stepping in to handle his case and asserted that Petitioner was entitled to continue the attorney-client relationship with his public defender. *Id.* at 4a, 15a-16a.

After a hearing, the trial court also denied this motion. *Id.* at 4a. The court emphasized the difficulties it was having in setting trials and indicated that this was basically a traffic case that could probably be tried in one day. *Id.* The court also observed that under Colorado precedent, the "substitution of one public defender with another does not violate the Sixth Amendment right to counsel" unless the substitution prejudices the defendant. *Id.* The court determined that the case was simple enough that a lawyer "of any competence" would need little time to prepare for trial,

and that Petitioner therefore would not be prejudiced by the appointment of new counsel. *Id.*

On the morning of trial, Petitioner, through his substituted attorney, again moved for a continuance. *Id.* The court denied the motion, and the trial proceeded. *Id.* The jury convicted Petitioner as charged. *Id.* at 4a.

A division of the Colorado Court of Appeals reversed. *Id.* at 13a-21a. Relying on a previous division's reasoning, the division held that "while there is no Sixth Amendment right for an indigent defendant to choose his appointed counsel, that defendant is entitled to continued and effective representation by court-appointed counsel of choice in the absence of a demonstrable basis in fact and law to terminate that appointment." *Id.* at 18a. "Thus, while no right exists for an indigent defendant to choose his counsel, once chosen, the indigent defendant's choice is afforded great weight." *Id.* (brackets and internal quotation marks omitted). The division acknowledged that an indigent defendant cannot choose a particular attorney at the outset of his case but held that "issues of constitutional dimension arise once an attorney-client relationship is established." *Id.* at 20a.

The People petitioned the Colorado Supreme Court for review. The court considered Petitioner's case in conjunction with a companion case, *People v. Rainey*, 527 P.3d 387 (Colo. 2023). The *Rainey* opinion explained the court's reasoning in detail, which the court relied on at length in its truncated opinion in this case. Pet. App. 8a-11a. For this reason, Colorado sets forth the facts from *Rainey*.

Rainey was charged with several criminal counts related to a domestic violence incident. *Rainey*, 527 P.3d at 390. The trial court appointed public defender Sara Schaefer and set the trial for January 9, 2017. *Id.* The trial was continued briefly twice—once because the victim failed to appear, and a second time because there were not enough jurors available. *Id.*

On February 23, Rainey appeared with Neil DeVoogd, a public defender who had just entered on his case. *Id.* At the hearing, the prosecution moved for another continuance because one of its witnesses was unavailable. *Id.* The court granted the motion over Rainey's objection and reset the trial for March 6, the day before the speedy-trial period expired. *Id.* at 390-91. DeVoogd accepted the trial date and agreed to appear for the pretrial readiness conference on March 3. *Id.*

At that conference, DeVoogd notified the court for the first time that he was unavailable for trial because of pre-existing vacation plans. *Id.* at 391. He explained that when he had substituted onto Rainey's case, he had accepted the trial date, despite being unavailable, because the parties had been negotiating a plea agreement and he had not anticipated going to trial. *Id.* Rainey offered to waive speedy trial to obtain another continuance so that DeVoogd could represent him at trial. *Id.*

The trial court refused to continue the case. *Id.* The court admonished DeVoogd for failing to disclose his vacation plans before accepting a trial date. *Id.* The court also found that arranging for a judge to cover Rainey's trial had been difficult; Rainey's case was not difficult; and a new attorney would not need much

time to get up to speed. *Id.* DeVoogd conceded that "he could not think of any reason why another public defender could not adequately prepare for the trial over the weekend." *Id.*

The case proceeded to trial the following Monday after Rainey's substituted attorneys announced ready. *Id.* The jury convicted Rainey on two of the nine counts. *Id.*

Rainey appealed, arguing that the trial court violated his Sixth Amendment right to continued representation of appointed counsel when it denied his request for a continuance and forced him to proceed with public defenders other than DeVoogd. *Id.* The Colorado Court of Appeals reversed, holding that while defendants do not have an initial right to choose their appointed counsel, once an attorney is appointed, they do have a constitutional right to choose continued representation by that specific attorney. *Id.*; *People v. Rainey*, 491 P.3d 531, 535, 538 (Colo. App. 2021). Again, the People petitioned the Colorado Supreme Court for review. *Rainey*, 527 P.3d at 391.

In ruling in both Petitioner's case and *Rainey* that the Colorado Court of Appeals had erred, the Colorado Supreme Court held that the Sixth Amendment to the U.S. Constitution does not guarantee a criminal defendant continued representation by a particular court-appointed attorney. *Rainey*, 527 P.3d at 390; Pet. App. 2a-3a. The court explained that the Sixth Amendment guarantees all criminal defendants the right to effective assistance of counsel. *Rainey*, 527 P.3d at 392. And for defendants who hire their own attorneys or find attorneys to represent them pro

bono, the Sixth Amendment right to counsel also encompasses a right to choose their own counsel. *Id.* But while the right to effective assistance of counsel is constitutionally guaranteed for all criminal defendants, the right to choose one's counsel does not extend to defendants with court-appointed counsel. *Id.*

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. If a defendant has the right to choose their attorney, they have the right to continued representation by that attorney – subject to balancing against the needs of a fair and efficient judicial system." *Id.* at 393. But defendants who receive court-appointed counsel do not have a right to choose their attorneys; thus, they do not have a Sixth Amendment right to continued representation by any particular appointed attorney. *Id.*

The lack of this right under the Sixth Amendment, however, did not mean that indigent defendants do not have an interest in continued representation by their appointed counsel. *Id.* Instead, "[a] defendant with appointed counsel has an interest in continued representation by that counsel if they can demonstrate that prejudice would result from substitution with a different court-appointed attorney." *Id.* at 394. Such an interest is protected by due process. *Id.* at 396. "Moreover, this interest is one that must be considered by a trial court in determining whether to grant a continuance to permit continued representation in order to ensure the basic fairness of the proceeding." *Id.* at 394.

