NO. PD-1245-06

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

STATE OF TEXAS

PETITIONER

V.

JANET LORRAINE WILLIAMS

RESPONDENT

ON PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT, HOUSTON, TEXAS
NO. 14-04-00998-CR

BRIEF OF AMICUS CURIAE TEXAS APPLESEED

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IDENTITY OF AMICUS CURIAE

In compliance with TEX. R. APP. P. 11, Texas Appleseed states the following: Texas Appleseed, a non-profit organized exclusively for charitable and educational purposes, was a leader in the passage of the Fair Defense Act of 2001 and continues to advocate for effective legal representation for indigent defendants in the criminal justice system. Texas Appleseed's mission is to further the public interest in the development and application of the law and public policy by courts, agencies, legislative bodies, and others in Texas; advance and improve the administration of justice; and advance the cause of social, economic and political justice in Texas. The Texas Appleseed Board of Directors comprises distinguished legal practitioners from various sectors of the Texas Bar who are committed to the pursuit of these goals. Andrews Kurth LLP represents Texas Appleseed pro bono for the purpose of filing this brief as an amicus curiae.

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I. INTRODUCTION AND SUMMARY

The United States Supreme Court has determined that the Sixth and Fourteenth Amendments to the United States Constitution require that all criminal defendants subject to punishment by imprisonment shall be afforded the right to counsel at trial. A court may not proceed to trial unless counsel for the defendant is present, or the defendant makes a voluntary, knowing, and intelligent waiver of the right to be represented by counsel. Failure to obtain a knowing, intelligent, and voluntary waiver is structural error that is not subject to harmless error review.

Presented with such a structural error, a reviewing court must presume prejudice, and overturn a defendant's conviction. The State argues that a harmless error standard should apply if the absence of counsel resulted from the trial court's failure to secure a valid waiver of the right to counsel. The State attempts to distinguish a court's barring retained counsel to appear at trial from a court proceeding to trial against a defendant without appointing counsel or securing a valid waiver. Because both errors result in the deprivation of the right to counsel at trial, and thus necessarily compromise the integrity of the trial itself, the State's distinction is immaterial. Structural errors are not subject to harmless error analysis because they are deemed to be per se prejudicial.

The State's position, if adopted by this Court, would abrogate the protections of the right to counsel that the United States Constitution and the Supreme Court deem fundamental to due process. Texas Appleseed appears here as an amicus curiae to support and advocate for the protection of this fundamental right.

II. ARGUMENT AND AUTHORITIES

A. The United States Constitution Provides The Right To Counsel To Indigent Criminal Defendants

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." UNITED STATES CONST. amend. VI. The Supreme Court holds that this right is so fundamental that all criminal defendants, including those who are too poor to afford their own counsel, should nevertheless be afforded counsel at trial. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); *cf. Martinez v. Court of Appeal of California, Fourth App. Dist.*, 528 U.S. 152, 154 (2000) ("The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.").

A criminal defendant can only proceed to trial without counsel if the trial court first properly admonishes that defendant of the nature of his right to counsel and determines that the waiver of that right is voluntary, knowing, and intelligent. *See Faretta v. California*, 422 U.S. 806, 835 (1975) ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits.") (quoting

Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)). Without the proper admonishments, a court cannot logically conclude that the waiver of that fundamental right was voluntary and intelligent. *See Faretta*, 422 U.S. at 835 (explaining accused must be informed of dangers and disadvantages of self-representation); *Johnson v. Zerbst*, 304 U.S. at 465 ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."). Absent a valid waiver, proceeding against an unrepresented indigent defendant results in the complete deprivation of the right to counsel.

