IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. ANTHONY J. GARCIA	CR 13-2322 MOTION TO RECONSIDER THE ORDER DISQUALIFYING ALISON MOTTA

COMES NOW the Defendant Anthony Garcia, by and through Counsel Jeremy C. Jorgenson, and moves this Court to vacate, reconsider, alter, or amend the April 6th Order (hereinafter the "Disqualification Order") disqualifying Alison Motta, lead counsel of choice prior to the Disqualification Order. The Defendant requests an evidentiary hearing, after adequate notice to all parties, where the Defendant and all parties (including Movant Alison Motta) may be heard on the record.

As part of This motion, the Defendant adopts and incorporates through reference the facts and assertions relating to information disseminated publically as to the Defendant and his counsel as same is relevant to any justification for the comments at issue, within Defendant's Supplement to his Motion to Disqualify the County Attorney's Office, which is being filed consecutively to the herein moiton.

From its earliest origins, the right to assistance of chosen counsel has been understood to preclude the government from unjustifiably interfering with an accused's right to be represented by the counsel of choice. And in the rare instances when trial judges have transgressed this constraint, appellate courts on direct review consistently have held that these errors require

reversal and new trials. Anthony Garcia, the family members of the victims, and the community as a whole deserve a trial which will withstand appeal.

IN SUPPORT of this motion the Defendant states and alleges as follows:

PROCEDURAL POSTURE

The procedural issues for which the Defendant seeks remedy relate to events beginning on or about March 29th, 2016 when Alison Motta received a telephone call from Emerson Clarridge of the Omaha World Herald. Emerson informed Alison Motta that the State intended to file a motion to revoke Alison Motta's *pro hac vice* appearance and was seeking comment for a story that was to be published on the matter. That same evening, Alison Motta wrote a letter to this Court, cc'd the County Attorney and informally requested that this Court enter a Protective Order to seal any potential filing by the State regarding her *pro hac vice* status, as she had correctly predicted that the press coverage would detrimentally prejudice the Defendant (*see* Attachment A to the March 30th, 2016 Response to State's Motion and Motion to Disqualify County Attorney). Despite the lip service, given at the hearing on Alison Motta's disqualification, to the notion that the County Attorney wishes to ensure that Anthony Garcia receive a fair trial, the State's Motion to disqualify Alison Motta was **not** filed under seal.

Also, on March 30th, 2016 Dan Stockmann and Jeff Leuschen both filed motions to withdrawal as counsel for the Defendant. Each filing contains a Certificate of Service indicating that the County Attorney was given notice. Neither contains any indication that the Defendant or his other retained attorneys were notified. The respective motions to withdraw were heard on March 31st when the State's Motion for Sanctions was set to be heard. While the record is stale

and unanimated and does not capture the electrifying buzz of media presence, from wall to wall, in the courtroom, it does contain the requisite content for the Court to reconsider the matter.

At the hearing, neither Stockmann nor Leuschen informed the Court that the necessary notice to the Defendant had **not** been given. The Court did **not** inquire of the Defendant if he had any concerns or objections to the withdrawal of his counsel of record. Prior to allowing the withdrawal, the Defendant was still represented by his chosen out-of-state counsel, yet the Court decided the matter abruptly without giving out-of-state counsel or the Defendant the opportunity to weigh in. Instead, the Court made it abundantly clear that it would not allow any comments or argument by out-of-state counsel, as they no longer had the authority to practice law in the state of Nebraska. The Defendant was left sitting, without counsel, one business day prior to the scheduled commencement of his capital murder trial. Shortly thereafter the Court issued an Order allowing the withdrawal of Stockmann and Leuschen, and declared that the State's Motion for Sanctions against out-of-state counsel was moot. No hearing on the Motion for Sanctions was set.

Later that day, on March 31th, 2016, out-of-state counsel filed an application for admission *pro hac vice* with the undersigned attorney and his firm. Undersigned counsel had set hearing, and provided notice, on out-of-state counsel's applications for *pro hac vice* admission for the following Monday morning, April 4th, 2016. It is presumed that the Court was well aware of the significant media coverage of the State's Motion for Sanctions and the subsequent motions to withdraw by Stockmann and Leuschen, as that had been the leading story on most local media outlets in the days surrounding the filing of those motions. Despite this Court having found that the issues related to the Motion for Sanctions was moot, and despite the fact that the Court's Order allowing withdrawal was issued after Alison Motta filed her application to appear *pro hac*

vice with undersigned counsel, the Court conducted a hearing on the State's Motion to Disqualify with **no** notice whatsoever to the Defendant or undersigned counsel. Curiously, the County Attorney was prepared for the hearing. Nevertheless, it is assumed that the Court took the Motion up *sua sponte*, and it did so without notice that the issue was no longer moot or that it would be called for hearing.

The Court abruptly started hearing evidence on the State's Motion for Sanctions at the April 4th hearing, took the matter under advisement and issued a corrected Order on April 6th 2016. The Court also signed an Order dated April 7th 2016 granting admission *pro hac vice* to Robert Motta II and Robert Motta Sr., noting that Alison Motta "is disqualified from legal representation of Anthony J. Garcia."