In applying *Rainey*'s holding in this case, the court concluded that the trial court properly considered whether Petitioner would be prejudiced by replacing his appointed counsel with a different public defender and determined that he would not. Pet. App. 10a.

REASONS FOR DENYING THE PETITION

I. The Colorado Supreme Court's decision is correct.

A. Colorado's rule is consistent with the text and history of the Sixth Amendment as well as this Court's precedents.

The Colorado Supreme Court correctly held that a defendant with a court-appointed attorney has no Sixth Amendment right to continuity of counsel, but such a defendant has an interest in continuity of counsel that is protected by the due process right to a fair trial. Pet. App. 11a.

1. The Sixth Amendment's text and history make clear that there is no right to continuity of appointed counsel.

The Sixth Amendment's plain text does not guarantee the right to continuous representation by a particular court-appointed attorney. As relevant here, that Amendment provides only that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI; *see also United States v. Ash*, 413 U.S. 300, 309 (1973) (noting that "the core purpose of the counsel guarantee was to assure 'Assistance' at trial").

The Sixth Amendment's history confirms this reading because that Amendment, as originally understood, was "not aimed to compel the State to provide counsel for a defendant," *Betts v. Brady*, 316 U.S. 455, 466 (1942), *overruled by Gideon v. Wainright*, 372 U.S. 335 (1963)—let alone to provide the right to continuous representation by a particular court-appointed attorney. The Amendment replaced the English common law, which had permitted counsel to represent defendants charged with misdemeanors, but not those charged with felonies other than treason. *Luis v. United States*, 578 U.S. 5, 25 (2016) (Thomas, J., concurring) (citing W. Beaney, The Right to Counsel in American Courts 8-9 (1955)); *see Powell v. Alabama*, 287 U.S. 45, 61-65 (1932) (recounting history of the Sixth Amendment Assistance of Counsel Clause). Thus, "[a]s originally understood, [the Sixth Amendment] guaranteed a defendant the right 'to employ a lawyer to assist in his defense.'" *Luis*, 578 U.S. at 26 (Thomas, J., concurring) (quoting *Scott v. Illinois*, 440 U.S. 367, 370 (1979)). Although this Court has since determined that criminal defendants have the right to a court-appointed attorney if they cannot otherwise retain counsel, *Gideon*, 372 U.S. at 343-44, this Court has cautioned against discovering "novel ingredient[s] of the Sixth Amendment guarantee of counsel" that lack a basis in the law, as explained further below, *Morris v. Slappy*, 461 U.S. 1, 13 (1983).

2. This Court's precedents foreclose the creation of a Sixth Amendment right to continuity of appointed counsel.

This Court has expressly rejected the suggestion that the Sixth Amendment guarantees a right to a "meaningful" attorney-client relationship, implicitly foreclosing any right to continuity of that relationship. In *Slappy*, this Court considered a question that closely resembles the issue in this case: "whether it was error for the Court of Appeals to hold that the state trial court violated respondent's Sixth Amendment right to counsel by denying respondent's motion for a continuance until the Deputy Public Defender initially assigned to defend him was available." 461 U.S. at 3. The Court concluded that despite the trial court's substitution of appointed counsel for new counsel six days before trial, "nothing in the record . . . gives any support for the conclusion that [the defendant] was constitutionally entitled to a new trial," as he was in fact provided "a fair trial." *Id.* at 15.[1]

The Court has since reiterated that "the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial,' and that in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'" *Wheat v. United States*, 486 U.S. 153, 159 (1988) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and *United States v. Cronic*, 466 U.S. 648, 657

[1] This Court found that the defendant in *Slappy* had not timely raised an objection to the appointment of replacement counsel. 461 U.S. at 12-13.

n.21 (1984)). In other words, "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.*[2] By recognizing a due process interest but not a Sixth Amendment right to continuity of counsel, the Colorado Supreme Court's decision below is fully consistent with these critical precedents.

To be sure, Justice Brennan, joined by Justice Marshall, wrote separately in *Slappy* to explain that he would have held that there is "a qualified right to continue . . . a defendant's relationship with his attorney" under the Sixth Amendment. 461 U.S. at 25 (Brennan, J., concurring in the result). He emphasized that, "where an indigent defendant wants to preserve a relationship he has developed with counsel already appointed by the court, I can perceive no rational or fair basis for failing at least to consider this interest in determining whether continued representation is possible." *Id.* at 23 (Brennan, J.).

That opinion was not the opinion of the Court, but it is worth noting that Justice Brennan's view—that a defendant has some qualified constitutional interest

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[2] Notably, the amicus brief filed by the National Association of Criminal Defense Lawyers ("NACDL") nowhere cites or acknowledges *Slappy* or *Wheat*, and many of its policy-driven assertions cannot be reconciled with those precedents. For example, NACDL argues that "[t]he 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[.]" NACDL Amicus Br. 2. This argument ignores this Court's holding in *Slappy* that a defendant has no Sixth Amendment right to a meaningful attorney-client relationship.

in continued representation by a particular attorney—is consistent with the Colorado Supreme Court's holding. Again, the Colorado Supreme Court recognized that "[d]efendants with court-appointed attorneys . . . . do have an interest in continued and effective representation by court-appointed counsel, and this interest must be given weight by district courts in the face of a request for a continuance." Pet. App. 11a; *see also id.* ("Because we find that continuity of counsel for defendants with appointed counsel is an aspect of their general interest in due process rather than a right guaranteed by the Sixth Amendment, prejudice is the proper standard for a district court to follow when deciding whether to grant such a continuance."). The Colorado Supreme Court's decision thus aligns with this Court's precedents.