B. Respondent Suffered A Complete Deprivation Of Her Right To Counsel

The Fourteenth District Court of Appeals in this case held that Respondent's "waiver of her right to counsel was not made knowingly, intelligently, and voluntarily as required by the Sixth and Fourteenth Amendments" of the United States Constitution. 194 S.W.3d 568, 578-79 (Tex. App.—Houston [14th Dist.] 2006, pet. granted). The court so held because, among other things, the trial court failed to properly admonish Respondent of her right to appointed counsel. Specifically, in response to the trial court's question about whether she intended to represent herself, Respondent explicitly stated: "Well I really can't afford [counsel] right now is the honest truth." *Id.* at 578. Despite this exchange, the trial court never informed Respondent of her right to appointed counsel, and did not perform its duty to investigate the voluntariness, knowledge, and intelligence of Respondent's purported waiver. *Id.* Nothing in the record shows that

Respondent was aware that she was entitled to court-appointed counsel under *Gideon v. Wainwright* before trial began.[1] Because counsel was absent as the court proceeded to trial, and insufficient evidence exists to establish a knowing and intelligent waiver by Respondent, Respondent suffered a complete deprivation of her right to counsel.[2]

C. No Harmless Error Analysis Applies: Supreme Court Precedent Requires Reversal, Without A Harmless Error Analysis

Respondent's conviction at trial without the assistance of counsel and without having voluntarily and intelligently waived her right to counsel, requires automatic reversal. The Court's review should stop here. However, the State attempts to lead the Court down an avenue it has never ventured, requesting that the Court hold that the deprivation of the right to counsel may nonetheless be harmless if it results from an invalid waiver stemming from an improper admonishment. The State's argument, and the courts of appeals' decisions on which it relies, runs afoul of long-standing Supreme Court precedent.

According to the United States Supreme Court, "there are some constitutional rights so basic to a fair trial that their infractions can never be treated as harmless error," including the "right to counsel." *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991); *Rose v. Clark*, 478 U.S. 570, 577 (1986); *Chapman v. California*, 386 U.S. 18, 23

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[1] Because the facts in this case are clear on this issue, the State did not seek relief concerning the court of appeals' finding of an invalid waiver, and Respondent's brief will likely discuss this point in more detail, Amicus Curiae presents only a brief discussion here.

[2] This is not to say that a court could not find a knowing, voluntary, and intelligent waiver despite the trial court's failure to deliver all of the admonishments. Because such a situation is not the case here, given that the court's colloquy itself demonstrates Respondent's choice was not knowing and intelligent, this exception to the *Faretta* requirement is inapplicable. The State admits as much by failing to pursue the appropriateness of the waiver on appeal to this Court.

& n.8 (1967). The Supreme Court has further held that the complete deprivation of this fundamental right occurs "if the accused is denied counsel at any critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984).[3] Here Respondent was without counsel throughout the entire trial.

1. The Absence Of Counsel At Trial Without A Voluntary, Knowing, And Intelligent Waiver Is A Structural Error That Skews The Integrity Of The Trial Process

Two basic tenets underlie the Supreme Court's unwavering rule that absence of counsel from a critical stage of trial is presumptively prejudicial, and thus beyond harmless error analysis. First, the absence of counsel pervades the entire trial process. The Supreme Court explained:

> 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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. 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 lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. 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.

Johnson v. Zerbst, 304 U.S. at 463.

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[3] The Court relied on precedent from four decades of cases. *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475-476 (1945)).

Second, the assertion of all other rights guaranteed at trial is necessarily hindered by the absence of counsel. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (citation omitted); *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) ("The right of an accused to counsel is beyond question a fundamental right. ... Without counsel the right to a fair trial itself would be of little consequence, ... for it is through counsel that the accused secures his other rights.").

In *Arizona v. Fulminante*, Justice Rehnquist wrote on behalf of the Court that "[t]he entire conduct of the trial from beginning to end is obviously affected ***by the absence of counsel*** for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." *Fulminante*, 499 U.S. at 309-10 (emphasis added). Thus, the Supreme Court considers the improper absence of counsel at trial to be one of a few "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards." *Id.* at 309.

2. Structural Error, As Opposed To Evidentiary Error, Precludes A Determination Of Harm Or Prejudice

The application of harmless error standards to a verdict based upon a structural error by a reviewing court is ineffective and inappropriate. Harmless error standards are ineffective because "structural" errors affect "the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. " 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence,

and no criminal punishment may be regarded as fundamentally fair.' " *Id.* (quoting *Rose v. Clark*, 478 U.S. at 577-78). "Harmless-error analysis thus presupposes a trial, at which the defendant, ***represented by counsel***, may present evidence and argument before an impartial judge or jury." *Rose v. Clark*, 478 U.S. at 578 (emphasis added).

