

No. 06-3995

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**NEFTALY RODRIGUEZ,**

Petitioner-Appellee,

v.

**NEDRA CHANDLER, Warden,**

Respondent-Appellant.

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Appeal from the United States District Court  
For the Northern District of Illinois, Eastern Division  
Case No. 02 C 2184  
The Honorable Judge Harry D. Leinenweber

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**BRIEF OF THE  
PETITIONER-APPELLEE, NEFTALY RODRIGUEZ**

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## JURISDICTIONAL STATEMENT

The appellant's jurisdictional statement is not complete and correct. Neftaly Rodriguez, Petitioner, timely filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois on March 26, 2002. (R. Ex.1) The district court had jurisdiction to entertain the petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254.

Rodriguez was convicted of first degree murder in the Circuit Court of Cook County and sentenced to a term of 29 years' imprisonment on March 11, 1999. (St. Ct. R. Vol. 11 at 139) Rodriguez appealed his conviction and sentence to the Illinois Appellate Court, First District. (St. Ct. R. Vol. 11 at 140) In his brief, Rodriguez alleged that he was denied his Sixth Amendment right to counsel of choice when the trial court arbitrarily disqualified his preferred attorney. (Dist. Ct. R. Exhibit A at 14) On December 5, 2000, the appellate court affirmed his conviction. (Resp. App. at A-8) Rodriguez filed a petition for rehearing which was denied on February 2, 2001. Rodriguez petitioned for leave to appeal to the Illinois Supreme Court and asked the court to review his claim that he was denied his Sixth Amendment right to counsel of choice. (Dist. Ct. R. Ex. C) The Illinois Supreme Court denied the petition for leave to appeal on June 6, 2001. (Dist. Ct. R. Ex. D) Rodriguez subsequently filed a petition for writ of habeas corpus in the United States District Court alleging that he was being held in prison pursuant to a state court judgment obtained in violation of his Sixth and Fourteenth Amendment rights guaranteed by the United States. (R. Ex. 1) Rodriguez remains in custody of Warden

Sternes at the Dixon Correctional Center in Dixon, Illinois.

Rodriguez properly invoked 28 U.S.C. § 2254 when his petition alleged that he was being held in prison pursuant to a state court judgment in violation of his Sixth Amendment right to counsel of choice. Further, Rodriguez exhausted his state remedies and avoided procedural default. 28 U.S.C. §2254(b)(1)(A). Rodriguez had no other means by which he could litigate his constitutional claim in state court. State habeas relief was unavailable to him because his complaint is not jurisdictional in nature. 735 ILCS 5/10-101 *et. seq.* (West 2002). Moreover, Rodriguez could not file a petition for post-conviction relief because Rodriguez is prohibited from raising in a post-conviction petition a constitutional issue which was litigated and rejected on direct appeal. 725 ILCS 5/122-2 *et. seq.* (West 2002). Thus, Rodriguez exhausted all of his state remedies before filing his petition for writ of habeas corpus.

The district court granted Rodriguez's petition for writ of habeas corpus on November 24, 2003. (Resp. App. at B-1) Respondent filed a timely notice of appeal on December 4, 2003. (Resp. App. at D-1) This appeal was docketed on December 4, 2003. This Court has jurisdiction over the Respondent's appeal from the district court's order granting Rodriguez's petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 1291 and 2253.

## STATEMENT OF THE ISSUE PRESENTED

Whether the Illinois Appellate Court unreasonably applied *Wheat v. Illinois*, 486 U.S. 153 (1988), when it affirmed the trial court's disqualification of Neftaly Rodriguez's attorney of choice even though no actual or serious potential for conflict existed to justify the removal.

## STATEMENT OF THE CASE

The State of Illinois charged Neftaly Rodriguez, Robert Munoz, and Angel Rosado with first degree murder. (St. Cr. R. Vol. 11 at 23-24) After a simultaneous, severed bench trial with Angel Rosado, the trial court found Rodriguez guilty and sentenced him to a term of 29 years' imprisonment in the Illinois Department of Corrections. (St. Ct. R. Vol. 11 at 139) Rodriguez appealed his conviction and the Illinois Appellate Court, First District, affirmed his conviction in an unpublished decision. *People v. Neftaly Rodriguez*, No. 1-99-1422 (December 5, 2000) (Resp. App. at A-1). Rodriguez filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on June 6, 2001. (Dist. Ct. R. Exhibits C & D)

On March 26, 2002, Rodriguez timely filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Illinois. (R. Ex. 1) On November 24, 2003, the Honorable Judge Harry D. Leinenweber granted Rodriguez's petition. (Resp. App. at B-1) The State of Illinois filed a notice of appeal on December 4, 2003. (Resp. App. at D-1)

## STATEMENT OF FACTS

The State of Illinois charged Neftaly Rodriguez, Robert Munoz, and Angel Rosado with first degree murder for the shooting and beating death of Dennis Rodriguez which occurred on April 13, 1995. (St. Ct. R. Vol. 11 at 23-24) In the state court proceedings, Rodriguez was represented by attorneys Joseph Brent and Perry Grimaldi. (St. Ct. R. Vol. 11 at 37) In an unrelated civil matter, Brent also represented, John McMurray, a detective in the Chicago Police Department who investigated the alibi of Rodriguez's co-defendant, Angel Rosado. (St. Ct. R. Vol. 4 at C-9; Pet. App. at B-9) On February 15, 1996, the State filed a Motion to Compel Joseph Brent to Withdraw as Counsel to Neftaly Rodriguez. (St. Cr. R. Vol. 11 at 54; Pet. App. at A-1) The State alleged that Detective McMurray was a State witness in the case against Rodriguez and that Brent's simultaneous representation of Rodriguez and McMurray gave rise to a *per se* conflict of interest that could not be waived by the defendant. (St. Ct. R. Vol. 11 at 54; Pet. App. at A-1)

Brent acknowledged that he represented McMurray in an unrelated civil matter but questioned whether McMurray was a State's witness against Rodriguez since McMurray's name did not appear in the State's answer to discovery. (St. Ct. R. Vol. 4 at C 5; Pet. App. B-5)<sup>1</sup> Brent indicated that Rodriguez was willing to waive any potential

