FILED January 25, 2024 15:25 PM Appellate Court Records

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 No. 17CR69755 CA A172873 SC S070046

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on 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 Judges: Ortega, P. J., and Powers, J., and Hellman, J.

Continued…

ERNEST LANNET #013248
Chief Defender
Oregon Public Defense Commission
LAURA A. FRIKERT #990503
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: laura.frikert@opds.state.or.us

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
CHRISTOPHER A. PERDUE #136166
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: chris.perdue@doj.state.or.us

Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Constitutional Provisions

Other Authorities

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

An appellant must develop a record sufficient for appellate review. Yet at the heart of this case are facts—concerning the nature of a "significant" ethical conflict involving defendant's two retained counsel—that defense counsel provided entirely off the record. Based on those undisclosed facts, the trial court determined that both defense attorneys must withdraw. Those facts "may or may not" have changed when counsel requested reappointment one week later. But defense counsel added nothing to the record about the conflict when they sought reappointment, nor did they request findings or ask the court to explain its ruling. For those reasons, the Court of Appeals declined to consider defendant's right-to-counsel-of-choice claim. So should this court.

At any rate, the trial court properly declined to reappoint counsel after their withdrawal. The parties agree that both Article I, section 11, and the Sixth Amendment, protect the right to retained counsel of choice. The parties likewise agree that other important interests, including the risk of unreasonable disruptions to trial and the integrity of the proceedings, may limit the right. The parties disagree only about the application of that rule to the facts. Here, the trial court found that a "significant" ethical conflict required counsel to withdraw and noted that that conflict "may or may not" have been resolved

when counsel sought reappointment. The trial had already been delayed for several months, and the state expressed a concern that, if the conflict arose again, further delay and disruption would result. Given those factors, even on the limited record available for review, the trial court correctly concluded that the ethical conflict posed a serious risk of unreasonable disruption to the trial court proceedings. That ruling comported with defendant's constitutional right to counsel of choice.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question: The only discussions about a potential ethical conflict that prompted defense counsel to withdraw occurred off the record. When a defendant seeks reappointment of counsel after the trial court has allowed counsel to withdraw, must the defendant develop facts about the ethical conflict and the alleged change in circumstances so that a reviewing court may adequately assess the trial court's ruling?

First Proposed Rule: Yes. Resolution of a request for reappointment after an order granting withdrawal depends on the facts warranting withdrawal and the existence and nature of any change in circumstances. If a party seeks to challenge a ruling that turns on particular facts, the party has an obligation to create a record of those facts that is adequate for appellate review.

Second Question: If a defendant fails to request that the trial court make particular findings when it rules on a motion for reappointment after ordering

counsel's withdrawal, has the defendant adequately preserved a claim that the trial court failed to make particular findings?

Second Proposed Rule: No. A trial court has no *sua sponte* obligation to make any particular findings or offer a more complete explanation on the record when a defendant does not request it.

Third Question: After the trial court granted defendant's attorneys' motion to withdraw, his attorneys asked to be reappointed nine days later. The trial court summarized an off-the-record discussion from which the court concluded that the significant ethical conflict requiring withdrawal "may or may not" have been resolved. By then, the trial had already been significantly delayed. In that circumstance, may a trial court deny a request that counsel be reappointed if the trial court determines that the significant ethical conflict poses a risk of unreasonably disrupting the trial proceedings?

Third Proposed Rule: Yes. Under Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution, a defendant's presumptive right to counsel of choice may be limited by the trial court's interest in the fairness of the proceedings, the avoidance of unreasonable disruptions to orderly processes, or the need for expeditious administration of justice. In determining whether a serious potential ethical conflict exists that poses a risk of disruption to trial, a trial court need not defer to counsel's

judgment about the legal significance of an ethical conflict or the potential consequences of that conflict for trial.

BACKGROUND

A. Before defendant's trial, his attorneys moved to withdraw based on a significant ethical conflict, and the trial court declined to reappoint them when they later claimed that the conflict may have been resolved.

In 2017, the state charged defendant with second-degree assault and strangulation after he attacked a person at a party. (ER-1). Defendant retained Mackeson and Hall as counsel.

1. After an anonymous package of photographs arrived at defense counsel's office, defense counsel moved for a continuance to investigate the photographs.

One morning in November 2018, Hall noticed a package in his office containing photographs that appeared to be from the crime scene. (Tr 47–48). The package also had pleading paper with the caption from the case and a statement, "All pictures—request all pictures from the scene." (Tr 48). When Mackeson and Hall alerted the prosecutor to the situation, he assured them that the state had not sent the photographs and suggested that they may be fraudulent. (Tr 49, 53). That afternoon, the parties informed the trial court of the situation. (Tr 173). The trial court agreed to receive evidence about whether the photographs were fraudulent, as the state alleged. (Tr 173–74).

At that evidentiary hearing, defendant moved for a continuance to allow time to investigate the photographs. (Tr 47, 49). The state opposed a

continuance, contending that it would unnecessarily delay trial. (Tr 53). The victim appeared at the same hearing and informed the court that he had been "impacted the better part of a year and a half" by the case and was seeking closure. (Tr 55). The state then offered seven witnesses who testified that the photographs were likely not authentic. (Tr 56–163).

At the close of the evidentiary hearing, Mackeson renewed his request for a continuance. (Tr 163–64). He argued that he had an ethical duty to determine if the photographs were authentic. (Tr 165–67). The state contended that the evidence showed that the photographs were not authentic and therefore irrelevant to any material issue. (Tr 168–69). For that reason, the state argued that the trial should not be delayed to allow further investigation. (Tr 169). Mackeson replied that defendant's theory was self-defense and explained that the photographs may be relevant to show how the victim was injured. (Tr 171). The state responded that, if defendant wanted to use the photographs when testifying about how the assault occurred, he would do so "at his own peril." (Tr 171–72).

The trial court declined to make a finding about whether the photographs had been altered. (Tr 177). It observed that, with the help of an expert, defense counsel may be able to authenticate the photographs. (Tr 177). It further noted that it was uncertain whether Hall "can still be on this case" and that Hall would need more time to consider that issue. (Tr 177–78). It also observed that the

parties and the court wanted the case "to go forward" because "it's been out there for a while." (Tr 178). It then reasoned that, "if the Court forces this case to go forward, then it's only prolonging potential issues down the road" and the court wanted to "make sure that [it was] not setting this thing up to come back in the future." (Tr 178).

Hall informed the court that he might need to seek independent counsel in relation to the issue. (Tr 178). Mackeson added that the photographs may become part of another criminal investigation. (Tr 179). To allow time for further consultation and investigation, the court decided to set over the trial until February 2019. (Tr 183). It later continued the trial until April 2, 2019. (Tr 246).

2. Based on a "significant" ethical conflict relating to the photographs, the trial court permitted defense counsel to withdraw and later declined their request for reappointment.