Structural errors are thus distinguished from evidentiary errors, which do not affect the framework of the trial. *See id.* at 579 n.7 (explaining other errors, "[u]nlike errors such as judicial bias or denial of counsel... [do] not affect the composition of the record"). Evidentiary errors can be removed leaving an untainted record for review of a finding of guilt:

> When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

Fulminante, 499 U.S. at 310.

Where an error is evidentiary rather than structural, it may be considered harmless because due process is not affected by considering the remaining evidence in the absence of that which was erroneously admitted. *See id.* at 310-11 (concerning wrongful admission of confession). However, Supreme Court precedent establishes that conducting a trial in the "absence of counsel for a criminal defendant" constitutes structural error. *Id.* at 309-10. Such a structural error, including the error in the instant case, "require[s] reversal without regard to the evidence in the particular case." *Rose v. Clark*, 478 U.S. at 577.

In the face of overwhelming Supreme Court precedent, the State argues that an improper admonishment resulting in an invalid waiver, unlike an outright refusal to appoint counsel or to allow retained counsel to appear, should not be presumptively prejudicial. The State draws a meaningless distinction between these infringements of the right to counsel; because these infringements all result in the complete absence of counsel from trial, prejudice must be presumed.

When a court proceeds to trial without an intelligent and knowing waiver, the action leaves the criminal defendant "completely without representation" during the decisional process. *See Penson v. Ohio*, 488 U.S. 75, 88 (1988) (holding appellate court erred in proceeding to examine record without briefing by court appointed counsel, which was not subject to harmless error). The result is the same whether the court seeks but does not obtain a valid waiver, does not seek any waiver at all, or forbids hired counsel from appearing during trial: counsel is absent from trial, and a criminal defendant's right to counsel is completely infringed.

Furthermore, only "unguided speculation" could support "an inquiry into a claim of harmless error" absent the invalid waiver in cases where a defendant is not properly admonished and a valid waiver is not obtained. *See Holloway v. Arkansas*, 435 U.S. 475, 491 (1978) (explaining why denial of separate representation without proper investigation into potential conflict of interest required automatic reversal). Here, we cannot know what choice Respondent would have made if she had been properly admonished. Had she known of her right to appointed counsel, she may very well have exercised that right. We cannot subtract this error from the record—as we can in cases where evidence is

improperly admitted—and determine whether the result would have been the same if it had not occurred. If the defendant has not voluntarily, knowingly, and intelligently waived his or her right to counsel and the trial court proceeds despite this error, the defendant has been deprived of due process and the error is presumptively prejudicial. *See, e.g., Johnson v. Zerbst*, 304 U.S. at 463 ("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.").

3. The United States Circuit Courts Are In Universal Agreement That Supreme Court Precedent Prohibits Harmless Error Review In This Circumstance

In accordance with clear standards set out by the Supreme Court, the United States circuit courts of appeals have also held that the absence of counsel at trial resulting from an invalid waiver is ***presumed*** prejudicial, and thus beyond harmless error analysis. *See United States v. Proctor*, 166 F.3d 396, 406 & n.13 (1st Cir. 1999) (holding error "was not subject to harmless error review" because court "cannot say that defendant Proctor's self-representation at trial resulted from a valid waiver of his Sixth Amendment right to counsel"); *United States v. Jones*, 452 F.3d 223, 230 (3d Cir. 2006) ("When a waiver is deemed ineffective (i.e., not knowing, intelligent, and voluntary), there is no harmless error review, and the conviction must be vacated and the case remanded for a new trial."); *United States v. Virgil*, 444 F.3d 447, 456 (5th Cir. 2006), *cert. denied*, 127 S.Ct. 365, 166 L.Ed.2d 138, 75 USLW 3169 (U.S. Oct 02, 2006) (NO. 05-11815) ("[W]e hold that *Faretta* violations of this type, even at the sentencing stage, are so fundamentally violative of due process that the error is harmful *per se*."); *Smith v. Lockhart*, 923 F.2d