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<sup>1</sup> In preparing his brief, Petitioner-Appellee Rodriguez discovered that pages C-4 and C-5 of Volume 4 of the state court record are missing, presumably through clerical error when the record was prepared. Petitioner-Appellee has filed a motion to correct the record contemporaneous with this brief.

conflict of interest and noted that co-counsel Grimaldi was from a different law firm that did not represent McMurray and therefore could conduct any examination of McMurray should he be called as a witness. (St. Ct. R. Vol. 4 at C-6; Pet. App. at B-6)

The prosecutor maintained that McMurray was a State witness since he had interviewed witnesses and arrested a co-defendant. (St. Ct. R. Vol. 4 at C 8; Pet. App. at B-8) The State indicated that it would update its answer to include McMurray's name. (St. Ct. R. Vol. 4 at C-8; Pet. App. at B-8) The trial judge, Judge Porter, transferred the matter to Judge Karnezis for ruling on the State's disqualification motion so as to avoid reading the police reports in the case. (St. Ct. R. Vol. 15 at B-1; Pet. App. at C-1) Judge Karnezis indicated that he would review the police reports tendered to him and make a ruling on the State's motion. (St. Ct. R. Vol. 15 at B-6; Pet. App. at C-6)

According to the supplemental police reports, McMurray was not an arresting officer of any of the co-defendants. (St. Ct. R. Vol. 14; Pet. App. at E-1) Rather, McMurray was one of the reporting officers listed in a supplementary report prepared on June 24, 1995, almost two and a half months after the shooting. According to the report, the reporting detectives were assigned to verify whether Angel Rosado was visiting Cook County Jail at the time of shooting. (St. Ct. R. Vol. 14; Pet. App. at E-4) The officers spoke to a supervisor at the jail who indicated that Rosado had not been logged in as a visitor. (St. Ct. R. Vol. 14; Pet. App. at E-4) The officers then interviewed Rosado and informed him that his alibi had not been substantiated. (St. Ct. R. Vol. 14; Pet. App. at E-5) Rosado admitted to lying about his whereabouts but continued to deny his

involvement in the shooting and instructed the officers to locate two sisters named Nana and Demaris who could verify that he was not involved in the shooting. (St. Ct. R. Vol. 14; Pet. App. at E-5) The reporting detectives interviewed both sisters who denied being with Rosado at the time of the shooting. (St. Ct. R. Vol. 14; Pet. App. at E-6) The officers then confronted Rosado with this fact, and Rosado eventually made an incriminating statement to the officers. (St. Ct. R. Vol. 14; Pet. App. at E-7-8)

Judge Karnezis reviewed the police reports and without hearing argument granted the State's motion to disqualify Brent. (St. Ct. R. Vol. 17 at 20; Pet. App. at D-5) Judge Karnezis found that Brent enjoyed separate professional relationships with both Rodriguez and McMurray. (St. Ct. R. Vol. 17 at 20; Pet. App. at D-5) Although he acknowledged that the matters were unrelated, Judge Karnezis stated that he was allowing the State's motion so as to prevent Rodriguez from later raising an ineffective assistance of counsel claim on appeal. (St. Ct. R. Vol. 17 at 20; Pet. App. at D-5)

Attorney Grimaldi continued to represent Rodriguez alone. Grimaldi's subsequent motion to sever was granted without objection by the State, and Rodriguez was tried in a severed, simultaneous bench trial with Angel Rosado. (St. Cr. R. Vol. 2 at F 3-4) None of the witnesses McMurray interviewed were called to testify against Rodriguez or Rosado. Moreover, McMurray did not testify in either case and McMurray's name was never referred to at the suppression hearing or at trial.

On February 4, 1999, the trial judge found Rodriguez guilty of first degree murder and on March 11, 1999, sentenced Rodriguez to 29 years' imprisonment. (St. Ct. R. Vol.

11 at 139) Rodriguez appealed his conviction to the Illinois Appellate Court claiming that: (1) the trial court improperly disqualified his attorney; and (2) he was arrested without probable cause.

In an unpublished opinion, the Illinois Appellate Court affirmed the decision of the trial court on both claims. *People v. Rodriguez*, No. 1-99-1422, Unpublished Rule 23 Order (Ill. App. Ct. December 5, 2000). Rodriguez petitioned for leave to appeal to the Illinois Supreme Court; however, that request was denied on June 6, 2001. (Dist. Ct. R. Exhibits C &D)

On March 26, 2002, Rodriguez timely filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Illinois. (R. Ex. 1) On November 24, 2003, the Honorable Judge Harry D. Leinenweber granted Rodriguez's petition. *United States v. Rodriguez*, No. 02 C 2184, (Nov. 24, 2003). The State of Illinois filed a notice of appeal on December 4, 2003. (R. Ex. 20)

### **STANDARD OF REVIEW**

Under the relevant provisions of Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), an application for the writ of habeas corpus may not be granted unless adjudication of the claim in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Within the framework of § 2254(d)(1), the circuit court of appeals will review the district court's grant of the petition *de novo*. *Jackson v. Frank*, 348 F.3d 658, 662 (7th Cir. 2003). Whether

the state court's holding involved an "unreasonable application" of clearly established federal law, as determined by the Supreme Court, is a mixed question of law and fact that the court of appeals traditionally reviews *de novo* but with a grant of deference to an *reasonable* state court judgment. *Id.*

### SUMMARY OF ARGUMENT

Neftaly Rodriguez was denied his constitutional right to counsel of choice under the Sixth and Fourteenth Amendments to our federal constitution when the state trial court arbitrarily granted the State's motion to disqualify Rodriguez's attorney, Joseph Brent. In an unrelated civil matter, Brent represented John McMurray, a detective who investigated the alibi of co-defendant Angel Rosado. The State alleged that Brent labored under a *per se* conflict of interest due to his contemporaneous representation of McMurray and Rodriguez that justified Brent's disqualification. Because the State failed to show that Detective McMurray was a potential witness in the case against Rodriguez and that Brent's representation of Rodriguez created an actual conflict or a serious potential for conflict, the trial court abused its discretion when it granted the State's disqualification motion.

