Toward a More Robust Right to Counsel of Choice

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* Associate Professor of Law, Tulane Law School. I wish to thank my colleagues who participated in the Annual Criminal Procedure Discussion Forum, particularly Russell Weaver, who organized the forum and provided one of the forum's topics—criminal procedure's underrated cases—which was the inspiration for this article on *Morris v. Slappy*, 461 U.S. 1 (1983). I also wish to thank the editors of the *San Diego Law Review* for agreeing to publish our articles.

"*Accordingly, we reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel.*"
Chief Justice Burger in *Morris v. Slappy* (1983)[1]

"*[T]he Sixth Amendment counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best.*"
Justice Scalia in *United States v. Gonzalez-Lopez* (2006)[2]

I. INTRODUCTION

The Supreme Court's generosity toward the criminal defendant's right to counsel has waxed and waned. It waxed in *Gideon v. Wainwright*[3] and waned in *Strickland v. Washington*.[4] *Gideon* promised every person, black or white, rich or poor, the "guiding hand of counsel at every step in the proceedings against him."[5] *Strickland*'s cramped definition of "effective counsel," however, meant that promise could be fulfilled with a lawyer of the most minimal competence.[6]

Less discussed is the low point reached in *Morris v. Slappy*,[7] where the Court declared that the Sixth Amendment did not include "the right to a meaningful attorney-client relationship."[8] That dictum was not necessary to decide *Slappy*, but this spare outlook has dominated the Court's view of the Sixth Amendment right to counsel of choice, a right that is nonexistent for indigent defendants and limited for nonindigent defendants.

However, in light of Justice Scalia's recent and more generous view of the right to counsel of choice in *United States v. Gonzalez-Lopez*,[9] it is

1. 461 U.S. 1, 14 (1983).
2. 126 S. Ct. 2557, 2562 (2006).
3. 372 U.S. 335 (1963).
4. 466 U.S. 668 (1984).
5. *Gideon*, 372 U.S. at 345 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)) (internal quotation marks omitted).
6. *See Strickland*, 466 U.S. at 687 (setting out the two-part test—performance of counsel and prejudice to the defendant); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 113 (1986) ("Altogether, the justices signaled an intent to shield at least appellate courts from more than minimal involvement with claims of inadequate representation . . . ."). For example, the standard is so low that the Fifth Circuit divided on whether a sleeping lawyer could still be "effective." *See* Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (en banc).
7. 461 U.S. 1 (1983).
8. *Id.* at 13.
9. 126 S. Ct. 2557 (2006).

time to revisit the Court's position in *Slappy*, an underrated and largely ignored case, as well as the limited nature of the right to counsel of choice in general. *Gonzalez-Lopez*'s narrow holding was that the erroneous denial of the right to retained counsel of choice is structural error requiring automatic reversal.[10] More broadly, Justice Scalia professed that the right to counsel of choice is not circumscribed by *Strickland*'s stingy definition of "effective" counsel, as the Court had previously intimated,[11] but has independent footing, implicitly encompassing the right to a meaningful attorney-client relationship.

There is ample support for the notion that "a meaningful attorney-client relationship" is not only contemplated by the Sixth Amendment, but is the point of the right to counsel of choice.[12] A client chooses a lawyer with whom he or she can develop the bedrock principle of trust. Without this trust, the relationship is indeed meaningless, and the client will choose another attorney. When grounded in this reality, the right to counsel of choice becomes more robust, for both the indigent and nonindigent defendant.

While the Supreme Court has established that the right to retained counsel of choice may be outweighed by countervailing interests, it has never given lower courts guidance on how much weight to give the Sixth Amendment right in the balancing.[13] For nonindigent defendants, this translates into giving trial courts broad discretion to deny counsel of choice for reasons of administrative efficiency. Rarely, if ever, will an

10. *Id.* at 2566. This holding was not necessarily surprising, as most of the circuits that had addressed the issue had used an automatic reversal standard. *See* Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 186 n.28 (1998) (stating that the nearly uniform rule among the courts of appeals which considered the question was that a defendant who has been denied the right to counsel of choice need not show prejudice). *See, e.g.*, Glasser v. United States, 315 U.S. 60, 70 (1942) (finding that an unreasonable denial of right to counsel of choice "may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process"); Wilson v. Mintzes, 761 F.2d 275, 281 (6th Cir. 1985) ("Evidence of unreasonable or arbitrary interference with an accused's right to counsel of choice ordinarily mandates reversal without a showing of prejudice.").

11. *See* Wheat v. United States, 486 U.S. 153, 159 (1988) ("[T]he 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.").

12. *See infra* notes 93–111 and accompanying text.

13. *See infra* notes 24–30 and accompanying text.

appellate court disturb a trial court's denial of a continuance when weighing the court's calendar against the right to counsel of choice.[14]

For indigent defendants, since they have no right to counsel of choice, a trial court can deny a defendant's motion to continue the trial in order to allow his appointed counsel to stay on the case, thereby severing an ongoing attorney relationship. In that circumstance, according to the Court in *Slappy*, there are no constitutional rights involved.[15]

This Article takes its lead from the core principles of the right to counsel of choice expressed in *Gonzalez-Lopez*.[16] These principles indicate that the right should include an indigent defendant's right to continue an attorney-client relationship established at some point in the past, and that, for both nonindigent and indigent defendants, the right to continue a trial with counsel of choice must be honored by trial courts unless it would be unethical or manifestly unjust to do so. This means that trial courts must almost always grant a continuance to accommodate that choice and could rarely deny such a request for reasons of administrative convenience or docket control.

Part II gives the reader a history of the development of the Court's jurisprudence in the Sixth Amendment right to counsel of choice. The history shows that the right is restricted by one's ability to pay for that counsel, and that the Court has placed limits on even the rich man's choice in certain situations. Part III positions the indigent defendant in *Slappy* in this history and describes the case in some detail. The detail is necessary to show the Court's hostility toward Joseph Slappy, whether owing to his poverty, his crime, or his nerve in standing up for himself. After describing the Court's rejection of a right to a meaningful attorney-client relationship, Part IV demonstrates that such a right, adequately defined, is inherent in our adversary system of justice and that a defendant's right to counsel incorporates this right. Finally, Part V looks closely at the Court's most recent description of the right to counsel of choice in *Gonzalez-Lopez*. The opinion suggests that Sixth Amendment right to counsel jurisprudence needs to be revisited and revised to give both the indigent and nonindigent defendant a stronger constitutional interest in an ongoing attorney-client relationship.

II. THE RIGHT TO RETAINED COUNSEL OF CHOICE

The origins of the Sixth Amendment right to counsel of one's choosing are murky, at best. Certainly, it is not contained in the words of the

14. *See infra* note 40 and accompanying text.
15. *See infra* notes 88–91 and accompanying text.
16. *See infra* notes 125–30 and accompanying text.