3. This Court has never recognized an independent Sixth Amendment right to continuity of retained counsel.

Much of Petitioner's argument rests on the suggestion that this Court has held that "[d]efendants who can afford to retain an attorney enjoy a Sixth Amendment right to continue being represented by that attorney," Pet. 1 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144-48 (2006)); *see also* Pet. 26, and that this Court should therefore recognize a corresponding right to continuity of appointed counsel. That suggestion, however, is false. Far from recognizing a Sixth Amendment right to continuity of counsel, this Court has made clear that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own

money to obtain the advice and assistance of counsel.'" *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) (citation omitted).

Critically, in *Gonzalez-Lopez*, this Court did not, as Petitioner suggests, *e.g.*, Pet. 1, 26, recognize a Sixth Amendment right to continuity of retained counsel. In that case, the defendant was represented by one attorney (John Fahle) before deciding after his arraignment that he would rather hire another attorney (Joseph Low). 548 U.S. at 142. The trial court repeatedly denied Low's motions for admission *pro hac vice*, so Low did not represent the defendant, except during one evidentiary hearing in which Fahle and Low provided joint representation. *Id.* at 142-43. The United States conceded that the defendant was erroneously deprived of his right to counsel of choice. *Id.* at 144. The question before this Court was therefore whether a violation of the Sixth Amendment right to choice of counsel is subject to harmless error review; the case did not concern the scope of the right to counsel. *Id.* at 142. In light of the government's concession, this Court held that the trial court violated the defendant's Sixth Amendment right to counsel of choice, regardless of whether that violation prejudiced the defendant. *Id.* at 148.

This Court's decision did not concern any right to continuity of counsel; instead, it concerned the right of a defendant to select paid counsel of his own choosing in the first instance. Indeed, the Court did not even consider the concept of continuity of counsel: it nowhere used the word "continuity" (or any variation of that word) in the sense Petitioner uses it here. Instead, it emphasized that "the right at stake here is

the right to counsel of choice." *Gonzalez-Lopez*, 548 U.S. at 146; *see also id.* at 142 ("We must decide whether a trial court's erroneous deprivation of a criminal defendant's *choice of counsel* entitles him to a reversal of his conviction." (emphasis added)). At the same time, as explained next, *Gonzalez-Lopez* confirmed several points that undercut Petitioner's argument.

4. Any Sixth Amendment right to continuity of counsel would necessarily derive from the right to counsel of choice, which does not apply to appointed counsel.

This Court has "held that an element of [the Sixth Amendment right to assistance of counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. at 144 (citing *Wheat*, 486 U.S. at 159). Equally clear after *Gonzalez-Lopez*, however, is that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *Id.* at 151; *see Caplin & Drysdale*, 491 U.S. at 624.

This Court first recognized a defendant's constitutional right to counsel of choice in *Powell v. Alabama*, 287 U.S. 45 (1932), *see Gonzalez-Lopez*, 548 U.S. at 156, n.3 (Alito, J., dissenting), where it expressly described that right as the right to *secure* counsel of one's choice in the first instance. In *Powell*, the defendants, Black men who were charged with the rape of two white girls, were not given an opportunity to select or hire counsel on their own behalf. 287 U.S. at 53-54, 56.

In response, this Court observed, "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." 287 U.S. at 53. Thus, the Court concluded that "the failure of the trial court to give [the defendants] reasonable time and opportunity to secure counsel was a clear denial of due process." *Id.* at 71.

Since *Powell*, this Court has identified the Sixth Amendment as the proper source of the right to counsel of choice and emphasized that that right "is circumscribed in several important respects." *Wheat*, 486 U.S. at 159. For example, "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Id.* Accordingly, "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." *Slappy*, 461 U.S. at 11 (citing *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970)); *see also Kaley v. United States*, 571 U.S. 320, 345 (2014) (Roberts, C.J., dissenting) (noting that "a district court need not always shuffle its calendar to accommodate a defendant's preferred counsel if it has legitimate reasons not to do so" (citing *Slappy*, 461 U.S. at 11-12)).

Petitioner apparently attempts to extrapolate from the Court's decision in *Gonzalez-Lopez* that because a defendant who retains counsel has the right to *select* counsel of choice, such a defendant must have

the right to choose at any stage[3] to *continue* to be represented by a particular attorney—a dubious proposition given the numerous limitations this Court has recognized on the Sixth Amendment right to counsel of choice.[4] Even if that were the case, however, that would not mean that there is a Sixth Amendment right to continuity of counsel, separate and apart from the right to choice of counsel. Instead, by Petitioner's own apparent logic, any right to continuity of counsel would flow only from the continued exercise of the right to choice of counsel. *Rainey*, 527 P.3d at 393.

As Petitioner acknowledges, *see* Pet. 1, 16, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them," *Gonzalez-Lopez*, 548 U.S. at 151; *see also Caplin & Drysdale*, 491 U.S. at 624 ("[T]hose 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."). Because this Court's decisions make clear that there is no right to appointed counsel of choice, "[t]here is no constitutional right to continuity of appointed counsel." *United*

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[3] Neither Petitioner nor NACDL attempts to define how far a Sixth Amendment right to continuity of counsel might stretch. If their view were adopted, it is unclear whether the same attorney could be compelled to represent a defendant all the way from arraignment through appellate review and even through habeas proceedings. It is also unclear how recognizing a Sixth Amendment right to continuity of appointed counsel would somehow ease public defenders' "extraordinarily high caseloads," and the "enormous strains on the public defender system," as NACDL suggests, NACDL Amicus Br. 7; indeed, recognizing such a right would seemingly do the opposite.