In affirming the erroneous decision of the trial court, the Illinois Appellate Court unreasonably applied the United States Supreme Court decision in *Wheat v. Illinois*, 486 U.S. 153 (1988). As the district court found, it was unreasonable for the appellate court to have found a serious potential for conflict where the information before the trial judge failed to indicate that McMurray was a probable witness in the State's case

against Rodriguez. *Wheat* prohibits the disqualification of the accused's preferred attorney based on unsupported and dubious speculation that a conflict could conceivably arise in the future. Thus, the appellate court's affirmance of the trial court's disqualification of Rodriguez's attorney was unreasonable.

The State argues alternatively that, even if Rodriguez was denied his Sixth Amendment right to counsel of choice, the error is harmless and the district court's judgment granting Rodriguez's petition for writ of habeas corpus should be overruled. In advancing this argument, the State impermissibly seeks the benefit of a new constitutional rule of law. With guidance from the United States Supreme Court's decision in *Flanagan v. United States*, 465 U.S. 259 (1984), virtually every court of appeals has applied an automatic rule of reversal to violations of the right to counsel of choice. At the time Rodriguez's conviction became final, Illinois Courts and most federal courts recognized that a violation of the right to counsel of choice was not subject to harmless error analysis. Accordingly, the State's request that this Court apply a harmless error analysis to the instant case is barred by the *Teague* rule, prohibiting retroactive application of new rules of law to collateral appeals.

Even if this Court reaches the merits of this claim, the district court properly concluded that the error is not subject to harmless error analysis. The right to counsel of choice is a structural error as defined by *Arizona v. Fulminante*, 499 U.S. 279 (1991), and defies analysis under harmless error standards. Like the right to self-representation, the right to counsel of choice reflects constitutional protection of the defendant's free

choice, independent of concern for the objective fairness of the proceedings. A violation of the right to counsel of choice affects the overall framework in which the trial proceeds and the prejudice stemming therefrom is not easily quantified. Furthermore, if a defendant was required to show prejudice from the denial of his right to counsel of choice in order to receive a new trial, the right to counsel of choice would be meaningless. The defendant would be obligated to show that the attorney that represented him rendered ineffective assistance of counsel, an independent violation. Accordingly, a denial of the right to counsel of choice squarely falls into the category of errors known as structural errors, the denial of which can never be harmless. The district court properly granted Rodriguez's petition for writ of habeas corpus and this Court should affirm the district court's decision.

#### **ARGUMENT**

**The United States District Court Properly Granted Rodriguez's Petition for Writ of Habeas Corpus Where the Illinois Appellate Court Unreasonably Applied the Law Set Forth in *Wheat v. Illinois* When it Affirmed the State Trial Court's Disqualification of Rodriguez's Attorney of Choice Even Though Rodriguez's Attorney Was Not Laboring under an Actual Conflict of Interest and the Potential for Conflict Was Remote and Speculative.**

Neftaly Rodriguez was denied his constitutional right to counsel of choice under the Sixth and Fourteenth Amendments to our federal constitution when the trial court arbitrarily granted the State's motion to disqualify Rodriguez's Attorney, Joseph Brent,

despite the fact that no actual conflict existed, and the potential for conflict was negligible, if non-existent. The Illinois Appellate Court's affirmance of the trial court's ruling involved an unreasonable application of *Wheat v. United States*, 486 U.S. 153 (1988). The district court properly found that the appellate court unreasonably applied *Wheat* to the facts of this case, and correctly determined that the error was a structural error immune from traditional harmless error analysis. Accordingly, this Court should affirm the district's order granting Rodriguez's petition for writ of habeas corpus.

Section 2254 of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA") entitles a prisoner to a writ of habeas corpus if he is being held in prison pursuant to a state court judgment obtained in violation of rights guaranteed by the United States Constitution. 28 U.S.C. § 2254. *See also Williams v. Taylor*, 529 U.S. 362, 375 (2000). A federal court may not grant a writ of habeas corpus for any claim that was adjudicated on the merits in the state court proceedings, unless the state court decision: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1) & (2); *Bell v. Pierson*, 267 F.3d 544, 551 (7th Cir. 2001).

A state court decision involves an unreasonable application of United States Supreme Court precedent if the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular

state prisoner's case. *Williams*, 529 U.S. at 407. A federal habeas court making the unreasonable application inquiry asks whether the state court's application of clearly established Supreme Court law was objectively unreasonable. *Id.* at 409. A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established law erroneously or incorrectly. Rather, that application must also be unreasonable. *Id.* at 411. Even so, the federal court, even on habeas, has an independent obligation to say what the law is. *Id.* at 411.

In this case, the district court properly granted Rodriguez's petition, finding that the appellate court unreasonably applied the law set forth in *Wheat v. Illinois* to the facts of this case. *United States v. Rodriguez*, No. 02 C 2184, (Nov. 24, 2003). The appellate court identified *Wheat* as the governing United States Supreme Court decision and correctly recognized that *Wheat* only permits a court to overcome the presumption in favor of petitioner's counsel of choice when there is a showing of either actual conflict or serious potential for conflict. However, the appellate court unreasonably applied this standard to the facts of this case when it ruled that the trial court did not abuse its discretion in disqualifying Rodriguez's counsel of choice.

The Sixth Amendment to the Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the effective assistance of counsel." U.S. Const. Amend VI. The right to counsel encompasses both the right to effective assistance of counsel and the right to select and be represented by one's

preferred attorney. *Wheat v. United States*, 486 U.S. 153, 159 (1988). In ruling on a motion to disqualify defense counsel, a court must balance these competing interests. *United States v. O'Malley*, 786 F.2d 786, 790 (7th Cir. 1986). Although the primary aim in providing assistance of counsel is to ensure that criminal defendants receive a fair trial, the United States Supreme Court has stressed the presumption and deference that must be afforded a defendant's choice of counsel. *Wheat*, 486 U.S. at 159, 164. *See also United States v. Seale*, 461 F.2d 345, 358 (7<sup>th</sup> Cir. 1972). After all, lawyers are not fungible and may differ significantly with respect to their trial strategy, their oratory style, or the importance they give to particular legal issues. *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979). Because an accused is bound by his attorney's failings unless prejudice can be established, the choice of counsel may be the most pivotal decision a defendant makes in shaping his defense. *Id.* *See also United States v. Urbana*, 770 F. Supp. 1552, 1556 (S.D. Fla. 1991).

