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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

TASI AUTELE, aka Brian Mulivai Autele, aka Tasi Mulivai Autele,

Defendant-Appellant
Petitioner on Review.

Washington County Circuit Court
Case No. 17CR69755

CA A172873

S070046

# PETITIONER'S BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County
Honorable Ricardo J Menchaca, Judge

Opinion Filed: January 5, 2023
Author of Opinion: Ortega, P.J.
Before Ortega, Presiding Judge, and Powers, Judge, and Hellman, Judge.

Brief on Merits will be filed if review is allowed.

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# PETITIONER'S BRIEF ON THE MERITS

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## STATEMENT OF THE CASE

In this criminal case, defendant seeks reversal of his conviction for third-degree assault because the trial court violated his right to counsel. The indictment charged defendant with, *inter alia*, second-degree assault, ORS 163.175. A jury found defendant guilty of a lesser-included third-degree assault, ORS 163.165. The trial court sentenced defendant to two years in prison.

After ruling on motions on the day scheduled for trial, the trial court allowed retained counsel to withdraw, told defendant that he had 10 days to find counsel or that counsel would be appointed, and scheduled a status conference. Defendant appeared at the status conference with the same counsel. But even though the ethical conflict that led to counsel's withdrawal "may or may not have resolved itself," the trial court was unwilling to allow counsel to resume representation due to its concerns about ethical obligations previously raised.

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## QUESTION PRESENTED AND PROPOSED RULE OF LAW

Does a trial court deny a defendant the right to retained counsel of the defendant's choosing, under the state or federal constitutions, when the court denies retained counsel's request to represent the defendant after retained counsel—having previously withdrawn from representation due to a conflict—later tells the court that, in counsel's view, the conflict no longer exists and that defendant and counsel both want the representation to resume?

Yes. Balanced against a defendant's right to retained counsel of choice, a trial court's "concerns" about unspecified "ethical obligations" are insufficient to refuse to accommodate the exercise of his right. Absent a trial court's determination that chosen counsel creates a substantial risk that an ethical conflict would require a retrial—and a record supporting that determination—a trial court lacks discretion to subordinate the defendant's right to counsel of choice to its obligation to ensure the integrity and fairness of the trial.

## SUMMARY OF ARGUMENT

Before the commencement of trial, a trial court has limited authority to subjugate a criminal defendant's exercise of the right to retained counsel of choice to its obligation to preserve the integrity and fairness of the proceeding, as well as its interest in orderly and expeditious proceedings. When chosen counsel stands ready to provide legal representation and can meet the court's

schedule, the defendant's exercise of his right will not impinge the trial court's interest in orderly and expeditious proceedings.

Here, the trial court referenced "concerns" about counsel's "ethical obligations" previously raised without further explanation, which indicates that the trial court refused to accommodate the defendant's exercise of his right to ensure the integrity and fairness of the trial. But a trial court's authority to refuse to accommodate a defendant's exercise of the right to retained counsel of choice based on ethical conflicts requires a determination that allowing chosen counsel creates a substantial risk that an ethical conflict will require a retrial, whether by mistrial or reversal. The trial court did not determine whether such an ethical conflict would arise, nor would the record support such a determination. The trial court violated defendant's right to counsel, which requires reversal.

## STATEMENT OF FACTS

In late August 2017, defendant attended an outdoor party on Brody Fry's Washington County farmland, where guests could camp overnight. Tr 597-606. In the early morning hours, Fry noticed that J.G. and defendant were no longer among the guests gathered around the campfire. Tr 611-12. Fry found J.G. unconscious on the ground and defendant standing nearby. Tr 613-14, 634-36. J.G.'s face was covered in blood, and he was having difficulty breathing. Tr

614, 638. Defendant told Fry that J.G. had attacked him. Tr 620. As party guests administered first aid and called 9-1-1, defendant left with the friend who had driven him there. Tr 616, 638, 826-27. A sheriff deputy noticed the car speeding away as he approached and had a second sheriff deputy stop the car and arrest defendant on suspicion of assaulting J.G. Tr 528-29, 549-51, 556-60.

Sometime before December 4, 2017, defendant retained Mackeson, who appeared with him for arraignment. Tr 3-4; TCF PDF 20.[1] Defendant also retained Hall two months later. TCF PDF 46. Before an April 2, 2019, setting for trial, Mackeson and Hall filed approximately 10 substantive pleadings on defendant's behalf, including proposed jury instructions, a demurrer, and motions to compel discovery, suppress evidence, return property, exclude evidence, and compel production. TCF PDF 36-45, 97-103, 107-10, 179-215, 233-34, 236-69; *see also* Tr 4-393 (pretrial litigation).

Some of those filings stemmed from an event that occurred on the eve of a November 14, 2018, trial date. Tr 38, 47. On the morning of trial, defendant asked for a continuance to investigate the authenticity of 12 photographs anonymously left at Hall's office the morning before. Tr 47-48. The photos purported to be additional images captured by law enforcement at the scenes of

[1] By TCF PDF, defendant refers to the 486-page PDF file that the trial court transmitted. Unless context requires further specificity, defendant refers to the PDF page number without further description.

J.G.'s assault and defendant's arrest. Tr 47-48. The photos had been left in a brown envelope with a paper note that had the caption of defendant's criminal case and the statement, "Request all pictures from the scene." Tr 48. The prosecutor, who had been shown the photos the day before, objected to the setover because, in his view, the photos were irrelevant and inadmissible. Tr 49, 53-54. The judge who presided that day—a different judge than the one who later made the ruling on review and presided over trial—allowed the state to present evidence that the photos were inauthentic and had not been taken by the law enforcement officers who conducted the investigation. Tr 53-163. After hearing the parties' arguments, the trial court granted the continuance to allow defense counsel to investigate the photos. Tr 163-82.

When the trial court reconvened for trial nearly five months later, on April 2, 2019, the parties had switched positions regarding the admissibility of the photos. Defendant moved to exclude the photos and wanted to prevent the prosecution from using them when cross-examining defendant. Tr 372-74. The state contended that the photos "relate[d] to" defendant's anticipated testimony that J.G. "was charging at [defendant] and smashed his face into a vehicle" and, if defendant had created the photos, were a proper line of impeachment for recent fabrication. Tr 374-75. After the state acknowledged that its only evidence connecting defendant to the creation of the photos was the fact that they were left at his attorney's office, the trial court excluded them. Tr 382-85.

But when the state asked whether the trial court's analysis would change if defendant testified that J.G. "smashed his face into a bumper," the trial court was uncertain. Tr 384. The court said, "If the defense goes there, then I'll -- I'll take it up at that time," but it later stated that it was "not comfortable, given what I know about the photos, allowing any testimony to come in." Tr 385-86.

The state then told the court that defense counsel had shared a concern that they "may have some ethical obligation to withdraw from this case" if defendant is confronted with the photos; but the trial court adhered to its ruling:

> "[THE STATE]: So in prior conversations, Mr. Mackeson has expressed to me concern that if the defendant is confronted with those photos; that they may have some ethical obligation to withdraw from this case. And so I don't want to be in a situation where we have presented all of the State's case, we get to the defense case.
>
> "The defendant testifies in a manner consistent with what I anticipate. Then I'm able to confront the defendant with these photographs and then defense team has to withdraw for some reason at that moment in time.
>
> "I think that we -- we should have clarity going into trial whether this ethical issue exists or not. And I think that it's probably better to take some time for Mr. Mackeson to talk to the defendant to have an idea of what the nature of the defendant's testimony would be and then address this particular issue so that the Court has more awareness as to what direction things are headed for trial.
>
> "THE COURT: All right. Well, again, I'm going to stick to my decision. I'm going to exclude the photos at this point."

Tr 386-87.

The trial court then recessed over the lunch hour to deliberate on other pretrial motions. Tr 387-88. When it reconvened, the trial court issued its decisions on those motions. Tr 388-92. But then the court addressed a motion to withdraw due to an unspecified "ethical conflict" that defense counsel made during the recess:

> "THE COURT: All right. So those are the Court's finding with respect to the motions. I also over the lunch hour at the end of the lunch hour met with the attorneys in chambers, with [the prosecutor], Mr. Mackeson and Mr. Hall.
>
> "It's my understanding that Mr. Mackeson at this point has a conflict with -- he has requested to withdraw. I don't know that it's appropriate for me to go into the conflict, but he has motioned the Court for a withdrawal.
>
> "Based on his ethical conflict, I'm going to allow the withdrawal. The State opposed that based primarily on the age of the case. It's a 2017 case. But based on my understanding of the conflict, I don't know that I have a choice. So I will reluctantly grant the withdrawal."