Amendment itself, which guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[17] Historically, the right to counsel developed as a right that inured only to the wealthy defendants, as they had the means to bring counsel to trial with them, and, of course, they brought counsel of their choosing.[18] Hence, when the Supreme Court in *Powell v. Alabama* stated that "[i]t 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," this meant no more than that someone who could afford a lawyer should be given time to get one.[19]

However, *Powell* was not a case about right to counsel of choice.[20] The Court did not have a real opportunity to recognize this right directly until 1988, in *Wheat v. United States*.[21] Shortly before his trial, Mark Wheat wanted to substitute his own retained counsel with Eugene Iredale, a well-known, successful defense attorney, who had already orchestrated good results for two of his codefendants.[22] All three defendants executed waivers of any conflicts of interest in the multiple representation by Iredale.[23]

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17. U.S. CONST. amend. VI.

18. *See* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 41–42 (1991) (explaining that, at the time of enactment, the Sixth Amendment only meant the right to retain counsel of choice at one's expense).

19. 287 U.S. 45, 53 (1932).

20. In *Powell*, six African American men—the "Scottsboro boys," as they were called—were accused of the capital offense of raping two white women. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 247–48 (Oxford Univ. Press 1971) (1969). On the day of trial, a member of the bar offered in a very casual manner to help in representation of the men. *See Powell*, 287 U.S. at 56 (describing the appointment of counsel as "little more than an expansive gesture"). Given the timing, the number of defendants, the "hanging" atmosphere, and the seriousness of the offense, the issue was one of adequate representation more than counsel of choice. *See* Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: An Exercise in the Weighing of Unarticulated Values*, 43 S.C. L. REV. 345, 345–46 (1992) (stating that the first strong mention of the right was in *Powell*, and even that mention was only peripheral).

21. 486 U.S. 153 (1988).

22. *See id.* at 155 (describing the two favorable results); *id.* at 170 (noting Iredale's "fantastic job" on behalf of one of the codefendants) (Marshall, J., dissenting); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 687 n.79 (1992) (noting Iredale was recognized as a "superstar").

23. *Wheat*, 486 U.S. at 156.

A bare majority of the Supreme Court found that while Wheat should be given a presumption in favor of counsel of his choice, the presumption was overcome by the showing of "a serious potential for conflict."[24] Justice Rehnquist justified the qualification of the Sixth Amendment right to counsel of choice by noting:

> [W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, 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.[25]

Justice Rehnquist implied that the right to counsel of choice, if denied, could never be remedied as long as the defendant received effective assistance of counsel at trial. Hence, the majority did not endorse a very robust Sixth Amendment right to counsel of choice.

The *Wheat* Court also gave little weight to the right to counsel of choice in the balancing process. The Court rejected the defendant's claim that the waivers by all three defendants cured the conflict, stating that "institutional interests in the rendition of just verdicts in criminal cases" may override the defendant's interests.[26] Those interests include "ensuring that criminal trials are conducted within the ethical standards of the profession,"[27] ensuring that "the legal proceedings appear fair to all who observe them,"[28] and "the legitimate wish of district courts that their judgment remain intact on appeal."[29] This broad language has done little to guide lower courts on how much weight to give the right to counsel of choice in the balance.[30]

A year later, in *Caplin & Drysdale, Chartered v. United States*, the Court again recognized the defendant's "right to retain counsel of his choosing" and his "'right to spend his own money to obtain the advice

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24. *Id.* at 164. The alleged conflicts were far from realizable, and it was apparent to observers that the government did not want to deal with the potency of Eugene Iredale. In dissent, Justices Stevens and Blackmun contended that the Court held "a paternalistic view of the citizen's right to select his or her own lawyer," "greatly exaggerate[d] the significance of the potential conflict," and gave "inadequate weight to the informed and voluntary character of the clients' waiver of their right to conflict-free representation," ignoring the fact that independent counsel had advised Wheat concerning the wisdom of a waiver. *Id.* at 172 (Stevens, J., dissenting). Scholars have written about and recognized the falsity of the government's claims of potential harmful conflicts in *Wheat*. *See, e.g.*, Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1262 (1989).

25. *Wheat*, 486 U.S. at 159.

26. *Id.* at 160.

27. *Id.*

28. *Id.*

29. *Id.* at 161.

30. *See* Shapiro, *supra* note 20, at 350 (making the same point).

and assistance . . . of counsel.'"[31] Like *Wheat*, however, *Caplin & Drysdale* upheld a limitation on the right.[32] The majority upheld a restriction on the defendant's ability to retain counsel of his choice due to a federal asset forfeiture provision that reduced a defendant's available funds to pay a lawyer.[33] Justice White, for the bare majority, reasoned that a "defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice."[34]

As in *Wheat*, the Court was sharply divided. The dissent in *Caplin & Drysdale* articulated the basic underlying values of the right that support a more robust right to counsel of choice. Justice Blackmun argued that the right plays a "distinct role . . . in protecting the integrity of the judicial process, a role that makes 'the right to be represented by privately retained counsel . . . the primary, preferred component of the basic right,'"[35] it "foster[s] the trust between attorney and client that is necessary for the attorney to be a truly effective advocate,"[36] and it assures "some modicum of equality between the Government and those it chooses to prosecute."[37] These principles, including a formulation of a meaningful attorney-client relationship, would logically apply to indigent defendants as well, but the Court has yet to make that application.[38]

Following *Wheat* and *Caplin & Drysdale*, lower courts consistently hold that the right to a retained lawyer of one's choosing "can be circumscribed by a sufficient overriding interest of the judicial system."[39] Because the Court did not give guidance as to how much weight to give the right to

31. 491 U.S. 617, 626 (1989) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting)).
32. *Id.* at 624–25.
33. *Id.*
34. *Id.* at 626. For a criticism of the Court's treatment of the right to counsel in *Caplin & Drysdale*, see Garcia, *supra* note 18, at 87 ("[T]he *Caplin* Court left no doubt about its predilections: it thoroughly concurred with legislative efforts to deprive defendants charged with major drug offenses of their ability to hire private attorneys."); *id.* at 86 ("The Court's jurisprudence in this sphere is seriously flawed, reflecting its strong preference for crime control and efficiency imperatives and its corresponding depreciation of the critical role of the defense attorney in the criminal process.").
35. *Caplin & Drysdale*, 491 U.S. at 645 (Blackmun, J., dissenting).
36. *Id.*
37. *Id.* at 646.
38. *See* discussion *infra* Part III.
39. 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.4(c), at 557 (2d ed. 1999).

counsel of choice, courts have readily denied counsel of choice when it interferes with the trial court's effective administration of justice in controlling its own docket. Appellate courts give the trial courts wide latitude in exercising their discretion to grant or deny the continuances requested by defendants to accommodate chosen counsel's schedules.[40] Such an unchecked ability to sever the ongoing relationship between a defendant and his chosen attorney suggests that the right to counsel of choice is fairly low on the hierarchy of Sixth Amendment rights.[41]

In this context, a trial court's denial of a continuance request by an indigent defendant, which effectively severed the defendant's ongoing relationship with his appointed lawyer, and the subsequent affirmance by the Supreme Court in *Slappy*, likely appeared unremarkable at the time.