While undersigned counsel has exhaustively researched the issues related to Alison Motta's disqualification and concluded that Anthony Garcia was wrongfully denied choice of counsel, the Defendant asks the Court to reconsider the Disqualification Order. For the reasons listed below, Defendant asks this Court to reconsider noting that erroneous disqualification is a structural error that, if uncorrected, could delay the proceedings until Anthony Garcia's interlocutory appeal goes as far as the United States Supreme Court. Moreover, even if Anthony Garcia prosecutes an interlocutory appeal to a court of last resort, and is nonetheless retried, convicted and sentenced to death, the Disqualification Order will be dangerously vulnerable to collateral attack during **every** stage of post-conviction review and will likely prevent the ultimate sentence from being imposed. If **any** appellate court, at any stage of appeal, finds the disqualification order erroneous, as a matter of course, Anthony Garcia will be granted a new trial.

The legal arguments below are not, as the Court indicated in its April 13th Order, about "a violation of the court rule", but rather implicate fundamental Constitutional principles that exist on a landscape cloaked in antiquity, that this Court's Disqualification Order threatens to dramatically alter. The interests at stake have been very carefully balanced in presumptive favor of the Defendant's choice of counsel. Undersigned counsel affirmed the categorical distinction between Anthony Garcia's Sixth Amendment right to counsel of choice, and the Sixth Amendment right to a "fair trial" during argument at the Disqualification hearing, but did so to no avail, as the Court indicated that it did not think the same to be true. Nevertheless, "[t]he right to select counsel of one's choice, by contrast, 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." (internal citations omitted) *United States v. Gonzales-Lopez*, 548 U.S. 140, 152, (2006).

INTRODUCTION:

The Defendant has a recognized 6th Amendment right to the continued representation of his counsel of choice. So whether this Court considers its Order of April 6, 2016 a disqualification Order or a denial of admission, the implications of the Defendant's Sixth Amendment rights as well as the Due Process Rights of both Anthony Garcia and Alison Motta are equally implicated.

The Defendant asserts that he was denied procedural due process as there was improper notice that the April 4, 2016 hearing would involve an evidentiary hearing on the State's Motion for Sanctions. The Substantive rights of both Anthony Garcia and Alison Motta were at risk on April 4, 2016 where This Court heard evidence and made findings of fact and findings of law based upon evidence offered by the State. However, the defendant was not afforded an

opportunity to prepare or to present a meaningful response. Accordingly, Defendant requests This Honorable Court vacate its Order of April 6, 2015.

The Defendant asserts that This Court's findings were inconsistent with the evidence presented. The comments made to KMTV did not involve DNA and on the face of the comment itself it is impossible to know what Alison Motta had referred to before stating that "this" exclusively exonerates …; however, it is clear from the remaining portion of the comment that she had not said that scientific evidence cleared the Defendant. It is clear from the comment that Alison Motta was speaking to the totality of the circumstances as discovered over the course of the defense's ongoing investigation into the Joy Blanchard murder.

As to the protection Order, the defense team was specifically authorized to share information with defense experts. The information disseminated only spoke to information established through independent investigation. The discovery disclosed to the defense did not include any DNA comparison of Simmer as to the offenses that Anthony Garcia is charged with and same was developed by way of a defense expert. Moreover, Alison Motta never disclosed the actual results of any DNA testing. Further, the State disclosed the fact that Simmer's DNA was present at the Blanchard scene before Alison Motta ever spoke about anything related to DNA. Moreover, the stated purpose of the protective Order was that it was an ongoing investigation.

Pursuant to the Supreme Court of the United States, the scope of the law enforcement privilege is limited by its underlying purpose. See *Roviaro v. United States*, 353 U.S. 53, 60, 77 S. Ct. 623, 627, 1 L. Ed. 2d 639 (1957). Materials protected under the law enforcement privilege, are no longer protected once the justification for the protection no longer exists. See *Id.* In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Supreme Court recognized

the government's privilege to withhold certain evidence pursuant to the Governmental privileged. *Id*. at 53, 77 S.Ct. at 627, 1 L.Ed.2d at 644. The Court found that "[t]he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement" *Roviaro v. United States*, 353 U.S. 53, 59, 77 S. Ct. 623, 627, 1 L. Ed. 2d 639 (1957). There, the Court was looking at the informant identity prong of the privileged and found that since "the scope of the privilege is limited by its underlying purpose",[] "where the disclosure [] will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." Thus, under the reasoning applied by the Court in *Roviaro*, the privileged, if any, ended before Alison Motta spoke.

Moreover, despite the State position, the violation identified by This Court is merely technical in nature. The State motions attacks the DNA evidence on the grounds that there is no statistical probability but mere conclusory finding. The DNA report was entered into evidence and same clearly establishes that the two suspects at issue cannot be excluded and further identifies a statistical probability for same. The fact of the matter is, upon rehearing on this matter the defense is willing to provide evidence, to This Court in camera, which will establish that the discovery of the partial profiles of both suspects at both scenes, ***coupled with the other significant connectors***, developed through the ongoing investigation and unknown to This Court, the public and the State, in fact lend strong support for the conclusion that Dr. Garcia did not commit these offenses (unless he teamed up with two strangers in order to kill three other strangers.)

Nonetheless, the comments at issue are taken out of context. So to conclude they were reckless or find that it was reckless to make the overall assertion that the combined evidence developed by the defense's investigation, does not "conclusively exonerate" the defendant, without

knowing any of the underlying evidence or reasons for same is unjust, unfair and unsupported. However, This Court seemingly relied on the mere technical violation and as such, it does not warrant disqualification or denial of the Defendant's right of chosen counsel, especially without a meaningful hearing.