Tr 393; *see also* Tr 397 (clarifying that ruling also pertained to Hall).

The court told defendant that he had 10 business days to find new counsel or counsel would be appointed, and it scheduled a status conference. Tr 394, 397.

Defendant appeared at the status conference with Mackeson and Hall. April 11, 2019, Tr 2.[2] But the trial court was unwilling to allow counsel to

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[2] After the transcript was filed, defendant amended the designation of record to include the April 11, 2019, hearing, so it is separately paginated.

resume representation of defendant due to its concerns about "ethical obligations" previously raised, notwithstanding its understanding that the ethical conflict that led to counsel's withdrawal "may or may not have resolved itself":

> "THE COURT: Okay. Mr. Mackeson and Mr. Hall, good afternoon.
>
> "MR. MACKESON: Good afternoon, Your Honor.
>
> "THE COURT: Anything to add today?
>
> "MR. MACKESON: Judge, I think I'd like the record to reflect that in chambers, we made the request to be permitted to represent [defendant]. I know the Court's going to address that -- at least I think -- that request. And then, otherwise, I have [defendant's] file.
>
> "THE COURT: Okay. I met with the attorneys in chambers the last time we were in open court. The exact date escapes me. I want to say it was two weeks ago. Correct me if I'm wrong, both of you.
>
> "At that point in time, without getting into specifics, I -- Mr. Mackeson had made a motion in my office and -- and we put it on the record to withdraw based on some ethical considerations, which, in my mind and in his at the time, were significant.
>
> "And so I withdrew Mr. Mackeson and set over the trial of this very old case. I directed [defendant] to be here today with new counsel or I would appoint counsel. I met with the attorneys in my office just a few moments ago and Mr. Mackeson and Mr. Hall asked to be reappointed.
>
> "The conflict may or may not have resolved itself, but, in my mind, the Court's mind, my concerns about the ethical obligations that were raised in the last hearing we had, I'm just not willing to reappoint Mr. Mackeson or Mr. Hall to retain Mr. -- to represent [defendant]."

April 11, 2019, Tr 3-4.

The trial court then appointed a local defense consortium to represent defendant and informed defendant that he could retain other counsel. April 11, 2019, Tr 4-5. Defendant subsequently retained different counsel, and defendant was tried in October 2019. Tr 422, 429. Defendant testified that he punched J.G. in the face immediately before J.G. rushed at defendant and struck his face on a truck and the ground. Tr 821-22. No one referenced any photos left at Hall's office. *See* Tr 431-32 (parties and trial court confirming that no evidence of photos would be offered).

## ARGUMENT

The Bill of Rights in the Oregon Constitution provides a criminal defendant with the right to counsel:

> "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]"

Or Const, Art I, § 11.

The right to counsel is also guaranteed by the Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

US Const, Amend VII.

Here, the trial court violated defendant's state and federal right to counsel when it refused to allow defense counsel to resume their representation of defendant. The scope of the two rights do not always overlap. *See State v. Prieto-Rubio*, 359 Or 16, 26-37, 376 P3d 255 (2016) (discussing divergence of the state constitutional right to counsel in the context of police questioning from the holding in *Texas v. Cobb*, 532 US 162, 172, 121 S Ct 1335, 149 L Ed 2d 321 (2001), that the federal constitutional right to counsel is "categorically offense-specific"); *see also State v. Savinskiy*, 364 Or 802, 814, 441 P3d 557, *modified on other grounds on recons*, 365 Or 463, 445 P3d 307 (2019) ("*Prieto-Rubio* makes clear that the result [in *Cobb*] would have been different under Article I, section 11."). And this court usually addresses state constitutional claims before turning to a claim under its federal counterpart. *See*, *e.g.*, *State v. Gilmore*, 350 Or 380, 385-89, 256 P3d 95 (2011) (concluding police questioning violated defendant's right to counsel under Article I, section 11, which made consideration of Sixth Amendment claim unnecessary).

But two reasons might justify deviating from the usual "first-things-first" approach. First, the Court's caselaw on when a trial court may abridge the right to retained counsel of choice is relatively robust, while this court has not yet addressed the issue, much less in the context of a trial court's ethical concerns. Therefore, a review of the federal authorities may help inform this court's Article I, section 11, analysis. *See State v. Davis*, 350 Or 440, 467, 470-72, 256

P3d 1075 (2011) (consulting the Sixth Amendment right to counsel cases when construing the meaning of Article I, section 11, right to counsel). Second, the denial of the federal right to retained counsel of choice constitutes "structural error" for which no showing of prejudice is required. *United States v. Gonzalez-Lopez*, 548 US 140, 150, 126 S Ct 2557, 165 L Ed 2d 409 (2006). Thus, the federal issue may provide a clearer and more complete path, which the state constitution should follow at a minimum. But defendant begins with Article I, section 11.

## I. Article I, section 11, guarantees a defendant's right to retain counsel of their choosing; when chosen counsel can meet their obligations to the defendant and the court's schedule, a trial court cannot deny the defendant's exercise of that right based on concerns about unspecified ethical obligations.

The question here is whether the trial court violated defendant's Article I, section 11, right to counsel, when it refused to allow Mackeson and Hall (defense counsel) to resume their representation of defendant. Answering that question requires an examination of the contours of the right to counsel guaranteed by the Oregon Constitution.

But this court should focus on the precise facet of the right at issue before commencing. Defense counsel had withdrawn on the day scheduled for trial due to an ethical conflict, and the trial court set over trial and scheduled a status hearing. They appeared with defendant at the hearing and sought to

immediately resume their representation. Their request necessarily meant that the ethical conflict had resolved, that they could meet the court's schedule, and that defendant thought they could best represent his interests in the prosecution. Yet the trial court cited its lingering "concerns" about "ethical obligations" to deny their request. The question is whether, before a trial date has been set, a trial court has authority to refuse to accommodate a defendant's exercise of his right to retained counsel of choice because of an unspecified ethical conflict that only the trial court perceives but does not put on the record.

The right to counsel found in Article I, section 11, stems from the original Oregon Constitution:

> "*In all criminal prosecutions, the accused shall have the right* to public trial by an impartial jury in the county in which the offence shall have been committed; *to be heard by himself and counsel*; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

Or Const, Art I, § 11 (1857) (emphasis added).[3]

When construing a provision of the original Oregon Constitution, this court engages in a three-part analysis: looking at the text in its context, the

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[3] Article I, section 11, was amended in 1932 and 1934 to add the right to waive jury with the consent of the court in non-capital cases and to allow non-unanimous verdicts save verdicts for first-degree murder, respectively. *See State v. Harrell*, 353 Or 247, 255-59, 297 P3d 461 (2013) (reviewing 1932 amendments); *State v. Larson*, 252 Or 624, 625-27, 450 P2d 754 (1969) (reviewing 1934 amendments).

historical circumstances of the adoption of the provision, and the caselaw that has construed it. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). The purpose of such examination is to ascertain the meaning most likely understood by those who adopted the provision and then determine how the court should apply those principles to modern circumstances. *Davis*, 350 Or at 446.

A. *The* Priest v. Pearce *methodology, which this court has repeatedly engaged in with respect to an accused's right to be heard by himself and counsel, includes a vigorous right to retained counsel of choice.*

When ascertaining the meaning of Article I, section 11, this court has chronicled an accused's right to be heard by counsel (and by himself) from early English common law to colonial American, through the formation of the United States to the adoption of the original Oregon Constitution, and over the ensuing decades. *State v. Gray*, 370 Or 116, 128-29 & n 6, 515 P3d 348 (2022) (noting that this court first employed the methodology for the right to counsel in *Davis*, 350 Or at 446, 462-77); *see also State v. Rogers*, 330 Or 282, 296-300, 4 P3d 1261 (2000) (so examining Article I, section 11, right to be heard by himself); *cf. State v. Douglas*, 292 Or 516, 527-37, 641 P2d 561 (1982) (Lent, J, specially concurring) (undertaking an extensive historical analysis of Article I, section 11, right to be heard).