[4] *See Wheat*, 486 U.S. at 159; *Slappy*, 461 U.S. at 11-12.

States v. Parker, 469 F.3d 57, 61 (2d. Cir. 2006) (Sotomayor, J.).

Petitioner pejoratively describes the effects of this reasoning as reflecting a "two-class view of the Sixth Amendment." Pet. 2. But he concedes, as he must, that if a dual system were to exist, this Court's precedent, not Colorado's decision, would provide that system's foundation. *See* Pet. 21 ("The Court has recognized . . . [a] defendant who can afford to hire his own attorney has the right to choose at the outset which attorney he retains, but a defendant who needs appointed counsel must at the outset accept the attorney assigned to represent him." (internal citations omitted)).

As Petitioner admits, recognizing a defendant's right to appointed counsel of choice "would be utterly unworkable." Pet. 24. Petitioner attempts to bypass this obstacle to his position by characterizing it as a "narrow exception" that "rests solely on a practical concern," that "completely disappears" after appointment. Pet. 21-22. But that characterization is wrong. As argued above, that defendants with appointed counsel do not enjoy the right to counsel of choice is directly tied to the text and history of the Sixth Amendment, as well as this Court's legal decisions. Petitioner also fails to explain how the practical differences between private and appointed counsel vanish after appointment. In reality, continued appointment of government-funded counsel, unlike continued retention of counsel, will still be governed by statutory criteria rather than private agreement. *See* § 21-1-103, C.R.S. (2024)(Colorado law governing appointment of counsel); *see also* 18 U.S.C. § 3006A(c) ("The United States magistrate judge or the court may, in

the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.").

Recognizing the potential pitfalls of expanding the Sixth Amendment, Colorado declined to do so. But, as argued next, far from widening the chasm between defendants with appointed and retained counsel, Colorado's approach promotes equity without sacrificing fidelity to this Court's precedent.

B. Colorado recognizes a defendant's interest in continued representation by appointed counsel, but correctly grounds that interest in due process, not the Sixth Amendment.

In stretching to portray this case as promoting a two-class system of justice, Petitioner largely ignores the Colorado Supreme Court's actual holding. Although not grounded in the Sixth Amendment, Colorado's approach *does* recognize a defendant's interest in continued representation by appointed counsel as an aspect of their general right to due process. This approach demonstrates that creating a new Sixth Amendment right is unnecessary and that declining to do so will not lead to a dual system of justice.

1. Expanding the Sixth Amendment is unwarranted because due process adequately protects a defendant's interest in continuity of appointed counsel.

The Colorado Supreme Court correctly declined to create a new Sixth Amendment right to continuity of counsel from whole cloth. *Rainey*, 527 P.3d at 396-97; Pet. App. 11a. But, contrary to Petitioner's arguments,

such a holding does not mean that defendants with appointed counsel are given "less protection" than defendants with retained counsel. Pet. 3. It merely recognizes that, because it does not flow from the right to counsel of choice, any interest in continuity of appointed counsel arises from a different source.

Importantly, "[t]hat the Sixth Amendment does not guarantee" a defendant with appointed counsel "the right to continued representation does not mean that [such] defendants never have an interest in continued representation by their appointed counsel." *Rainey*, 527 P.3d at 393. They do. *Id.* at 397. As Colorado has long recognized, "a defendant's interest in continued representation by a lawyer they have been working with is 'entitled to great weight.'" *Id.* at 394 (quoting *People v. Nozolino*, 298 P.3d 915, 920 (Colo. 2013)).

Rather than grounding that interest in the Sixth Amendment where it finds no legal support, the Colorado Supreme Court properly concluded "that continuity of counsel for defendants with appointed counsel is an aspect of their general right to due process[.]" *Rainey*, 527 P.3d at 396-97. "[A] defendant with appointed counsel" thus "has an interest in continued representation by that counsel if they can demonstrate that prejudice would result from substitution with a different court-appointed attorney." *Id.* at 394. Because the Due Process Clause safeguards fairness, potential prejudice to a defendant's case is the proper lens through which courts should decide claims related to defendants' continuity of appointed counsel. *Id.* at 396-97; *accord Slappy*, 461 U.S. at 15.

2. Under Colorado's approach, no dual system of justice exists.

Far from creating a two-tiered system of justice, the upshot of the Colorado Supreme Court's holding is that all defendants receive the same functional treatment. *Rainey*, 527 P.3d. at 396 n.5. Petitioner never explains how, under Colorado's rule, a defendant with retained counsel—or a defendant with a Sixth Amendment right to continuity of appointed counsel—would have been entitled to a continuance while Petitioner was not. Indeed, Petitioner acknowledges that even the right to choice of counsel is qualified. Pet. 22; *see Gonzalez-Lopez*, 548 U.S. at 151-52; *Wheat*, 486 U.S. at 159; *Caplin & Drysdale*, 491 U.S. at 624. In a continuance case like this one, a trial court possesses "wide latitude" in balancing a defendant's interest in choice of counsel "against the demands of its calendar." *Gonzalez-Lopez*, 548 U.S. at 152 (citing *Slappy*, 461 U.S. at 11-12). And, because prejudice must be considered at the point where counsel is to be substituted, defendants with appointed counsel are not denied "any meaningful protection enjoyed by a defendant who hires counsel or finds a private attorney to take a case pro bono." *Rainey*, 527 P.3d at 396 n.5.

Under Colorado's approach, no defendant—regardless of means—need fear unreasoning and arbitrary insistence upon a trial date, let alone removal of counsel "at any moment," Pet. 23, because every defendant has an interest in continued representation that must be weighed against the competing interests, *see Rainey*, 527 P.3d at 396 & n.5.

