

## CASE COMMENTS

### **Constitutional Law and Criminal Procedure**—Criminal Defendant Erroneously Denied First-Choice Counsel Entitled to Automatic Reversal of Conviction—*United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006)

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>1</sup> The United States Supreme Court has interpreted this guarantee to protect the right of a defendant who does not require appointed counsel to choose who will represent him.<sup>2</sup> In *United States v. Gonzalez-Lopez*,<sup>3</sup> the Supreme Court, faced with a circuit split, considered whether a trial court’s erroneous deprivation of a defendant’s choice of counsel entitles him to an automatic reversal of his conviction.<sup>4</sup> Justice Scalia, writing for a 5-4 Court, held that the denial of a defendant’s right to choose counsel violates the defendant’s Sixth Amendment rights regardless of whether prejudice is shown.<sup>5</sup>

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1. U.S. CONST. amend. VI.

2. See *Wheat v. United States*, 486 U.S. 153, 159 (1988) (holding Sixth Amendment protects non-indigent criminal defendant’s right to preferred counsel); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (reasoning defendant must have fair opportunity to secure counsel of choice); Laura Dietz et al., 21A AM. JUR. 2D *Criminal Law* § 1190 (2006) (outlining defendant’s right to counsel of choice); Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1250-51 (2006) (explaining purpose of defendant’s right to preferred counsel).

3. 126 S. Ct. 2557 (2006).

4. See 126 S. Ct. at 2560 (determining whether denial of defendant’s Sixth Amendment right to counsel of choice requires automatic reversal). Some courts have been reluctant to award the remedy of automatic reversal of a conviction because it results in substantial social costs. See *United States v. Mechanik*, 475 U.S. 66, 72 (1986) (describing automatic reversal’s costs to society); *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (per curiam) (“[T]he Constitution ‘does not require a new trial every time a juror has been placed in a potentially compromising situation’” (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982))); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (explaining burden automatic reversal places on jurors, witnesses, courts, the prosecution and the defendants). As the *Mechanik* Court explained:

The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The [passage] of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost society the right to punish admitted offenders. Even if a defendant is convicted in a second trial, the intervening delay may compromise society’s interest in the prompt administration of justice, and impede accomplishment of the objectives of deterrence and rehabilitation.

*United States v. Mechanik*, 475 U.S. 66, 72 (1986) (citations and internal quotation marks omitted).

5. See 126 S. Ct. at 2566 (2006) (concluding erroneous disqualification of preferred counsel entitles defendant to automatic reversal of conviction).

On January 7, 2003, Cuauhtemoc Gonzalez-Lopez (Gonzalez-Lopez) was charged with conspiracy to distribute marijuana in the United States District Court for the Eastern District of Missouri.<sup>6</sup> His family hired local attorney John Fahle to represent him at an evidentiary hearing before a magistrate judge, but Gonzalez-Lopez hired California attorney Joseph Low.<sup>7</sup> The magistrate judge initially permitted Low and Fahle to work together on the condition that Low would immediately file a motion for admission pro hac vice.<sup>8</sup> The judge revoked Low's admission pro hac vice, however, when Low violated a local court rule restricting the cross-examination of a witness to one attorney.<sup>9</sup>

Soon after, Gonzalez-Lopez informed Fahle that he wanted Low to be his sole attorney.<sup>10</sup> Low subsequently filed a second request to be admitted pro hac vice, which the district court and the United States Court of Appeals for the Eighth Circuit both rejected.<sup>11</sup> Meanwhile, Fahle filed a motion to withdraw and a complaint against Low claiming that Low violated the Missouri Rules of Professional Conduct (Rules) by contacting Gonzalez-Lopez when Fahle represented him.<sup>12</sup> The district court permitted Fahle to withdraw from the case but did not allow Low to represent Gonzalez-Lopez, reasoning that Low violated the Rules.<sup>13</sup>

On May 2, 2003, Gonzalez-Lopez went to trial and was represented by yet another attorney, Karl Dickhaus.<sup>14</sup> Dickhaus requested permission for Low to sit with him at the counsel table, but the district court denied the request,

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6. United States v. Gonzalez-Lopez, 399 F.3d 924, 926 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006).