By failing to realistically assess the likelihood that McMurray was a witness in the case against Rodriguez before disqualifying Brent, the trial court infringed on Rodriguez's Sixth Amendment right to choice of counsel. In arriving at its decision that Brent labored under a conflict of interest that mandated his removal, the trial court relied on police reports and the State's assertion that McMurray was a witness against Rodriguez. However, neither the pleadings nor the police reports established that McMurray was a witness against Rodriguez. In fact, the pleadings demonstrated that McMurray was not a witness against Rodriguez since McMurray's name did not even

appear on the State's Answer to Discovery. Additionally, the supplemental police report failed to demonstrate how McMurry's testimony was relevant to Rodriguez. (St. Ct. R. Vol. 14; Pet. App. at E-1)

McMurray's involvement in the case pertained only to co-defendant Rosado. Critically, Rodriguez and Rosado's cases were ultimately severed since both defendants made statements implicating the other. (St. Ct. R. Vol. 2 at F 3-4) Detective McMurray's involvement in the case consisted of taking a statement from Rosado and interviewing potential alibi witnesses pertaining to Rosado, none of whom corroborated his alibi or admitted to having knowledge of the offense. (St. Ct. R. Vol 14; Pet. App. at E-1)

Admittedly, the trial court did not have the wisdom of hindsight when it ruled on this issue; however, nothing in the discovery materials indicated that McMurray's testimony would be relevant against Rodriguez. Notably, McMurray never even testified against Rosado in whose case he actively participated.

Additionally, Brent indicated that co-counsel Grimaldi did not represent McMurray and the two lawyers were not members of the same law firm. (St. Ct. R. Vol 4 at C-6; Pet. App. at B-6) Brent suggested that in the unlikely event that McMurray testified, Grimaldi could handle any cross-examination of McMurray. Moreover, there was no indication that by virtue of Brent's attorney-client relationship with McMurray, Brent possessed any relevant information harmful to McMurray or helpful to Rodriguez.

Judge Porter, the trial judge, recognized that once brought to his attention, he had a duty to investigate the nature of the conflict. (St. Ct. R. Vol. 4 at C-11-12; Pet. App. at B-

11-12) Judge Porter then indicated that he found it necessary to read the police reports to determine whether a conflict existed. (St. Ct. R. Vol. 4 at C-13-14; Pet. App. at B-13-14) At defense counsel's suggestion, the matter was transferred to Judge Karnezis for ruling on the disqualification motion. (St. Ct. R. Vol. 4 at C 16; Pet. App. at B-16) Without holding an evidentiary hearing or hearing argument by either side, Judge Karnezis disqualified Joseph Brent as co-counsel. Judge Karnezis based his ruling solely on police reports indicating that McMurray had interviewed Rosado and several potential alibi witnesses for Rosado. (St. Ct. R. Vol. 17 at 20; Pet App. at D-5) The judge expressed his concern that Rodriguez might be able to raise an ineffective assistance of counsel argument on appeal if Brent remained as co-counsel and stated "we think we are coming down on the safer side, so to speak [by disqualifying Brent]." (St. Ct. R. at 20; Pet. App. at D-5) At no point, did the State make an offer of proof stating that McMurray had relevant and admissible testimony to provide at Rodriguez's trial. The State merely assured the court that it would add McMurray's name to its answer.

The Illinois Appellate Court ruled that the trial court did not abuse its discretion when it granted the state's motion to disqualify Brent. The appellate court reasoned that because McMurray interviewed witnesses and co-defendant Rosado, he was a potential witness in the case. However, the appellate court failed to explore in any detail the relationship between the parties before determining that the trial court did not abuse its discretion. As this Court has held, when determining whether a state court's treatment was "unreasonable," it is necessary to take into account the care with which the state

court considered the subject. *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) *reversed on other grounds*, 521 U.S. 320.

In this case, the appellate court offered no analysis to justify its position that McMurray was a likely witness against Rodriguez that gave rise to a serious potential for conflict. Because the record before the trial court revealed that the likelihood that McMurray would testify against Rodriguez was low, the district court properly concluded that the appellate court unreasonably applied the law in *Wheat* when it held that Rodriguez's rights under the Sixth and Fourteenth Amendments were not violated by trial court's disqualification of his counsel of choice.

In its brief the State concedes that the Illinois Appellate Court did not elucidate its reasons for affirming the trial court's ruling, but argues that the appellate court's holding is minimally consistent with the facts and circumstances of the case. (St. Br. 9) The State argues that at the time that the trial court granted the State's motion to disqualify, the cases were not severed. Therefore, from the trial court's perspective, a joint trial was possible, in which there was a very real possibility that Rodriguez's co-defendant would have testified against him. The State opines that if a joint trial was had, McMurray would likely have testified concerning the statements made by co-defendant Rosado. This scenario would have placed Brent in the untenable position of cross-examining McMurray, his own client.

While the State acknowledges, as it must, that McMurray's testimony concerning Rosado's confession would confront insurmountable hearsay problems if offered

against Rodriguez, the State opines that McMurray's testimony might have been offered for impeachment purposes. To illustrate this point, the State offers a complex hypothetical in which Brent might be forced to cross-examine McMurray. The State reminds us that co-defendant Rosado told McMurray that he was with two sisters named Nana and Demaris. Both girls failed to confirm Rosado's alibi in an interview with McMurray. McMurray then informed Rosado that his alibi was not substantiated and Rosado gave an inculpatory statement that also incriminated Rodriguez. The State opines that if the girls subsequently changed their stories and confirmed Rosado's alibi, their testimony would have been inconsistent with Rosado's statements implicating Rodriguez since Rosado would be unable to confirm that Rodriguez was involved in the shooting as he was not present. The State theorizes that under this scenario, McMurray would be called as a rebuttal witness and Brent would then be in the position of cross-examining McMurray.

The State's hypothetical underscores the remoteness of the feared conflict and serves only to bolster Rodriguez's argument that no serious potential for conflict existed. As the district court points out, the State must "knit together a rather complex set of facts" to demonstrate a scenario under which Brent would be in the position of cross-examining McMurray.