Further, in order to pass constitutional muster, a protection Order must only be as restrictive as is necessary to accomplish the identifiable purpose of the Order. Moreover, it cannot be vauge as to what conduct is restricted. An Order "that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972). This requirement "applies with particular force in review of laws dealing with speech," *666 Hynes v. Mayor of Oradell, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976); "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," Smith v. California, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959)."Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 665-66, 105 S. Ct. 2265, 2289, 85 L. Ed. 2d 652 (1985)

These guarantees apply fully to attorney disciplinary proceedings. In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1225, 20 L.Ed.2d 117 (1968). Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many

instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." Id., at 555, 88 S.Ct., at 1228 (WHITE, J., concurring in result).9 But where "[t]he appraisal of [an **2290 attorney's] conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question," and where the State has not otherwise proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct. Id., at 555-556, 88 S.Ct., at 1228-1229." Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 666, 105 S. Ct. 2265, 2289-90, 85 L. Ed. 2d 652 (1985)

I. A Trial Court's Unjustified Refusal To Allow A Defendant To Be Represented By Counsel Of His Choice Violates The Sixth Amendment, Irrespective Of Any Demonstrable Prejudice.

The State's proposition that this Court may disqualify a criminal defendant's choice of retained counsel in order to ensure a fair trial ignores the history, purpose, and practical operation of the Sixth Amendment's core. While the Court seems to embrace the notion that the right to select and be represented by one's preferred attorney, *Wheat v. United States*, 486 U.S. 153, 159 (1988), as a qualified or subordinate right, this right actually forms the historical core of the Assistance of Counsel Clause. Lessons learned under oppressive kings and colonial governors left the Framers with a keen appreciation for the need to protect criminal defendants from the power of the state. Their solution was to provide not "merely that a defense shall be

made for the accused," *Faretta v. California*, 422 U.S. 806, 819 (1975), but that the defendant shall have the right to decide whether to defend himself through counsel and, if so, which counsel. And this right, as opposed to modern jurisprudence such as the right to "effective" or conflict free assistance of counsel, always has been defined and enforced for its own sake, irrespective of any objectively demonstrable prejudice arising from any particular violation.

a. Under English common law in the eighteenth century, only those charged with misdemeanors had a right to be represented by counsel at trial. *See* William M. Beaney, *The Right to Counsel in American Courts* 8-9 (1955). Parliament extended the right to 1695, 7 & 8 Will. 3, C. 3, § 1 (Eng.). In the wake of this change, English courts began to allow limited representation of some felony trials, but the decision to do so remained completely within the discretion of the court and could not be demanded as a right. *See* Beaney, *supra*, at 9-11.

b. It was against the backdrop of governmental interference with counsel of choice that the new states legislated and constitutionalized the right to counsel after independence. Following the Declaration of Independence, nearly every former colony adopted provisions protecting a criminal defendant's right to counsel. *See* Beaney, *Supra*, at 18-21. The early constitutions of several of the states demonstrate the personal nature of the right to retain counsel of choice, as the founders perceived it: the constitutions of Pennsylvania (1776), Vermont (1777), Massachusetts (1780), and Delaware (1792) each provided that in all criminal prosectuions a defendant has the right to be heard by "his counsel." Beaney, *Supra*, at 20-21. Within two generations, the General Court of Virginia clarified the meaning of the right when it held that in a criminal trial a minor possessed the same right as any adult to appear "by attorney of his own selection," and thus that a trial court had erred in appointing a guardian to defend the minor. *Word v. Commonwealth*, 30 Va. (3 Leigh) 743, 759 (1827). The appellate court made no

inquiry into the effectiveness of the guardian, or into whether the minor had suffered any demonstrable prejudice. The trial court's interference with the minor's right to control his own defense intself violated his common-law right. *See id*. At 748-49 (argument of amicus curiae on behalf of the minor).

The right to counsel, thus protected by the states, was among the rights the people **demanded** during ratification of the federal Constitution. Beaney, *Supra*, at 22-23. The Sixth Amendment's "Assistance of Counsel" Clause responded to that cry. The thrust of the Clause was to guarantee the right to have defendants' chosen attorneys appear on their behalf.

c. State and federal courts repeatedly have reaffirmed that the original understanding of the Sixth Amendment and parallel state constitutional provisions was to guarantee defendants' right to obtain counsel of choice, irrespective of any prejudice that would result from denying that choice. In *Delk v. State*, 100 Ga. 61 (1896), for example, two codefendants, Tom Delk and Taylor Delk, were tried for murder. Although the trial court appointed a lawyer for each defendant, Taylor sought a continuance. The trial court appointed a lawyer for each defendant, Taylor sought a continuance to allow counsel he had retained to appear. The trial court denied the request and forced both defendants to trial with their appointed lawyers. Both defendants were convicted and appealed, asserting violations of the right to counsel. The Georgia Supreme Court easily disposed of Tom's appeal, holding that his appointed attorney had ably represented him. *Delk v. State*, 99 Ga. 667, 669-71 (1896). But the same court took a different view of Taylor's appeal, holding that its state bill of rights provision that "every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel,' confers upon every person indicted for crime a most valuable and important constitutional right, and entitles him to be defended by counsel of his own selection whenever he is able and willing to

employ an attorney and uses reasonable diligence to obtain his services. No such person…should be deprived of his right to be represented by counsel chosen by himself. *Delk*, 100 Ga. At 61. The court thus reversed Taylor's conviction. *Ibid.*