Before jury selection on the day set for trial—April 2, 2019—defendant moved to exclude the photographs previously in dispute. (Tr 372). The state explained how the photographs could be relevant, generally describing how the photographs had likely been altered. It indicated that one of the photographs was "actually [a] legitimate photograph from the crime scene" that had "been altered with some blurring" on portions of the image. (Tr 376). In another photograph, the state pointed out that "there [was] a hat that was photographed at the scene that is similar but not identical to this hat." (Tr 377). In another

photograph a "DNA swab that is reportedly taken from the bumper" can be seen, yet, as the state explained, "[t]here would be testimony that [the materials in the photograph] are not evidence packaging material [used] by the Sheriff's office." (Tr 377). The state pointed out other examples of photographs with packaging material that the sheriff's office did not use. (Tr 378).

The state anticipated that defendant would testify that "the victim was charging at him and smashed his face into a vehicle that was in this field area where the party occurred," which the photographs showed. (Tr 375). It further indicated that defendant may have "generate[d] those photographs" to support "his fabricated testimony." (Tr 375, 379). It therefore intended to ask defendant about the photographs if he testified at trial. (Tr 375, 379–80).

Hall represented that, if defendant testified and the state asked him about the photographs, defendant would assert his privilege against self-incrimination. (Tr 372–73). The state responded that, if defendant invoked his right against self-incrimination, the trial court should strike his entire testimony. (Tr 375, 380). The state acknowledged that its use of the photographs would depend on how defendant testified at trial. (Tr 375).

Defendant urged the court to exclude the photographs. (Tr 380). He represented that he had "no intention whatsoever to make any use of the photographs or to make any reference to their existence." (Tr 380). Defendant also told the court that "there is an ongoing criminal investigation" and "at least

two search warrants" related to defendant's attempt to manufacture or make the photographs and other items. (Tr 381).

The trial court declined to issue a final ruling but indicated that it was not inclined "to allow any evidence whatsoever regarding the photos at this juncture." (Tr 384). The court also told the parties that, if defendant testified that the victim "smashed his face into a vehicle bumper," it may revisit its ruling about the admissibility of the photographs. (Tr 385).

The state was still concerned about not knowing definitively whether the trial court would admit the photographs. (Tr 386). The prosecutor explained that "Mackeson has told [the prosecutor] that he—" at which point, the prosecutor suggested that the parties talk in chambers. (Tr 386). For a minute, the parties engaged in a whispered discussion off the record. (Tr 386).

Back on the record, the state expressed its concern about the potential consequences for the trial if the photographs were used while the state was cross-examining defendant:

> 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.

(Tr 386). The state asserted that "we should have clarity going into trial whether this ethical issue exists or not." (Tr 387). The state added 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" before the court addressed the issue further. (Tr 387).

Later that day, the trial court explained on the record that the attorneys—the prosecutor, Mackeson, and Hall—had met in chambers during lunch. (Tr 393). The court asserted that "Mr. Mackeson at this point has a conflict" and "has requested to withdraw." (Tr 393). It observed further, "I don't know that it's appropriate *for me* to go into the conflict," but reiterated—without any elaboration by Mackeson or Hall—that counsel had moved to withdraw. (Tr 393 (emphasis added)). It determined that "[b]ased on [Mackeson's description of the] ethical conflict" it would allow the withdrawal. (Tr 393). It noted that the state objected based on the case's age. (Tr 393). It then explained that "based on [its] understanding of the conflict" it did not know that it had a choice but to allow the withdrawal. (Tr 393). It advised defendant that he

///

///

///

///

would have 10 business days to retain another attorney and appear at a status conference.[1] (Tr 393).

At the next status hearing, on April 11, 2019, Mackeson and Hall appeared with defendant. (April 11, 2019, Tr 3). Mackeson explained on the record that "in chambers, we made the request to be permitted to represent [defendant]." The trial court confirmed that request and explained the recent procedural history:

> At [the April 2, 2019, proceeding], 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, [given] 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 4). At no point did Mackeson or Hall add anything to the record or request findings. Nor did they or defendant mention that

---

[1] Although the court initially identified only Mackeson by name, it clarified that both Mackeson and Hall would withdraw from the case. (*See* Tr 397).

this ruling implicated defendant's right to counsel of choice under Article I, section 11, or the Sixth Amendment.

The court then advised defendant that it would appoint a lawyer from the Oregon Defense Consortium. (April 11, 2019, Tr 5). It also informed defendant that he could retain counsel of his own choosing. (April 11, 2019, Tr 5). Ultimately, defendant retained private counsel, Townsend, to represent him at trial. Townsend never raised any issues relating to whether defendant's right to counsel of choice had been violated by the trial court's earlier rulings. A jury found defendant guilty of third-degree assault. (Tr 1055).

B. The Court of Appeals rejected defendant's choice-of-counsel arguments because the record was inadequate for review and because defendant failed to preserve his argument.

On appeal, defendant contended that the trial court erred in denying him the right to retained counsel of choice in violation of Article I, section 11, and the Sixth Amendment. *State v. Autele*, 323 Or App 594, 595 (2023) (nonprecedential). The state responded that defendant had failed to make an adequate record for review. *Id.* at 596.

The Court of Appeals agreed with the state. *Id.* It observed that, although the record lacked "the information on which the trial court based its decision," the trial court apparently considered defense counsel's conflict of interest "significant" enough that it posed a risk that counsel would need to

withdraw in the middle of trial. *Id.* at 597. It reasoned that, if trial were disrupted because of the conflict, "it would be a disruption of the orderly processes of justice." *Id.* (internal quotation marks omitted). It thus determined that "[w]ithout further information about the nature of the conflict or whether the risk of the conflict arising during trial had been resolved," it could not "say that the trial court erred under the circumstances of this case." *Id.* Defendant petitioned this court for review, and this court allowed the petition.[2]

SUMMARY OF ARGUMENT

Article I, section 11, and the Sixth Amendment guarantee the right to counsel, including the right to choose retained counsel. But the right to choose retained counsel may be limited by other circumstances. For instance, if counsel is representing multiple parties with conflicting interests, a trial court may disqualify that counsel because of its interest in the integrity of the judicial system. Similarly, a trial court may properly deny a continuance that would result in significant delay even if it effectively bars the defendant from proceeding with counsel of choice. Likewise, if a lawyer may become a witness in the proceeding or if a lawyer knows that a client intends to commit perjury, a trial court may disqualify that attorney and require that a defendant

---

[2] Before this court allowed defendant's petition, it received supplemental briefing about whether the record was adequate for review. Letter to the Parties, *State v. Autele* (S070046) (Sept. 11, 2023).

find new counsel to avoid undermining the integrity of the proceedings. The proper application of those limitations depends largely on the particular facts of each case.

In this case, the dispositive facts do not appear on the record. At most, the record shows that the trial court found a "significant" ethical conflict that would likely disrupt the trial court proceedings. The trial court noted the conflict "may or may not" have been resolved when counsel asked to be reappointed a week after they had withdrawn. Yet counsel said nothing more about the conflict itself or the reasons that they believed that it had been resolved. The record is therefore inadequate for review, and defendant failed to preserve any argument that the trial court erred by not making findings or balancing certain factors on the record. This court should decline to review defendant's claim.