More importantly, this contrived hypothetical is dependent on two erroneous assumptions, namely that: (1) Rosado and Rodriguez could have been tried jointly; and (2) the two women, Nana and Demaris changed their stories and confirmed Rosado's

alibi. First, the State incorrectly assumes that a scenario exists under which Rodriguez and his co-defendant could have been tried jointly. Because Rodriguez and Rosado made statements incriminating one another, Illinois law precluded these co-defendants from being tried jointly. *People v. Bean*, 109 Ill.2d 80 (1985); *People v. Jackson*, 150 Ill. App. 1, 4, 501 N.E.2d 802 (Ill. App. Ct. 1986). No scenario exists under which these co-defendants could have been tried jointly which explains why their trials were severed with no objection from the State.

Even if it was possible for the co-defendants to be tried jointly, the State's hypothetical assumes that Nana and Demaris would change their testimony, an assumption that finds absolutely no support in the materials presented to the judge who ruled on the disqualification motion. The State counters that there was no evidence to suggest that the girls would *not* change their testimony, and witnesses can do very unpredictable things. While Rodriguez agrees that the possibility always exists that a witness could change his or her testimony, the remote possibility of a conflict arising at some unexpected point in the future cannot justify the disqualification of the defendant's attorney of choice. As the United States Supreme Court has held, a court may only disqualify an attorney of one's choosing if a *serious* potential for conflict exists. Admittedly, the trial judge in this case did not possess the wisdom of hindsight when ruling on the motion; however, none of the information before the trial judge suggested an actual conflict or a serious potential for conflict. The judge was not authorized to disqualify Rodriguez's attorney based on remote possibilities that find no support in

the record.

Additionally, even if the unlikely scenario posed by the State materialized, Detective Wojcik, McMurray's partner, could have testified to the contents of Rosado's statements to the police. In an effort to preserve Rodriguez's constitutional right to counsel of choice, the trial court could have excluded McMurray's testimony where the same evidence could have been introduced through the testimony of his partner Detective Wojcik. *See United States v. Messino*, 181 F.3d 826, 830 (7th Cir. 1999). *See also United States v. Diozzi*, 807 F.2d 10 (1st Cir. 1986) (observing that it may be appropriate to exclude testimony to avoid disqualification when the same information is available from other sources).

In the instant case there was neither an actual conflict nor a serious potential for conflict. At the time the State's motion to compel Brent's withdrawal was litigated, McMurray was not listed as a State's witness. Although the State stated in summary fashion that McMurray was a potential witness against Rodriguez, the State gave no offer of proof of the nature or substance of McMurray's testimony. Moreover, McMurray interviewed Rosado on June 24, 1995, and discovery did not close until February 15, 1996. As the district court observed, if McMurray was as integral to the State's case against Rodriguez as it claimed, it had ample time to include his name on the witness list.

Simply because McMurray was involved in the murder investigation, it does not follow that Brent's representation of McMurray gave rise to a serious potential for

conflict that compelled his withdrawal. The presumption that a defendant has the right to be represented by his preferred counsel under the Sixth Amendment is a critical one that courts may not take lightly. *Wheat* requires more than unsupported and dubious speculation that a potential conflict might arise to override the presumption in favor of one's counsel of choice. Thus, the Illinois Appellate Court unreasonably applied the holding of *Wheat v. Illinois* to the instant case when it determined that the trial court did not abuse its discretion by disqualifying Rodriguez's attorney of choice even though no serious potential for conflict existed. Accordingly, this Court should affirm the district court's order granting Rodriguez's petition for writ of habeas corpus.

**Because an Automatic Reversal Rule for Violations of the Denial of Right to Counsel Has Earned Widespread Acceptance Amongst the Federal Courts, the State's Argument That this Court Should Apply a Harmless Error Analysis Is Barred by the Holding in *Teague v. Lane*. In Any Event, A Denial of a Right to Counsel of Choice Is a Structural Error Immune from Harmless Error Analysis.**

Rodriguez has satisfied the hefty burden of establishing that the appellate court unreasonably applied *Wheat v. Illinois* when it affirmed the trial court's order disqualifying his attorney of choice. The State contends that even if Rodriguez was denied his Sixth Amendment right to counsel of choice, the appellate court's judgment should be affirmed and the district court's order overruled because the error was harmless. This Court must reject the State's alternative argument for two reasons: (1) even if this Court were inclined to find that a denial of the right to counsel of choice is

subject to harmless error, this pronouncement would amount to a new rule of law that could not be applied retroactively to the instant case; and moreover, (2) a violation of the right to counsel of choice is a structural error that defies harmless error analysis.

Although the State contends that Rodriguez suggests a new constitutional rule of law, it is actually the State who argues for a new rule. The United States Supreme Court held in *Teague v. Lane*, 489 U.S. 288, 310 (1989), that new constitutional rules of criminal procedure will not be applicable to those cases which have become final before new rules are announced. The Court explained that a case announces a new rule if the result was dictated by precedent existing at the time defendant's conviction became final. *Id.* at 301.

At the time Rodriguez's conviction became final, the accepted rule amongst the federal courts and Illinois courts was that harmless error did not apply to denials of the right to counsel of choice. *Flanagan v. United States*, 465 U.S. 259, 267 (1984). *See also* *People v. Friedrich*, 20 Ill.2d 240 (1960); *People v. Childress*, 276 Ill. App. 3d 402 (Ill. App. Ct. 1995). In *Flanagan*, the United States Supreme Court stated that no showing of prejudice is necessary to receive a new trial following the denial of a right to counsel of choice. *Id.* Virtually every court of appeals has held similarly. *See e.g., United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987); *United States v. Voight*, 89 F.3d 1050, 1074 (3d Cir. 1996); *United States v. Rankin*, 779 F.2d 956, 960 (3d Cir. 1986); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995); *Crandell v. Bunnell*, 144 F.3d 1213, 1217 (9th Cir. 1998); *Bland v. Cal. Dept. of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994). As the

district court stated, “[g]iven the long-standing and widespread acceptance of the rule of automatic reversal, it can hardly be described as a new rule of law.” *Rodriguez*, slip op. at 17. Accordingly, in arguing for a rule that requires a showing of prejudice, the State is advancing a new rule of law that would have no application to the case at bar under *Teague v. Lane*, 489 U.S. 288, 310 (1989).