III. SITUATING *MORRIS V. SLAPPY*

Just as it has always been assumed since the adoption of the Sixth Amendment that a defendant has a right to retained counsel of his choice, it has also always been assumed that the indigent defendant has no correlative right to counsel of his choosing.[42] While the Court expanded the Sixth Amendment right to counsel to indigent defendants in *Gideon v. Wainwright*,[43] the right to counsel of choice was not also extended.[44] Once *Gideon* effectively created an appointed counsel system,

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40. *See* Holly, *supra* note 10, at 191–92 & nn.58–59 (1998) (observing that appellate courts give trial courts "wide discretion to . . . grant or deny continuance . . . to (i) accommodate a defendant's chosen counsel's scheduling conflict or illness, or (ii) to provide a defendant with additional time to obtain new counsel," and citing cases). *See also* LAFAVE ET AL., *supra* note 39, § 11.4(c), at 559 n.44, 560 n.46 (citing cases demonstrating that the right to counsel of choice "may not be insisted upon in a manner that will obstruct an orderly procedure in courts of justice and deprive such courts of their inherent powers to control the same").

41. Judge Posner described the reduced status of the right to counsel of choice as follows:

> That a district judge has a broad discretion to extinguish the right to counsel of one's choice for reasons of calendar control suggests that this right, which in any event no indigent criminal defendant has, is, like the right to effective assistance of counsel (a right whose vindication requires proof of prejudice), not so fundamental as the rights protected by the rule of automatic reversal.

United States v. Santos, 201 F.3d 953, 960 (7th Cir. 2000).

42. *See* LAFAVE ET AL., *supra* note 39, § 11.4(a), at 550 n.2 (citing cases stating the indigent defendant has no right to counsel of choice); Holly, *supra* note 10, at 197 n.91 (same).

43. 372 U.S. 335 (1963).

44. Ironically, in retrospect, on remand from *Gideon*, the trial court deferred to Gideon's choice of appointed counsel. Abe Fortas had enlisted a prominent trial lawyer to represent him, the prosecution suggested a public defender, and Gideon asked for a particular local attorney. Gideon's wish was granted. Brief for the Respondent at 21, United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) (No. 05-352), 2006 WL 838892 (citing ANTHONY LEWIS, GIDEON'S TRUMPET 237–38 (Vintage Books 1989)

appellate courts upheld trial judges' complete discretion to appoint any competent attorney they chose for an indigent defendant, regardless of the defendant's preferences.[45]

There is a lively debate about whether the justifications traditionally given are adequate to deny indigent defendants a Sixth Amendment right to counsel of choice. According to Professor Wayne LaFave, one of the justifications is an assumption that judges are better able to choose an attorney than the indigent defendant "because they know the abilities of the available local counsel."[46] A second justification is a concern that allowing defendants to choose will disrupt the "even handed distribution of assignments" by imposing a substantial burden on the more experienced attorneys and giving an advantage to repeat offenders, who are most likely to know and select those attorneys.[47] Both of these rationales have been roundly criticized as inadequate,[48] and scholars have called for a system that allows for choice in the initial appointment.[49]

(1964)) ("That the trial judge deferred to Gideon's choice shows the continued vitality of the original understanding that the assistance of counsel involved a defendant's choice and not simply the presence of some attorney at his trial.").

45. LAFAVE ET AL., *supra* note 39, § 11.4(a), at 550. This is mirrored by the rules regarding substitution of counsel: an indigent defendant has no right to replace one appointed counsel with another and has a right to substitution only upon establishing "good cause, such as conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead . . . to an apparently unjust verdict." *Id.* § 11.4(b), at 555. Mere loss of confidence in one's attorney is not "good cause," and the defendant cannot insist upon new counsel because he does not like the appointed counsel's "attitude," association with the prosecutor, or approach on matters of strategy. *Id.*

46. *Id.* §11.4(a), at 550.

47. *Id.* §11.4(a), at 550–51. Professor LaFave gives a third justification: since the Sixth Amendment guarantees the defendant a right only to representation that is competent, and not to that representation that he believes—correctly or not—to be the best, the trial court may value over the defendant's choice the administrative convenience of an appointment system that ignores defendant's preference. *Id.* Importantly, however, the Supreme Court in *Gonzalez-Lopez* rejects this rationale. *See* discussion *infra* Part V.

48. *See* Holly, *supra* note 10, at 201–15 (arguing the inadequacy of each of the three rationales); Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 918 (2004) (same); Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 80, 89–95 (1974) (same).

49. *See, e.g.*, Holly, *supra* note 10, at 225 (advocating a presumption in favor of accommodating an indigent defendant's choice from among a panel of attorneys rendering public defender assistance, and that courts should consider efficiency, reasons for the defendant's choice, and availability of counsel); Lefstein, *supra* note 48, at 918 (arguing in favor of preferring an indigent defendant's choice, as is done in England); Tague, *supra* note 48, at 99 ("The importance to the indigent of choosing his attorney is

Putting that debate aside for the moment, there is a narrower Sixth Amendment right contained within the right to counsel of choice that is at issue whenever a trial court severs an ongoing attorney-client relationship. Much less debatable, it would seem, is whether the justice system can and should give preference to such an ongoing relationship. When Joseph Slappy's case made its way to the Supreme Court, he was not asking for a blanket right to counsel of choice, but was simply asking to continue his trial with his appointed lawyer.[50] Like Clarence Gideon and Anthony Faretta before him, Joseph Slappy hoped that the Court would champion the rights and dignity of the indigent criminal defendant. He was terribly wrong.

Joseph Slappy was charged in San Francisco Superior Court with rape, forcible oral copulation, robbery, burglary, and false imprisonment.[51] The prosecution contended that Slappy accosted the female victim in a grocery store, was kicked out of the store by the manager, threw a beer bottle at the victim when she left the store, and was waiting for her in the lobby of her apartment building when she arrived. Slappy then forced her into the basement where he raped and sodomized her, and then robbed her. The victim gave the police a description and the police apprehended Slappy two blocks away, wearing the "Afro" wig and the green fatigue jacket with a fur-trimmed hood that the victim had described. The police found the victim's jewelry on Slappy's person and a button from his jacket on the basement floor of the apartment building, along with the victim's scattered clothing.[52] Suffice it to say, this was a serious, and ugly, case.

Because Joseph Slappy was indigent, the court appointed the San Francisco Public Defender's office to represent him.[53] Deputy Public Defender Harvey Goldfine was assigned to the case. It is unclear when the assignment occurred, but the offense date was July 7, 1976, and Slappy was arrested the same day. Goldfine represented Slappy at least as early as the preliminary hearing and then supervised "an extensive

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clear: improvement in the attorney-client relationship, representation by an able attorney who will fight aggressively for him, and the likelihood of greater participation in structuring his defense."); Kenneth P. Troccoli, *"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 48 (2002) (arguing that an indigent defendant should be given the option to select his own lawyer and the court should appoint the lawyer provided he or she is available, willing, and conflict-free).

50. *See* Morris v. Slappy, 461 U.S. 1, 6–9 (1983).

51. *Id.* at 5 n.1.

