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## Justices Hear Case on Right To Choose Defense Counsel

By LINDA GREENHOUSE

The right to counsel is a bedrock constitutional principle, guaranteed to criminal defendants by the Sixth Amendment. But what about the right to a particular lawyer? What about a defendant who wants the best, and can pay for it, but who is required as the result of improper government intervention to settle for second best, or worse?

The issue in a Supreme Court argument on Tuesday was what remedy defendants can invoke when they have been improperly deprived of their choice of lawyer.

The prevailing view in the lower courts, as in the case from the federal appeals court in St. Louis that the justices heard, is that such a deprivation is a "structural" error, so serious that it automatically entitles the defendant to a new trial.

The government argued in its appeal that a new trial was not warranted unless the defendant could show that the preferred lawyer would have made a difference in the outcome.

The circumstance is rare: most criminal defendants cannot afford lawyers, and indigent defendants must accept the lawyers the court appoints for them. Lawyers for Cuauhtemoc Gonzalez-Lopez, the defendant in the Supreme Court case, told the justices in their brief that they could find only 16 federal cases in the past 14 months in which defendants with paid counsel claimed a violation of a right to the lawyer of their choice.

Nonetheless, as the argument on Tuesday made clear, the issue goes to the essence of the Sixth Amendment's promise that a criminal defendant may "have the assistance of counsel for his defence."

Michael R. Dreeben, a deputy solicitor general arguing for the government, said the "overarching goal" of the Sixth Amendment was "to secure a fair trial, conducted in accordance with adversary procedures."

Consequently, Mr. Dreeben said, defendants who were improperly denied their first-choice lawyer should get a new trial only if the deprivation rendered the trial unfair.

A rule of automatic retrial, he said, amounts to "forcing society to bear the costs of a retrial even when there is no reasonable probability that another lawyer would have made a difference."

Jeffrey L. Fisher, representing Mr. Gonzalez-Lopez, who was convicted of conspiring to distribute a large amount of marijuana, said the choice of a lawyer was inherent in a defendant's personal autonomy, as recognized 30 years ago by the court in a decision that guaranteed defendants the right to dispense with a lawyer entirely and represent themselves.

The right to a preferred lawyer is a "core right" under the Sixth Amendment "that goes beyond simply a fair trial," Mr. Fisher said. "The right is violated at the moment the trial judge impermissibly disqualifies" the lawyer the defendant has selected, he added.

In this case, *United States v. Gonzalez-Lopez*, No. 05-352, Mr. Gonzalez-Lopez hired a California lawyer,

Joseph H. Low IV, an experienced defense attorney who had recently been successful in negotiating a favorable plea agreement for another drug defendant in the same federal district court in St. Louis where Mr. Gonzalez-Lopez was to be tried.

Because Mr. Low was not admitted to practice before that court, he needed permission from the judge overseeing the Gonzalez-Lopez matter to enter the case. While awaiting a decision, Mr. Low arranged for a local lawyer whom he knew, a specialist in consumer protection cases, to serve as counsel for what both men assumed would be a short period.

But the judge denied Mr. Low's motion -- improperly, as the appeals court later ruled -- and prohibited him from having contact with Mr. Gonzalez-Lopez during the trial. Mr. Gonzalez-Lopez was convicted and sentenced to 24 years in prison.

The appeals court, observing that "lawyers are not fungible," found a violation of Mr. Gonzalez-Lopez's Sixth Amendment right, vacated the conviction and ordered a new trial.

During the argument on Tuesday, Chief Justice John G. Roberts Jr. was openly skeptical of Mr. Fisher's argument in support of a rule of automatic reversal. Observing that "there are hundreds of thousands of lawyers," the chief justice suggested it was improbable that a defendant's second choice would not approximate a first choice. "It's not as if he asks for a Rolls Royce and gets a Yugo or something," Chief Justice Roberts said.

Justice Samuel A. Alito Jr. asked Mr. Fisher what would happen if the second choice turned out to be a better lawyer.

"Let's say the defendant wanted to be represented by a relative who specialized in real estate law," Justice Alito said. If that lawyer was disqualified and the defendant was eventually represented by an experienced criminal defense lawyer with a national reputation, "why wouldn't that be harmless error?" he asked.

That would still be "unquestionably a Sixth Amendment violation," Mr. Fisher replied.

The justices also had tough questions, probably more of them, in fact, for Mr. Dreeben, the government's lawyer. Justice Antonin Scalia was clearly unimpressed by the argument that as long as the trial was fair and the lawyer competent, the Sixth Amendment was not violated.

"I don't want a 'competent' lawyer," Justice Scalia told Mr. Dreeben. "I want a lawyer to get me off. I want a lawyer to invent the Twinkie defense. I want to win."