At any rate, even on this limited record, the trial court did not violate defendant's rights under Article I, section 11, or the Sixth Amendment. The trial court found that counsel had a significant ethical conflict requiring their withdrawal, explained on the record that the conflict "may not have" been resolved when defense counsel asked to be reappointed, and determined that counsel's ethical conflict precluded the court from allowing reappointment. Under those circumstances, the trial court acted within its broad discretion to ensure orderly proceedings and avoid an unreasonable disruption to a case

already long delayed. That exercise of discretion comports with defendant's right to counsel of choice under Article I, section 11, and the Sixth Amendment.

ARGUMENT

The Court of Appeals correctly declined to review defendant's claim of error because the record was not adequately developed. In any event, the trial court acted within its discretion under Article I, section 11, and the Sixth Amendment when it denied defendant's motion to have counsel reappointed after their withdrawal.

A. Because defendant failed to develop a record adequate for this court's review, this court lacks the facts necessary to assess the trial court's ruling.

An appellant must create a record adequate to review a fact-dependent claim of error. Defendant's failure to make that record here undercuts this court's ability to meaningfully assess the trial court's reasoning. Similarly, defendant cannot complain that the trial court erred by failing to make findings or balance factors on the record if he did not ask the court to do those things. For both reasons, this court cannot properly review his claim of error.

1. Appellants must create a record adequate for review.

Essential to appellate court review is the principle—applied for decades in Oregon and other jurisdictions—that a court cannot review matters not developed on the record. That principle stems from concerns about fairness and the practical needs of a reviewing court. *State v. Dilallo,* 367 Or 340, 345, 478

P3d 509 (2020) (describing those aspects in explaining why parties must develop the record). Where the events giving rise to an error occur off the record, a reviewing court might need to "speculate about what might or might not have occurred." *See State v. Turnidge*, 357 Or 507, 521–22, 373 P3d 138 (2016). That kind of speculation turns appellate review into a guessing game. *See Peeples v. Lampert*, 345 Or 209, 220, 191 P3d 637 (2008) (observing that full development of the record "aids the trial court in making a decision and the appellate court in reviewing it"); *see also State v. Bowen*, 340 Or 487, 501, 135 P3d 272 (2006) (declining to review claim in part because "defendant failed to make an adequate record for this court to review"). For those reasons, "[d]iscussion off the record of matters as to which issues on appeal could arise is ill-advised." *State v. Williams*, 322 Or 620, 625 n 7, 912 P2d 364 (1996).

This court has consistently adhered to those principles. *See, e.g.*, *State v. Terry*, 333 Or 163, 180, 37 P3d 157 (2001) ("This court, however, will not look outside the record to find objections."); *State v. Lutz*, 306 Or 499, 503, 760 P2d 249 (1988) (observing that "[a] criminal trial should be conducted on the record" because "nothing of importance bearing on the conduct of the trial should be 'off the record'"); *King City Realty, Inc. v. Sunpace Corp.*, 291 Or 573, 582, 633 P2d 784 (1981) ("It is well established that it is the duty of the appellant to designate and bring to the appellate court such portions of the record of the proceedings before the trial court as are necessary to support and

establish his contention that the trial court committed the error of which the appellant complains on appeal."). Indeed, those principles have longstanding roots in this court's jurisprudence. *Benson v. Birch*, 139 Or 459, 466, 10 P2d 1050 (1932) (declining to consider error turning on statements in affidavits where no affidavits appear in the record); *State v. Anderson*, 10 Or 448, 451–52 (1882) (declining to review arguments about findings or reasoning that did not appear in the record).[3]

2. The record here is inadequate for review because key discussions with the court were not transcribed.

The record here does not contain two critical in-chambers conversations between the trial court and the parties about the potential ethical conflict. Instead, the court summarized the general substance of the conversations on the record after the fact. Describing the conversation from the April 2, 2019, proceedings, the court noted that Mackeson and Hall informed the court in chambers during the lunch break that they "ha[d] a conflict" and that they were requesting to withdraw. (Tr 393). It then observed that it was doubtful whether

[3] The Court of Appeals also consistently applies those principles to disputes for which the record is incomplete. *See, e.g.*, *Sugiyama v. Arnold*, 294 Or App 546, 551, 431 P3d 466 (2018) ("[W]e will not speculate or resolve disputes about events that occurred off the record"); *Richardson v. Fred Meyer, Inc.*, 211 Or App 421, 426, 155 P3d 881 (2007) ("It is axiomatic that an appellant has the responsibility of providing a sufficient record for review of the claims of error.").

it was "appropriate for [the court] to go into that conflict."[4] (Tr 393). In response to that description of the circumstances, and the implied invitation for counsel to "go into" it, counsel said nothing. (*See* Tr 393). The court next explained that "[b]ased on [Mackeson and Hall's] ethical conflict" it would allow the withdrawal. (Tr 393). Noting the state's opposition to the withdrawal, and the inevitable delay to trial, the trial court explained that "based on [its] understanding of the conflict" it did not know that it "[had] a choice." (Tr 393). Again, counsel said nothing in response to the court's observation that it had no choice but to allow withdrawal given the nature of the conflict. (*See* Tr 393). Counsel did not request further findings or suggest that, contrary to the court's concern, it would be "appropriate for [the court] to go into" the nature of the conflict on the record. (Tr 393).

Nor did counsel add anything else to the record, or request findings, when the trial court declined to permit them to represent defendant nine days later. (April 11, 2019, Tr 3–4). The court put on the record that the parties had held an unrecorded discussion in chambers. (April 11, 2019, Tr 4). It noted that, based on that discussion, "[t]he conflict may or may not have resolved itself." (April 11, 2019, Tr 4). But counsel said nothing further and did not ask

---

[4] Indeed, because defendant was being investigated for crimes relating to the photographs, the trial court was understandably discreet about the facts that counsel disclosed.

the court to make any findings about the conflict or the potential resolution of the conflict. (*See* April 11, 2019, Tr 4). Most significantly, counsel lodged no objection and requested no findings when the trial court explained that, "in [its] mind," the "concerns about the ethical obligations" that were raised off-the-record during the April 2 proceedings made the court "not willing" to permit Mackeson or Hall to represent defendant. (April 11, 2019, Tr 4). In other words, the trial court's rulings—to which defendant and defense counsel acceded when counsel moved to withdraw—depended on specific facts developed in conversations that appear nowhere in the record. The only evidence of those conversations are the trial court's general descriptions of what they covered.