1314, 1321-22 (8th Cir. 1991) (holding harmless error did not apply because lack of waiver resulted in indigent defendant not represented by counsel at critical stage of proceeding); *United States v. Mohawk*, 20 F.3d 1480, 1485 & n.4 (9th Cir. 1994) (holding because "the government failed to carry its burden of establishing knowing and intelligent waiver...," "[h]armless error analysis is inapplicable"); *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990) (holding Supreme Court precedent "precludes application of harmless error analysis to waiver of counsel cases"); *Strozier v. Newsome*, 871 F.2d 995, 997 & n.3 (11th Cir. 1989) (holding failure to conduct appropriate *Faretta* warnings reversible and "fact that the evidence against Strozier was overwhelming plays no part in the analysis, because the denial of right to counsel cannot be harmless error").

The most instructive opinion comes from the United States Court of Appeals for the Tenth Circuit. *See United States v. Allen*, 895 F.2d 1577 (10th Cir. 1990). In *United States v. Allen*, a criminal defendant refused to accept court-appointed counsel, but appeared at trial on his own. *Id.* at 1578. The trial court found that the defendant thus waived his right to counsel and voluntarily elected to represent himself at trial. *Id.* The Tenth Circuit found that that the defendant's appearance at trial may have constituted a voluntary waiver of his right to counsel. *Id.* at 1579. The fact that the waiver was voluntary did not excuse the trial court from its "obligation to ensure that waiver is knowing and intelligent." *Id.* The Tenth Circuit held that the trial court's failure to conduct a sufficient colloquy on the record to ensure the waiver was knowing and intelligent was error. *Id.* Therefore, "the trial below was conducted in violation of [the defendant's] Sixth Amendment right to counsel." *Id.*

The court in *Allen* acknowledged that it had previously applied harmless error analysis in similar cases, but suggests that these findings were based purely on old Tenth Circuit precedent. Even in those prior cases the Tenth Circuit had noted that the "waiver-of-counsel error is not like erroneous introduction of evidence. Rather, it results in the defendant proceeding through an entire trial without counsel." *See id.* (quoting *Sanchez v. Mondragon*, 858 F.2d 1462, 1468 (10th Cir. 1988)).

By the time *Allen* was decided, the Tenth Circuit recognized that its earlier cases were in conflict with the United States Supreme Court: "***We believe that the Supreme Court's decision in Penson v. Ohio, 488 U.S. 75 (1988), has now dispelled all doubt about the application of harmless error analysis to invalid waivers of counsel.***" *Id.* (emphasis added). In rejecting the application of harmless error analysis to the case of an indigent criminal defendant who proceeded to trial without a proper admonishment, the Tenth Circuit quoted at length from *Penson v. Ohio*:

> [I]t is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process. This is quite different from a case in which it is claimed that counsel's performance is ineffective. As we stated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], the '[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.' 466 U.S. at 692, 104 S.Ct. at 2067. Our decision in *United States v. Cronic*, [466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)], likewise, makes clear that '[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.' 466 U.S. at 659, 104 S.Ct. at 2047 (footnote omitted). Similarly, *Chapman* recognizes that the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.' 386 U.S. at 23, & n. 8, 87 S.Ct. at 827-28 and n. 8. And more recently, in *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, [1797], 100 L.Ed.2d 284 (1988), we stated that a pervasive denial of counsel casts such doubt on the fairness of

> the trial process, that it can never be considered harmless error. Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, ... the presumption of prejudice must extend as well to the denial of counsel on appeal.

Penson, 488 U.S. at 88 (quoted in *Allen*, 895 F.2d at 1580).

Based upon this clear Supreme Court precedent, the Tenth Circuit held in *Allen*:

> We believe that *Penson* precludes application of harmless error analysis to waiver of counsel cases. Acceptance of an invalid waiver in violation of a defendant's Sixth Amendment rights necessarily leaves him "entirely without the assistance of counsel" at trial. To the extent that our cases are inconsistent with this holding, they are overruled.

Allen, 895 F.2d at 1580.