This court utilized the methodology focused on the issues before it, such as when the right to counsel "attaches," especially in the modern world of

organized police forces and professional prosecutors. *Davis*, 350 Or at 446, 462-77. Other cases used the methodology to examine the "scope" of the right to determine whether actions implicated the right. *E.g., Savinskiy*, 364 Or at 807-19. Those cases and examinations reveal that the right to retained counsel of choice embodies the very core of the right to counsel.

1. *Text in Context*

This court found three items of significance from the phrasing of the right to be heard by counsel in Article I, section 11. *Davis*, 350 Or at 462. First, the rights listed in section 11 arise in "prosecutions," which contemporary dictionaries defined as the formal criminal proceedings that are initiated by presentment, information, or indictment. *Id*. at 463 (citations omitted). Second, rather than being always held by all persons, the rights may be invoked only by one who is an "accused," which contemporary dictionaries defined as one who has been formally charged with committing a criminal offense. *Id*. at 463-64 (citations omitted). Third, each of the rights pertain to the conduct of a criminal trial. *Id.* at 464. The court concluded "the bare wording suggests that the right may be exercised at trial or, at the earliest, after formal charges have been filed against a defendant." *Id*.

To that, one may add the contemporary definition of "counsel," which in context referred to a "counsellor at law." John Bouvier, 1 *A Law Dictionary Adapted to the Constitution and Laws of the United States* 358 (2ed 1843)

(2004 reprint). That term, in turn, was defined as a title for one "who is employed by a party in a cause, to conduct the same on its trial on his behalf." *Id*. at 359. Thus, the bare wording states that a criminal defendant has the right to employ a legal counsellor to represent their interests at trial.

From the context, this court also can conclude that the right is personal to the accused, indispensable to the fairness the prosecution, and—absent a valid waiver—cannot be abridged or eroded absent extraordinary cause. As with an accused's right to a jury trial, "the provision undoubtedly is worded as an individual right." *State v. Barber*, 343 Or 525, 529, 173 P3d 827 (2007). It is "part of a panoply of trial rights expressly set out in Article I, section 11, and reserved to criminal defendants." *State v. Harrell*, 353 Or 247, 262, 297 P3d 461 (2013). And it "should be read in context as a right no less fundamental and no less personal than the other rights with which it is associated in the Oregon Constitution." *See id.* at 263 (discussing the later insertion of the right to waive jury into Article I, section 11, and drawing on the interpretive canon *noscitur a sociis*). Thus, the right to be heard by himself and counsel—whatever its nature and scope—is as important a trial right as the right to notice of the charges, the right to confront witnesses, the right to secure favorable witnesses, the right to an impartial jury, and the right to the public trial, itself.

### 2. *Historical Analysis*

This court has written extensively on the historical circumstances surrounding the adoption of the right to counsel at trial and the expansion of the right to critical stages of a criminal prosecution, which may precede trial. *Davis*, 350 Or at 464-72. That is, the court focused on the *timing* of the right to counsel under Article I, section 11. Nonetheless, the examination stands as a useful starting point.

This court noted that the drafters of the Oregon Constitution borrowed the wording of Article I, section 11, from the 1851 Indiana Constitution, which itself was a slightly modified version of the guarantee included in its first constitution:

> "That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel[.]"

In Const, Art I, § 13 (1816).

The Indiana constitutions followed a long tradition of American colonies, the federal government, and its states, guarantying a right to counsel to criminal defendants. *Davis*, 350 Or at 464-67 (discussing authorities); *see also Powell v. Alabama*, 287 US 45, 61-65, 53 S Ct 55, 77 L Ed 158 (1932) (same). Throughout the seventeenth and eighteenth centuries, American colonies enacted statutory guarantees that provided the right to assistance of counsel to those accused of a crime. *See Davis*, 350 Or at 465-66. After the Declaration

of Independence, "a majority of the states adopted constitutions that explicitly recognized a right to the assistance of counsel." *Id.* at 466-67. And the federal government guaranteed the right to counsel in 1791, when it adopted the Sixth Amendment.

Those decisions marked a rejection of English common law, which until 1836 prohibited a defendant accused of a felony from being represented by counsel. *Id.* at 465 (discussing history and authorities); *see also Powell*, 287 US at 60-61 (discussing same history and contemporaneous criticism of the limitation). This court noted the "general agreement among historians that the Sixth Amendment and its state constitutional counterparts were understood to have a limited scope—they were originally understood to apply to the conduct of the criminal trial only and, even then, as a guarantee only of the right to *retained* counsel." *Id.* (emphasis in original) (citations omitted). For what else could it guarantee before a right to the *appointment* of counsel was a recognized? Thus, when the provisions declared a right to counsel, it meant the right to retained counsel.

When Article I, section 11, was adopted, the territorial law (and, thus, state law) provided the right to counsel at arraignment:

> "If the defendant appear without counsel, he shall be informed by the court that it is right to have counsel before being arraigned; and he shall be asked if he desire the aid of counsel."

An Act to Define Crimes and Misdemeanors, and Regulate Criminal Proceedings, ch XXII, § 14 (1853), in *The Statutes of Oregon Enacted and Continued in Force by the Legislative Assembly* (1855), p 259; *see also* Or Const, Article XVIII, § 7 (continuing territorial laws until superseded). When the Legislative Assembly enacted its own criminal code, it retained the statutory right. General Laws of Oregon, Crim Code, ch IX, § 95, p 457-58 (Deady 1845-1864). The right to counsel of choice is plainer on appearance before a magistrate on an information for a preliminary hearing:

> "When the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel before any further proceedings are had.
>
> "He must allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and may, upon the request of the defendant, require a peace officer to take a message to such counsel in the precinct, town or village, as the defendant may name. The officer, when required by the magistrate, must take the message without delay."

*Id.*, ch XXXVII, §§ 379-80, p 506.

So, the historical context also supports the conclusion that the drafters likely intended to guarantee a criminal defendant's right to select and retain counsel to appear on his behalf at trial.

3. *Oregon Case Law*

An accused's right to be heard by himself and counsel in Article I, section 11, was not remarked upon by this court until the late nineteenth

century. Then an issue regarding a defendant's right to retain counsel arose, albeit obliquely, in *Morrell v. Miller*, 28 Or 354, 43 P 490, *motion to recall mandate den*, 45 P 246 (1896). That case arose out of "a suit to set aside conveyances and mortgages, as being in fraud of creditors [,]" brought by Morrell, a victim of a shooting, against Miller, the man convicted of shooting Morrell. *Id.* at 355-56. In the wake of the shooting, Miller retained three attorneys (Lord, Simon, and Mays) to defend him from criminal prosecution and any associated civil suits by conveying approximately $600 in financial instruments to Lord and by deeding and mortgaging real property worth $5000 to Lord, Simon, and May. *Id*. at 356-58. Untangling the financial ties would require a separate brief but suffice to say that each attorney or firm expected consideration of $1,000 in exchange for legal services rendered. *See id.* at 356-66 (reciting convoluted history).

After Miller was convicted on three indictments related to the shooting, Morrell filed a civil suit and was awarded a $10,000 judgment against Miller. *Id.* at 356. Morrell then sought to set aside the conveyances to seek satisfaction of the judgment through the sale of the property. *Id.* at 357. All three attorneys had provided representation to Miller during the criminal and civil suits. *Id.* at 366.

This court set aside the conveyances but also ordered the property sold and proceeds divided among the attorneys before relegating the balance to

Morrell. *Id.* at 368. In doing so, this court relied on Miller's constitutional right to select and retain counsel of his choice, rejecting Morrell's assertion that Miller's actions had no legal effect:

> "There are some attendant indicia of fraud, such as the transfer of all of Miller's property of such considerable value to Lord, the declaration of a secret trust in connection therewith, and the inadequacy of consideration for the second deed. But, upon the other hand, Miller was deeply interested. He was in the toils of the law, charged with a grave offense, and his object was to extricate himself therefrom. *The purpose of making such use of his property as to secure able counsel to conduct his defense, and to attend to other apprehended litigation, was perfectly legitimate. His right to be heard by counsel is a constitutional right, and he should be permitted, unless hindered by legal process, the free and untrammeled use of his property to obtain legal assistance; otherwise constitutional privileges would be invaded.*"

*Id.* at 364-65 (emphasis added). Thus, this court's first notice of an accused's right to be heard by counsel was a ringing endorsement of its unencumbered exercise to retain counsel (even multiple counsel) as the defendant saw fit.