Even if the United States Supreme Court’s language in *Flanagan* does not amount to a holding as the State suggests, the United State Supreme Court’s holding in *Richardson-Merrell* demonstrates that a rule requiring a defendant to show actual prejudice to vindicate a denial of his right to counsel of choice amounts to a new rule of law. In *Richardson-Merrell*, 472 U.S. 424, 438 (1985), the United States Supreme Court explicitly stated, “[t]his Court has never held that prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases.” The Supreme Court has not spoken to the issue since its decision *Richardson-Merrell*. At the time Rodriguez’s conviction became final, the rule was that no showing of prejudice was necessary to vindicate the denial of a right to counsel of choice. Thus, the State’s argument that a denial of the right to counsel of choice is harmless without a showing of actual prejudice is a new constitutional rule that even if adopted would be inapplicable to this case under *Teague*.

Should this Court reach the merits of this issue, Rodriguez still prevails as an established violation of the Sixth Amendment right to counsel of choice cannot be subjected to harmless error analysis. In *Flanagan v. United States*, 465 U.S. 259 (1984), the

United States Supreme Court found that obtaining reversal for violation of defendant's right to counsel of choice does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceedings. *Id.* at 268. *Flanagan* analogized the right to counsel of choice to the right to self-representation, the denial of which can never be harmless. *Id.* See also *Rankin*, 779 F.2d at 960. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984) (holding that the right to self-representation is either respected or denied; its deprivation cannot be harmless).

The State argues that the Court's language in *Flanagan* is dicta and carries no precedential value. However, the Court's language in *Flanagan* is not merely obiter dicta, but rather is binding on this court since the ultimate holding in *Flanagan* is largely dependent on the Court's finding that a reversal for violation of a defendant's right to counsel of choice does not require a showing of actual prejudice. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (observing that when an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which the Court is bound).

As the State correctly points out, in *Flanagan*, the Court was asked to decide whether a pretrial disqualification of defense counsel in a criminal prosecution is immediately appealable under 28 U.S.C. § 1291. *Flanagan*, 465 U.S. at 260. The Court determined that a disqualification of defense counsel is not immediately appealable. The Court reasoned that finality as a condition of review is an historic characteristic of federal appellate

procedure, and as a general rule, the doctrine of finality prohibits appellate review until conviction and imposition of sentence. *Id.*

The *Flanagan* court acknowledged that in a limited set of circumstances, known as the collateral order exception, an appeal prior to final judgment is possible where the trial court's order: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. *Id.* at 256. The Court reasoned that where these pre-conditions are met, an interlocutory appeal is appropriate because it involves rights, the legal and practical value of which would be destroyed if they were not vindicated prior to trial. The *Flanagan* Court pointed out that it had found only three types of pretrial orders in criminal prosecutions that meet these requirements, namely an order denying a motion to reduce bail, orders denying a motion to dismiss an indictment on double jeopardy grounds, and an order denying a motion to dismiss on speech or debate grounds. *Id.* at 266.

In contrast, the Court determined that an order disqualifying counsel does not satisfy the collateral order criteria. In reaching this conclusion, the Court recognized that a violation of the right to counsel of choice is analogous to the right to self-representation, in that no showing of prejudice is necessary to obtain reversal. *Id.* at 267-68. The Court observed that if establishing a violation of their asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not satisfy the third condition of the collateral order exception: it is not "effectively

unreviewable on appeal from a final judgment.” *Id.* at 268.

The *Flanagan* Court reached its decision that a disqualification order is not immediately appealable based in large part on its finding that a showing of actual prejudice is not necessary to obtain reversal on the denial of a defendant’s right to counsel of choice. Because the *Flanagan* Court relied on this rationale to justify its holding, this Court should read *Flanagan’s* language as binding.

Even if the *Flanagan* Court’s statement that a showing of actual prejudice is not necessary to obtain a reversal from the denial of a right to counsel of choice is not binding, the Court’s language plays an important part of its rationale and is therefore entitled to great weight. *Seminole Tribe of Florida*, 517 U.S. at 67, citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) (“Although technically dicta, . . . an important part of the Court’s rationale for the result that it reach[e]s . . . is entitled to greater weight . . .”) (O’Connor, J., concurring). In fact, a majority of the circuits have relied on the *Flanagan* language in determining that a violation of the right to counsel of choice is not subject to harmless error analysis. See, e.g., *United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987); *United States v. Voight*, 89 F.3d 1050, 1074 (3d Cir. 1996); *United States v. Rankin*, 779 F.2d 956, 960 (3d Cir. 1986); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995); *Crandell v. Bunnell*, 144 F.3d 1213, 1217 (9th Cir. 1998); *Bland v. Cal. Dept. of Corrections*, 20 F.3d 1469, 1479 (9th Cir. 1994). Compare *United States v. Mendoza-Salgado*, 964 F.2d 993, 1016 (10th Cir. 1992) (holding that when the trial court unreasonably and arbitrarily interferes with a defendant’s right to counsel of choice, the conviction cannot

stand irrespective of whether the defendant has been prejudiced). *But see United States v. Arena*, 180 F.3d 380, 397 (2d Cir. 1999) (holding that the denial of a defendant's request for a continuance will not be reversed absent a showing both of arbitrariness and of prejudice to the defendant).