52. *Id.*

53. *Id.* at 5.

investigation."[54] The trial was scheduled for September 23, 1976, but Goldfine was hospitalized for emergency surgery shortly before trial.[55]

Six days before the trial date, the Public Defender's office reassigned the case to Bruce Hotchkiss, a senior trial attorney in the office.[56] In those six days, Hotchkiss met with Slappy once at his jail cell to tell him he would be representing him, and then one more time before trial.[57] On the day of trial, Slappy said to the trial court, "I have only had this P.D. [Public Defender] for a day and a half, we have not had time to prepare this case."[58] Hotchkiss, on the other hand, stated, "I feel that I am prepared. My own feeling is that a further continuance would not benefit me in presenting the case."[59] Slappy said that he was "*satisfied with the Public Defender*, but it's just no way, no possible way, that he has had enough time to prepare this case."[60] The court construed this as a motion to continue and denied it, accentuating that Hotchkiss had had the case for *six* days.[61]

On the second day of trial, Slappy repeated his concerns that Hotchkiss had not had time to prepare the case and said, "Mr. Harvey Goldfine was my attorney, he was my attorney, and he still is . . . . Mr. Harvey Goldfine didn't even have enough time to go over my case with me . . . ."[62] On the third day of trial, Slappy filed a pro se petition for a writ of habeas corpus, claiming he was unrepresented by counsel.[63] He argued that "my attorney's in the hospital, and I don't legally have no attorney, and this P.D. here told me . . . *I didn't have no defense to my charges*."[64] Hotchkiss denied this latter statement, and the trial court treated Slappy's petition as a renewal of the motion to continue and denied it.[65] Thereafter, Slappy sat through his trial but did not

54. *Id.* at 5.
55. *Id.*
56. *Id.*
57. Slappy v. Morris, 649 F.2d 718, 719 (9th Cir. 1981), *rev'd*, 461 U.S. 1 (1983).
58. *Slappy*, 461 U.S. at 6. From Slappy's point of view, it is a day and a half because his first real interview with Hotchkiss was just on the Tuesday before the trial began on Thursday. *Id.*
59. *Id.* Mr. Hotchkiss's choice to go to trial against his client's wishes and without spending the time necessary to establish a relationship with Slappy are inexcusable and potentially unethical. *See* discussion *infra* notes 95–99 and accompanying text.
60. *Slappy*, 461 U.S. at 6.
61. *Id*.
62. *Id.* at 7–8.
63. *Id.* at 8.
64. *Id.*
65. *Id.*

participate or testify.[66] At one point, the following colloquy between the judge and Slappy occurred:

> THE DEFENDANT: Your Honor, I'm leaving that part up to you. I asked you may I be excused. If you don't want to excuse me, I'll sit right here. What difference does it make?
>
> THE COURT: Well, I would urge you then Mr. Slappy to remain seated and in the Courtroom, and should you desire to discuss this case further with your Counsel, why you certainly can let me know, or through your Counsel let me know.
>
> THE DEFENDANT: What do I have to say to get through to you, your Honor, what do I have to say to make you understand. I have told you two or three times and then you keep telling me about talking to my Counsel. I don't have no attorney . . . . [M]y attorney's name is Mr. P.D. Goldfine, Harvey Goldfine, that's my attorney, he's in the hospital.
>
> THE COURT: Well, I am going to ask you then under the circumstances, Mr. Slappy, to remain in the Courtroom and to listen to the proceedings and listen to the progress of this case.
>
> THE DEFENDANT: [T]hat's up to you what you do, your Honor. If you say so I'll remain here, but I am not participating in the trial, I'm through with it, as of now I am through with this trial. I was through with it the 24th when this P.D. told me that I didn't have no defense from my charges. I was through then, and that's why I didn't see him when he come down to see me.[67]

Slappy was convicted of robbery, burglary, and false imprisonment, but the jury hung on rape and forcible oral copulation.[68]

The second trial on the two sexual assault charges took place a week later. Slappy refused to cooperate or even speak with Hotchkiss. Again, he refused to take the stand, against Hotchkiss's advice. He was convicted of both sexual assault charges this time.[69]

Slappy's pro se writ of habeas corpus wound its way to the United States Supreme Court.[70] Whereas Clarence Gideon is haled as a hero for fighting for the right to counsel all the way to the Supreme Court, Joseph Slappy's efforts toward recognition for his plight were treated by Chief

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66. *Id.* at 8–9.
67. Slappy v. Morris, 649 F.2d 718, 719 (9th Cir. 1981), *rev'd*, 461 U.S. 1 (1983).
68. *Slappy*, 461 U.S. at 9.
69. *Id.*
70. *See id.* at 9–11.

Justice Burger with disdain, if not contempt.[71] The majority of the Court had no sympathy for a man in his position, even as he was without funds, accused of a heinous crime, and without the "guiding hand" of a lawyer he trusted.[72] Chief Justice Burger described Slappy's "What do I have to say to get through to you" comment to the trial judge as a renewed "attack" on the judge.[73] A more sympathetic observer would have described Slappy's words as courageous and admirable attempts by a pro se litigant to maintain his position and his dignity amidst the utter abandonment of his concerns by Bruce Hotchkiss and the trial judge.

The Court's attitude toward the efforts of Joseph Slappy is notably the opposite of the Court's attitude toward Anthony Faretta eight years earlier.[74] Anthony Faretta was charged with grand theft and requested that he be allowed to represent himself.[75] The Court was all too willing to give Anthony Faretta every benefit of the doubt in granting his wishes, emphasizing that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[76] Further, "[a]n unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense."[77] Alas, while those noble phrases are equally applicable to Joseph Slappy, they only apply to a man willing "to make a fool of himself," for "one who is his own lawyer has a fool for a client."[78] Ironically,

71. *See infra* notes 73 and 82 and accompanying text; *see also Slappy*, 461 U.S. at 12 (describing Slappy's refusal to cooperate with Hotchkiss as "adamant–even contumacious"); Berger, *supra* note 6, at 49 ("[F]ive justices . . . had managed to denigrate both defense attorney and client, and to do so in a wholly gratuitous fashion.").

72. *See* Berger, *supra* note 6, at 50 (finding that, in *Slappy*, the Court "reached out to disparage generally the importance of the bond between an accused and his attorney. Their doing so, moreover, in the setting of a poor man's prosecution revealed a total insensitivity to the special disadvantages of pauper defendants caught in the toils of assembly-line justice.").

73. It is worth noting that Burger excerpted only that one comment from *Slappy* from the fuller colloquy quoted by the Ninth Circuit and recited in this Article. Of course, out of context, that statement may appear ruder and more abrupt to the reader.

74. *See* Faretta v. California, 422 U.S. 806 (1975).

75. *Id.* at 807.

76. *Id.* at 819–20.

77. *Id.* at 821.

78. *Id.* at 852 (Blackmun, J., dissenting) (internal quotation marks omitted).

then, Joseph Slappy only could have won the Court's approval if he was foolish enough to represent himself.[79]

Further, Slappy, who was essentially pro se in his presentation to the court, was expected to make his arguments with precision. Because Slappy framed his complaints as Hotchkiss not being ready, and did not express dissatisfaction with Hotchkiss himself until "midtrial,"[80] all nine members of the Court agreed that the trial court did not abuse its discretion in denying a continuance.[81] Further, while there was no evidence in the record of any dishonesty,[82] Chief Justice Burger surmised that the trial court "could reasonably have concluded that respondent's belated requests to be represented by Goldfine were not made in good faith but were a transparent ploy for a delay."[83]

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79. Professor Garcia notes that "the dignitary values *Faretta* safeguarded were scorned in *Slappy*," Garcia, *supra* note 18, at 96, and further:

> Since rendering its opinion in *Faretta* . . . the Court has been loath to recognize the crucial dignitary norms promoted by the right to counsel. Rather, the Court has devalued the critical link between the defendant's dignity and the attorney's role in preserving and safeguarding the client's autonomy against the government.