Eight years later, this court considered an issue regarding the exercise of the right to be heard by counsel at trial—as opposed to the right to retain counsel. *State v. Rogoway*, 45 Or 601, 78 P 987 (1904), *rev'd on reh'g*, 45 Or 611, 81 P 234 (1905). The defendant appealed from a judgment of conviction for arson. *Id.* at 602, 608. The primary issue before the court was the admissibility and corroboration of the defendant's confession. *Id.* at 606-10. But the defendant also excepted below when, "at the close of the testimony the court limited the time for argument to the jury to one hour on each side[.]" Id. at

610-11. Relying primarily on a civil case, this court found that the trial court acted within its discretion. *Id.* (citing, *inter alia*, *Hurst v. Burnside*, 12 Or 520, 8 P 888 (1885)).

On rehearing, this court considered for the first time whether the trial court's restrictions on closing argument violated the defendant's Article I, section 11, right to be heard by counsel. *State v. Rogoway*, 45 Or 611, 612, 81 P 234 (1905) (on rehearing). This court explained that the guarantee "means that the accused shall have the right to be fully and fairly heard, or else it means nothing [;] [a]nything less would be an invasion and restriction of the right guarantied." *Id.* This court cautioned that the right to be heard by counsel was not unlimited and, when necessary, the trial court could regulate its exercise:

> "This guaranty vouchsafed to the defendant, however, is not inconsistent with the existence of the power in the court to regulate the exercise of the right of argument, so as to prevent an abuse thereof, by restricting it to a discussion of the matters relevant to the cause and preventing counsel from wasting the time of the court by useless repetition."

*Id.* at 613. This court noted that other jurisdictions would review such a ruling as relegated to "the sound discretion of the court." *Id.* (citations omitted). But this court took a narrower view and held that a trial court had limited discretion to curtail the exercise of the guarantee so as to prevent its abuse and no more:

> "But the better doctrine seems to be that the court may adopt suitable rules and limitations, and exercise such supervisory control over the course of the argument as may seem reasonably calculated to prevent the abuse of the right to be fully heard, *and*

> *that otherwise it cannot exercise any discretion in the premises, limiting or curtailing such right.*

*Id.* at 613-14 (emphasis added; citations omitted).

Turning to the case before it, this court noted that the defendant had been represented by "two counsel," that more than 20 witnesses testified, and more than 51 exhibits introduced. *Id.* at 614. When the trial court stated that each side would be limited to one hour of argument, "one of [defendant's counsel] then and there declined to address the jury, on the ground that the time limited was too short" and "[t]he other spoke for about three-quarters of an hour." *Id.* This court concluded that "[c]onsidering the whole case and the character of the testimony, we are clear that the limitation of an hour was too restrictive to permit a full and fair discussion of the case before the jury, and a violation of defendant's constitutional rights." *Id.*

Thus, in *Rogoway*, this court held that the trial court's authority to abridge a defendant's right to be heard by counsel is *limited*, in that case limited to such actions as necessary to prevent the abuse of the right by, for example, referring to irrelevant matters or needlessly wasting the court's time.

This court approached the exercise of the right to the *choice* of counsel in a similar manner—allowing the free exercise of the choice of counsel, while not always indulging in requests that new or additional counsel have additional time to prepare for trial. That is, while accommodating the right to choice of

counsel, the trial court retains authority to conduct its business in a manner that may impact the defendant's benefit from the right.

The earliest case is *State v. Haynes*, 120 Or 573, 253 P 9 (1927). In that case, the defendant and a codefendant were charged with "unlawful possession of a still and still worm." *Id.* at 574. The codefendant pleaded guilty. *Id.* The defendant pleaded not guilty and retained attorney Frank Dick as counsel. *Id.* at 574-75. The court allowed Dick to withdraw from the case on the day of trial after Dick learned that the codefendant, who was to appear as a state's witness, "was intending to change his testimony." *Id.* at 575. The trial court gave the defendant one hour to retain another attorney before trial would commence. *Id.* The defendant secured new counsel in the allotted time, who "without making any showing by affidavit asked for an extension of time until the afternoon at 1 o'clock for the purpose of arranging the defense for the defendant." *Id.* The trial court denied the continuance, and the trial commenced. *Id.*

Before turning to the errors assigned in the bill of exceptions, this court concluded that the trial court did not abuse its discretion in denying the continuance—without citing any caselaw or Article I, section 11:

> "There is no showing in the record about how the defendant was prejudiced or what better defense he could have made if time had been given as requested. For all that appears in the record, he was as ably defended and his rights observed as scrupulously as though he had been given much more time in which to prepare his defense. The case presented is one where the discretion of the court was not abused."

*Id.* Thus, while the defendant was able to exercise his right to retain counsel of his choice, the trial court need not allow additional time for newly retained counsel to prepare.

This court came to the same conclusion in *State v. Nelson*, 162 Or 430, 443-44, 92 P2d 182 (1939), a case in which the defendant's family had retained two attorneys to represent him but, on the day of trial, the defendant asked for a continuance to retain *additional* counsel. There, on the day scheduled for trial, "notwithstanding that the present attorneys for the defendant had already been fully paid in advance by the defendant's family to conduct his defense, the defendant suddenly announced to the court that he was discharging these attorneys and desired to have either Frank B. Reid of Eugene Or., or Jerry Geisler of Los Angeles, as his attorney." *Id.* Presumably giving a deaf ear to the defendant's "Get me Geisler" request, the trial court appointed Reid "as attorney for [the] defendant, with the express understanding that the attorneys already in the case would remain, and [the trial court] continued the trial to the following day[.]" Id. at 444. On that day, previously retained counsel and Reid moved to postponement trial for at least one week to allow Reid to prepare. *Id.* The trial court denied the motion. *Id.* at 433. On appeal, the defendant contended "that he had a constitutional right to be fully represented by counsel of his own selection." *Id.* at 443.

This court concluded that the trial court's denial of the continuance did not violate the defendant's right to counsel, because the defendant already had retained counsel who were already providing him representation, the defendant really wanted additional counsel, and the defendant made his request too late. This court noted that a trial court's exercise of discretion when ruling on a continuance motion "will not be disturbed on appeal, except for a manifest abuse of discretion prejudicial to the defendant." *Id.* at 444 (citations omitted).

The court next observed that "[i]t is not an abuse of discretion to refuse to grant a continuance to enable the defendant to procure the services of *additional* counsel when the defendant has had sufficient earlier opportunity to do so." *Id.* (emphasis added; citations omitted). The court noted that counsel that the defendant's family had retained on his behalf had "immediately became active in representing the defendant's interests," they had "appeared at the preliminary hearing," had "appeared and represented the defendant at the hearing on the defendant's application for a preliminary hearing on the question of present insanity," and had appeared at arraignment. *Id.* at 446. During the weeks and months leading to trial, "no effort of any kind was made to prevent [the defendant] from freely communicating with anyone or making any efforts to hire further counsel, if he had desired them." *Id.*

This court held that the denial of the continuance was not error:

> "As stated, the defendant was represented by able counsel at the trial and his rights were all protected. There is no error in failure to grant a continuance where the defendant is adequately represented the defended by counsel during the trial."

*Id.* at 445 (citations omitted). The court followed with the declaration that

> "[t]he defendant has no constitutional right to be represented by counsel of his own selection under the circumstances of this case, when otherwise adequately represented."

*Id.* at 445 (citing, *inter alia*, *Howard v. Commonwealth*, 240 Ky 307, 42 SW2d 335 (1931); *State v. Crump*, 274 SW2d 62 (Mo 1925); *Owens v. Commonwealth*, 181 Ky 257, 204 SW 162 (1918)).