Yet the details of those conversations—the nature of the ethical conflict and what, if anything, changed within the nine days between withdrawal and the request for appointment—are crucial to determining the propriety of the trial court's ruling. For instance, if the ethical conflict concerned the potential that either Mackeson or Hall could become a witness in the case—either because they knew information or witnessed events relevant to the creation of the photographs—the trial court could properly deny the request for reappointment of counsel. *See, e.g., State v. Taylor*, 155 NC App 251, 257, 574 SE2d 58 (2002) (holding that the lower court properly disqualified counsel based on prediction that counsel may become a witness in the case depending on how

witnesses testified); *United States v. Merlino*, 349 F3d 144, 151 (3d Cir 2003) (holding similarly); *see also* ORPC 3.7(a) (barring an attorney from acting as an advocate at a trial in which the lawyer is likely to become a witness on behalf of the attorney's client). Similarly, Mackeson and Hall may have had an irresolvable conflict requiring withdrawal if they learned that defendant intended to commit a crime, such as perjury. *See, e.g.*, *State v. Phelps*, 24 Or App 329, 332, 545 P2d 901 (1976) (describing that circumstance as creating a conflict between an attorney and client); *see also State v. Berrysmith*, 87 Wash App 268, 280, 944 P2d 397 (1997) (affirming order allowing withdrawal based on attorney's reasonable belief that defendant intended to commit perjury).

The off-the-record conservations about the nature of the ethical conflict were therefore crucial. Without them, a reviewing court cannot fairly tell whether the trial court committed error, especially when the court otherwise found that a "significant" ethical conflict had arisen and that the conflict "may not have" been resolved. For those reasons, the Court of Appeals properly declined to consider defendant's claim of error.

In arguing to the contrary, defendant suggests that the trial court has a *sua sponte* duty to create a record showing its findings and balancing the relevant factors on the record. (Def BOM 40–41 (arguing that the record must "show[] that the court balanced" certain concerns); *see also* Def Suppl Br, *State v. Autele* (S070046) at 12 n 8). In support, he relies primarily on *State v.*

Rogers, 330 Or 282, 4 P3d 1261 (2000), and *State v. Hightower*, 361 Or 412, 393 P3d 224 (2017). But neither case establishes a *sua sponte* duty to create a record of particular findings or to balance certain factors on the record. Rather, in *Rogers*, this court held merely that the trial court erred by striking from a written allocution statements relevant to a request for mercy and lenience. *Rogers*, 330 Or at 304. It suggested nothing about what findings the trial court must make or what the record must reflect about the trial court's ruling. In fact, in *Rogers*, the record clearly showed what happened and why the court ruled as it did.

Similarly, in *Hightower*, this court reversed the trial court's denial of the defendant's mid-trial motion to proceed *pro se* based on its legal misunderstanding about the scope of the right to self-representation. *Hightower*, 361 Or at 421. That misunderstanding altogether prevented the trial court from exercising the discretion required to determine whether a defendant may proceed *pro se.* In other words, because the court erroneously concluded that it lacked discretion, it erroneously failed to exercise discretion. But the problem was not that the trial court failed to make particular findings or create a record reflecting its reasoning. To the contrary, this court made clear that "express findings are not required, so long as the record reveals the reasons for the trial court's actions." *Id.*; *see also State v. Anderson*, 363 Or 392, 406, 423

P3d 43 (2018) (concluding that a trial court need not recite on the record each aspect of its reasoning when engaging in OEC 403 balancing).

In the context of rulings about counsel of choice, the reasons stated on the record can be general. In that respect, cases involving motions for substitution of appointed counsel are useful analogies. In *State v. Smith*, 339 Or 515, 123 P3d 261 (2005), for instance, this court held that a trial court did not err by denying the defendant's motion for substitute counsel based on general complaints about his attorney's performance even though the court did not make particular findings. In *Smith*, on the day of the defendant's trial for robbery, assault, and firearms offenses, the parties discussed in chambers the defendant's concerns about his attorney's representation of him. *Id.* at 517–18. After that discussion, defense counsel put on the record that the parties had discussed the matter "in chambers this morning" and that defendant had "indicated to counsel" that he was "concerned" about counsel's representation of him and "had some problems" with counsel's approach. *Id.* Defense counsel then invited defendant to articulate his concerns. *Id.* at 518. The defendant explained that counsel appeared to want to resolve the case quickly and had not discussed the facts with the relevant witnesses. *Id.* The trial court denied the defendant's motion for substitute counsel, reasoning that counsel was a "very good attorney" by reputation and that "at some point in time, we have to resolve

this matter and we have lots of other cases and lots of other people that are trying to get their day in court." *Id.* at 519.

This court held that the trial court did not err by failing to make a factual inquiry into the defendant's complaints about appointed counsel. *Id.* at 530. Rather, "the obligation of coming forward with 'adequate reasons' for the substitution of counsel or a 'legitimate complaint' about existing counsel [was placed] squarely on the defendant." *Id.* at 524 (citing *State v. Davidson*, 252 Or 617, 620, 451 P2d 481 (1969)). Given the "nature of [the] defendant's complaints," the trial court did not err by considering the general facts and making a ruling based on those facts. *See id.* at 530; *see also State v. Johnson*, 340 Or 319, 348, 131 P3d 173 (2006) (reiterating that "there is no rule of law requiring a trial court to conduct an inquiry into, and make a factual assessment of, a defendant's complaints about appointed counsel").

The reasoning in *Smith* and *Johnson* applies with equal force to the analysis of a defendant's right to counsel of choice. In both contexts, counsel may need to describe sensitive facts about counsel's relationship to defendant. *See Smith*, 339 Or at 518 (describing in-chambers discussion about certain aspects of attorney-client relationships). In both contexts, a trial court may articulate its reasoning in general terms to avoid revealing confidential information. Yet, in both contexts, a trial court may ensure that the record reflects its rationale for denying a defendant's request for counsel by

articulating what it knows about the potential conflict and permitting a defendant to develop the record further if necessary. If a defendant's argument depends on facts or findings or a legal determination not revealed through a court's general explanation of its ruling, defendant has the burden of adducing those facts, requesting those findings, or clarifying that legal determination.

Nor must a trial court require a defendant to reveal privileged material, work product, or trial strategy in open court. A party may request that the court consider evidence or testimony *in camera* or through *ex parte* proceedings. *See, e.g.*, *Frease v. Glazer*, 330 Or 364, 372–73, 4 P3d 56 (2000) (describing circumstances in which a party opposing a privilege may obtain an *in camera* hearing); *see also State v. Macbale*, 353 Or 789, 809, 305 P3d 107 (2013) (reasoning that *in camera* proceedings are sometimes necessary to protect parties from disclosure of private facts and holding that not all such proceedings violate the guarantee of open courts or the right to a public trial). Those hearings could then be transcribed and filed under seal for inspection by an appellate court to determine the propriety of the trial court's decision. *See* ORAP 3.07 (providing that a trial court may transmit materials not subject to inspection by parties or attorneys to trial court as "confidential" or "sealed"); *see also State v. Langley*, 351 Or 652, 672–73, 273 P3d 901 (2012) (reasoning that a court should endeavor to allow the defendant to present his position on his counsel's performance "in a manner that permits, if appropriate, the

safeguarding of confidential communications and trial strategy from disclosure"). That procedure obviates the concern that counsel may need to reveal confidential information to other parties, as defendant suggests.[5] (Def BOM 42 n 5).