Id. at 92. Professor Tague also emphasizes:

> It is ironic that judges so jealously guard the power to select an indigent's attorney while granting so much freedom to other aspects of the relationship between a criminal defendant and his attorney. Traditionally the courts have found that a defendant has an interest in defending himself in whatever way he considers best, using whatever resources are legitimately available to him, regardless of the consequences.

Tague, *supra* note 48, at 84–85.

80. Morris v. Slappy, 461 U.S. 1, 13 (1983).

81. *See id.* at 12; *id.* at 18 (Brennan, J., concurring); *id.*at 29 (Blackmun, J., concurring).

82. The Ninth Circuit had noted that there was no evidence in the record of bad faith on the part of Joseph Slappy in making his request. Slappy v. Morris, 649 F.2d 718, 722 (9th Cir. 1981), *rev'd*, 461 U.S. 1 (1983). Chief Justice Burger cites to no evidence, but simply recites the State's contention that it was bad faith. *Slappy*, 461 U.S. at 11 n.4.

83. *Slappy*, 461 U.S. at 13. Inexplicably, Chief Justice Burger continued, "In our view, the record shows that the trial judge exhibited sensitive concern for the rights of the accused and extraordinary patience with a contumacious litigant." *Id.* Rather, the record showed a trial court allowing substitute counsel to step in on a very serious felony case only six days before trial and over the defendant's firm and unwavering objection. *Id.* at 5–9.

Consistent with Burger's negative view of Slappy is the finding that "judges in the criminal justice system appear to rely on their own, often skeptical, presumptions regarding a criminal defendant's or his lawyer's motivations for alleging a breakdown in the lawyer-client relationship" when ruling on motions to substitute counsel. Lindsay R. Goldstein, Note, *A View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship—An Analysis and Proposal for Reform*, 73 FORDHAM L. REV. 2665, 2700 (2005). Goldstein's review of the judiciary's response to motions to withdraw or substitute counsel in civil and criminal cases suggests:

> [D]espite some congruence in judges' approaches to breakdowns in the lawyer-client relationship, judges in the criminal context seem more likely to

Before Joseph Slappy's writ reached the Supreme Court, the Ninth Circuit Court of Appeals had decided that his writ should be granted if he was not given a new trial on all five counts.[84] The Court of Appeals found that, while "an indigent defendant does not have an unqualified right to the appointment of counsel of his own choosing," he does have a Sixth Amendment right to "a meaningful attorney-client relationship."[85] The trial court ignored this right by failing to conduct a balancing test weighing Slappy's interest in continued representation by Goldfine against the State's interest in proceeding with the scheduled trial.[86] Indeed, the trial court had not inquired at all into the expected length of Goldfine's unavailability. Hence, the appellate court said the violation of his Sixth Amendment right to counsel required automatic reversal, without a showing of prejudice.[87]

Chief Justice Burger, writing for five members of the Court, scoffed at the notion that the Sixth Amendment contains a right to a meaningful attorney-client relationship.[88] He dismissed the Ninth Circuit's reasoning in one short paragraph, stating simply that it is "without basis in the law."[89] Because the indigent defendant has no right to counsel of choice, the

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> reject even a worthy motion to withdraw or substitute counsel. The apparent result of this disparate treatment is that trust and confidence in the lawyer-client relationship receives less protection in the criminal justice system than in civil litigation.

Id. at 2681–82.

84. *Slappy*, 461 U.S. at 11.

85. *Slappy*, 649 F.2d at 720.

86. The Ninth Circuit stated:

> Because of the importance of the attorney-client relationship to the substance of the defendant's sixth amendment right to counsel, we hold that the sixth amendment (as incorporated by the fourteenth amendment) encompasses the right to have the trial judge accord weight to that relationship in determining whether to grant a continuance founded on the temporary unavailability of a defendant's particular attorney. In considering the continuance, the trial court must balance the defendant's constitutional right to counsel against the societal interest in the "prompt and efficient administration of justice."

Id. at 721 (quoting Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978)).

87. *Slappy*, 461 U.S. at 11.

88. Although the Court was unanimous in the judgment, all agreeing that the denial of the defendant's motion for a continuance was well within the court's discretion, Justice Brennan's concurrence, joined by Justice Marshall, disagreed with the Court's conclusion denying a right to a meaningful attorney-client relationship. *Id.* at 15 (Brennan, J., concurring). Justices Blackmun and Stevens wrote separately to argue that the Court should not have addressed the Sixth Amendment issue. *Id.* at 29 (Blackmun, J., concurring).

89. *Id.* at 13 (majority opinion).

Court treated the issue as simply a matter of a judge's broad discretion to grant or deny a continuance.[90] Of course, this discretion was not abused because substitute counsel Hotchkiss said he was ready for trial.[91]

While not directly deciding the issue, a majority of the Supreme Court did not appear sympathetic to recognizing a right to continue an ongoing attorney-client relationship. As argued by Professor Alfredo Garcia, "The cumulative impact of *Slappy*, *Wheat*, and *Caplin* is to abridge the defendant's dignitary interest in counsel who will be perceived as effective and who will foster the defendant's belief in the legitimacy of the criminal process."[92]

IV. THE RIGHT TO A MEANINGFUL ATTORNEY-CLIENT RELATIONSHIP

The concept of a Sixth Amendment "right to a meaningful attorney-client relationship" was obviously too vague for the Supreme Court to embrace in *Slappy*.[93] However, like all of the rights enumerated in the Sixth Amendment, the right simply needs defining parameters. One concrete aspect of the right that can be easily embraced and defined is a Sixth Amendment right to continue an ongoing relationship with counsel, whether appointed or retained.[94] The right to retained counsel of choice is supported by three basic tenets of our adversary system: trust, autonomy, and fairness. Those three precepts apply equally to recognition of a Sixth Amendment right of any defendant to continue a relationship with counsel without undue interference from the trial court.

First, the development of trust between the attorney and her client is well recognized by the courts and ethical rules as "the cornerstone of the adversary system"[95] and a primary rationale behind the right to counsel

90. *Id.* at 11–12.
91. *Id.* at 12.
92. Garcia, *supra* note 18, at 98.
93. *See Slappy*, 461 U.S. at 13–14.
94. Justices Brennan and Marshall, concurring in *Slappy*, agreed with the Ninth Circuit that, while an indigent defendant has no right to choose his appointed counsel, he does have a right to continued representation by the attorney appointed to represent him and with whom he has developed a relationship. *Slappy*, 461 U.S. at 20–21 (Brennan, J., concurring).
95. Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981) ("Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel."). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEFENSE FUNCTION Standard 4-3.1(a) (1993) ("Defense counsel should seek to establish a relationship of trust and confidence with the accused . . . ."); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2007) (stating that trust is "the hallmark of the client-lawyer relationship").

of choice.[96] If the client trusts his lawyer, the quality of representation is vastly increased. An effective defense at trial, the negotiation of a good plea bargain, and the development of mitigating evidence for sentencing all require the full cooperation of the client.[97] A trusting client is far more likely to reveal facts and details that not only help in formulating the defense, but, in the absence of broad discovery rules, help the attorney learn more about the prosecution's case.[98] The ethical rules

96. *See, e.g.*, United States v. Panzardi Alvarez, 816 F.2d 813, 816 (1st Cir. 1987) ("The denial of a defendant's right to choose his own counsel jeopardizes his sixth amendment guarantees because 'a substantial risk [arises] that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.'") (alteration in original) (citation omitted).