To the extent that this court cited authorities bearing on the issue of whether a defendant's right to counsel includes choice of counsel, they stand for the proposition that the defendant cannot insist that trial be postponed or rescheduled to exercise that right of choice. *Howard*, 42 SW2d at 338 (holding that the trial court did not abuse its discretion when it overruled the motion for a continuance to allow retained counsel to conclude another trial); *Crump*, 274 SW at 68 (holding that trial counsel did not abuse discretion when it overruled the motion for a continuance when retained counsel's illness prevented him from appearing at trial); *Owens*, 204 SW at 164 (same).

And, in fact, the cases cited suggest that a trial court *would* act outside its proper authority to deny a continuance when the defendant was not afforded a reasonable time to retain counsel or when defendant's retained counsel of choice was unexpectedly unavailable. *See Howard*, 42 SW2d at 338 ("The case

is unlike one where counsel had already been employed at a time when there was no doubt about his ability to attend the trial, and who had in advance of the day of trial familiarized himself with the case and the facts therein, but for some sudden and unexpected occurrence he was prevented from attending the trial.”).

Notably, neither *Haynes* nor *Nelson* are, in fact, counsel of choice cases. In *Haynes*, the defendant’s first counsel of choice withdrew, and the court recessed to allow the defendant to choose new counsel. 120 Or at 575. The court allowed the defendant in *Nelson* to retain Reid and even delayed trial for a day to allow Reid’s appearance. 162 Or at 443-44. Both cases are more properly understood as cases concerning denial of continuances after the defendant exercised his right to counsel of choice immediately before trial.

Then, in 1958, this court considered the scope of the right to counsel guaranteed by Article I, section 11, in an unusual context. *State v. Delaney*, 221 Or 620, 332 P2d 71 (1958). The defendant appealed from an assault conviction and moved this court for the appointment of *appellate* counsel. *Id.* at 621-23. This was well before the Court held that equal protection and due process provided a right to counsel on appeal when a state jurisdiction allowed an appeal from a criminal conviction as a matter of right. *Douglas v. California*, 372 US 353, 356-57, 83 S Ct 814, 9 L Ed 2d 811 (1963) (holding that equal protection guarantees indigent defendants the right to assistance of counsel on appeal).

But this court decided *Delaney* at a precipitous time for another reason. The Court had rejected the argument that the Sixth Amendment right to *trial* counsel extended to the states as a matter of Fourteenth Amendment due process. *Betts v. Brady*, 316 US 455, 62 S Ct 1252, 86 L Ed 1595 (1942), *overruled by Gideon v. Wainwright*, 372 US 335, 339, 83 S Ct 792, 9 L Ed 2d 799 (1963). That is, the issue arose before the Court held that the Sixth Amendment, as incorporated and applied to the states through the Fourteenth Amendment, guaranteed all persons accused of a serious crime the right to appointed *trial* counsel. *Gideon*, 372 US at 339. Yet the Court, by plurality opinion and special concurrence, had pronounced that a state violated "equal justice" when it gave all criminal defendants the right to appeal their convictions yet withheld the provision of a transcript at state expense to indigent individuals. *Griffin v. Illinois*, 351 US 12, 20, 76 S Ct 585, 100 L Ed 891 (1956).

In light of those competing precedents, this court considered the appellant's claim that he was entitled to appointed *appellate* counsel under *Griffin*. *Delaney*, 221 Or at 621. After reviewing the federal authorities and decisions from other states, this court turned to the nature of the right to counsel provided by Article I, section 11, and concluded it guaranteed the right to "be heard by counsel of his own choice":

> "Constitutional provisions such as Art I, § 11, Oregon Constitution, have frequently been construed as going no further than *to assure the defendant that he may be heard by himself and the counsel which he chose to employ.* * * * . When the constitutional provision is construed in that manner, the accused has the right to be heard through his counsel, and the legislature is prohibited from destroying the right. * * * . Very likely Art. I, § 11, of the Oregon Constitution, which grants the accused the right 'to be heard by himself and counsel,' means *that he shall be heard by counsel of his own choice if he wishes*, but does not confer upon any court power to appoint counsel."

*Id.* at 639 (emphasis added).

The text of Article I, section 11, the historical circumstances that led to its adoption, and this court's caselaw establish that the core guarantee afforded by an accused's right "to be heard by himself and counsel" is the right to select and retain the counsel who will act as the accused's agent and choose how to defend against the state's accusations. That trial right is listed with, and important as, the right to notice of the charges, the right to confront witnesses, the right to secure favorable witnesses, and the right to an impartial jury. A trial court has limited authority to regulate the exercise of that right to prevent abuse. And it need not adjust its schedule when a defendant exercises the right on the eve of trial. But it cannot deny the defendant's exercise of the right. To date, this court has not had occasion to consider whether any circumstances would allow a trial court to flatly refuse to allow a defendant's exercise of that right when it is not intertwined with a request for continuance.

### B. *An accused's right to counsel of choice is not unlimited; a defendant may waive the right, and as trial approaches or is underway, the trial court may gain increasing authority to balance a defendant's exercise of constitutional rights against the court's interest in orderly and expeditious proceedings, and its obligation to ensure the integrity and fairness of the proceeding.*

The caselaw establishing that Article I, section 11, guarantees the right to counsel of choice suggests that the right is not unlimited. A primary example concerns the right to counsel when the defendant relies on court-appointed counsel. While this court has held that Article I, section 11, provides an indigent defendant with the right to court-appointed counsel, *State v. Smith*, 339 Or 515, 526, 123 P3d 261 (2005), "an indigent defendant does not have the right to court-appointed counsel 'of the defendant's own choosing.'" *State v. Stanton*, 369 Or 707, 715, 511 P3d 1 (2022) (quoting *State v. Langley*, 351 Or 652, 664, 273 P3d 901 (2012)).

Of course, the right to counsel also can be waived, *i.e.*, "a trial court may accept a defendant's proffered waiver of counsel only if it finds that the defendant knows of his or her right to counsel and, if indigent, of his or her right to court-appointed counsel, and that the defendant intentionally relinquishes or abandons that right." *State v. Meyrick*, 313 Or 125, 133, 831 P2d 666 (1992). Short of waiver, though, the exercise of a constitutional right can be limited as necessary to balance against other concerns.

But the extent of a trial court's authority to abridge a defendant's exercise of the right to counsel of choice is uncertain. *Haynes* and *Nelson* advise that a defendant's exercise of the right to choice of retained counsel does not require that the trial court postpone or reschedule trial. Similarly, *Rogoway* suggests that the court has authority to prevent a defendant from abusing the right to counsel by, for example, wasting the court's time or commenting on irrelevant matters. But this court has not considered a court's decision to outright deny a defendant's exercise of his right to choice of counsel before a trial date has been set (or reset, as in this case).

Relatedly, in *Rogers*, the defendant argued in a death penalty case that the trial court had unlawfully abridged his Article I, section 11, right to be heard by himself. 330 Or at 292. The defendant moved the trial court for permission to make an unsworn statement to the jury at the end of the penalty-phase proceeding. *Id.* Citing its concern that the contents of the defendant's statement could result in error and cause a mistrial, the trial court required the defendant to submit to the trial court in writing what he intended to say to the jury for the court to review. *Id*. at 292-93. The trial court allowed the defendant to read to the jury the first paragraph from his statement, in which he acknowledged the harm and grief that he caused, disavowed any blame on his abusive parents for his adult actions, and said that he never belonged in a free community. *Id.* But the court struck the second paragraph from his statement,

which consisted of two sentences that would have informed the jury that he was serving a life sentence with a 30-year minimum in another case and asked the trial court to impose consecutive life sentences on the charged counts if the jury did not impose death sentences. *Id.*

After concluding that Article I, section 11, provided a defendant the right to make an unsworn statement, this court considered whether "the trial court erred in constraining [the defendant's] right to be heard." *Id.* at 300. Specifically, this court addressed the "procedural restrictions" in requiring the defendant to read from a prepared statement and to submit the statement to the trial court in advance for review and the "substantive restrictions" by refusing to allow the defendant to read the second paragraph. *Id.* at 300-02, 304-08. This court found that the trial court acted within its lawful authority with respect to the procedural restrictions but that it violated the defendant's right to be heard by himself with respect to the substantive restrictions.