In *Allen*, the Tenth Circuit rejected the State's novel argument ***seventeen years ago***. The State's attempt to resurrect this argument here, without any citation to any United States Supreme Court authority, is baffling.

Nor does ***any*** circuit agree with the State's argument. Counsel for Texas Appleseed could find no court of appeals' decision after *Penson* that has held that a waiver of counsel was not voluntary, knowing, and intelligent, but the conviction was nevertheless subject to harmless error review. The Fifth Circuit has most recently held that "*Faretta* violations...are so fundamentally violative of due process that the error is harmful *per se*." *Virgil*, 444 F.3d at 456. As the court made clear, this was not a new rule, but one "which our precedent has long recognized." *Id.* The court also noted that case law predating *Penson v. Ohio* was "further undercut by the holdings of ***every other circuit to consider this issue, all of which have concluded that harmless error analysis is inapplicable to failure-to-warn Faretta violations***." *Id.* at 455 (emphasis added); *cf.*

United States v. Pollani, 146 F.3d 269, 273 (5th Cir. 1998) (holding that because "right to counsel at trial occupies an elevated status among fundamental constitutional rights" and waiver of right to counsel was invalid because it was later withdrawn, the verdict should be reversed without conducting a harmless error analysis).

4. State Courts Overwhelmingly Follow Supreme Court Precedent In This Area

Like all federal courts of appeals, an overwhelming number of states have shunned the application of harmless error analysis to a criminal defendant's conviction where the defendant was not represented at trial and the trial court failed to obtain a valid waiver of the right to counsel. *See Kincade v. Arkansas*, 796 S.W.2d 580, 581-82 (Ark. 1990); *California v. Bigelow*, 691 P.2d 994, 1001 (Cal. 1984); *Hsu v. United States*, 392 A.2d 972, 987 (D.C. 1978); *Florida v. Young*, 626 So.2d 655, 657 (Fla. 1993); *Illinois v. Campbell*, No. 101263, 2006 WL 3491653, at *2 (Ill. Nov. 30, 2006), *as modified upon denial of rehearing* (Ill. Jan. 22, 2007) (not yet designated for publication); *Iowa v. Cooley*, 608 N.W.2d 9, 18 (Iowa 2000); *Hill v. Kentucky*, 125 S.W.3d 221, 229 (Ky. 2004); *Richardson v. Maryland*, 849 A.2d 487, 498 (Md. 2004); *Michigan v. Russell*, 684 N.W.2d 745, 752-53 & n.29 (Mich. 2004); *Missouri v. Wilson*, 816 S.W.2d 301, 303-304 (Mo. 1991); *New Jersey v. McCombs*, 408 A.2d 425, 426-27 (N.J. 1979); *North Carolina v. Thomas*, 417 S.E.2d 473, 476 (N.C. 1992); *North Dakota v. Wicks*, 576 N.W.2d 518, 520-21 (N.D. 1998); *Utah v. Lovell*, 984 P.2d 382, 388 (Utah 1999); *Church v. Virginia*, 335 S.E.2d 823, 828 (Va. 1985); *Trujillo v. Wyoming*, 2 P.3d 567, 571 (Wyo. 2000).

For example, the Missouri Supreme Court, like the Fifth and Tenth Circuits, found that *Penson v. Ohio* precludes harmless error analysis. *See Missouri v. Wilson*, 816 S.W.2d 301, 303-304 (Mo. 1991). In *Wilson*, the trial court failed to make an adequate inquiry into the defendant's waiver of counsel, and the Missouri Supreme Court found the waiver to be invalid. *Id.* at 304. In reversing the conviction, the court held the harmless error standard does not apply as required by settled Supreme Court precedent:

> The Supreme Court, in *Chapman*, 386 U.S. at 21, 87 S.Ct. at 826, 17 L.Ed.2d at 709 n. 4, specifically mentioned the 6th amendment right to counsel as one of the constitutional rights so basic to a fair trial that its infraction can never be treated as harmless error. Any doubt about the application of harmless error analysis to invalid waivers of counsel appears to have been laid to rest in *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), as follows:
>
> "Chapman recognizes that the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.' (Citation omitted.) And more recently, in *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988), we stated that a pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error."