7. United States v. Gonzalez-Lopez, 399 F.3d 924, 926-27 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006). Gonzalez-Lopez opted to hire Low because he had heard of Low's expertise in litigating drug conspiracy trials. *Id.* at 927.

8. United States v. Gonzalez-Lopez, 399 F.3d 924, 927 (8th Cir. 2005) (setting forth facts of case), *aff'd*, 126 S. Ct. 2557 (2006). An attorney appears "pro hac vice" when allowed to conduct a case in a jurisdiction in which she is not permanently admitted. BLACK'S LAW DICTIONARY 1248 (8th ed. 2004) (defining "pro hac vice"); Thomas C. Canfield, Note, *The Criminal Defendant's Right to Retain Counsel Pro Hac Vice*, 57 FORDHAM L. REV. 785, 785 (1989) (describing pro hac vice appearances).

9. United States v. Gonzalez-Lopez, 399 F.3d 924, 927 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006).

10. United States v. Gonzalez-Lopez, 399 F.3d 924, 927 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006).

11. United States v. Gonzalez-Lopez, 399 F.3d 924, 927 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006). Low's appeal to the Eighth Circuit was in the form of an application for a writ of mandamus. *Id.* "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). A writ of mandamus, the most common type of extraordinary writ, directs a public official to perform a mandatory duty and is "generally used to prevent district judges from exceeding their authority." 19-204 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE—CIVIL PROCEDURE § 204.01 (3d ed. 2006) (discussing writ of mandamus); *see also* BLACK'S LAW DICTIONARY 980 (8th ed. 2004) (defining "mandamus").

12. United States v. Gonzalez-Lopez, 399 F.3d 924, 927 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006). Missouri Rule 4-4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Mo. Rules of Prof'l Conduct R. 4-4.2 (2007).

13. United States v. Gonzalez-Lopez, 399 F.3d 924, 927-28 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006).

14. United States v. Gonzalez-Lopez, 399 F.3d 924, 927 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006).

ordering Low to sit in the audience and to have no contact with Dickhaus.<sup>15</sup> The jury found Gonzalez-Lopez guilty.<sup>16</sup> The Eighth Circuit reversed the conviction, however, reasoning that the district court erred in interpreting the Rules as prohibiting Low's conduct and that this error violated Gonzalez-Lopez's Sixth Amendment right to paid counsel of his choosing.<sup>17</sup> On certiorari, the United States Supreme Court agreed with the Eighth Circuit, holding that a trial court's erroneous deprivation of a criminal defendant's choice of counsel automatically entitles him to reversal of his conviction with no need to show prejudice.<sup>18</sup>

The Sixth Amendment to the U.S. Constitution protects a non-indigent criminal defendant's right to choose his own counsel.<sup>19</sup> That right, however, is qualified and may be denied entirely.<sup>20</sup> For example, a criminal defendant desiring representation must choose an advocate who is a lawyer, who is qualified to practice in the relevant jurisdiction, who he can afford, and who does not have a nonwaivable conflict of interest.<sup>21</sup>

Rule 52(a) of the Federal Rules of Criminal Procedure, the harmless-error rule, provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."<sup>22</sup> In *Neder v. United States*,<sup>23</sup> the

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15. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 928 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006). The trial judge enforced the order by having a United States Marshall sit between Dickhaus and Low throughout the trial. *Id.*

16. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 928 (8th Cir. 2005), *aff'd*, 126 S. Ct. 2557 (2006).

17. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 932-33 (8th Cir. 2005) (concluding defendant's choice of counsel fundamental to trial process), *aff'd*, 126 S. Ct. 2557 (2006).

18. 126 S. Ct. at 2566 (holding Sixth Amendment demands new trial whenever defendant wrongfully denied first-choice counsel).