Protecting the interest as an aspect of due process also avoids the parade of horribles marched out by NACDL. NACDL argues that failing to create a novel Sixth Amendment right to continuity of counsel leaves defendants with appointed counsel with only the protection of an ineffective assistance of counsel claim, NACDL Amicus Br. 16-17, and such claims are normally relegated to postconviction proceedings, *Massaro v. United States*, 538 U.S. 500, 505 (2003); *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003), and present a high bar to relief, *Strickland*, 466 U.S. at 687. Colorado's approach rightly avoids such concerns by requiring trial courts to grant a continuance to allow continuity of appointed counsel when there is a demonstrated likelihood of prejudice to a defendant's case. *See Rainey*, 527 P.3d at 396. Examining the totality of the circumstances, a trial court must weigh the defendant's interest in continuing with a particular appointed counsel against interests like the court's calendar, at the time the request is made. *See id.*; *see also Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Due process already provides the necessary protection to avoid any fairness concerns Petitioner and his amicus argue will flow from the failure to constitutionalize defendants' interests under the Sixth Amendment.[5] *See Ungar*, 376 U.S. at 589.

The Colorado Supreme Court's resolution of this case and its companion demonstrates the propriety of its approach. In *Rainey*, the companion case below, the

[5] Similarly, a defendant's right to representation at all critical stages, as well as the right to make certain decisions about his defense, do not turn on the identity of counsel. *See Cronic*, 466 U.S. at 659; *Jones*, 463 U.S. at 751.

trial court refused to grant the continuance, emphasizing the difficulty it had in securing a judge to cover the trial, the lack of notice of counsel's vacation plans, and docket congestion, while noting that the case was factually simple. 527 P.3d at 391. Appointed counsel, who had been assigned to Rainey's case for only eight days, conceded that another public defender could adequately prepare for trial in his place. *Id.* Considering the trial court's record, the Colorado Supreme Court concluded that the substitution did not prejudice the defendant, and thus, affirmed. *Id.*

In Petitioner's case, the trial court correctly considered prejudice to Petitioner before denying a continuance. Pet. App. 3a-4a, 10a. After a hearing, the trial court considered Petitioner's interest in continuity of appointed counsel, but, weighing that interest against scheduling difficulties in setting a trial date and the straightforward nature of the case, the court concluded that proceeding with substitute counsel would not prejudice Petitioner's case. *Id.* at 4a. In both cases, the Colorado Supreme Court gave weight to the defendants' interest in continuity of counsel. *Id.*; *Rainey*, 527 P.3d at 396.

Petitioner ignores the Colorado Supreme Court's approach. Ultimately, and as argued next, courts around the country are moving toward Colorado's position precisely because it adheres to this Court's caution against expanding the Sixth Amendment beyond its text while still exhibiting "sensitive concern for the rights of the accused[.]" *Slappy*, 461 U.S. at 13.

II. Petitioner overstates the split.

Petitioner argues that this Court should review this case because there is a split of authority in which

"most courts" have held that the Sixth Amendment guarantees a right to continuity of appointed counsel. Pet. 7. But Petitioner overstates the split. First, Petitioner's "majority" side is comprised only of state appellate courts; the federal appellate courts that have ruled on this issue are not split. Second, the vast majority of state court decisions Petitioner cites as holding that there is a Sixth Amendment right to continuity of counsel predate critical choice-of-counsel decisions by this Court or rely on repudiated reasoning. Lastly, half of the decisions Petitioner places on the "majority" side of the split are from intermediate appellate state courts, with no resolution yet from the states' highest appellate courts.

A. The circuit courts of appeals are not split.

This Court "will consider, as a reason for granting a writ of certiorari, the fact that a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) (internal quotation marks omitted).[6] Here, however, no circuit split exists.

Petitioner acknowledges that the Second, Fourth, and Sixth Circuits have all ruled that the Sixth Amendment does not guarantee a right to continuity of appointed counsel. Pet. 14.

Petitioner omits from this list the D.C. Circuit, which has also held that there is no Sixth Amendment right to continuity of appointed counsel. In *United*

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[6] Citing Rule 38(5) of the Supreme Court Rules, the modern version of which is Rule 10.

States v. Bell, the D.C. Circuit rejected the argument that there is a Sixth Amendment right to continuity of counsel under the right to effective assistance of counsel. 795 F.3d 88, 92 (D.C. Cir. 2015). The court reasoned that "since the Sixth Amendment does not guarantee representation by a single counsel or a meaningful relationship with counsel," no presumption of prejudice arises when one appointed counsel is substituted for another. *Id.* at 94 (citing *Slappy*, 461 U.S. at 19-20). The court explained that "[if] any break in the continuity of counsel at trial were sufficient to create a presumption of prejudice . . . the Sixth Amendment's guarantee would resemble less the assurance of 'effective' representation and instead demand something closer to a 'perfect' defense." 795 F.3d 88, 96 (D.C. Cir. 2015). The court also noted that although "[m]id-trial substitution may prove disruptive," and "best practice may favor allowing for a severance or mistrial where the prolonged . . . absence of a defense counsel would require substitution," the standard for constitutional deficiency is not "'best practice.'" *Id.* Nor does every disadvantage to the defense's representation . . . suffice to infect[] [an] entire trial with error of constitutional dimensions." *Id.* at 95-96.

Thus, the federal circuits are not split, and Colorado aligns with all four circuit courts that have ruled on the issue.

B. Almost all of the cases Petitioner cites on the "majority" side predate critical decisions by this Court or rely on repudiated reasoning.

1. Most of the state court cases Petitioner cites to establish a split predate critical decisions by this Court.

As described above, beginning in the 1980s, this Court issued multiple opinions that have clarified the Sixth Amendment right to counsel. *See Gonzalez-Lopez*, 548 U.S. at 151-52 (holding that the right to choice of counsel "does not extend to defendants who require counsel to be appointed for them"); *Wheat*, 486 U.S. at 159 (explaining that "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers"); *Caplin & Drysdale*, 491 U.S. at 624 (concluding that "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"); *Slappy*, 461 U.S. at 14 (holding that the Sixth Amendment does not guarantee a "'meaningful relationship' between an accused and his counsel").

