



# The Right to Present a Twinkie Defense

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“THERE CAN BE NO equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>1</sup> But the Sixth Amendment right to counsel has never been interpreted to require attainment of that goal. For most criminal defendants, who are mired in poverty, the Sixth Amendment right to counsel means the right to have counsel appointed by the court. For the rich, that is not so. The Supreme Court recognized in 1988 that the Sixth Amendment also comprehends the right of a defendant to have counsel of his choice – that is, to retain counsel or to enjoy representation by a counsel willing to volunteer his services or be compensated by others.<sup>2</sup>

The right of retained counsel of one’s choice is a highly qualified right. If counsel of first choice has a conflict of interest, or has run afoul of a court’s ethical rules, or is unable to meet the court’s trial schedule, a trial

court has discretion to refuse to allow representation by that lawyer. A disqualification order, however, does not normally mean the denial of *any* choice by the defendant about his representation. Rather, it simply means that the defendant must go to Plan B, and retain a counsel who is not burdened by the disqualifying fact. And in such cases, there is every reason to believe that a defendant will retain the highest quality substitute counsel available, who will carry out the defendant’s original strategic goals and will try to achieve the same outcome: vindication at trial. Of course, retention of new counsel does not guarantee a perfect substitute. Lawyers, like snowflakes, are unique. No two lawyers, no matter how talented and how attuned to the client’s desires, will carry out a defense in precisely the identical manner. Even lawyers who are pursuing generally similar strategies will inevitably perform in court in a myriad of recognizably distinct

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<sup>1</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

<sup>2</sup> *Wheat v. United States*, 486 U.S. 153 (1988).

ways. For that reason, the legal system confronts a dilemma when a defendant's counsel of first choice is improperly disqualified: should a defendant automatically receive a new trial from an appellate court, without regard to any showing of possible prejudice to the defendant's defense? Or, should a defendant be required to point to something specific – a preferred line of defense or a particular area of expertise – that substitute counsel lacked, but first-choice counsel had, which might have made a difference to the outcome of the trial?

In *United States v. Gonzalez-Lopez*,<sup>3</sup> the Supreme Court, by a 5–4 vote, held that the erroneous denial of the qualified right to counsel of choice is “structural error,” entitling the defendant to automatic reversal of his conviction without any showing of prejudice. Such a ruling reaffirms both the mythically unique character of the trial lawyer and that an individual's right to choose his lawyer protects an autonomy right that is too precious to subject to after-the-fact prejudice inquiries. As Justice Scalia – who later wrote the Court's opinion – put it at argument,<sup>4</sup> a defendant with the means to retain counsel wants the most inventive, creative, and vigorous defense that money can buy: not just a professionally adequate defense that any public defender might provide, but a “Twinkie defense,” a novel approach that an ordinary lawyer would never

find but that leads to victory.<sup>5</sup>

The Court's decision to require a new trial automatically when counsel of first choice is wrongly disqualified may have given rise to celebrations in the criminal defense bar. But observers of American criminal justice have good reason to step back and ask what automatic reversal in this context really means for the Court's overall approach to the Sixth Amendment, and for the yawning gap in the quality of justice provided to the rich and the poor in our nation's criminal courts. A fair conclusion is that treating the denial of counsel of choice as structural error serves as a profound affront to the principle of equal justice in American criminal law. Indeed, it represents a striking affirmation of a two-tiered criminal justice system in which a defendant's wealth may matter more than his guilt or innocence.

Start with the stark fact that for most defendants in this country, the right to counsel of choice is someone else's right. If a defendant is indigent, he has essentially no right to counsel of choice. And the reality is that the vast majority of criminal defendants are too poor to afford to retain a lawyer.<sup>6</sup> For such defendants, the court must appoint counsel. And an indigent defendant has no right to a particular public defender; has no right to a “meaningful” relationship with his appointed counsel; and has no say about which law-

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3 126 S. Ct. 2557 (2006).