As to the procedural restrictions, this court concluded that "the trial court acted within its discretion to ensure orderly and expeditious proceedings and to avert error [,]" while the defendant made "no convincing showing that those procedural restrictions prevented him from exercising fully his constitutional right to be heard." *Id.* at 302. This court observed that "a trial court generally possesses broad discretion to control the proceedings before it." *Id.* at 300 (citations omitted). Besides noting a court's broad discretion "to ensure that the

trial is orderly and expeditious," this court noted the trial court's "legitimate concern with assuring that the defendant does not make irrelevant or prejudicial statements." *Id.* at 300-01. This court then turned to the balance of those interests with the defendant's exercise of his rights, specifically noting that a trial court *must* "accommodate the exercise" of constitutional rights within the context of regulating a trial:

> "A trial court's authority to exercise reasonable discretion to ensure that the trial is orderly and expeditious does not evaporate when the parties assert their constitutional rights during trial. Rather, a trial court *is obligated to accommodate the exercise of all pertinent constitutional and statutory rights by all parties* within the context of an orderly and expeditious trial."

*Id.* at 301 (emphasis added). This court held that nothing in either the text, historical circumstances, or caselaw surrounding Article I, section 11, suggested that "the framers intended that a defendant's right to be heard 'by himself' should override the court's authority and responsibility to conduct the trial as an orderly and expeditious proceeding." *Id.* This court concluded that the trial court acted within its limited discretion, because its procedural restrictions did not "prevent [] [the defendant] from exercising fully his constitutional right to be heard." *Id.* at 302.

In contrast, this court concluded that the trial court exceeded its authority when it did not allow the defendant to make the following statement in front of the jury:

> "'Besides the task before you in this case, I am currently serving a life sentence with a 30-year minimum from the previous Smith trial. And your Honor, at this time I respectfully appeal to you that should this jury spare my life, I ask that I be sentenced to consecutive life sentences.'"

*Id.* at 304-05.

The trial court did not explain why it struck those statements. But its action followed its agreement to review the statement based on its "concern" that the contents of the statement not "result in error that would cause a mistrial" and its observation that the review "provides the Court with a safeguard on the relevancy and other matters." *Id.* at 292-93 (internal quotations omitted). The state defended the trial court's actions on appeal by contending that the second sentence was "inappropriate for allocution in two related ways": (1) "the topic of consecutive sentencing was 'a matter over which the jury has no say,' and hence was outside the proper scope of allocution to the jury[,]" and (2) "the second sentence was addressed to the judge, not to the jury, to whom the defendant had asked to address his allocution." *Id.* at 305.

This court did not reject the accuracy of the state's assertions: "We agree with the state that, in all cases, including capital cases, whether sentences are to be served consecutively or concurrently is a matter for the court, not for the jury." *Id.* at 306 (citation omitted). This court even acknowledged that it upheld a similar restriction on counsel; that is, it already had held that a trial

court did not violate a defendant's right to be heard by counsel when it refused "to allow a capital defendant's counsel to argue to the jury that the court could impose consecutive life sentences if the jury returned multiple life sentence verdicts." *Id.* (citing *State v. Williams*, 322 Or 620, 628, 912 P2d 364 (1996)). This court also agreed that the defendant's invitation to the trial court to impose consecutive life sentences "ordinarily would be pertinent to only the traditional sentencer, the judge[.]" Id. at 308. The limitations, therefore, seemed reasonably related to prevent the introduction of extraneous issues.

But this court concluded that, despite those facts, "the trial court violated Article I, section 11, of the Oregon Constitution, in striking [the statements] from [the] defendant's proposed unsworn statement." *Id.* at 308. The statements contained a relevant mitigating circumstance. *Id.* This court observed that the second sentence that the trial court struck was within the proper scope of allocution because it was relevant to a question of mercy and defendant's character. *Id.*

Thus, with respect to a defendant's exercise of his right to be heard, this court has recognized a trial court has limited authority to restrict the exercise of that right to ensure that the trial is orderly and expeditious, as well as to avert error. But those limitations must be reasonably based on verifiable concerns. Also, limitations that a trial court places on the exercise of a constitutional right will not violate that right if the defendant cannot make a convincing showing

that those restrictions prevented him from fully exercising the right. On the other hand, even a limited abrogation of a defendant's exercise of his right to be heard can violate Article I, section 11, when the trial court imposes unwarranted restrictions.

This court considered the discretionary of the right to counsel in *State v. Hightower*, 361 Or 412, 393 P3d 224 (2017) (*Hightower I*). There this court considered a trial court's discretion to deny a defendant's midtrial request to waive his right to counsel and exercise his right to be heard by himself by proceeding *pro se* for the remainder of his trial. During the first three days of trial, the defendant "repeatedly complained about defense counsel's actions, questioning his performance, instructing him to ask further questions, and attempting to object to witness testimony." *Id.* at 414. The trial court responded by telling the defendant to be quiet and twice warning that it would send the defendant out of the courtroom if he did not stop objecting. *Id.*

During the fourth day of trial, the defendant—by himself and through counsel—repeatedly requested that the trial court allow the defendant to represent himself and that, absent a finding it would be disruptive to allow counsel to withdraw, the court could not deny the defendant's exercise of his right to represent himself. *Id.* at 414-15. The trial court refused those requests. *Id.* On appeal, the defendant argued that the trial court violated his Article I, section 11, right to be heard by himself. *Id.* at 415.

On review, this court reaffirmed the understanding that the Article I, section 11, right to be represented at trial by counsel is mutually exclusive to the Article I, section 11, right to represent oneself *pro se* at trial. *Id.* at 417. However, this court noted that exercise of one of the rights does not mean that "the correlative right has been forever relinquished." *Id.* Rather, "[n]othing prevents a defendant who has invoked the right to counsel or the right to self-representation from later waiving that right." *Id.* (citation omitted).

The court continued,

> "[t]hat said, the right to waive is not absolute and unqualified. For one thing, a waiver of the Article I, section 11, right to counsel or to self-representation must be knowing and voluntary. For another, the timing of a defendant's waiver matters. *In particular, once a trial has begun, a number of interests other than the defendant's Article I, section 11, rights come into play. Among those are the trial court's overriding obligation to ensure the fairness and integrity of the trial and its inherent authority to conduct proceedings in an orderly and expeditious manner*."

*Id.* at 417-18 (emphasis added; citations omitted). After quoting at length from *Rogers*, this court again emphasized that the scope of the trial court's authority was largely governed by the timing of the defendant's request. *Id.* at 418 ("In light of those additional interests *that are triggered by the commencement of trial*, any invocation of the right to counsel or self-representation that occurs after that time is subject to the court's discretion." (Emphasis added)).

At that point, this court concluded, "a trial court's decision concerning the defendant's request is subject to appellate review for an abuse of

discretion." *Id.* This court gave two examples of how a trial court could lawfully exercise that discretion to deny a mid-trial request:

> "[A] trial court may exercise its discretion to deny a motion for self-representation that is conditioned on the grant of a continuance. Or it may reasonably deny the motion if it has reason to conclude that granting the motion would result in disruption of proceedings."

*Id.*

But the court cautioned that, even in mid-trial, where a trial court has the most discretion to circumscribe a defendant's exercise of his Article I, section 11, rights, the trial court's exercise of discretion—the balance of the competing interests—must be apparent on the record, supported by the record, and free from legal or factual missteps:

> "First, the record must include some indication of how the trial court actually weighed the relevant competing interests involved for an appellate court to be able to determine whether the trial court abused its discretion in ruling on a request to waive the right to counsel and proceed *pro se*. As this court explained in *State v. Guzek*, 358 Or 251, 269, 363 P3d 480 (2015), "[appellate] review is better facilitated by a record of findings that is direct, express, and clearly delineated." Nevertheless, such express findings are not required, so long as the record reveals the reasons for the trial court's actions. *Id.* It is not sufficient that an appellate court may be able to speculate about what *might* have been the trial court's rationale for its decision.
>
> "Second, although the trial court's decision in response to a request for self-representation is ordinarily a matter of discretion, in some cases, that decision may be predicated on certain subsidiary determinations—either findings of fact or conclusions of law—that trigger their own standards of review. So, for example, if a court's decision as to whether to grant a request for self-representation turns on the court's legal conclusions as to the

> scope of the right, that determination is reviewed for errors of law."

*Id.* at 421 (emphasis in original; citations omitted).