Other state courts issued similar opinions over the years. The Supreme Court of Wisconsin observed that a defendant "may have [for his defense] whatever counsel he chooses to retain," *Baker v. State*, 56 N.W.1088, 1089 (1893), while the Court of Appeals of Maryland noted in 1914 that "[i]t is, of course, the right of one accused of crime to be represented by counsel of his own selection," *McCleary v. State*, 89 A. 1100, 1103 (1914). In 1933, the New York Court of Appeals held that both the federal and New York Constitutions protect a defendant's "right to defend in person or by counsel of his own choosing," and consequently that the court had no authority to assign counsel to a defendant who retained his own. *People v. Price*, 187 N.E. 298, 299 (1933). The Appellate Division a few years later reversed a conviction where the trial judge refused to reasonably accommodate the schedule of the defendant's chosen counsel, and then appointed counsel after the defendant refused to retain another. *People v. Gordon*, 30 N.Y.S.2d 625 (1941). Emphasizing the "invasion of the substantial rights of the accused to appear by counsel of his own choosing," the court made no inquiry into the effectiveness of the appointed counsel. *Id*. At 628.

Federal courts quickly followed suit as their jurisdiction over criminal matters grew. In *Powell v. Alabama*, this Court reversed the convictions of three of the Scottsboro Boys because the trial court's failure to allow them an opportunity to secure counsel of their own choice denied them due process, independent of the court's additional failure to appoint effective counsel for them. 287 U.S. 45, 52-53 (1932). This Court explained in plain terms: "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to

secure counsel of his own choice." *Id*. At 53. This Court reiterated the importance of the right to choose counsel two decades later in *Chandler v. Fretag* when it reversed the conviction of a defendant denied a continuance to obtain a lawyer, observing that the defendant's "right to be heard through his own counsel was unqualified." 348 U.S. 3, 9 (1954).

In between these decisions, the Third Circuit relied on *Powell* to reverse the conviction of defendants whose chosen out-of-state counsel was improperly denied admission *pro hac vice*. *United States v. Bergamo*, 154 F.2d 31, 34 (CA3 1946). Although the case was "clearcut and simple" and the local counsel conducted it "with skill and competence" *id*. At 33, the Third Circuit nonetheless ordered a new trial because "[t]o hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." *Id*. At 35.

II. The Right To Counsel Of Choice Protects Interests Distinct From Merely Guaranteeing An Adversarial Process.

The right to counsel of choice serves three main functions, each of which has vitality independent of merely ensuring an objectively fair trial.

a. First and foremost, a defendant's counsel of choice is one of two entities (along with the jury) that the Constitution interposes in criminal cases between the accused and the government. The presence of these entities ensures that the people themselves have some say in whether the government may deprive individuals of their physical liberty. The Supreme Court has held, for example, that trial courts may not interfere with juries by "directing the jury to come forward with…a [guilty] verdict." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). Juries, rather, must be allowed to perform their role as "circuitbreaker[s] in the State's machinery of justice." *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004).

By the same token, forbidding the government from unjustifiably interfering with a defendant's ability to choose and retain an attorney ensures that the government may not exercise any form of supervisory veto over "the type of defense [the defendant] wishes to mount." *United States v. Laura*, 607 F.2d 52, 56 (CA3 1979). *Cf. Caplin & Drysdale*, *Chartered v. United States*, 491 U.S. 617, 646 (1989) (Blackmun, J., dissenting) (counsel of choice ensures "equality between the Government and those it chooses to prosecute"). It also ensures that the government may not cause a defendant to question the "trust between attorney and client that is necessary for the attorney to be a truly effective advocate." *Caplin & Drysdale*, 491 U.S. at 645 (Blackmun, J., dissenting). Once the government, at its whim, could disqualify a defendant's chosen attorney, a defendant would be bound to be suspicious of any lawyer whom the government allowed to stay in a case.

b. A related "primary purpose" of the Sixth Amendment right to counsel of choice "is to grant a criminal defendant effective control over the conduct of his defense" as a means of respecting the constitutional values of individual dignity, autonomy, and free will. *Wheat*, 486 U.S. at 1656-66 (Marshall, J., dissenting); *see also McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1975) (noting the importance of affirming "the dignity and autonomy of the accused"). Defending oneself against criminal charges is a traumatic and deeply personal endeavor. It involves innumerable choices about how to vindicate one's interests. Defendants therefore must be allowed to select the attorney who will help them make those choices, so long as defendants' selection s fall within accepted limits. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring).