3. Defendant did not preserve his argument that the trial court failed to make findings or balance factors on the record.

Finally, if defendant is arguing that the trial court erred by failing to make findings or conduct balancing that he never requested, this court should reject it. (Def BOM 39 (arguing that the trial court did not weigh any competing interests that could be verified on the record)). This court has consistently held that, if a party does not request findings, that party cannot claim that the absence of findings is reversible error. *Anderson*, 363 Or at 410 (noting that "[i]f defendant believed that further explanation than the trial court provided was necessary for meaningful appellate review, it was incumbent on

---

[5] At any rate, even if trial courts could not protect otherwise privileged or confidential information through *in camera* or *ex parte* proceedings, defendants may give informed consent to relieve counsel from their duty to keep information relating to the representation of a client confidential. *See, e.g.*, ORPC 3.3(a)(1). Counsel may also reveal such information if "the disclosure is impliedly authorized in order to carry out the representation." *See id.* Finally, counsel may reveal the information if it is necessary to prevent a client from committing a crime. *See* ORCP 3.3(b). At the very least, it is best practice for defense attorneys to create *some* record of any disagreements with their clients. *See, e.g.*, ABA Standards for Criminal Justice, Defense Function, standard 4–5.2(e) (4th ed. 2017) (recommending that defense attorneys create records of any disagreement on a significant matter and preserve those records in the file).

him to request it"); *State v. Bucholz*, 317 Or 309, 320, 855 P2d 1100 (1993) (reasoning that "silence provides no basis for considering a claim of error on later appeal" where defendant failed to object to "a lack of findings or request for findings"); *Peeples*, 345 Or at 222 (applying similar principle).

For instance, in *Peeples*, this court held that a petitioner cannot complain that a post-conviction court did not make particular findings in dismissing his post-conviction petition if the petitioner did not request those findings. *Peeples*, 345 Or at 213–15. The petitioner had argued that the post-conviction court could not dismiss his post-conviction petition as a sanction for refusing to sit for his deposition without expressly finding that dismissal was more appropriate than a lesser sanction. *Id.* at 218. This court rejected that argument, reasoning that a party must "alert a trial court to its failure to make special findings that are material to the decision, given the issues framed by the parties," because it "serves the salutary purpose of permitting the trial court to avoid making an error or to correct an error already made." *Id.* at 222.

Applying the same principle, this court in *Anderson* rejected the defendant's argument that the trial court erred by failing to make "a more complete explanation" on the record of its OEC 403 ruling to ensure "meaningful appellate review." *Anderson*, 363 Or at 410. This court reasoned that, under *Peeples*, "ordinary preservation rules apply to claims that a trial court failed to make findings necessary for meaningful appellate review." *Id.*

As this court explained, "[h]aving failed to raise that issue below, defendant cannot fault the trial court for failing to make findings beyond those required by [*State v. Mayfield*, 302 Or 631, 733 P2d 438 (1987)]."

Defendant does not claim that those cases are inapplicable or wrongly decided. Nor does this case present any special circumstance that would justify departing from that well-established principle. *See, e.g.*, *State v. Barber*, 343 Or 525, 530, 173 P3d 827 (2007) (concluding that preservation requirement does not apply because of unique wording of constitutional right to a written jury waiver). Applied here, that principle precludes defendant's argument that the trial court failed to make a sufficient record to support its legal conclusions.

B. Under Article I, section 11, the trial court properly declined to permit Mackeson and Hall to represent defendant after they withdrew based on a significant ethical conflict.

Even if this court concludes that the record is adequate for review, the trial court properly denied defendant's motion for reappointment of Mackeson and Hall after it allowed their withdrawal. The parties generally agree that the right counsel of choice under Article I, section 11, and the Sixth Amendment must sometimes give way to the judicial system's interest in fairness and orderly proceedings. Indeed, as many courts have concluded, trial courts retain broad discretion in determining whether a conflict of interest poses a risk of delay or disruption or may otherwise undermine the integrity of the proceedings. The trial court did not abuse that discretion here.

1. Under Article I, section 11, a trial court may deny a request for counsel of choice if the representation would pose a serious risk of unreasonable disruption to trial.

Article I, section 11, guarantees defendants the right "[i]n all criminal prosecutions" to be "heard by [themselves] and counsel." Or Const., Art I, § 11. The question in this case is how that right may be limited. As defendant correctly explains, (Def BOM 12–13), this court ordinarily determines the scope of a constitutional right by considering the constitution's text, the historical circumstances surrounding the adoption of the text, and any case law construing the constitutional text. *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992).

As explained below, the Court of Appeals—adopting an approach followed in other jurisdictions—has held that the right to counsel of choice can be overcome if counsel's representation would result in unfairness, unreasonable disruptions to orderly processes, or delays to the expeditious administration of justice. That approach, which defendant endorses (Def BOM 30), finds support in the wording, historical circumstances, and case law of Article I, section 11.

a. The text of Article I, section 11, is consistent with the understanding that it generally protects a right to retained counsel.

As this court has explained, the text of Article I, section 11, speaks only of the right to be "heard" by "counsel" in a "criminal proceeding." *State v.*

Davis, 350 Or 440, 464, 256 P3d 1075 (2011). In that sense, its wording differs from the Sixth Amendment and analogous state constitutional provisions which describe a right to "assistance" of counsel. *See* William M. Beaney, *The Right to Counsel in American Courts* 80–81 (1955) (describing various wording in state constitutional provisions guaranteeing right to counsel). But that slight textual difference sheds little light on the scope of the right to counsel of choice more generally.

As defendant explains, the contemporaneous meanings of "counsel" and "heard" likewise suggest little about the scope of the right. (Def BOM 14–15). Around 1857, "counsel" meant simply a person "who give[s] counsel in law," such as attorneys and solicitors. Noah Webster, *An American Dictionary of the English Language* 3993 (1828). To be "heard," in the relevant sense, meant to have a case "tr[ied] in a court of law or equity." *Id.* at 6338.

Article I, section 11's bare text thus establishes the right to *some* form of counsel. That wording does not indicate whether such counsel must be defendant's chosen or preferred attorney. The wording thus casts no doubt on the conclusion that the right to counsel of choice can be overcome by concerns of unfairness, unreasonable disruptions to orderly processes, or delays to the expeditious administration of justice.

///

///

b. Contemporaneous cases and treatise writers understood that the right to retained counsel could be limited.

The historical circumstances likewise cast no doubt on that conclusion. The text of Article I, section 11, derived from the text of Article I, section 13, of the 1851 Indiana Constitution. *Davis*, 350 Or at 464 (citing Henry Carey, *The Oregon Constitution* 468 (1926)). Oregon framers adopted it without amendment or debate. *Id.* (citing Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 Will L Rev 469, 517–18 (2001)).