Id. at 303-304 (quoting *Penson*, 488 U.S. at 88).

Other states follow the well-established practice of reversing a conviction in favor of a new trial once an insufficient waiver or denial of the right to counsel at trial is found, without discussion of harmless error analysis. *See Johnson v. Alabama*, 716 So.2d 745, 750 (Ala. Crim. App. 1997); *O'Dell v. Municipality of Anchorage*, 576 P.2d 104, 108 (Alaska 1978); *Connecticut v. Diaz*, 878 A.2d 1078, 1086 (Conn. 2005); *Louisiana v. Adams*, 369 So.2d 1327, 1330 (La. 1979); *Minnesota v. Bauer*, 245 N.W.2d 848, 860-61 (Minn. 1976); *Cohen v. Nevada*, 625 P.2d 1170, 1171 (Nev. 1981); *Nave v. Oklahoma*,

808 P.2d 991, 994 (Okl. Crim. App. 1991); *Ohio v. Weiss*, 637 N.E.2d 47, 50 (Ohio 1993); *Pennsylvania v. Brazil*, 701 A.2d 216, 219 (Pa. 1997); *South Dakota v. Patten*, 694 N.W.2d 270, 274 (S.D. 2005); *Vermont v. Pollard*, 657 A.2d 185, 191 (Vt. 1995); *City of Bellevue v. Acrey*, 691 P.2d 957, 963 (Wash. 1984); *City of Bluefield v. Williams*, 456 S.E.2d 548, 549 (W. Va. 1995); *Wisconsin v. Klessig*, 564 N.W.2d 716, 725 (Wis. 1997).

This Court, like some states' highest courts, has not yet had before it the specific argument the State makes: harmless error analysis applies to an invalid waiver of counsel. Rather, this Court has consistently abided by the same well-established practice of requiring ***automatic reversal*** when an infringement of the right to counsel is found based upon invalid waiver. *See Murphy v. State*, 644 S.W.2d 487, 488 (Tex. Crim. App. 1983) (holding because trial court failed to conduct "investigation into indigency," the record failed "to show a voluntary and knowing waiver of the right to counsel, retained or appointed" mandating reversal); *Powell v. State*, 632 S.W.2d 354, 355 (Tex. Crim. App. 1982) (reversing because "record fails to establish that the appellant knew what he was doing and made hic choice with eyes wide open") (citing *Faretta*, 422 U.S. 806; *Campbell v. State*, 606 S.W.2d 862 (Tex. Crim. App. 1980)); *Geeslin v. State*, 600 S.W.2d 309, 314 (Tex. Crim. App. 1980) (holding "failure to adequately inquire into appellant's capacity to voluntarily and intelligently waive his right to counsel require reversal"); *Lawson v. State*, 604 S.W.2d 91, 92-93 (Tex. Crim. App. 1979) (reversing because although appellant "stated she would waive counsel and sign a written waiver, the record contains no evidence she comprehended the meaning of her act or the

problems of self-representation"); *Thomas v. State*, 550 S.W.2d 64, 67 (Tex. Crim. App. 1977) (holding "a conviction of an indigent defendant cannot be allowed to stand where the accused is not represented at trial by counsel unless it be determined that there was an intelligent and competent waiver by the accused").

This practice is understandable, given the Supreme Court rule that gauging prejudice caused by structural error, like the absence of counsel at trial, is impossible. *See Fulminante*, 499 U.S. at 310; *Holloway*, 435 U.S. at 491.

5. The State's Argument Defies The Long-Standing Definition Of "Structural Error"

Despite the Supreme Court calling this task impossible, the State would have this Court, and all lower courts, apply harmless error analysis in review of a criminal defendant's trial, even if the defendant failed to have voluntarily, knowingly, and intelligently waived her right to counsel. Such a view invites the "impossible task" of potentially surmising that "the outcome of the trial would have been no different had [Respondent] been more thoroughly admonished with regard to her right to court-appointed counsel upon a finding of her indigence, and, as a result, decided not to represent herself." *See* States's Brief at 14. Such an invitation flies in the face of reason and experience, as well as Supreme Court precedent.