Based on that standard, the trial court's ruling failed in multiple respects. The trial court did not weigh any competing interests that could be verified on the record, and it made a legal error in determining the scope and nature of the defendant's right that he wanted to exercise:

> "[The trial court's] statements do not reflect an exercise of discretion or any finding that granting the motion would significantly delay or disrupt the trial. Rather, as we have noted, they appear to reflect an impression that the law simply does not permit a defendant to waive the right to counsel and proceed *pro se* once trial has commenced. That, as we have explained, is incorrect as a matter of law.
>
> "The state argues that, given the stage of the proceedings and [the] defendant's prior record of disruptive behavior, 'the trial court reasonably could have' determined that the interest in orderly and expeditious trial outweighed any prejudice to [the] defendant's right to self-representation. But the test is not whether the court 'reasonably could have' made that determination. The test is whether the record reflects that the trial court's actual decision amounted to a reasonable exercise of its discretion."

*Id.* at 422.

This court's comments on a lawful exercise of discretion echo others. "Judicial discretion is not absolute." *Harrell*, 353 Or at 254 (citing *State v. Hubbard*, 297 Or 789, 794 n 2, 688 P2d 1311 (1984)). "Judicial discretion should, for example, 'be exercised according to fixed legal principles in order to promote substantial justice.'" *Id.* at 254 (quoting *Elliott v. Lawson*, 87 Or 450,

453-54, 170 P 925 (1918)). "It must be lawfully exercised to reach a decision that falls within a permissible range of legally correct outcomes." *Id*. (citing *Rogers*, 330 Or at 312).

*Hightower I* suggests that a trial court's duty to accommodate a defendant's exercise of constitutional rights may change after the trial begins, jeopardy attaches, and the proceeding ensnare the parties, witnesses, judge, and jurors. Some of those same considerations are present on the eve of trial, because the players have made arrangements to be available during the proceeding. But even then, a trial court must reasonably balance a defendant's exercise of constitutional rights against countervailing concerns. *See State v. Mai*, 294 Or 269, 277-78, 656 P2d 315 (1982) (precluding witness from testifying as sanction under reciprocal discovery statute did not violate the defendant's Article I, section 11, right to compulsory process after the defendant frustrated the trial court's first, lesser sanction of directing him to make his witnesses available to the state during a recess).

Here, given that defendant's request that counsel resume representation did not pose any risk to the trial court's interest in orderly and expeditious proceedings, the trial court's "concerns" about "ethical obligations" must mean that the court thought allowing counsel to appear would implicate the integrity and fairness of the trial. Drawing from *Rogers* and *Hightower*, this court should hold that, when a trial date has not yet been set, a trial court may prevent the

defendant from exercising his right to retained counsel of choice only if the trial court determines that counsel's ethical obligations create a substantial risk of retrial, the record shows that the court balanced those concerns, and the record supports that determination.

Such a standard would adhere to the appropriate balance between a court's obligation to accommodate a fundamental right of the accused with its obligation to ensure the integrity and fairness of the trial:

> "Where the right to counsel of choice is circumvented by precluding representation by a particular individual or category of individuals, the government interest justifying that restriction typically will be related to preserving a fundamental tenet of the adversary system—such as ensuring competent legal representation, requiring adherence to the ethical standards of the profession, or preserving the appearance of fairness."

Wayne R. LaFave, *et al.*, 3 Criminal Procedure § 11.4(c), 816 (4th ed 2015).

C. *The trial court violated defendant's right to retained counsel of choice, because the record does not support the court's concerns that counsel's ethical obligations would jeopardize the integrity and fairness of the trial, and because the record does not show how the trial court weighed the defendant's right to counsel of choice against its other obligations.*

Defendant asked that his previously retained counsel be allowed to resume representation because the conflict that had led to their withdrawal had resolved. In asking to resume the representation, counsel necessarily represented to the court that the conflict had been resolved, because counsel would have been barred from representing defendant had there still been a

conflict.[4] Defense counsel have an obligation to advise the court of conflicts of interests and, as officers of the court, their declarations as to conflicts are "virtually made under oath." *Holloway v. Arkansas*, 435 US 475, 786, 98 S Ct 1173, 55 L Ed 2d 426 (1978). Moreover, depending on the nature of the past conflict, counsel's duty to maintain client confidences significantly constrains what counsel could place on the record.[5] Neither defendant nor counsel was required to describe the prior conflict on the record.

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[4] Oregon Rule of Professional Conduct (ORPC) 1.16(a)(1) provides that "a lawyer shall not represent a client * * * if: (1) the representation will result in violation of the Rules of Professional Conduct or other law[.]"

ORPC 1.7(a)(2) prohibits a lawyer from representing a client if the representation involves a current conflict of interest, which exists if "there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

ORPC 8.4 provides that it is "professional misconduct" for a lawyer to "violate the Rules of Professional Conduct," to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law," or to "engage in conduct that is prejudicial to the administration of justice."

[5] ORPC 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." None of the subjections of paragraph (b) appear to be relevant to the case.

> "'Information relating to the representation of a client' denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has request be held

The request was not accompanied by a motion for a continuance, and retained counsel were already well-versed in defendant's case, having been active in the case for more than one year. There was no evidence that counsel needed more time or were unprepared. Therefore, there was no evidence that accommodating defendant's right to counsel of his choice would pose any risk to the trial court's interest in orderly and expeditious proceedings.

The trial court did not deny the request because of a current conflict of interest. Instead, it stated that the "conflict may or may not have resolved itself," but that it was unwilling to allow the representation based on its concern "about the ethical obligations that were raised" earlier. The trial court should not have second-guessed counsel and instead should have allowed the representation to resume, or it should have made a record of the issue for meaningful appellate review. In the absence of any evidence of a current conflict or substantial likelihood that a conflict would lead to a retrial, the fact that there had been a prior conflict was not a basis to deny counsel of one's choice.

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> inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

ORPC 1.0(f).

The trial court refused to accommodate defendant's exercise of his right to counsel of choice without any substantiated basis. "Concerns" about unarticulated "ethical obligations" are insufficient to justify the trial court's utter prevention of defendant's exercise of his right to counsel of choice. And nothing in this record shows how the trial court weighed–or even *whether* the trial court weighed—defendant's Article I, section 11, right to counsel of choice against any other legitimate interest. Thus, the trial court lacked the factual or legal predicate to issue its ruling. Most assuredly, the trial court's ruling cannot be defended on the basis that allowing counsel to resume representation created a substantial risk that counsel's ethical obligations would require a mistrial. The trial court violated defendant's right to retained counsel of choice.

D. *The trial court's error was not harmless.*

Identification of trial court error does not automatically lead to reversal. Under Article VII (Amended), section 3, of the Oregon Constitution,[6] this court

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[6] That section provides, in pertinent part,

> "If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial[.]"

Or Const, Art VII (Amended), § 3.

must affirm if it can affirmatively say that an error had little likelihood to affect the verdict or was "harmless error." *State v. Hightower*, 368 Or 378, 386-87, 491 P3d 769 (2021) (*Hightower II*) (describing constitutional provision and this court's shorthand reference to the legal standard). This court already has determined that the denial of a defendant's right to counsel cannot be deemed harmless. *State v. Cole*, 323 Or 30, 36-37, 912 P2d 907 (1996) (concluding that the trial court's failure to obtain a valid waiver of counsel before allowing the defendant to proceed *pro se* at a suppression hearing was prejudicial and not harmless because the court was "unable to determine the outcome of such a hearing" had it been conducted with the assistance of defense counsel); *see also Stanton*, 369 Or at 723 (concluding that the trial court's failure to obtain a valid waiver of counsel before allowing the defendant to proceed *pro se* at trial was prejudicial and not harmless because the court could not "determine what the outcome of the case would have been had [the] defendant been represented by counsel").