It is, after all, the accused "who sufferes the consequences if his defense fails." *Faretta*, 422 U.S. at 819-20. So just as the government may not unjustifiably interfere with a defendant's right to represent himself, the federal courts of appeals have held that it may not unjustifiably interfere with his free choice of counsel. *See, e.g.*, *United States v. Panzardi Alverez*, 816 F.2d 813, 818 (CA1 1987) ("Obtaining reversal for violation of [the 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." (citation omitted)); *Wilson v. Mintzes*, 761 F.2d 275, 279 (CA6 1985) ("Recognition of the right [to counsel of choice] also reflects constitutional protection of the accused's free choice independent of these [fairness] concerns."); *United States v. Curcio*, 694 F.2d 14, 25 (CA2 1982) (Friendly, J.) ("[T]he defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates"), disapproved on other grounds in *Flanagan v. United States*, 465 U.S. 259, 263 n.2 (1984). If a trial court does so, the court violates the Sixth Amendment regardless of whether an objective observer would believe the court's actions undermined the adversarial process.

c. Finally, the right to counsel of choice serves an important institutional role: When the government unjustifiably interferes with the accused's retained counsel, the government "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young v. United States ex rel. Vuitton et Fils* S.A., 481 U.S. 787, 811 (1987) (plurality opinion). "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); *see also United States v. Olano*, 507 U.S. 725, 736 (1993) (reaffirming the need to correct error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" (citation omitted)). Accordingly, *Wheat* itself recognized that a

defendant's choice of counsel implicates the judicial system's interest in ensuring that criminal trials are conducted "justly" and in a manner that "appears fair to all." 486 U.S. at 160. These values are harmed whenever a court, for no legitimate reason, bars a defendant's chosen counsel from appearing on his behalf. Under these rare and extreme circumstances, it is not only the defendant who is led to "believe that the law contrives against him," *Faretta*, 422 U.S. at 834; the public also naturally doubts whether an ensuing conviction is legitimate and impartial. When, as here, the prosecution itself plays a role in blocking the defendant's chosen counsel, *see supra*, at 7, this public harm is only exacerbated.

III. None Of The Sixth Amendment Doctrines That Look More Generally To Concerns about the "Administration Of Justice" Have Found That Defendant's Right To Counsel Of Choice Can Be Denied For Concerns That Can Be Analyzed In The Context Of Effective Assistance Of Counsel.

The only authority cited by the Court, *State v. Marcano*, No. CR140280165T, 2014 WL 7714326 (Conn. Super. CT. Dec. 17, 2014), the trial court's basis for disqualification was primarily due to a conflict of interests between counsel of choice and the defendant. In fact, undersigned counsel is unable to find a single case that has been reviewed by an appellate court, where disqualification was upheld for reasons other than the limited few that the Supreme Court has outlined.

In a case coincidentally decided the day that former local counsel filed their motions to withdraw, the Supreme Court of the United States decided *Sila Luis v. United States*, 578 US____ (2016). In that case the Court analyzed the limits to a court's broad latitude by clarifying that "It is consequently not surprising: *first,* that this Court's opinions often refer to the right to counsel as "fundamental," *id.*, at 68; see *Grosjean* v. *American Press Co.,* 297 U. S. 233, 243-244 (1936) (similar); *Johnson* v. *Zerbst,* 304 U. S. 458, 462-463 (1938) (similar); *second,* that commentators describe the right as a "great engin[e] by which an innocent man

can make the truth of his innocence visible," Amar, Sixth Amendment First Principles, 84 Geo. L. J. 641, 643 (1996); see *Herring* v. *New York,* 422 U. S. 853, 862 (1975); *third,* that we have understood the right to require that the Government provide counsel for an indigent defendant accused of all but the least serious crimes, see *Gideon, supra,* at 344; and *fourth,* that we have considered the wrongful deprivation of the right to counsel a "structural" error that so "affec[ts] the framework within which the trial proceeds" that courts may not even ask whether the error harmed the defendant. *United States* v. *Gonzalez-Lopez,* 548 U. S. 140, 148 (2006) (internal quotation marks omitted); see *id.,* at 150."

A trial court's ability to ensure that a defendant's choice of counsel is legitimate and nondisruptive does not grant it a concomitant power to reject legitimate counsel for mistaken or illegitimate reasons. Courts may limit representation to those who are attorneys who are eligible to practice in the jurisdiction. In order to protect the efficiency or integrity of the judicial process, courts also may refuse repeated, unreasonable, or abusive requests for continuances even if this prevents a defendant from proceeding with his chosen counsel. *See Unger v. Sarafite*, 376 U.S. 575, 588089 (1964). Courts may also reject conflicted counsel in order to promote the fairness of a trial, the ethical standards of the legal profession, and the appearance of impropriety. The Disqualification Order seems to suggest that the trial court's broad latitude extends to situations where ethical standards and/or the appearance of impropriety exists while dispensing with the underlying premise of Sixth Amendment authority suggesting that these factors are only considered in relation to a conflict of interests.

The Supreme Court addressed this constellation of concerns in *Wheat*. There, a defendant had sought to be represented by an attorney who was already engaged by co-

defendants and potential witnesses, presenting a serious risk of a conflict of interest. 486 U.S. at 155-56, 163-64. Although this Court recognized the defendant's presumptive right to be represented by his preferred attorney, *id.* at 160, it concluded that the trial court acted within its discretion in forbidding the attorney from representing the defendant. This Court explained that the defendant's interest in choosing his counsel had to give way to the "institutional interest in the rendition of just verdicts," – the interest of "[f]ederal courts…in ensuring that criminal trials are conducted within the ethical standards of the profession that legal proceedings appear fair to all." *Ibid*.