97. Professor Anne Bowen Poulin notes that:

> Counsel's view of the defendant, as well as the defendant's trust or mistrust of counsel, plays a role in determining the course of the defendant's representation. Thus, the relationship between the defendant and counsel plays a critical role in ensuring the defendant's proper involvement in the proceedings and will be enhanced if based on the defendant's desire to begin or maintain that relationship.

Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1250–51 (2006).

98. *See Morris v. Slappy*, 461 U.S. at 20–21 (1983) (Brennan, J., concurring) ("Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy. This may require the defendant to disclose embarrassing and intimate information to his attorney."). The Ninth Circuit expressed a similar view in *Slappy v. Morris*, noting that:

> The attorney-client relationship involves 'an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney.' Often, the outcome of a criminal trial may hinge upon the extent to which the defendant is able to communicate to his attorney the most intimate and embarrassing details of his personal life. Complete candor in attorney-client consultations may disclose defenses or mitigating circumstances that defense counsel would not otherwise have uncovered. At the very least, an open exchange between attorney and client will often foreclose the possibility of surprise at trial.

649 F.2d 718, 720 (9th Cir. 1981), *rev'd*, 461 U.S. 1 (1983) (citation omitted). The ABA Standards emphasize the importance of trust, stating:

> Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEFENSE FUNCTION Standard 4-3.1 cmt. (1993).

guiding criminal defense attorneys expect and require the development of this trusting relationship.[99]

Trust also means that the defendant is far more likely to follow his lawyer's advice and instincts.[100] Representing a criminal defendant is a treacherous balancing act. A good lawyer is sometimes tough with the prosecution, and sometimes cooperative with the prosecution, depending upon what is best for the client. A good lawyer tries to persuade his client to plead guilty when, in his or her professional opinion, a plea will produce a better outcome. A good lawyer persuades his client not to testify when it will reveal damaging prior convictions. If the client does not trust his lawyer, the client's instincts will tell him to fight the lawyer at every step. Representation, and likely the outcome, will suffer. There is no way to know whether Harvey Goldfine would have been able to produce a better result for Joseph Slappy, but with his client's cooperation, Goldfine would have had a much better chance than Hotchkiss.

A defendant who is able to choose and hire his lawyer is far more likely to trust that attorney than a defendant who cannot afford a lawyer and has one appointed by the court.[101] There is good reason for this

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99. The ABA Standards, standards to which the Court has "long . . . referred 'as guides to determining what is reasonable'" in determining competency of representation, set out duties of counsel which would be all but impossible without a trusting relationship with the client. Wiggins v. Smith, 539 U.S. 510, 524 (2003) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). For example, because "[t]he client is usually the lawyer's primary source of information for an effective defense," counsel is charged with seeking to know "all relevant facts known to the accused" as soon as practicable. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEFENSE FUNCTION Standard 4-3.2(a) & cmt. (1993). Counsel must keep the client informed of developments and progress, *id.* Standard 4-3.8(a), give explanations to the extent necessary to help the client make informed decisions, *id.* Standard 4-3.8(b), urge the client to take professional advice, *id.* Standard 4-5.2(a) & cmt., involve the client in plea discussions, *id.* Standard 4-5.2(a), and develop and raise mitigating factors both to the prosecutor initially and to the court at sentencing, *id.* Standard 4-4.1 cmt. The ABA Standards admit that confidence of the client in his lawyer is critical and that chosen counsel's persuasion will carry greater weight. *Id.* Standard 4-1.2 cmt.

100. The Ninth Circuit elaborated:

> The attorney-client relationship is accorded special protection because of its impact on the truth-finding process . . . . But representation at trial is without substance if the defendant does not have confidence in his attorney's ability to represent the defendant's best interests. It is unlikely that a criminal defendant will have a legal education. He, therefore, will have to rely on his attorney's advice for the most basic decisions in a criminal trial whether to plead guilty, whether to testify, whether to present a defense, and which witnesses to call. If the defendant does not trust his attorney, he may be unwilling to follow his attorney's advice in these most important areas.

Slappy, 649 F.2d at 720.

101. Studies have shown this to be the case. *See* Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 87 (2001) (finding that the studies show that retained attorneys are

since the quality of representation for poor criminal defendants in this country suffers greatly. Many public defenders do not have the time, resources, or abilities to meet with their clients often, keep them informed, or develop trust.[102] They are underpaid and overworked, and, sadly, many also do not care.[103] Therefore, when an indigent defendant does develop a working relationship with an appointed attorney, and wishes to keep that attorney, it should not be easily severed.[104]

Second, the decision to choose one's lawyer, or, in this case, to choose to continue an ongoing relationship without risk of it being severed, promotes individual autonomy.[105] The Supreme Court has recognized this as a core value in *Faretta*, for it is the defendant whose freedom is at stake, and he should have a role in key decisions related to the course and quality of his defense.[106] Courts recognize that autonomy is served

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viewed more positively than court-appointed attorneys, who are generally not trusted and are perceived as representing the state and as inexperienced and overworked).

102. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005).

> For indigent defendants the development of robust communicative relationships with counsel is difficult if not impossible. In overburdened state courts, it is not uncommon for a defendant to meet his public defender, hear about the deal, and decide what to do—all in the span of less than an hour and within the confines of a court lock-up or hallway while waiting to go into court.

Id. at 1462.

103. *See* Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 253–54 ("Defendants are not only given bad lawyers, they are tethered to them because defendants have no right to replace even the most incompetent and unsympathetic lawyer.").

104. *See* Berger, *supra* note 6, at 50 ("[T]he grim reality of indigents' pervasive mistrust of their lawyers . . . should make a court hesitate to compel or condone the rupture of a good indigent-counsel relationship.").

105. *See* Flanagan v. United States, 465 U.S. 259, 268 (1984) (stating that the right of an accused to retain counsel of his choice "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding"); Holly, *supra* note 10, at 188 (stating that the right to counsel of choice implicates accused's personal interest in autonomy and the personal right to control one's defense).

106. The Second Circuit recognized that:

> [T]he defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates. . . . The resolve of the [defendants] to stand before the law together, . . . no less than Faretta's resolve to stand before the law entirely alone, is worthy of constitutional protection.