In *Cole*, this court concluded that the trial court violated the defendant's right to counsel when it held a hearing on the defendant's motion to suppress without first obtaining an informed or intelligent waiver of the right to counsel. 323 Or at 35-36. The defendant, who was charged with firearm offenses, moved to suppress the firearm that was found in his car. *Id.* at 32-33. The defendant's motion was denied and, when he later retained an attorney for trial,

he did not renew the motion and was ultimately convicted. *Id.* at 33 & n 1. The state conceded that the trial court erred in holding the suppression hearing without properly advising the defendant of his right to counsel, but it argued that the error was harmless because "there was no chance that [the] defendant could win a suppression ruling, even if represented by competent counsel at that hearing" and because proof of the defendant's guilt "was clear." *Id.*

This court rejected the state's arguments. *Id.* The court cited its inability to determine the outcome of the hearing if the error had not occurred (and the defendant had obtained the assistance of counsel) and it noted that "the state's case (and, apparently, defendant's best line of defense) depended on the outcome of the motion to suppress." *Id.*

Here, the trial court's ruling changed the course of defendant's prosecution. Defendant's trial was delayed for months. He retained a new attorney who had to acquaint herself with his case. That attorney pursued the trial strategy deemed most effective based on her professional opinion, including which motions to file, which objections to make, which questions to ask on cross-examination, which witnesses to call, which questions to ask those witnesses, which jury instructions to request, and which legal arguments to make to the trial court, and which arguments to make to the jury. This court cannot determine the outcome of trial if defendant had been able to go to trial sooner with the team of attorneys who had been representing him for more than

a year. Because no one could affirmatively say that the record created or the verdict reached are the same that the jury would have reached had defense counsel resumed representation, the error cannot be deemed harmless.

## II. A trial court's unarticulated "concerns" about "ethical obligations" fall short of the "showing of a serious potential for conflict" sufficient to deprive a defendant of his Sixth Amendment right to retained counsel of choice and constitutes structural error.

More than 90 years ago, the United States Supreme Court thought "it 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*." *Powell*, 287 US at 53 (emphasis added). The Court observed that the right to be heard by the counsel who appeared on the defendant's behalf was as essential as the hearing itself:

> "Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. * * *. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. * * * . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. * * * . *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.*"

*Id.* at 68-69 (emphasis added).

Although the Court was considering the issue as a matter of Fourteenth Amendment due process, the Court thoroughly examined the history leading to the adoption of the Sixth Amendment right to counsel—as well as similar state constitutional protections. *Id.* at 60-65. The Court not only held that the trial court erred in not appointing counsel, it held that the trial court erred in not allowing the defendants sufficient time to retain counsel of choice. *Id.* at 52-53. The Court subsequently relied on the principles discussed to describe the Sixth Amendment right to counsel. *Gideon*, 372 US at 344-45 (extending Sixth Amendment right to counsel to the states); *Johnson v. Zerbst*, 304 US 458, 462-63, 58 S Ct 1019, 82 L Ed 1461 (1938) (holding that "the Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of Counsel").

When a criminal defendant has means to secure counsel for their defense and need not rely on the state to provide counsel, the right to the assistance of counsel includes the *choice* of counsel. *See Caplin & Drysdale, Chartered v. United States*, 491 US 617, 624-25, 109 S Ct 2646, 105 L Ed 2d 528 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.").

The Court considered the limitations to that right in *Wheat v. United States*, 486 US 153, 100 L Ed 2d 140, 108 S Ct 1692 (1988). The Court considered "whether the [trial court] Court erred in declining [the] petitioner's waiver of right to conflict-free counsel and by refusing to permit [the] petitioner's proposed substitution of attorneys." 486 US at 154. The petitioner, "along with numerous codefendants, was charged with participating in a far-flung drug distribution conspiracy." *Id.* The petitioner sought to substitute an attorney as counsel, notwithstanding that the attorney already represented two of the codefendants. *Id.* at 155. The government objected to the substitution of counsel because, in its view, the attorney's representation of the petitioner presented ethical conflicts with the other two codefendants. *Id.* at 155-56.

The most serious of the conflicts that the government identified concerned codefendant Bravo, who had pleaded guilty to transporting marijuana but had not yet been sentenced. *Id.* at 155. "The Government believed that a portion of the marijuana delivered by Bravo * * * eventually was transferred to [the] petitioner." *Id.* at 156. In exchange for beneficial sentence-recommendation concessions, the attorney had agreed to make Bravo available as a witness to testify against the petitioner. *Id.* At the petitioner's trial, the attorney would not be able to represent both Bravo and the petitioner and would provide ineffective assistance of counsel. *Id.* (describing counsel's ethical conundrum and inability to conduct cross-examination).

The trial court, after concluding that "an irreconcilable conflict of interest exists," denied the petitioner's motion for substitution. *Id.* at 157. The Court granted certiorari to consider whether "the [trial court] had correctly balanced two Sixth Amendment rights: (1) the qualified right to be represented by counsel of one's choice, and (2) the right to a defense conducted by an attorney who is free of conflicts of interest." *Id.* at 157. The specific question that the Court identified was "the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same conspiracy." *Id.* at 159.

The Court noted that a defendant's right to retained counsel of choice is not unlimited:

> "The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive power, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has previous or ongoing relationship with an opposing party[.]"

*Id.* at 159 (footnote omitted).

The Court concluded that a willingness to waive such a conflict "by all affected defendants" could not trump the trial court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the

profession and that legal proceedings appear fair to all who observe them." *Id.* at 160. Because "[t]he government might readily have tied certain deliveries of marijuana by Bravo to [the] petitioner, necessitating vigorous cross-examination of Bravo by [the] petitioner's counsel," and because the attorney that the petitioner preferred "would have been unable ethically to provide that cross-examination," the trial court had authority to refuse to permit the substitution of counsel. *Id.* at 164. The Court instructed that trial courts "must recognize a presumption in favor of [a defendant's] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id.*

The Court further commented on a defendant's right to retained counsel of choice in a case in which the trial court erroneously refused an attorney's request to appear *pro hac vice* on a mistaken understanding that the attorney had violated an ethics rule. *United States v. Gonzalez-Lopez*, 548 US 140, 143-4, 126 S Ct 2557, 165 L Ed 2d 409 (2006). Because the trial court lacked any basis to subjugate the defendant's choice of counsel on ethical grounds, the trial court "erroneously deprived [the defendant] of his counsel of choice." *Id.* at 144.

The government, however, contended that the deprivation of the right to counsel of choice was not "complete" unless the refusal to allow representation by the counsel of choice resulted in ineffective assistance or resulted in a

different trial strategy. *Id.* at 144-45. The government's argument harkened back to the *Wheat* Court's description of the Sixth Amendment's provision of counsel to obtain a fair trial rather than a right to the selection of particular counsel. *Wheat*, 486 US at 159 (acknowledging that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment" but contending that "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers") (citations omitted). The Court flatly rejected the government's contention, stating the Sixth Amendment right to counsel of choice is "the root meaning" of the guarantee, separate and apart from the guarantee to effective representation:

> "[The Sixth Amendment right to counsel of choice] commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. * * * [T]he right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'
>
> "* * * * * .
>
> "The right to select counsel of one's choice * * * has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee. Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is 'complete' when

> the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence of whatever lawyer is chosen or appointed."

*Gonzalez-Lopez*, 548 US at 146, 147-48 (citations and footnotes omitted).

The Court then turned to the other issue before it, *i.e.*, whether the denial of the Sixth Amendment right to counsel of choice was subject to review for harmlessness or qualified as structural error. *Id.* at 148-49. The Court had "little doubt concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."'" *Id.* at 150 (quoting *Sullivan v. Louisiana*, 508 US 275, 282, 113 S Ct 2078, 124 L Ed 2d 182 (1993)). The Court noted that "different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Id.* The Court noted the impossibility of knowing "what different choices the rejected counsel would have made" and "the impact of those different choices on the outcome of the proceedings." *Id.*

The trial court here denied defendant's exercise of his right to counsel of choice based on concerns about unspecified ethical obligations previously raised, despite not identifying any potential conflict—much less serious

potential for a conflict—that risked a retrial. Without such a justification, the trial court violated defendant's right to retained counsel of choice. That structural error requires reversal.

## CONCLUSION

Because the trial court violated defendant's right to retained counsel of choice, this court should reverse the judgment of the trial court and remand the case for a new trial. *Hightower II*, 368 Or at 392 (holding that a trial court must grant a defendant a new trial when one cannot say whether the record below would have remained the same in the absence of the error).

Respectfully submitted,

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***Signed***
By ErnestG Lannetat 4:06pm, Dec 11, 2023

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## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 13,904 words.

Type size

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on December 11, 2023.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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