4 2006 WL 1134467 (Apr. 18, 2006), at \*16–\*17.

5 The “twinkie defense” owes its name to the 1979 trial of Dan White in San Francisco for the shooting deaths of Mayor George Moscone and Supervisor Harvey Milk. In fact, White did not use a “junk food” defense, but instead argued diminished capacity because of his episodes of depression. White's allegedly poor diet played only a small part in his lawyers' attempt to explain his plunge into a depressed state that led him to snap. Nevertheless, the phrase “twinkie defense” has entered the lexicon to describe a seemingly absurd defense strategy that somehow works. See Carol Pogash, *Myth of the “Twinkie defense”: The verdict in the Dan White case wasn't based on his ingestion of junk food*, S.F. CHRON., Nov. 23, 2003, at D-1.

6 According to a recent study by the Bureau of Justice Statistics, “[p]ublicly financed counsel represented about 66% of Federal felony defendants in 1998 as well as 82% of felony defendants in the 75 most populous counties in 1996.” See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/id.htm>.

yer a court might appoint to represent him.<sup>7</sup> The defendant is only entitled to counsel to assist him, not to funds to go out and retain a chosen lawyer in the marketplace.

The backstop constitutional protection for the right to counsel is that any defendant's lawyer, whether appointed or retained, must meet the constitutional standard of effective assistance. But here's the rub: a lawyer does not render ineffective assistance unless he performs below professional standards and his deficient performance causes prejudice to the fairness of the trial.<sup>8</sup> If you are poor, in other words, you are guaranteed a lawyer to defend you, but no matter how abysmally your lawyer performs, in all but the most unusual cases you are stuck with the outcome unless you can show a "reasonable probability" that adequate performance would have led to a different outcome.<sup>9</sup>

That means that an indigent defendant may find himself represented by a lawyer with zero criminal law experience and mere weeks to prepare for trial, and have no recourse on collateral attack of his conviction unless he can point to a specific error or omission in the representation that prejudiced the outcome.<sup>10</sup> Or, a defendant in a capital case may find himself saddled with a lawyer who finds his case "hopeless" and who puts on virtually no defense, yet is held to have performed adequately.<sup>11</sup> Even a defendant who is represented by a lawyer who previously represented the *victim* in a capital offense may have no recourse, unless he can show (at least) that the lawyer's conflict of interest had an adverse effect on the lawyer's

performance.<sup>12</sup> The Constitution, in short, provides a rigorous standard for an indigent defendant to meet in order to overturn his conviction based on his counsel's performance. Only if the defendant was denied counsel altogether; or if the lawyer essentially provided no representation at a critical stage; or if the lawyer was compelled to represent multiple defendants at the same trial over the lawyer's objection, can a defendant obtain reversal without any specific showing of prejudice.<sup>13</sup>

Contrast that with the remedy afforded under *Gonzalez-Lopez* to denial of counsel of choice. A defendant with means who is told that he cannot have his first-choice counsel is not necessarily, or even likely, left with no counsel at all, or with conflicted counsel, or with professionally incompetent counsel. Rather, such a defendant will likely seek to retain the best replacement counsel he can find. A trial conducted with that counsel at the helm will likely involve effective, vigorous representation by an advocate selected by the defendant. Yet, if it is found on appeal that the trial court erred in disqualifying the defendant's first-choice counsel, *Gonzalez-Lopez* holds that there must be an automatic do-over. The well-off defendant would not even need to allege that he was prejudiced by going to trial with his second choice.

Try explaining that to the poor defendant, who never had any choice about his lawyer and may have received the most minimally adequate defense that the State was willing to fund. Or to the indigent defendant

7 E.g., *Morris v. Slappy*, 461 U.S. 1 (1983).

8 *Strickland v. Washington*, 466 U.S. 668 (1984).

9 *Id.* at 693–694.

10 *United States v. Cronin*, 466 U.S. 648 (1984).

11 *Strickland*, 466 U.S. at 669.