Oregon sources around the time of adoption suggest little about the scope of the right to counsel under Article I, section 11. Before statehood, for instance, the territorial legislature enacted a provision requiring that courts "assign counsel to defend the prisoner, in case he cannot procure counsel himself." Laws of a General and Local Nature Passed by the Legislative Committee and Legislative Assembly [of the Oregon Provisional Legislature], Chapter V, § 64, p 129 (Bush 1853). The Oregon Legislature adopted a similar rule after statehood. *See* General Laws of Oregon, Crim Code, ch IX, § 95, p 457–58 (Deady 1845-1864). But the state is aware of no Oregon sources contemporaneous with the adoption of Article I, section 11, explaining how a defendant's right to counsel of choice applies to particular factual circumstances.

Contemporaneous treatises generally describe the right to counsel as the right to counsel's help in adducing evidence and making argument. Joel Prentiss Bishop recognized that "every person accused of crime" has the right to be defended by counsel. Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure*, § 1001 (1866). Professor Thomas Cooley observed that "it is a universal principle of constitutional Law[] that the prisoner shall be allowed a defence by counsel." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 360 (2d ed. 1871). Yet neither Bishop nor Cooley describes the right in terms of a defendant's choice or preference. Rather, they wrote more broadly of the general need for counsel and the duty of counsel to represent defendants who could not afford to pay. Bishop, *Criminal Procedure*, § 1001; Cooley, *Constitutional Limitations* at 360.

But both Bishop and Cooley identified limits on the exercise of the right to counsel. Bishop observed that attorneys could not defend parties if they knew those parties intended to "obstruct the courts" to win acquittal. Bishop, *Criminal Procedure*, § 1001. Similarly, Bishop recognized that attorneys ordinarily should avoid becoming witnesses for defendants. *Id.* § 1004. More generally, Bishop explained that courts have "a superintending control over the course of the argument, to prevent the abuse of [permitting a defendant to address the jury directly] or any other right of counsel." *Id.* § 1005. Likewise,

Cooley explained that "misconduct in [the legal profession] may be summarily dealt with by the courts, who will not fail, in all proper cases, to use their power to protect clients or the public, as well as to preserve the profession from the contamination and disgrace of a vicious associate." Cooley, *Constitutional Limitations* at 337. As an example, Cooley described "counsel who has once taken part in litigation, and been the adviser or become intrusted with the secrets of one party" and suggested that such counsel "will not afterwards be suffered to engage for an opposing party, notwithstanding the original employment has ceased, and there is no imputation upon his motives." *Id.*; *see also id.* at 337–38 n 3 (describing proper disqualification as defense counsel of former solicitor general who had helped institute a prosecution against the defendant).

Cases in other jurisdictions contemporaneous with the adoption of Article I, section 11, understood the right to be heard by counsel to protect a right to have counsel present evidence and argument on a defendant's behalf. *Davis*, 350 Or at 467 (explaining that understanding of the Sixth Amendment and state constitutional counterparts). And although few universal principles emerged, several early cases recognized that the right to counsel may yield to other interests, including the timing and control of trial. *See, e.g.*, *State v. Walker*, 39 La Ann 19, 21, 1 So 269 (1887) (describing the right to be heard by counsel but concluding that the trial court did not err by letting defendant proceed without

counsel when retained counsel withdrew shortly before trial and defendant did not request new counsel or a continuance); *Dille v. State*, 34 Ohio St 617, 620 (1878) (describing state constitutional right to counsel and observing that "the exercise of the right is subject to judicial control to the extent that is necessary to prevent the abuse of it"); *Stewart v. Commonwealth*, 117 Pa 378, 381, 11 A 370 (1887) (observing that courts may not outright deny defendant the right to be heard by counsel but may "regulate the manner and time for the exercise of the right to be heard by counsel, and may limit the number and the length of the addresses to be made to the jury by general rule, or by an order").

c. Relevant Oregon case law supports the understanding that the right to counsel of choice must sometimes yield to other important interests.

Early Oregon case law reveals little about the scope of the right to counsel of choice as a constitutional matter.[6] As defendant explains, in the late nineteenth century, this court recognized that defendants have a right to retain counsel and that restrictions on the use of property that would make it

[6] As defendant correctly explains, this court has often addressed the right to *appointed* counsel. It has held that a defendant may waive the right to appointed counsel expressly or by misconduct. *See State v. Stanton*, 369 Or 707, 716, 511 P3d 1 (2022) (so noting and collecting cases). Similarly, a trial court has discretion to deny a motion for substitute appointed counsel unless a defendant demonstrates a legitimate complaint about counsel's performance. *See State v. Langley*, 314 Or 247, 257, 839 P2d 692 (1992), *adh'd to on recons*, 318 Or 28, 861 P2d 1012 (1993) (so observing). Those cases, however, shed little light on the right to retained counsel of choice.

impossible to hire an attorney might violate Article I, section 11. *See State v. Hansen*, 25 Or 391, 398, 35 P 976 (1894) (noting that defendant "had a right to employ and consult counsel, in order to prepare for his defense"); *Morrell v. Miller*, 28 Or 354, 364, 43 P 490, *aff'd*, 28 Or 354 (1896) (recognizing that the "right to be heard by counsel is a constitutional right"). Other cases hold that a trial court has discretion to deny a continuance for a defendant to retain new counsel if the continuance would significantly delay trial. *See, e.g.*, *State v. Nelson*, 162 Or 430, 92 P2d 182 (1939) (affirming ruling denying a continuance so that newly retained counsel could prepare for trial); *State v. Haynes*, 120 Or 573, 253 P 7 (1927) (same). Those cases assume that a trial court may deny counsel of choice if certain interests of the trial court, including the avoidance of delay or disruption, require it. But except for a brief mention in *State v. Delaney* that "[v]ery likely" Article I, section 11, "means that [a defendant] shall be heard by counsel of his own choice if he wishes * * *[,]" this court has not addressed the scope of the right or adopted a test to determine how, if at all, the right may be limited by other interests. 221 Or 620, 639, 332 P2d 71 (1958).

The Oregon Court of Appeals has filled the gap by adopting the test used in other jurisdictions. In *Greenough*, for instance, the court recognized that the right to a fair trial includes the right to be "represented by retained counsel of the defendant's own choosing." *State v. Greenough*, 8 Or App 86, 92, 493 P2d

59 (1972). It then determined that that right must yield where the record establishes a "clear and convincing" likelihood that retained counsel would pose a "significant likelihood of prejudice to the defendant himself or a disruption to the orderly processes of justice unreasonable under the circumstances of the particular case." *Id.* at 92–93 (quoting *People v. Crovedi*, 65 Cal 2d 199, 208, 417 P2d 868 (1966)). In other words, the right to counsel of choice is a presumption that may be overcome by other vital interests of the criminal justice system.