With guidance from *Flanagan*, a majority of the circuits recognize that the denial of a defendant's right to counsel of choice squarely falls into the category of errors known as structural errors and no showing of actual prejudice is required to justify reversal of the defendant's conviction. While the United States Supreme Court has recognized that most constitutional errors can be harmless, the Court has also identified certain constitutional violations that are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome. *Neder v. United States*, 527 U.S. 1, 46 (1999). *See also Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Errors that require automatic reversal include structural defects affecting the framework in which the trial proceeds, as opposed to errors in the trial process itself. *Neder*, 527 U.S. at 8-9. *See also United States v. Harbin*, 250 F.3d 532, 542 (7th Cir. 2001). Structural errors implicate basic protections, and render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilty or innocence. *Id.* It is a categorical determination rather than a case-specific one. *Id.*

Like the right to self-representation, a defendant's right to be represented by his preferred attorney squarely falls into the category of structural errors as it reflects constitutional protection of the defendant's free choice, independent of concern for the

objective fairness of the proceedings. *Flanagan*, 465 U.S. at 268. The State suggests that the right to counsel of choice is more akin to the right to effective assistance of counsel, a right whose vindication requires proof of prejudice. The right to counsel of choice differs radically from the right to effective assistance of counsel, as a denial of the right to effective assistance of counsel impacts only the objective fairness of the proceedings. As the Ninth Circuit has held, “A prejudice requirement has no applicability to counsel of choice cases since, unlike the right to counsel of choice, the right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” *Crandell v. Bunnell*, 144 F.3d 1213, 1216 (9th Cir. 1998). Most critically, a denial of effective assistance of counsel can be quantitatively assessed in the context of other evidence presented in order to determine whether counsel’s performance was harmless beyond a reasonable doubt. *Fulminante*, 499 U.S. at 307-08; *Strickland v. Washington*, 466 U.S. 668 (1984). In contrast, it is impossible to quantitatively assess the resulting prejudice when a defendant is unfairly denied representation from his preferred attorney.

It is beyond debate that when an individual is accused of a crime and must stand trial for that crime, the single most important decision he will make is the selection of an attorney. *Laura*, 607 F.2d at 56. This is so because that attorney is the mechanism through which the defendant will learn all of the options available to him, including many that affect other constitutional rights (e.g., the right to plead guilty, the right to a jury trial, the right to testify). More importantly, with the selection of an attorney, the

defendant gives that attorney the authority to make decisions for him, most of which will be binding decisions of trial strategy. *Id.* The selection of that attorney may mean the difference between a verdict of guilt and an acquittal, a point this Court has acknowledged. *United States v. Santos*, 201 F.3d 953, 960 (7th 2000) (recognizing that an attorney may not be ineffective but may be substantially less likely to achieve acquittal than another attorney).

Lawyers are not fungible and may differ significantly as to their legal knowledge, experience, trial strategy, oratory style, or the importance they give to particular legal issues. It is therefore virtually impossible to quantify the prejudice that results when a defendant is denied his chosen attorney. There is no way to determine whether the character of the proceedings would have been altered, whether counsel would have made different decisions or whether the entire defense strategy would have been different had the defendant received his preferred attorney. *See Morris v. Slappy*, 461 U.S. 1, 28 (1983) (Brennan, J., concurring). The entire framework of the proceedings is affected by the selection of an attorney, and in that sense, the right to counsel of choice is nothing like the right to effective assistance of counsel. Indeed, the right to counsel of choice carries all of the features of a structural error, and like the right to self-representation, cannot be subjected to harmless error analysis.

The State claims that in *Santos*, this Court indicated through dicta that harmless error analysis is applicable to choice of counsel cases. The State's assertion is directly refuted by the *Santos* decision. In *Santos*, the defendant argued that the trial court

deprived her of her Sixth Amendment right to counsel of choice when it failed to grant her a continuance so that she could have her preferred attorney represent her at trial. *Santos*, 201 F.3d at 957. After determining that the trial court abused its discretion in denying the defendant a continuance, this Court contemplated the question of whether the defendant was required to make a showing of actual prejudice in order to receive a new trial. *Id.* at 959-61. Although this Court identified various arguments on both sides of the issue, it ultimately refused to decide the question as it determined that the defendant was entitled to a new trial on altogether different grounds. *Id.* at 961. Therefore, the State is incorrect when it concludes that this Court indicated in *Santos* that a violation of the right to counsel of choice requires a showing of actual prejudice to warrant a new trial.

Notably, the *Santos* decision sets forth highly persuasive grounds for characterizing a violation of the right to counsel of choice as a structural error, exempt from harmless error analysis. *Santos* recognizes that requiring a defendant to make a showing of actual prejudice will vitiate the right to counsel of choice all together. Prejudice will not be provable unless the replacement counsel failed to render effective assistance of counsel, an independent constitutional violation. *Id.* at 960. As such, no independent means for remedying a violation of the right to counsel of choice would exist in the law.

Playing devil's advocate, the *Santos* Court advances two arguments in response to this position. First, *Santos* suggests that a defendant who is denied his right to counsel of choice might be able to prove prejudice even though replacement counsel did not

render ineffective assistance of counsel by showing that his replacement attorney's representation, while not ineffective, was substantially less likely to achieve acquittal. However, the prejudice test suggested by the *Santos* Court is at odds with traditional harmless error analysis as established under *Chapman v. California*, 386 U.S. 18 (1967), and *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). In *Chapman*, the Court held that the test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. See also *Neder*, 527 U.S. at 15. In the context of federal habeas proceedings, the Supreme Court has held that a constitutional trial error is harmless unless the error "had substantial injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) quoting *Kotteakos v. United States* 328 U.S. 750, 776 (1946). The prejudice tests contemplated by *Chapman* and *Kotteakos*, necessarily include an inquiry into what effect the error had on the outcome of case. The *Santos* Court's reference to a lesser standard of prejudice unrelated to the outcome of the case is inconsistent with traditional harmless error analysis espoused by the United States Supreme Court. Even if a defendant can show that his preferred attorney was superior in some way to the attorney who ultimately represented him at trial, the defendant would not be entitled to relief unless that attorney's performance was so inadequate that it rendered his trial unfair. Under this scenario, the defendant would be entitled to relief under an ineffective assistance of counsel standard. Thus, the *Santos* court's suggestion that a defendant might be entitled to relief under some lesser

standard of prejudice conflicts with binding harmless error analysis and cannot justify the argument that a defendant's constitutional right to counsel of choice can be adequately protected even if categorized as a "trial error" rather than a "structural error."