Next, prior to *Gonzalez-Lopez* reaching the Supreme Court, the Eighth Circuit discussed denial of counsel of choice at length then reversed Gonzales-Lopez's conviction. *US v. Gonzalez-Lopez,* 399 F. 3d 924 (8th Cir. 2005). "Cuauhtemoc Gonzalez-Lopez was convicted by a jury of conspiring to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846. On appeal, he argues his conviction should be vacated because the district court violated his Sixth Amendment right to be represented by the counsel of his choice at trial by refusing to grant his attorney's applications for admission pro hac vice. Finding a Sixth Amendment violation, we vacate the conviction and remand the case for a new trial." *Id.* at 925. "On January 7, 2003, Gonzalez-Lopez was charged with conspiring to distribute more than 100 kilograms of marijuana in the Eastern District of Missouri." *Id*. at 925-26. "At Gonzalez-Lopez's request, Low met with him at the jail in Farmington, Missouri, between January 8 and 10, 2003. Within ten days of this meeting, Gonzalez-Lopez hired Low." *Id*. at 926. "On March 17, 2003, Low filed an application for admission pro hac vice to the Eastern District of Missouri. The district court denied Low's application the next day without providing any oral or written explanation. On April 14,

2003, Low filed a second application for admission pro hac vice. The district court denied the application again without explanation." *Id*. at 928 "The jury found Gonzalez-Lopez guilty of the sole count of the indictment on July 11, 2003." *Id*.

On appeal to the Eighth Circuit Court of Appeals Gonzalez-Lopez argued that "his conviction should be vacated because the district court violated his Sixth Amendment right to be represented by the counsel of his choice at trial by refusing to grant his attorney's applications for admission pro hac vice."

The Eighth Circuit noted several salient propositions of law in the opinion, including that: "As a general rule, "`defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice.'" *United States v. Lewis*, 759 F.2d 1316, 1326 (8th Cir.1985) (quoting *United States v. Cox*, 580 F.2d 317, 321 (8th Cir.1978))."";

More importantly ""Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." *Mendoza-Salgado*, 964 F.2d at 1015-16 (internal quotations and citations omitted)."; and that

"Furthermore, "`[a] defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted pro hac vice.'" *United States v. Ries*, 100 F.3d 1469, 1471 (9th Cir.1996) (quoting *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir.1993)). Thus, "a decision denying a pro hac vice admission necessarily implicates constitutional concerns." *Panzardi-Alvarez v. United States*, 879 F.2d 975, 980 (1st Cir.1989) (citation omitted)."

The Eighth Circuit went on to note that it was "clear from the record" that "the district court's **decision to deny Low admission pro hac vice was based on conduct occurring**

outside the presence of the judge, namely Low's communication with represented parties. See *United States v. Collins*, 920 F.2d 619, 628 (10th Cir.1990) (revocation of attorney's admission pro hac vice reviewed de novo where attorney was disqualified based on pleadings not conduct in open court)" and that "the district court's decision to deny Low's applications for admission pro hac vice turned on the district court's interpretation of the law" Accordingly, the Eighth Circuit found that the appropriate standard of review was de novo.

Prior to performing that de novo review, the appellate court further noted that "A district court which denies an application for admission pro hac vice submitted by the attorney for a criminal defendant must articulate the reason for the denial "for the benefit of the defendant and the reviewing court." *Ries*, 100 F.3d at 1472; *Collins*, 920 F.2d at 628 (citing *Laura*, 607 F.2d at 60)."

Ultimately, after performing de novo review, the Eighth Circuit found that the district court had "erred in denying Low's application for admission pro hac vice." In determining what remedial measures were necessary, the Eighth Circuit found it necessary to determine the precise nature of appellate review of Sixth Amendment violations, noting that they had never before directly addressed the issue. The opinion went on to note that while some constitutional violations are subject to the harmless error standard whereby they do not require automatic reversal there are still other constitutional violations which do require automatic reversal. Specifically, the Eighth Circuit reasoned that:

"The second category consists of "a limited class of fundamental constitutional errors that `defy analysis by "harmless error" standards.'" *Neder,* 527 U.S. at 7 (quoting *Fulminante,* 499 U.S. at 309). These constitutional errors "are so intrinsically harmful as to require automatic reversal (*i.e.,* `affect substantial rights') without regard to their effect on the outcome." *Id.* In

these cases, the error causes a "`defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* at 8 (quoting *Fulminante,* 499 U.S. at 310). The Supreme Court has not decided whether harmless error review applies to the denial of the Sixth Amendment right to be represented by the attorney chosen by the defendant. In *Flanagan v. United States,* 465 U.S. 259, 268 (1984), however, the Court hinted that the denial of the right to counsel of choice may result in automatic reversal by comparing the right to rights which if violated result in automatic reversal."

Ultimately, the opinion went on the hold that the erroneous denial of Mr. Gonzalez-Lopez's counsel of choice caused a structural defect in the proceedings and that such error required an automatic reversal.

Although the Supreme Court in *Wheat* shelved the possibility of prosecutors "manufactur[ing]" attorney conflicts of interest, 486 U.S. at 163, the Court and the State seem to propose a new standard for disqualification that raises far more acutely the possibility of abusive disqualification motions. Instead of having to manufacture a conflict of interest, the Court and the State adopt a rule where prosecutors, or the court *sua sponte*, can advance any reason – *e.g.*, a supposed breach of an ethical rule – to remove defense counsel from a case, and still remain insulated from an appellate rebuke by expanding the "wide latitude" from *Wheat* and rendering *Wheat* a dead letter in terms of its latitude. Put another way, the court under this approach would be allowed to engage in a *Strickland* analysis and determine, prior to the outcome of trial, that the defendant was prejudiced by the actions of chosen counsel. This same rule was rejected in *Gonzales-Lopez* where the Court made it clear that the only way that such an analysis can determine if counsel's "ineffectiveness pervades a trial" is through identifiable mistakes…"We can assess how

those mistakes affected the **outcome**." (emphasis added) *Gonzales* 547 U.S. at 152. The Court concluded that such an analysis of prejudice, based on a harmless error analysis was wholly inappropriate because "[t]he difficulties of conducting the two assessments of prejudice are not remotely comparable...and that this violation is not subject to harmless-error analysis." *Id*.