United States v. Curcio, 694 F.2d 14, 25 (2d Cir. 1982) (Friendly, J.). *See* Morris v. Slappy, 461 U.S. 1, 20–21 (1983) (Brennan, J., concurring) ("Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant

by the nonindigent defendant's right to counsel of choice.[107] Logically, it is served by any measure of choice given to the indigent defendant. Because lawyers are not interchangeable, choosing a lawyer can make all of the difference in the way a case proceeds.[108] A client who consciously chooses or prefers an aggressive litigator may be more likely go to trial than a client who prefers a lawyer whom he knows gets great deals from the prosecutor. Regardless of what the defendant knows in advance, each lawyer will choose her own strategies at every step, as there are usually multiple possible strategies. Choosing his lawyer may be the most important choice the defendant will make in the presentation of his defense.[109]

Lastly, the right to an ongoing relationship with a lawyer of one's choosing promotes the principles of fairness and integrity in the criminal judicial process. For example, the defendant is more likely to see the

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has an interest in his relationship with his attorney. . . . It is the defendant's interests, and freedom, which are at stake.").

107. In dissent in *Wheat v. United States*, Justice Marshall observed that the right to counsel of choice sounded in "an appreciation that a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense" and "[a]n obviously critical aspect of making a defense [acknowledged in *Faretta*] is choosing a person to serve as an assistant and representative." 486 U.S. 153, 165–66 (1988) (Marshall, J., dissenting).

108. Third Circuit Judge Higginbotham described the importance of selecting an attorney as follows:

> We would reject reality if we were to suggest that lawyers are a homogenous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. The differences, all within the range of effective and competent advocacy, may be important in the development of the defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.

United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979). *See also* Fuller v. Diesslin, 868 F.2d 604, 610 (3d Cir.1989), *cert. denied*, 493 U.S. 873 (1989) ("The most important decision a defendant makes in shaping his defense is his selection of an attorney. The selected attorney is the mechanism through which the defendant will learn of the options which are available to him."); United States v. Nichols, 841 F.2d 1485, 1502 (10th Cir. 1988) ("A defendant's right to choose an attorney is a corollary right to decide what type of defense the accused will present."); *Curcio*, 694 F.2d at 24 (recognizing that defendants who sought joint representation by a single chosen attorney through whom they had been previously represented were asserting their "right to present their defense in what they have reasonably concluded to be the most effective fashion . . . .").

109. As some commentators noted:

> Choice of counsel in some cases may be the most important decision the defendant makes. . . . Because the defendant has to live with the results of such decisions by counsel, it may be argued that the defendant should be given an unfettered right to choose counsel on the basis of a right to personal autonomy . . . .

Peter A. Joy & Kevin C. McMunigal, *Client Autonomy and Choice of Counsel*, CRIM. JUST., Fall 2006, at 57, 59.

process as fair if the judge's calendar does not prevail over his relationship with his lawyer.[110] Also, allowing the indigent defendant the very limited tool of choosing to continue with counsel he trusts provides some equilibrium with the government, which traditionally possesses more power, more money, and more tools.[111]

Of course, since the majority of the Court in *Slappy* appeared to reject many of these same arguments, as made by the Ninth Circuit and by concurring Justices Brennan and Marshall, it may seem that the cause is lost. However, the Court did not rule directly on the issue and merely rejected in dicta a broader right to "a meaningful attorney-client relationship."[112] Furthermore, in *United States v. Gonzalez-Lopez*, a different set of Supreme Court Justices put a new spin on the right to counsel of choice that offers room for a reconsideration of the limited goal of Joseph Slappy.[113]

V. REVISITING *SLAPPY* AFTER *GONZALEZ-LOPEZ*

On June 26, 2006, the Court decided *Gonzalez-Lopez*, and the case made very few ripples in the academic community. *Gonzalez-Lopez* would appear to affect only the ten percent of criminal defendants who retain counsel, and only the small percent of those whose choice of counsel is erroneously denied.[114] However, in penning the opinion for the Court, Justice Scalia made several declarations about the right to counsel of choice that may well have a much larger ripple effect.

Cuauhtemoc Gonzalez-Lopez was charged in federal court with

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110. Professor Poulin notes that "[c]hanging counsel without the defendant's consent reduces the likelihood that the defendant will receive effective assistance, and will perceive the process as fair." Poulin, *supra* note 97, at 1256. This point is underscored by Professor Garcia:

> To a large degree, the defendant's willingness and ability to acquiesce in the outcome of the criminal process hinges on his confidence in the efficiency of trial counsel. Because the Court [in *Slappy*] refused to acknowledge at least a "qualified" right of an indigent defendant to continue an existing relationship with appointed counsel, it further undermined, if not obliterated, any belief in the legitimacy of the system the accused may have had.

Garcia, *supra* note 18, at 96–97.

111. *See* Garcia, *supra* note 18, at 86 ("This right to retain private counsel is crucial to the validity of the adversary process because it ensures somewhat of an equilibrium between the prosecution and the defense.").

112. *Slappy*, 461 U.S. at 13–14.

113. 126 S. Ct. 2557 (2006).

114. *See* Joy & McMunigal, *supra* note 109, at 57 (providing that public defenders and other appointed counsel represent approximately ninety percent of criminal defendants).

conspiracy to deliver more than one hundred kilograms of marijuana.[115] Gonzalez-Lopez wanted out-of-state attorney Joseph Low to represent him. Joseph Low was an award-winning, seasoned defense attorney known for his aggressive approach to criminal defense work.[116] Low filed a motion for admission pro hac vice, and he affiliated with local counsel Karl Dickhaus for the limited purpose of handling filings. Dickhaus was a consumer protection attorney with little criminal experience. The federal district court erroneously denied Low's several motions for admission pro hac vice.[117] The case proceeded to trial with Dickhaus as sole counsel. The court denied Dickhaus's request to have Low sit at counsel table with him and ordered Low to sit in the audience and have no contact with local counsel. The court went so far as to place a United States Marshal between Low and Dickhaus.[118]

On appeal, the Government conceded that the defendant was erroneously denied his Sixth Amendment right to counsel of his choice.[119] The only questions for the Court were whether the defendant had to show prejudice from the erroneous denial, as is required under the *Strickland v. Washington* analysis,[120] and whether the error was subject to harmlessness review or was in fact structural error amounting to automatic reversal.[121] A bare majority of the Court held that prejudice need not be shown and that the error was structural.[122]

Justice Scalia's analysis[123] made a major doctrinal shift in the Court's jurisprudence on the right to counsel of choice. The Court in *Wheat* had said that the Sixth Amendment right to counsel did not guarantee choice, but only that a trial be fair.[124] In other words, the denial of counsel of first choice would not be violated as long as replacement counsel was "effective" under *Strickland v. Washington*'s minimal standards. Justice Scalia switched this course: "It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair."[125] Instead, Justice Scalia gave the right to counsel of choice

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115. *Gonzalez-Lopez*, 126 S. Ct. at 2560.
116. Brief for the Respondent at 2, *Gonzalez-Lopez*, 126 S. Ct. 2557 (No. 05-352), 2006 WL 838892.
117. *Gonzalez-Lopez*, 126 S. Ct. at 2560–61.
118. *Id*. at 2560.
119. *Id.* at 2561.
120. 466 U.S. 668, 687 (1984).
121. *Gonzalez-Lopez*, 126 S. Ct. at 2560.
122. As already noted, this holding was not necessarily unexpected. *See supra* note 10.
123. Justice Scalia was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Gonzalez-Lopez*, 126 S. Ct. at 2557.
124. Wheat v. United States, 486 U.S. 153, 159 (1988).
125. *Gonzalez-Lopez*, 126 S. Ct. at 2562.

its own separate place of distinction within the Sixth Amendment, much as he did with the Confrontation Clause:[126] "The right to select counsel of one's choice . . . has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee."[127] In other words, the Sixth Amendment originally referred to the man of means' right to bring a lawyer of his choosing to court with him.