12 *Mickens v. Taylor*, 535 U.S. 162 (2002).

13 *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Cronin*, 466 U.S. at 659; *Holloway v. Arkansas*, 435 U.S. 475 (1978).

whose lawyer had a conflict of interest, or was drunk, disbarred, or asleep through significant portions of the trial. For that defendant, the likely response of the judicial system to an ineffective assistance challenge is “no prejudice shown.” But for the well-heeled defendant who missed out on his first choice, it is a mandatory second bite at the apple.

All of this might be justifiable if the heart of the Sixth Amendment was an individual’s right to retain counsel of his choice, with the right to appointed counsel making its debut only as constitutional afterthought dreamed up by an activist Court. It is certainly true that the Sixth Amendment, as implemented by the Framers, did not encompass the right to appointed counsel. While the Federal government early on provided a statutory right to appointed counsel in capital cases, Congress did not provide a corresponding right to appointed counsel for non-capital criminal defendants.<sup>14</sup> And, although the Sixth Amendment did not apply to the States, most States similarly did not uniformly provide appointed counsel to indigent criminal defendants in the nineteenth and early twentieth centuries.<sup>15</sup> But that historical practice provides only a weak justification for concluding today that the Sixth Amendment’s core protection is counsel of choice for the wealthy.

The Supreme Court did not construe the Sixth Amendment right to counsel at all until the twentieth century, and, when it finally did consider the question of an indigent’s right to counsel, the Court unequivocally held that the Assistance of Counsel Clause required the appointment of counsel for an impoverished defendant absent a knowing

and intelligent waiver of counsel.<sup>16</sup> What other conclusion could the constitutional text permit? The Sixth Amendment guarantees the “accused” in “all criminal prosecutions” a variety of trial rights, including the right to a speedy trial; the right to an impartial jury; the right to compulsory process for defense witnesses; and the right to the “Assistance of Counsel for his Defence.” No one would seriously suggest that the government could comply with that constitutional mandate by granting a “speedy” trial only to a defendant who could pay the prosecution’s costs of preparation; or by granting a “jury” trial only to those who could afford to pay the jurors’ daily attendance fees; or by granting “compulsory process” only to defendants with the resources to retain their own process servers. If that is true, how can the Sixth Amendment right to counsel exist only if the accused has the means to pay for it? Nowhere does the Amendment state or imply that the right to counsel is a right pertaining exclusively to the wealthy; rather, it is a right that any individual enjoys once he becomes an “accused.”

More fundamentally, it would make a mockery of American justice to seize on early constitutional history, in which indigents were not routinely appointed counsel, as a basis for deeming counsel of choice to be the prime directive of the Sixth Amendment. Today, a trial in which an indigent defendant was compelled to represent himself because of the government’s refusal to appoint counsel would rank as one of the ultimate injustices that could be inflicted on the accused. A trial in which a defendant is compelled to proceed without the “guiding hand of coun-

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14 *Bute v. Illinois*, 333 U.S. 640, 660–663 (1948).

15 *Id.* at 663–667.

16 *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (“The Sixth Amendment withheld from the federal courts the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”).

sel”<sup>17</sup> would be little better than a kangaroo court, in which the prosecution could routinely convict even a completely innocent defendant. This would be a spectacle that no devotee of the American adversary system could regard as fair. It would be as outrageous as, say, having a trial presided over by a biased judge or a jury whose selection was infected by racial prejudice. Not coincidentally, those are two of the exceedingly rare forms of constitutional errors that are protected by a rule of automatic reversal.<sup>18</sup> The Court reverses in such cases because the violations strike to the core of the fair trial values that the Sixth Amendment protects. Is denial of counsel of first choice really the constitutional equivalent?