*Santos* also points out that mandamus is an available remedy when an abuse of discretion by the trial judge cannot effectively be remedied by appealing final decision. *Id.* at 960-61. However, *Santos* overlooks that mandamus is not an available remedy for matters that fall within the discretion of the trial court. The Illinois Supreme Court has repeatedly emphasized that mandamus is an extraordinary remedy used to enforce, as a matter of right, a public officer performance of his or her duties *where no exercise of discretion on the officer's part is involved*. *People v. McKoski*, 195 Ill.2d 393, 398, 748 N.E.2d 175, 177 (2001). It is axiomatic that the standard of review applicable to claims of violation of the right to counsel of choice is whether the trial court abused its discretion. *People v. Holmes*, 141 Ill.2d 204, 228 (1990). Because the trial court has full discretion to rule on disqualification motions or motions for continuance, mandamus would never be an appropriate remedy. *See United States v. Rankin*, 779 F.2d 956, 958 n.1 (3d Cir. 1986) (questioning whether mandamus may be invoked to challenge a matter such as the denial of a continuance, which falls within the trial judge's discretion).

With support from *Santos*, the State argues that the United States Supreme Court in *Neder v. United States* limited the rule of automatic reversals to complete denials of the right to assistance of counsel. *Santos*, 201 F.3d at 960. Contrary to the State's position,

*Neder* made no such holding. *Neder* merely held that the well-established harmless error rule of *Chapman v. California* can apply to a jury instruction that omits an element of an offense, where the omitted element was uncontested and supported by overwhelming evidence. *Neder*, 527 U.S. at 4-9.

Significantly, *Neder* reiterated that there are a limited number of structural errors that can never be harmless because they affect the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Id.* at 8. *Neder* recognized that one of those errors is the right to self-representation. Notably however, like the right to counsel of choice, the right to self-representation is not absolute. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 160-61 (2000). As the United States Supreme Court held in *Martinez*, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer. *Id.* at 162. However, when a defendant establishes the denial of his right to self-representation the error is not subject to harmless error analysis, even after *Neder*. Similarly, the right to counsel of choice is not absolute, but once a defendant establishes violation of that right, the error cannot be subject to harmless error analysis.

The State also contends that in *United States v. Turk*, 870 F.2d 1304, 1307 (7th Cir. 1989), this Court previously determined that a showing of actual prejudice is required to warrant reversal where a defendant's right to counsel of choice is denied. However, a careful review of *Turk* reveals that this Court did not make such a holding. In *Turk*, the defendant argued that the district court abused its discretion because it refused to grant

her a continuance in order to hire new counsel. *Id.* In response to this assertion, this Court observed that “to establish an abuse of discretion, Joyner [the defendant] must show that actual prejudice resulted from the denial.” *Id.*

From this, the State argues that this Court has held that a violation of the right to counsel of choice is subject to harmless error analysis. The State’s argument is easily defeated. First, in making this statement, the *Turk* Court was responding to the defendant’s general claim that the Court’s denial of her request for a continuance resulted in a violation of her Sixth Amendment right to counsel. This general claim encompassed not only a claim of the denial of counsel of choice, but also a claim of constitutionally inadequate counsel which requires a showing of “actual prejudice.” Significantly, as authority for its prejudice statement, the *Turk* Court cites to *United States v. Hamm*, 786 F.2d 804, 806 (7th Cir. 1986), a decision involving a claim of ineffective assistance of counsel, and not a claim of a violation of counsel of choice. Thus, the State cannot fairly argue that the *Turk* Court’s passing reference to an actual prejudice requirement applies to established violations of the right to counsel of choice.

Second, the State’s reading of *Turk* must be rejected where the *Turk* Court was never asked to resolve the question of whether an established violation of the right to counsel of choice is subject to harmless error analysis. Critically, the *Turk* Court rejected the defendant’s claim that she was denied her right to counsel of choice, finding that the trial court did not abuse its discretion when it denied her last-minute request for a continuance to obtain new counsel. *Id.* at 1307. Since the *Turk* Court found that the

defendant failed to establish a violation of her counsel of choice rights, it was unnecessary for the *Turk* Court to reach the question of whether a showing of prejudice is necessary for reversal where a defendant adequately demonstrates a violation of his right to counsel of choice.

Third, it seems implausible that this Court would pronounce a new standard for reversal inconsistent with the United States Supreme Court's decision in *Flangan* and contrary to every other court of appeals decision, all without so much as a mention of those cases. The most logical reading of *Turk* is that this Court was merely referencing the actual prejudice requirement necessary for establishing a claim of ineffective assistance of counsel and not crafting a new and unprecedented rule establishing that violations of the right to counsel of choice are subject to harmless error analysis.

Finally, even if this Court were to apply a harmless error analysis, Rodriguez would prevail as the State has failed to establish that the error was harmless. In its brief, the State argues that "petitioner has not shown that his lawyer's representation had a substantial or injurious effect on the jury's verdict." (St. Br. 20) However, the State overlooks that it carries the burden in establishing harmless error, not Rodriguez. *Lainfiesta v. Artuz*, 253 F.3d 151, 158 (2d Cir. 2001), citing *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

To show lack of prejudice, the State points out that Rodriguez was represented by one attorney of his choosing. However, this argument merely underscores the prejudice suffered by Rodriguez. Rodriguez presumably chose Grimaldi and Brent as a defense

team for specific reasons and negotiated a fee that allowed both attorneys to represent him. Perhaps Rodriguez felt that “two heads were better than one” or believed that each lawyer possessed different strengths or skills that would provide him with the best possible defense. Whatever his reasoning, Rodriguez was entitled to create his defense, and the State has failed to establish that when he was arbitrarily denied of one half of his defense team, the error was harmless.

In sum, the trial court abused its discretion when it disqualified Rodriguez’s attorney of choice even though no actual conflict or serious potential for conflict warranted the disqualification. As a result, Rodriguez was deprived of his constitutional right to attorney of choice and the district court correctly determined that the appellate court unreasonably applied *Wheat* when it affirmed the trial court’s ruling. Additionally, this Court should not entertain the State’s argument that the error is subject to harmless error analysis since the rule of *Teague* would prohibit application of harmless error to the instant case. Even if this Court reaches the merits of the harmless error claim, a denial of the right to counsel qualifies as a “structural error” since it affects the entire framework of the trial and the prejudice stemming from such a denial cannot be quantified. Accordingly, the district court properly granted Rodriguez’s petition for writ of habeas corpus and this Court should affirm that decision.

## CONCLUSION

For the foregoing reasons, Rodriguez respectfully requests that this Court affirm the judgment of the district court.

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