The Court of Appeals has consistently applied those principles in cases since *Greenough*. *See, e.g.*, *State v. Schmick*, 62 Or App 227, 232, 660 P2d 693, *rev den*, 295 Or 122 (1983) ("[D]efendant's right to retain counsel of his choice must, after a reasonable opportunity to exercise that right, be balanced against the state's need to conclude the case in a timely manner."); *State v. Zaha*, 44 Or App 103, 107, 605 P2d 306 (1980) (noting that the right to counsel of choice is "of such magnitude that the need of the court for expeditious administration must reasonably accommodate that right"); *State v. Pflieger*, 15 Or App 383, 390, 515 P2d 1348, 1351 (1973) (applying *Greenough* principle and reasoning that "the defendant need not be allowed without a showing of substantial cause to disrupt the orderly processes of justice by seeking on the very morning of trial to change counsel").

In short, the parties largely agree on the basic constitutional analysis here. The wording, historical circumstances, and case law interpreting Article I, section 11, are consistent with the proposition that there is a right to counsel of choice but that the right may be limited by other important interests, as *Greenough* articulated. (Def BOM 2–3). In light of those sources, a defendant's presumptive right to counsel of choice may be limited by the public's interest in the fairness of the proceedings, unreasonable disruption to orderly processes, or the need for expeditious administration of justice.

2. The trial court properly declined to allow counsel to represent defendant after finding that a significant ethical conflict warranted their withdrawal.

Under that test, the trial court did not abuse its discretion when it declined to reappoint Mackeson and Hall after allowing their withdrawal. As explained, although the record is limited, it shows that, five months before the April 2, 2019, trial date, the trial court explicitly indicated that the case had already been delayed significantly and that the parties wanted to bring the case to trial. (Tr 55 (the victim representing that the case had affected his and his family's life for a year and a half); Tr 53 (the state opposing a continuance because of unnecessary delay to the trial)). At that November 2018 hearing, the court noted that one risk of not permitting defense counsel to investigate the photographs independently was that it may "only prolong[] potential issues down the road." (Tr 178). Moreover, the trial court wanted to "make sure that

[it was] not setting this thing up to come back in the future." (Tr 178). Put simply, five months before counsel moved to withdraw, the trial court was aware that the case had already been delayed, that issues relating to the photographs raised concerns that could cause the case "to come back in the future," and that "potential issues down the road" needed to be resolved to avoid disruption to the proceedings.

Five months later, on the day set for trial, with more information about the photographs, the parties agreed that a brewing ethical conflict might disrupt the proceedings. (Tr 386–87). The trial, by then, had already been delayed. The state understandably wanted clarity about whether an ethical conflict existed. (Tr 387). Such clarity was all the more necessary because, as the prosecutor explained, defense counsel had previously suggested to him that they "may have some ethical obligations to withdraw" from the case if defendant took the stand. (Tr 386). Further off-the-record conversations revealed an ethical conflict so "significant" that the trial court believed that it may not have a choice but to grant the motion—that is, the conflict was such that the trial court would abuse its discretion or otherwise commit legal error by denying the motion to withdraw. (Tr 393; April 11, 2019, Tr 4).

Hence, when defendant asked that Mackeson and Hall be reappointed nine days after their withdrawal, the trial court was acting against a backdrop of a significant ethical conflict that could delay trial. Hearing counsel's reasons

that the ethical conflict "may have or may not" have been resolved, the court ruled that "in [its] mind," given the "concerns about the ethical obligations that were raised in the last hearing," it was "not willing" to reappoint Mackeson or Hall. (April 11, 2019, Tr 4). In other words, if Mackeson and Hall continued to represent defendant, there was still a risk that during trial they might need to withdraw.

In summary, even on the limited record in this case, this court can still tell from the parties' representations and arguments that (1) a "significant" ethical conflict arose from the discovery of photographs that may have been doctored; (2) the potential for disruption caused by a need to appoint new counsel likely turned on whether or how defendant would testify at trial; (3) the potential ethical conflict was so significant that the trial court did not think it had a choice but to allow withdrawal, implying that the fairness and integrity of the proceedings might be at stake; (4) the state and trial court were aware that the potential conflict could prolong the case; and (5) the conflict "may have" been resolved, but also "may not have" been resolved based on what counsel told the court in chambers just over a week after conveying the details of an otherwise "significant" ethical conflict that required their withdrawal. The record thus reflected that the trial court considered defendant's preference to be represented by Mackeson and Hall but determined that their representation posed a serious risk of unreasonable disruption to an already delayed case. The

trial court did not abuse its discretion by determining that those factors outweighed defendant's right to counsel of choice.

Countering that conclusion, defendant first suggests that the trial court was not concerned about potential disruption to the proceedings, but rather only the fairness and integrity of the trial.[7] (Def BOM 43 (arguing that "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")). To begin, even if the trial court were concerned primarily about the integrity of the proceedings, the trial court could decline to permit Mackeson and Hall to represent defendant. *See, e.g.*, *State v. Vanover*, 559 NW2d 618, 626 (Iowa 1997) (observing that a trial court may "disqualify counsel if necessary to preserve the integrity, fairness, and professionalism of trial court proceedings" and collecting cases); *In re Grand Jury Subpoena Served Upon Doe*, 781 F2d 238, 251 (2d Cir 1986) (observing that "courts have the power and duty to disqualify counsel where the public interest in

---

[7] Defendant also suggests that the choice-of-counsel issue is best understood as arising before trial was set. (*See* Def BOM 31 (describing the "court's decision to outright deny a defendant's exercise of his right to counsel of choice before a trial date has been set (or reset, as in this case)")). But, as explained, the trial date had been set several times. Indeed, the withdrawal occurred on what was supposed to be the first day of trial. If defendant is arguing that delay or disruption of the trial was not a factor concerning the trial court, the record does not support that claim.

maintaining the integrity of the judicial system outweighs the accused's constitutional right"). Nor does a court's discretion depend on whether the potential ethical conflict would result in a retrial—as opposed to delay or disruption—as defendant suggests. (Def BOM 40–41). Defendant cites no source for that proposition.

In any case, defendant is mistaken to suggest that the trial court was concerned only about the fairness or integrity of the proceedings. To the contrary, both the state and the trial court were concerned about unreasonable delay and disruption to trial proceedings that had already been delayed considerably for other reasons. At the initial hearing, the state emphasized that the parties needed to know how the photographs could be used in part because if "[t]he defendant testified in a manner consistent with what [the state] anticipate[s]," the defense team may need to withdraw. (Tr 386). Moreover, when the trial court permitted defense counsel to withdraw, the state opposed the ruling, contending that the case had already been significantly delayed. (Tr 393 (showing state's objection based on the age of the case)). The record thus shows that the court was responding to the state's concerns about further delay to a trial that had already been delayed. (April 11, 2019, Tr 4 (trial court describing the case as "very old")). Defendant does not otherwise meaningfully respond to the notion that the potential for disruption to trial warranted denying the motion for reappointment under the circumstances. (*See* Def BOM 39–43).