Most of the cases Petitioner cites for the proposition that there is a Sixth Amendment right to continuity of appointed counsel predate these pivotal decisions, including the decisions from the highest courts of Alaska, Arizona, Arkansas, California, the District of Columbia, Florida, and Texas, as well as from intermediate appellate courts in Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, and Tennessee.[7] The only exceptions are *State v.*

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[7] *See McKinnon v. State*, 526 P.2d 18 (Alaska 1974); *State v. Madrid*, 468 P.2d 561 (Ariz. 1970); *Clements v. State*, 817 S.W.2d

Cottrell, 809 S.E.2d 423 (S.C. 2017); *State v. Taylor*, 171 A.3d 1061 (Conn. App. Ct. 2017); *State v. McKinley*, 860 N.W.2d 874 (Iowa 2015); and *Lane v. State*, 80 So.3d 280 (Ala. Crim. App. 2010).[8] Although *Taylor* and *Lane* postdated critical decisions by this Court and the repudiation of *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65, 75 (Cal. 1968) (discussed below), they both erroneously relied at least in part on *Smith*. We discuss *Cottrell* and *McKinley* further below.

2. The majority of cases Petitioner cites rely on repudiated rationale.

Most of the cases Petitioner cites rely on *Smith*, a 1968 California Supreme Court case that has since been repudiated in light of this Court's intervening precedent.

In *Smith*, the California Supreme Court held that "once counsel is appointed to represent an indigent defendant . . . the parties enter into an attorney-client relationship which is no less inviolable than if counsel

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194 (Ark. 1991); *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65 (Cal. 1968); *Harling v. United States*, 387 A.2d 1101 (D.C. 1978); *Weaver v. State*, 894 So.2d 178 (Fla. 2004); *Stearnes v. Clinton*, 780 S.W.2d 216 (Tex. Crim. App. 1989); *People v. Davis*, 449 N.E.2d 237 (Ill. App. Ct. 1983); *English v. State*, 259 A.2d 822 (Md. Ct. Spec. App. 1969); *Commonwealth v. Jordan*, 733 N.E.2d 147 (Mass. App. Ct. 2000); *People v. Johnson*, 547 N.W.2d 65 (Mich. Ct. App. 1996); *In re Welfare of M.R.S.*, 400 N.W.2d 147 (Minn. Ct. App. 1987); *People v. Espinal*, 781 N.Y.S.2d 99 (N.Y. App. Div. 2004); *State v. Huskey*, 82 S.W.3d 297 (Tenn. Crim. App. 2002).

[8] Petitioner does not include Alabama's decision in *Lane* in his list of intermediate state appellate court cases, but he does refer to it in his brief, so Colorado includes it here.

had been retained." *Smith*, 440 P.2d at 74. Courts in Alabama, Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Florida, Illinois, Massachusetts, Michigan, Minnesota, New York, Tennessee, and Texas relied on the rationale of *Smith* to recognize a right to continuity of appointed counsel. *See State v. Madrid*, 468 P.2d 561, 563 (Ariz. 1970); *McKinnon v. State*, 526 P.2d 18, 22 (Alaska 1974); *Harling v. United States*, 387 A.2d 1101, 1106 (D.C. 1978); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. App. Ct. 1983); *In re Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987); *Stearnes v. Clinton*, 780 S.W.2d 216, 221 (Tex. Crim. App. 1989); *Clements v. State*, 817 S.W.2d 194, 199 (Ark. 1991); *People v. Johnson*, 547 N.W.2d 65, 69 (Mich. Ct. App. 1996); *Commonwealth v. Jordan*, 733 N.E.2d 147, 152 (Mass. App. Ct. 2000); *State v.* Huskey, 82 S.W.3d 297, 306 (Tenn. Crim. App. 2002); *People v. Espinal*, 781 N.Y.S.2d 99, 101 (N.Y. 2004); *Weaver v. State*, 894 So.2d 178, 188 (Fla. 2004); *Lane v. State*, 80 So.3d 280, 296 (Ala. Crim. App. 2010); *State v. Taylor*, 171 A.3d 1061, 1075 (Conn. App. Ct. 2017).

In *Madrid*, for example, the Arizona Supreme Court relied primarily on *Smith* because it determined that that case involved "an analogous situation to that presented here." 468 P.2d at 563. The *Madrid* court cited *Smith*'s language that "once counsel is appointed to represent an indigent defendant . . . the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained." *Id.* (quoting *Smith*, 440 P.2d at 74).

Four years later, in *McKinnon*, the Alaska Supreme Court quoted the same language from *Smith*

and held that a defendant has "reposed his trust and confidence in the attorney assigned to represent him." 526 P.2d at 22. Four years after that, in *Harling*, the District of Columbia Court of Appeals relied on both *McKinnon* and *Smith* and quoted the now-familiar language from *Smith* that "an attorney-client relationship . . . is no less inviolable than if counsel had been retained." *Id.* at 1106 (quoting *Smith*, 440 P.2d at 74).

Five years after *Harling*, the *Slappy* ruling undermined the reasoning in the *Smith* line of cases, which had focused on a defendant's right to continuity of counsel on the basis of the "inviolable" attorney-client relationship. *Smith*, 440 P.2d at 74. Five years after *Slappy*, *Wheat* further weakened *Smith* and its progeny by holding that "the district court must be allowed substantial latitude" in refusing to accept a defendant's waiver of conflict and disallowing him from being represented by his counsel of choice when that counsel already represents a codefendant. 486 U.S. at 163.