Justice Scalia went further to explain the consequences of an erroneous denial of choice: "[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be the best."[128] Therefore, the deprivation of the right is complete when the defendant is erroneously denied counsel of his first choice, regardless of the effectiveness of the representation he actually received.[129] In Justice Scalia's words, "To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective

126. Indeed, Justice Scalia did not miss the opportunity to compare his analysis of the right to counsel of choice with the right to confrontation. *Id.* (citing Crawford v. Washington, 541 U.S. 36, 61 (2004)).

127. *Id.* at 2563 (citing *Wheat*, 486 U.S. at 159; Andersen v. Treat, 172 U.S. 24 (1898); WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 18–24, 27–33 (1955)). For a criticism of this point by Justice Scalia, see Paul Alessio Mezzina, *Elevating Choice Over Quality of Representation:* United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006)*, 30 HARV. J.L. & PUB. POL'Y 451, 454 (2006) ("[T]he supposed right to counsel of choice was born out of the reality that private retention of counsel was the only way for many defendants to obtain meaningful legal assistance."). *See also id.* at 456 ("[T]he text, structure, and history of the Amendment suggest a right to obtain a certain fixed quantum of legal representation by private retention.").

128. *Gonzalez-Lopez*, 126 S. Ct. at 2562.

129. The reason that Justice Scalia finds that prejudice need not be shown reflects the importance of the defendant's autonomous choice:

> Different 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. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.

Id. at 2564 (citation omitted).

counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed."[130]

As expansive as his language is, Justice Scalia noted for the record that the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.[131] He referred to *Slappy* as representing a "trial court's wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar."[132] Of course, as the Ninth Circuit and Justice Brennan noted in *Slappy*, the trial court in *Slappy* never balanced any "right" against its calendar, having recognized no right and not having made an inquiry into the amount of time Goldfine would be unavailable.[133]

Nonetheless, once again, the Court was not presented with the question of whether there is a Sixth Amendment right to an ongoing attorney-client relationship, and so it remains an issue to be decided. However, by enshrining the right to counsel of choice in its own place among Sixth Amendment rights and disaggregating it from the right to mere effective assistance of counsel, Justice Scalia gives the issue new life. If the core of the right is choice, and not effectiveness, and if it is so fundamental that it leads to automatic reversal when ignored, then the right is more robust than previously acknowledged.

First, for nonindigent defendants, lower courts must recognize that increased weight must be given to the right to counsel of choice when balancing it against governmental interests. While the government surely has powerful interests in ethical and just proceedings such that, for example, a defendant should not be represented by a person who is not a lawyer or by an attorney with an active conflict,[134] the court's interest in expeditious proceedings is quite different. The courts should grant a request for a continuance to accommodate chosen counsel's schedule or illness, unless to do so would create a manifest injustice. Manifest injustice would not include a reasonable delay of trial, nor would it include a delay of justice for the victim or the victim's family. While the victim's interests are an important governmental concern, they cannot outweigh the defendant's fundamental constitutional right to be represented by the attorney he chose to represent him.[135]

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130. *Id.* at 2563.
131. *Id.* at 2565.
132. *Id.* at 2565–66.
133. *See* Morris v. Slappy, 461 U.S. 1, 25–26 (1983) (Brennan, J., concurring); Slappy v. Morris, 649 F.2d 718, 721–22 & n.3 (9th Cir. 1981).
134. The word "active" is meant to distinguish it from the kind of distant potential conflict at issue in *Wheat*. *See* Wheat v. United States, 486 U.S. 153, 155 (1988).
135. In *Morris v. Slappy*, Chief Justice Burger criticized the Ninth Circuit for creating the "novel idea" of a Sixth Amendment right to a meaningful attorney-client relationship and ignoring the victim's rights; he argued that allowing for an automatic

Second, if the right to counsel of choice is fundamental to the Sixth Amendment right to counsel, it should be extended to indigent defendants, at least with respect to a right to choose to continue an ongoing attorney-client relationship. This should not only include the continuation of a relationship within a trial, but between trials. In other words, given the importance of trust, autonomy, and fairness to the right to counsel of choice, the court should appoint the same attorney to represent an indigent defendant in his subsequent cases, if the defendant so chooses.[136] The continuity of the relationship would enhance perceptions of fairness, decrease start-up costs, and ensure the best possible representation from the client's perspective.[137]

Again, here, the court should not be able to sever the relationship over the defendant's objection in the absence of manifest injustice, and particularly not for purposes of expeditious calendaring. In *Slappy*, Justice Brennan's concurrence was a bit too vague when it acknowledged that a right to continued representation may be qualified by a balancing inquiry between the defendant's interest and "the public's interest in the efficient and expeditious administration of criminal justice."[138] Certainly, if Goldfine was going to be unavailable for a year, then Joseph Slappy's preference could not be accommodated. However, the primacy of the constitutional interest in the continued relationship would outweigh any reasonable delay.

Joseph Slappy had the right instincts. He believed that the law contrived against him, as he was rushed to trial with a lawyer he had just met. No matter how heinous the crime, an indigent defendant has a constitutional right to be assisted in facing those charges. That assistance is worthless

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reversal in the case would have required the victim to "undergo[] the ordeal of yet a third trial in this case." 461 U.S. 1, 14 (1983). The first two trials were the result of a hung jury on some counts, and, in any case, one of the costs of violating the fundamental constitutional rights of a criminal defendant is that victims have to undergo new trials.

136. *See, e.g.*, Davis v. State, 403 S.E.2d 800, 801 (Ga. 1991); Amadeo v. State, 384 S.E.2d 181, 183 (Ga. 1989) (appointing, upon defendant's request, the attorney who had represented defendant in his original capital trial now being retried); Harris v. Superior Court, 567 P.2d 750, 758–59 (Cal. 1977) (holding that the trial court abused discretion in denying the request of defendant, member of a radical group, for appointment of two attorneys who had represented members of the same radical group in prior criminal proceedings and had established familiarity and trust).

137. *See* Holly, *supra* note 10, at 207 ("[A] greater stability and trust between counsel and client will cause a proportional decline in the need for pre-trial motions for continuances and post-conviction claims of ineffective assistance.").

138. *Slappy*, 461 U.S. at 25 (Brennan, J., concurring).

to the defendant if he cannot establish a working relationship with the lawyer appointed to represent him—he cannot make his defense. While it may be more than the Supreme Court can bite off to say that the Sixth Amendment includes a positive right to a "meaningful attorney-client relationship," it is surely palatable to conclude that the fundamental right to counsel of choice includes the right of any criminal defendant to continue an ongoing attorney-client relationship. If the opportunity arises, the Court should think hard about what Cuauhtemoc Gonzalez-Lopez has to offer Joseph Slappy.