IV. The Disqualification Order Does Not Adequately Analyze Any Particular Justification For Disqualification Such That An Appellate Court Can Understand The Actions Of Alison Motta, The Resulting Prejudice To The Defendant, And How The Effect Of Those Actions Is Weighed Against Anthony Garcia's Sixth Amendment Right To Chosen Counsel.

There was no evidence offered to establish how the Defense came about When considering whether to disqualify a defendant's chosen counsel before trial, the judge must carefully balance the defendant's right to be represented by the counsel of his choice against the court's interest in the orderly administration of justice. *Gonzales* 547 U.S. at 152.

In the Disqualification Order, filed on April 6th, 2016 the Court made the following findings relevant to the Disqualification of Alison Motta:

Motion to Withdraw for Stockmann and Leuschen

1. "The Mottas have been involved in this case for more than 2 ½ years as lead defense counsel with the assistance of local attorneys Daniel Stockmann and Jeffrey Leuschen." (Disqualification Order of April 6th at 2).
2. "[T]his Court granted attorneys Stockmann and Leuschen's motion to withdrea from the case based o[n] their affidavits each alleging:

> 10. After being made aware of the **potential** violation of § 3-305.6 by attorney Alison Motta, undersigned counsel conducted his own research [on] this issue and

has determined that there is a likelihood that the Nebraska Council [sic] for Discipline **could** find that she **may** have violated the rule.

11. As such, undersigned counsel does not wish to be held accountable by the Nebraska Counsel for Discipline for the behavior or actions of Motta & Motta and feels that this motion to withdraw is appropriate in order to distance undersigned counsel from any **alleged** ethical violations by Motta & Motta." (emphasis added); *Id* at 2-3.

3. "Without a local attorney of record, the Mottas could not practice law in the state of Nebraska. This rendered the State's Motion for Sanctions moot." *Id* at 3.

Findings Regarding the Conduct of Out-Of-State Counsel Does Not Warrant The Harsh Penalty of disqualificaiton

4. "Since the date the Mottas were retained as defense counsel, they have perhaps been inappropriately active in the media. Alison Motta's recent statements are especially concerning given the timing and content." *Id* at 4.

5. "After the Blanchard suspect's arrest, Alison motta made numerous statements to news media related to the suspect in the Blanchard homicide and the defense's belief that the suspect was involved in two of the homicides which Defendant has been charged." *Id* at 4-5.

6. "News station WOWT quoted Alison Motta as saying "By cross-comparing the DNA evidence that they discovered at the Sherman/Hunter scene with the DNA evidence that they discovered at the Joy Blanchard scene, [the Blanchard suspect]'s DNA was at both scenes." *Id.*

7. Alison Motta said: "I don't see how they're going to explain the cross-over in the DNA and the existence of both people at both crime scenes." *Id* at 5.

8. She also said, to KMTV that: "This evidence conclusively exonerates Anthony Garia and shows that it cannot be a coincidence the two manners of killing being signature like and the crossover between the two scenes of the same two suspects." *Id*.

9. "Alison Motta made statements to the Omaha World-Herald that the defense team hoped that 'we'll get a call from the County attorney's office that they're dismissing those charges" *Id*. (It is thought that the Court mistakenly forgot to include the beginning of Alison Motta's statement, as cited in the State's Motion for Sanctions at page 2, where Alison Motta said: "**We are hopeful that** we will be getting a call from the County Attorney's office indicating that…") (emphasis added).

10. "The parties have vehemently litigated this case, initially in front of Douglas County District Judge Duane C. Dougherty and more recently in this Court." *Id* at 4.

11. "Defense counsel has filed several substantial motions, including a motion to sever charges, a motion for change of venue and jury sequestration. There have been more than a dozen motions to quash search warrants. One particular motion in this case has revolved around defense counsel's efforts to tie one of the sets of double homicides to the Blanchard homicide." *Id*.

The Court's subsequent findings that "Alison Motta's comments delayed the administration of justice in this case" is qualified by the Court's finding that "[a]lthough she surely intended her comments to be a defense to her client, the Court finds that the comments were so reckless and inflammatory, they prejudiced Defendant and damaged Defendant in the eyes of the public." (Disqualification Order at page 9). Without presupposing that Alison Motta would be disqualified, the Order makes absolutely no finding as to the effect of the comments,

but instead finds that they were made to the media. The Order then boldly concludes that they were reckless and inflammatory and somehow damaged Anthony Garcia in the eyes of the public. It is thought that the Court didn't balance anything of substance in any quantifiable way, but instead determined that the statements had a procedural effect. Just as the fruits of a search cannot provide probable cause for the search itself, neither can Alison Motta's statements be the basis for the disqualification as she did not delay the administration of justice until she was disqualified. The only remaining issue available for an appellate court to assess would be that Alison Motta's comments caused Stockmann and Leuschen to withdraw.