The California Supreme Court has since abrogated its decision in *Smith* by holding in *People v. Jones* that a trial court's removal of a defense attorney because of a potential conflict of interest did not violate the defendant's Sixth Amendment rights. 91 P.3d 939, 946 (Cal. 2004). *Jones* ruled "to that the extent that the holdings in *Smith* . . . were based on the federal constitution, they have been 'superseded' by the Supreme Court's decision in *Wheat v. United States*, 486 U.S. 153 (1988)." *Magana v. Superior Court*, 22 Cal. Ct. App.5th 840, 861 (2018).

In short, most of the cases that Petitioner cites to establish a split rely on rationale that predated this Court's Sixth Amendment decisions in *Slappy*, *Wheat*,

Caplin & Drysdale, and *Gonzalez-Lopez*. By contrast, all of the cases Petitioner cites on Colorado's side of the supposed split were decided after those four decisions and faithfully apply this Court's precedents.

Only two of the state supreme court cases Petitioner cites to establish a majority do not rely on *Smith*'s reasoning. *See Cottrell*, 809 S.E.2d at 430; *McKinley*, 860 N.W.2d at 880. The first case, *Cottrell*, in fact aligns with the Colorado Supreme Court's decision in this case. In *Cottrell*, the court held that "the trial judge acted properly and in accordance with his broad discretionary authority in removing [the defendant's] appointed attorneys." 809 S.E.2d at 430. Although the court recognized that a defendant's relationship with his appointed counsel "should be afforded the same level of deference as that which is afforded to clients with retained counsel," the court also emphasized "that does not overcome the strong language from *Gonzalez-Lopez*, *Sanders*, and the long line of other authorities delineating the wide latitude a trial judge possesses in balancing the right to counsel of choice with safeguarding the integrity of the judicial process." *Id.*

In *McKinley*, on the other hand, the Iowa Supreme Court held that "once an attorney is appointed, they should not be removed 'absent a factual and legal basis to terminate that appointment.'" 860 N.W.2d at 880. Similar to the already-abrogated *Smith* line of cases, *McKinley* focused on the "trust and good communication" of the "attorney-client relationship," *id.* and failed to consider this Court's holding in *Slappy* that the Sixth Amendment does not guarantee the

right to a "'meaningful relationship' between an accused and his counsel." 461 U.S. at 2.[9] *McKinley* also relied on a misreading of *Harlan*, a Colorado case that predated Petitioner's case, for the proposition that the Sixth Amendment guaranteed a right to continuity of counsel. 860 N.W.2d at 880. S*ee Rainey*, 527 P.3d at 395 (clarifying that "[n]owhere in *Harlan* did we suggest that the desire for continued representation flowed from the Sixth Amendment").

The intermediate appellate court cases Petitioner cites for its majority suffer from a similar flaw: all but two, *English*, 259 A.2d at 822, and *Espinal*, 781 N.Y.S.2d at 99, rely on *Smith*.

English involved substitution of privately retained counsel. Although the court mentioned that "once counsel has been chosen, whether by court or accused, accused is entitled to assistance of that counsel at trial," *id.*, this was dicta, as continuity of appointed counsel was not at issue in that case. This 1969 decision also predated this Court's Sixth Amendment decisions outlined above.

Espinal held that "a court commits reversible error when it interferes with an established attorney-client relationship without making threshold findings that [the attorney's] participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense." 781 N.Y.S.2d at 102 (internal quotation

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[9] Any difference between the outcome in *McKinley* and that in this case can also be explained by the fact that the court in *McKinley* removed defense counsel based on a potential conflict of interest. 860 N.W.2d at 886.

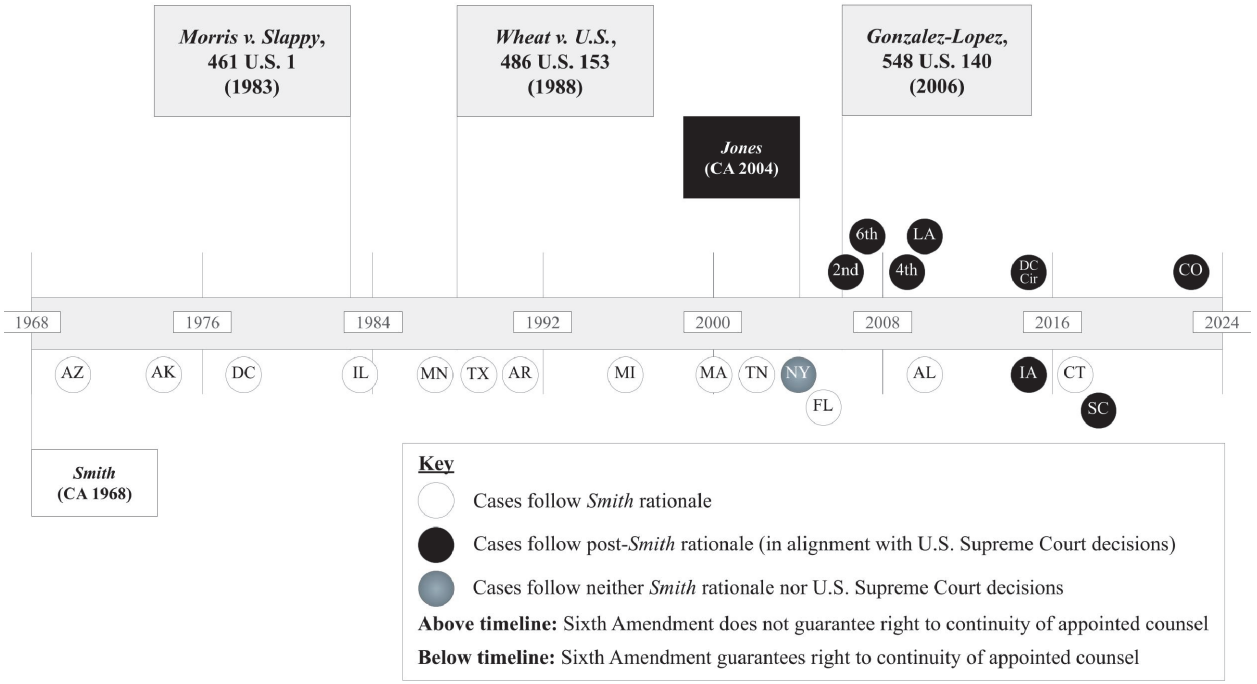
marks omitted). Such findings "must demonstrate that interference with the attorney-client relationship is justified by overriding concerns of fairness or efficiency." *Id.* (internal quotation marks omitted). This holding allows for substitution of appointed counsel in the interest of "fairness or efficiency," which is hardly the absolute Sixth Amendment "guarantee" Petitioner makes it out to be. *Espinal* also failed to consider *Slappy*, *Wheat*, or *Caplin & Drysdale*, and it predated *Gonzalez-Lopez*.