There is one member of the Court’s exclusive club of rights protected by a rule of automatic reversal that could be said to resemble the denial of counsel of choice, namely, the right to self-representation.<sup>19</sup> A denial of the right to forgo any lawyer and represent oneself, the Court has said, entitles the defendant to a new trial, regardless of the lack of prejudice to the outcome. But it is not hard to see that the right of self-representation stands on a very different footing from the right to counsel of choice. A defendant who has been forced into silence in the courtroom and required to submit to being heard only through the voice of a lawyer that the State has foisted on him has been denied his individual dignity and autonomy in a profound way. But a defendant who desires to be represented by counsel, and who does not have his first-choice lawyer, has not suffered anything like the same type of infringement. Whatever the special bond of trust between

a criminal defendant and his chosen counsel, it is not a marriage. There are plenty of other competent and trustworthy lawyers waiting in the wings to step in, if first-choice counsel must bow out. In a nation with hundreds of thousands of lawyers, it is almost absurd to suppose that a defendant is inherently and necessarily denied his autonomy interest if a judge makes a mistake and denies a pro hac vice motion, when there are so many other competent fish in the sea.

In the end, asking whether the improper denial of counsel of choice is “structural error” in the abstract misses the point. The Court in *Gonzalez-Lopez* divided over whether structural error (i.e., error that cannot be harmless on direct appeal) is present when the consequences of an error are “necessarily unquantifiable and indeterminate,” or, as the dissent saw it, only when the error necessarily rendered the trial “fundamentally unfair.”<sup>20</sup> But however that debate is resolved, the Court’s decision in *Gonzalez-Lopez* makes a far broader statement about the hierarchy of values in the criminal justice system. The Court, of course, cannot be asked to guarantee completely equal justice for the rich and the poor. No one would suggest that the right to appointed counsel means the right to an attorney equivalent in skill and experience to what the most wealthy defendant could afford. All the Court can do is to provide a baseline of fairness, and even that requires cooperation of other institutions of government. *Gideon v. Wainwright*,<sup>21</sup> perhaps the most admired decision of the Warren Court’s criminal procedure revolution, stands today as a battered symbol. The Court mandated appointed

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17 *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

18 See *Neder v. United States*, 527 U.S. 1, 8 (1997).

19 *McKaskle v. Wiggins*, 468 U.S. 168 (1984).

20 Compare 126 S. Ct. at 2564 (majority opinion) with *id.* at 2569 (Alito, J., dissenting).

21 372 U.S. 335 (1963).

counsel in felony cases in *Gideon*, but that has not meant that the States have provided the funds to implement it. Inadequate resources have plagued the appointed-counsel systems in many States.

But even if the Court cannot, through its decisions, equalize justice for the rich and poor, it also need not need poke a finger in the eye of indigent criminal defendants. Imagine this statement to the typical indigent defendant: "If you have incompetent, or conflicted, or lethargic, or grossly inexperienced counsel, you have no ground for complaint unless you can show that competent counsel would have created a reasonable probability of a different outcome. But if only you were rich! Then, a denial of your first-choice counsel would be the golden road to a new trial." That would be nothing less than a body blow to the ideal of equal justice. Justice Scalia inadvertently revealed how capricious such a ruling is by exalting the right to a "twinkie defense." If an indigent defendant were stuck with counsel who devised a defense that the defendant committed his crime because he ate too much junk food, inadequate perfor-

mance might be assumed – yet a complaint of ineffective assistance of counsel would surely fail unless the defendant could establish that a better defense existed, undermining confidence in the outcome. But if a rich defendant were *denied* a "twinkie defense" by his first-choice counsel, it is an automatic new trial – even if the defense that the defendant's second-choice counsel actually offered was objectively superior. Try explaining that to a defendant spending decades of his life in jail after an overworked and inexperienced public defender offered virtually no defense at all.

So, now that the Supreme Court has placed the denial of the right to counsel of choice at the pinnacle of Sixth Amendment rights, a small stratum of monied defendants has reason to applaud. But the vast multitude of defendants will never see one ounce of benefit from that ruling. And all participants in the criminal justice system might ask whether the creation of such asymmetrical Sixth Amendment rights for the rich and the poor truly fulfills the ideal of equal justice under law. *gfb*