As explained *supra*, the absence of counsel at trial pervades the entire trial process. Unlike an evidentiary error, where a court could conceivably remove the objectionable material and adjudicate based upon the remaining affirmative proof, no such removal can occur here. *See, e.g., Fulminante*, 499 U.S. at 310. The absence of

counsel necessarily affects the trial procedure, the introduction and exclusion of evidence, the presentation and cross-examination of witnesses, and the preservation of error. *Johnson v. Zerbst*, 304 U.S. at 463 (explaining a criminal defendant often "lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one"). Discerning whether the record is free from the taint of the absence of counsel is therefore impossible and a fruitless task.

The State's argument also "proves too much" and would require the effective reversal of *Gideon v. Wainwright*. Under the State's theory, if trial counsel were present in this case, the outcome would be the same as if trial were conducted with the absence of counsel. If that were true, the Court would be asked to assume that counsel would have no effect on the trial itself, including trial procedure, the introduction and exclusion of evidence, the presentation and cross-examination of witnesses, and the preservation of error. Thus, under the State's theory, an indigent defendant would not suffer harm from the lack of trial because the indigent defendant was still able to perform all of these tasks on her own. *Gideon* established that this antiquated belief is patently untrue. *See Gideon v. Wainwright*, 372 U.S. at 343 ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' ") (citing *Johnson v. Zerbst*, 304 U.S. at 462). Thus, finding counsel unnecessary, despite an invalid waiver, would effectively gut the rule that all persons have the right to counsel at trial and the deprivation of that right is beyond harmless error analysis. *Cf. Penson v. Ohio*, 488 U.S. at 86 (explaining the argument that the lack of prejudice on appeal based

upon independent record review by court would essentially result in abrogation of requirement of court appointed counsel for appeals of right).

The State also asks the Court to find that Respondent would "represent herself irrespective of the trial court's admonishments or advice." *See* State's Brief at 13. The State's request that the Court speculate about what Respondent would have done had she been properly admonished, presents the Court with a metaphysical conundrum much like the proverbial tree that falls in the forest unwitnessed. If the Respondent had known of the rights of which she was never made aware – would she have exercised those rights? The Supreme Court holds this question is impossible to answer.

Moreover, in advocating this faux harmless error standard, the State essentially requests that the Court overrule the requirement that a defendant knowingly and intelligently waive the right to counsel before a court may proceed to trial against a defendant. Otherwise, finding that a defendant would have still waived counsel, even if presented with a knowing and intelligent choice, belies the need to provide the choice in the first place. Thus, in addition to *Gideon*, the State in effect would overrule *Faretta* and the *Zerbst* doctrine, which necessarily presuppose that a choice cannot be made or known to a court without first giving the information needed to make that choice. *See Faretta v. California*, 422 U.S. at 835; *Johnson v. Zerbst*, 304 U.S. at 463.

Finally, the State argues that Respondent is obviously guilty, so she should not be allowed to go free given the lack of reasonable doubt. *See* State's Brief at 14. This argument presupposes that the outcome, rather than the structure of trial, is the subject of review by this Court. Appellate courts cannot allow outcomes to dictate their

jurisprudence, especially in cases where an error in the structure that produced that outcome is discovered. There are some errors that are so fundamental that their importance cannot be eschewed in favor of upholding the conviction of a defendant that the State considers obviously guilty—the absence of counsel from trial without a valid waiver represents such an error. *See, e.g., Rose v. Clark*, 478 U.S. at 579 (explaining structural errors, such as infringement of the right to counsel, are "the kinds of errors that automatically require reversal of an otherwise valid conviction."); *Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."). The Court should refuse to apply harmless error analysis to a verdict obtained form a trial where counsel for the defendant was absent, unless that absence was the result of a valid waiver.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae Texas Appleseed prays that the Court affirm the judgment below and hold that, pursuant to the Sixth Amendment to the United States Constitution, the conviction of an indigent criminal defendant, such as Respondent, otherwise entitled to the right to counsel, is not subject to harmless error analysis if that defendant is improperly admonished and therefore does not voluntarily, intelligently and knowingly waive his or her right to counsel.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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