In any case, intermediate court decisions are less indicative of an entrenched split because in these states, the issue has not yet reached the highest court.

C. When viewed temporally, there is no veritable split.

The following timeline illustrates how the "circuit split" to which Petitioner refers is actually a course-correction: an older line of cases (which largely follow *Smith*) and a newer line of cases (which largely follow post-*Smith* rationale and align with critical decisions by this Court).[10]

[10] *English v. State*, 259 A.2d 822 (Md. Ct. Spec. App. 1969), has been omitted from the timeline because the case involved removal of private, not appointed, counsel. Additionally, *State ex. rel. Allen v. Carroll Cir. Ct.*, 226 N.E.3d 206 (Ind. 2024), which Petitioner did not cite on either side of the split, has been omitted from the timeline because the court held the defendant had a right to continuity of appointed counsel, but declined to ground it in the Sixth Amendment.


Morris v. Slappy, 461 U.S. 1 (1983)
Wheat v. U.S., 486 U.S. 153 (1988)
Gonzalez-Lopez, 548 U.S. 140 (2006)
Jones (CA 2004)
Smith (CA 1968)
6th
LA
2nd
4th
DC Cir
CO
1968
1976
1984
1992
2000
2008
2016
2024
AZ
AK
DC
IL
MN
TX
AR
MI
MA
TN
NY
FL
AL
IA
CT
SC
Key
Cases follow *Smith* rationale
Cases follow post-*Smith* rationale (in alignment with U.S. Supreme Court decisions)
Cases follow neither *Smith* rationale nor U.S. Supreme Court decisions
Above timeline: Sixth Amendment does not guarantee right to continuity of appointed counsel
Below timeline: Sixth Amendment guarantees right to continuity of appointed counsel

As this full depiction of the supposed split demonstrates, denying review in this case does not mean a split will deepen or persist. Courts continue to reevaluate prior case law that was based on a misapprehension of the scope of the Sixth Amendment. Lower courts are correcting previous expansions of the Sixth Amendment based on existing declarations by this Court. And the trend is moving in Colorado's direction.

III. Petitioner oversells the need for this Court's review.

With the purported split placed in proper context, the primary basis Petitioner advances for this Court's review dissipates. But even if a dispute remains, Petitioner exaggerates the need for review in this case.

Although creatively repackaged to avoid asking this Court to overrule its own existing precedent, Petitioner recycles arguments this Court has already rejected or deemed unworthy of consideration. As Petitioner points out, this Court has been asked to take up this issue several times. Pet. 27. Each time, it has declined. *Id.* While Petitioner speculates that vehicle problems with each case were the true reason for denial, equally likely is this Court's conclusion that its existing decisions provide sufficient guidance as the issue continues to percolate.

Given where Colorado falls on this issue, Petitioner asks this Court to undertake review based on semantics. Colorado already recognizes a defendant's interest in continuity of appointed counsel. That such interest is grounded in a different constitutional right is of no moment. All defendants, regardless of means, are protected under Colorado's rule. Petitioner fails to explain, as a practical matter, how it would have this

Court decide the case differently, particularly given the limitations this Court has repeatedly recognized on the Sixth Amendment right to counsel of choice.

At the same time, Colorado agrees the stakes are high, although not for the reasons Petitioner suggests. Petitioner appears to take an expansive view of the right to continuity of counsel he claims defendants with retained counsel enjoy. Taking this broad right and applying it to defendants with appointed counsel would have massive implications for our justice system. As NACDL explains, the overwhelming majority of defendants in the United States require government-funded counsel. NACDL Amicus Br. 18 ("Today, 'ninety-five percent of criminal defendants nationwide' are 'represented by assigned counsel.'" (quoting William S. Moreau, *Desperate Measures: Protecting the Right to Counsel in Times of Political Antipathy*, 48 Stetson L. Rev. 427, 428-31 (2019)).

Given the lack of a constitutionally mandated system for providing appointed counsel, states vary widely in how they assign appointed counsel to a particular case.[11] Creating a broad Sixth Amendment right to continuity of appointed counsel could limit states' ability to make policy decisions about how best to mobilize limited resources, increasing strain on already overworked attorneys to the detriment of effective assistance for all. *See, e.g.*, *State v. Reeves*, 11 So.3d 1031, 1053-54 (La. 2009) (replacement of appointed counsel was necessary because of program

[11] *See* David Carroll, *Right to Counsel Services in the 50 States*, Sixth Amendment Center (March 2017), *available at* https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf.

funding issues). As Colorado's experience highlights, that sacrifice is not needed to provide equal justice to all defendants.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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