Viewed in this light, it is worth expressing that the Defendant filed a Motion to Reconsider the procedural defect in the Withdrawal of Stockmann and Leuschen, as neither gave notice of their withdrawal to out-of-state counsel, or to Anthony Garcia prior, to the hearing where the Court gave them leave to withdraw. In the Court's Order Denying Reconsideration, the Court found that the defect was harmless. Anthony Garcia insists that the defect created a situation where he was wrongfully denied counsel at an unmistakably critical stage of these proceedings. In fact, upon filing this motion, Stockmann and Leuschen have still not filed withdrawals from the representation of Anthony Garcia. This point is not made to 'beat a dead horse', but is made to highlight that the procedural defects that have "delayed the administration of justice" and suggest that they are by no means the fault of the Defendant. Without presupposing that Alison Motta's statements harmed Anthony Garcia by resulting in her disqualification, the procedural defect created by the improper withdrawal of Stockmann and Leuschenn create the only event by which an appellate court could find that an attorney in the case "delayed the administration of jutice."

It is not thought that the Court made any ruling, whatsoever, related to the quality or quantity of the messages that were made on twitter (or other social media), by Alison Motta. As there was no evidence that these social media posts of Alison Motta, offered as exhibits by the State at the hearing, reached any local audience that is likely to be in the jury pool, it is assumed that the Court's Disqualification Order of April 6th, was based on the statements reported by local News Media discussed in the Disqualification Order.

Assuming, for the sake of argument, that the statements made by Alison Motta were reckless and inflamitory, there is no finding, on the record, that the statements had any substantive impact on the potential jury pool. Even assuming, again for the sake of argument, that the statements negatively affected the public perception of Anthony Garcia and the defense team, the Order does not provide an appellate court with any insight into alternatives to disqualification. Instead, the Court found that "[a]lso, Alison Motta's comments led to the State's Motion For Sanctions, causing this Court to hear that issue two calendar days before Defendant's trial was scheduled to begin." Importantly, the Order avoids mentioning that Alison Motta moved the Court to keep the proceedings related to the State's motion for sanctions under seal two days prior.

Nevertheless, the Court does not balance the needs of the Court against the considerations of the Sixth Amendment right to counsel of choice because there is not mention of alternatives to disqualification. There are not findings, in the Disqualification Order, that speak to how voir dire could correct any prejudice caused to Anthony Garcia. There are no finding related to whether or not jury instrutions might correct any prejudice. There are no findings related to how a reprimand might rectify any prejudice, etc. Without a quantitative, or qualitative, analysis of prejudice resulting from the statements of Alison Motta, it is no surprise that the Court did not

articulate how less-restrictive alternatives to disqualification might remedy the prejudice. In any event, an appellate court reviewing the findings of the Disqualification Order will likely be unable to assess what interests were balanced against one another. Finally, without inquiring of Anthony Garcia, it is impossible to determine how the Court balanced his Sixth Amendment right to counsel of choice against any interest related to the orderly administration of justice.

Kaley v. U.S., 2014 –

A vital interest at state – constitutional right to retain counsel of their own choosing

Quote that says it's the "root meaning" of the 6th amendment

Discussion of structural error – gold for characterization of the importance of the right

KALEY dissent has gold re: "none of those limitations is imposed at the unreviewable discretion of a prosecutor – the party who wants the defendant to lose at trial."

Dissent says "few things could do more to "undermine the criminal justice system's integrity" than to allow the government to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice – without even an opportunity to be heard."

Kaley v. United States, 134 S.Ct. 1090 (2014):

WHEREFORE, the Defendant respectfully respectfully move this Court to vacate its Order of April 6, 2016 disqualifying, or denying admission to, Alison Motta or to otherwise alter, amend or reconsider said Order and to Grant him a new evidentiary hearing concurrent with

Defendant's Motion to Disqualify the County Attorney's Office, and the supplement thereto, which is being filed consecutively with this Motion.

DATED 15 day of April, 2016

NOTICE OF HEARING

You are hereby notified that the above and foregoing will be heard before the Honorable Gary B. Randall on the 21st day of April, 2016 at 9:00 a.m. in the Douglas County Courthouse, 1701 Farnam Street, Omaha, Nebraska. Please govern yourselves accordingly.

Dated: April 15, 2016

By: /s/ Jeremy Jorgenson
Jeremy C. Jorgenson, #23815

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was served via email, on March 31st, 2016, to the following party:

Donald Kleine
Douglas County Attorney
1701 Farnam Street, #100
Omaha, NE 68183

/s/ Jeremy Jorgenson

Certificate of Service

I hereby certify that on Monday, April 18, 2016 I provided a true and correct copy of the Motion to Reconsider to the following:

State of Nebraska represented by Sean Lynch (Bar Number: 25275) service method: Electronic Service to sean.lynch@douglascounty-ne.gov

State of Nebraska represented by Brenda D. Beadle (Bar Number: 20033) service method: Electronic Service to brenda.beadle@douglascounty-ne.gov

State of Nebraska represented by Donald W. Kleine (Bar Number: 15429) service method: Electronic Service to donald.kleine@douglascounty-ne.gov

Signature: /s/ Jeremy C. Jorgenson (Bar Number: 23815)