Defendant also contends that counsel represented that the ethical conflict had been resolved and that the trial court should not have second-guessed counsel on that point. (Def BOM 41–42). Defendant is mistaken on both fronts. First, neither defendant nor defense counsel made any on-the-record representation about whether the ethical conflict was resolved. Rather, the trial court merely reported a conversation that occurred entirely off the record; the court did not describe exactly what defense counsel told the court about the conflict or its supposed resolution. At most, the trial court related that the ethical conflict—which it had deemed "significant"— "may or may not have resolved." (April 11, 2019, Tr 4). In other words, the record did not *clearly* show anything about the current nature of the conflict. It contained an indefinite description of what defense counsel *reported* to the trial court off the record.

Second, even if counsel had conveyed unequivocally that the ethical conflict had been resolved, it would not have compelled the conclusion that the ethical conflict did not pose a serious risk of unreasonable disruption to the trial proceedings. Although a court may rely on representations by counsel as officers of the court, a court need entirely defer to counsel's legal conclusion that the conflict has been resolved in a way that will not pose a risk of disruption in the future. Presumptive deference to information or facts conveyed by counsel is one thing; the legal significance of those facts is

something else altogether. In short, absent further facts showing that a trial court could draw only one conclusion—that future conflicts are highly unlikely—a trial court need not give up its role in ensuring that defendant receives counsel free of ethical conflicts and that the parties receive a timely resolution of their legal dispute.

C. Under the Sixth Amendment, the trial court properly denied defendant's request to have counsel reappointed after their withdrawal.

The analysis under the Sixth Amendment yields the same answer: Because the trial court found that a "significant" ethical conflict posed a serious risk of disruption to the trial proceedings, the trial court had authority to deny defendant counsel of his choosing.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." One element of that right is the right of a defendant who can afford to pay counsel to choose who will represent him. *See Wheat v. United States*, 486 US 153, 159, 108 S Ct 1692, 100 L Ed 2d 140 (1988); *Powell v. Alabama*, 287 US 45, 53, 53 S Ct 55, 77 L Ed 158 (1932) ("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.").

But the right to counsel of choice may be "circumscribed in several important respects." *Wheat*, 486 US at 159. For instance, "an advocate who is

not a member of the bar may not represent clients (other than himself) in court" and "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Id.* Similarly, the right to counsel of choice must sometimes yield to the needs of fairness or the "demands of [a court's] calendar." *United States v. Gonzalez-Lopez*, 548 US 140, 152, 126 S Ct 2557, 165 L Ed 2d 409 (2006) (citing *Wheat*, 486 US at 163–64 and *Morris v. Slappy*, 461 US 1, 11–12, 103 S Ct 1610, 75 L Ed 2d 610 (1983)). Nor may a defendant insist on representation by counsel where that representation would create a conflict of interest. *Wheat*, 486 US at 163–64. Indeed, a trial court has an obvious "interest in ensuring that criminal trials are conducted within ethical and professional standards." *Gonzalez-Lopez*, 548 US at 152 (quoting *Wheat*, 486 US at 160). For that reason, a presumption in favor of petitioner's counsel of choice "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat*, 486 US at 164.

In determining whether a disruptive ethical conflict exists, a trial court ordinarily should inquire into the nature of the conflict and the potential that the conflict may pose a risk of disruption to trial. *See, e.g.*, *United States v. Cain*, 671 F3d 271, 293 (2d Cir 2012) (describing duty of inquiry). But a trial court retains broad discretion in determining the consequences of a potential ethical conflict. Indeed, a trial court "must be allowed substantial latitude" in

disqualifying counsel "not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat*, 486 US at 163. That is because "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." *Id.* at 162–63. Hence, "[t]he evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." *Id.* at 164.

In a slightly different context, this court applied Sixth Amendment caselaw to circumstances similar to this case. *See In re Sanai*, 360 Or 497, 520, 383 P3d 821 (2016). In *Sanai*, an attorney was subject to attorney disciplinary proceedings and preferred to be represented before the trial panel by his brother, a lawyer from California. *Id.* The Bar opposed the appointment, arguing that the accused knew that the Bar would call his brother as a witness in the proceedings and that, if his brother became a witness, his brother would need to withdraw as his counsel, raising the likelihood of a lengthy setover. *Id.* On review, the accused argued that the trial panel violated his right to counsel of choice under the Due Process Clause as applied to the state through the Fourteenth Amendment. *Id.* at 521.

In rejecting that argument, this court in *Sanai* considered Sixth Amendment caselaw, including *Gonzalez-Lopez*. It observed that the Court in

Gonzalez-Lopez recognized that "trial courts have wide latitude in balancing a defendant's right to his or her choice of counsel with, among other things, (1) the needs of fairness; (2) the demands of the trial court's calendar; and (3) the need to ensure that trials are 'conducted within the ethical standards of the profession[.]'" *Id.* (quoting *Gonzalez–Lopez*, 548 US at 152) (brackets in original). In upholding the trial panel's denial of the accused's brother's motion to represent the accused, this court found that the panel had shown "good cause" in part because of the "likelihood that, even if allowed to represent the accused, the accused's brother could nevertheless be required to withdraw after being subpoenaed as a witness once within this jurisdiction." *Id.* at 523.

Here, under those standards, the trial court did not exceed its broad discretion in concluding that the "potential for conflict" would likely "burgeon into an actual conflict as the trial progress[ed]." *Wheat*, 486 US at 163. Indeed, for the same reasons that the "significant" conflict authorized the trial court to deny defendant counsel of choice under Article I, section 11, the trial court had discretion to deny defendant counsel of choice under the Sixth Amendment. The trial court inquired into the nature of the conflict—albeit off the record, in chambers with counsel. The trial court found that the conflict was "significant" and determined that it required that counsel withdraw. It further implicitly found that "in [its] mind" the conflict continued to pose a risk of serious disruption by ruling that it could not reappoint counsel. In support of that

finding, it conveyed that it was unclear whether the current conflict had been resolved. (April 11, 2019, Tr 4 (explaining that the conflict "may or may not" have been resolved)). Under those circumstances, the trial court did not exceed its wide discretion under the Sixth Amendment in denying defendant counsel of his choosing.

CONCLUSION

For those reasons, this court should affirm the judgment of the Court of Appeals and the judgment of the circuit court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Christopher A. Perdue
CHRISTOPHER A. PERDUE #136166
Assistant Attorney General
chris.perdue@doj.state.or.us

Attorneys for Respondent on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 25, 2024, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Laura A. Frikert, attorneys for petitioner on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 11,224 words. I further 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 as required by ORAP 5.05(3)(b).

/s/ Christopher A. Perdue

CHRISTOPHER A. PERDUE #136166
Assistant Attorney General
chris.perdue@doj.state.or.us

Attorney for Respondent on Review
State of Oregon

CP3:mkf/947131047