19. See *Wheat v. United States*, 486 U.S. 153, 159 (1988) (holding Sixth Amendment protects criminal defendant's right to preferred counsel); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (recognizing defendant's right to preferred counsel); *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 203, 203 (2006) (describing right to counsel of choice); see also Canfield, *supra* note 8, at 786-87 (describing purpose of right to counsel of choice). The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The purpose of providing assistance of counsel is to "ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (explaining Assistance of Counsel Clause not intended "to improve the quality of legal representation").

20. See *Wheat v. United States*, 486 U.S. 153, 159 (1988) (explaining limitations on right to preferred counsel); 1-644 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE—CRIMINAL PROCEDURE* § 644.36 (3d ed. 2006) (discussing right to counsel of choice and its limitations).

21. See *Wheat v. United States*, 486 U.S. 153, 159-60 (1988) (discussing limitations on right to counsel of choice); Michael R. Dreeben, *The Right to Present a Twinkie Defense*, 9 GREEN BAG 2D 347, 347 (2006) (describing right to counsel of choice as "highly qualified right").

22. FED. R. CRIM. P. 52(a); see also 3B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 855 (3d ed. 2005) (discussing harmless-error rule in context of criminal procedure). In addition,

United States Supreme Court recognized that there is “a limited class of fundamental constitutional errors that ‘defy analysis by “harmless error” standards’” and “are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome.”<sup>24</sup> The Court further explained that, for all other constitutional errors, reviewing courts must apply harmless-error analysis and disregard errors that are harmless beyond a reasonable doubt.<sup>25</sup>

It is well-established that a defendant alleging a Sixth Amendment ineffective assistance of counsel violation must demonstrate prejudice.<sup>26</sup> In *Rodriguez v. Chandler*,<sup>27</sup> the Seventh Circuit addressed a different issue: whether a defendant alleging a Sixth Amendment *denial of first-choice counsel* violation must demonstrate prejudice.<sup>28</sup> Several circuits had held that no prejudice was required and that such a defendant was entitled to automatic reversal of his conviction.<sup>29</sup> In *Rodriguez*, however, the court rejected that approach, explaining that “[a] defendant with an inept attorney is in a more precarious position than one with a competent lawyer who is the defendant’s second or third choice.”<sup>30</sup> The court held that a defendant must show that the

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28 U.S.C. § 2111 provides that “[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.” 28 U.S.C. § 2111 (2006).

23. 527 U.S. 1 (1999).

24. *Neder v. United States*, 527 U.S. 1, 7 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)) (explaining most constitutional errors in criminal trials do not require automatic reversal of conviction). These errors are known as “structural” defects. See *Johnson v. United States*, 520 U.S. 461, 468 (1997) (defining structural defect as one “affecting the framework within which the trial proceeds” (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (internal quotation marks omitted))). Such errors include the denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, the lack of an impartial trial judge, the unlawful exclusion of grand jurors of defendant’s race, and an erroneous reasonable-doubt instruction to the jury. See *Neder v. United States*, 527 U.S. 1, 8 (1999).

25. See *Neder v. United States*, 527 U.S. 1, 10 (1999) (holding omission of element of offense in jury instruction subject to harmless-error analysis); *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (recognizing most constitutional errors harmless); *Rose v. Clark*, 478 U.S. 570, 579 (1986) (noting “strong presumption” in favor of harmless-error analysis where defendant had counsel and impartial adjudicator). These errors are known as “trial errors.” See *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) (defining “trial errors” as those a court may assess to determine whether harmful).

26. See *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (holding no constitutional violation where “no probable effect upon the trial’s outcome”); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding defendant must show result would have been different absent counsel’s error).

27. 382 F.3d 670 (7th Cir. 2004).

28. *Rodriguez v. Chandler*, 382 F.3d 670, 673-75 (7th Cir. 2004) (examining whether prejudice is a prerequisite to reversal of judgment following erroneous disqualification of counsel).

29. See *Bland v. Cal. Dep’t. of Corr.*, 20 F.3d 1469, 1479 (9th Cir. 1994) (holding denial of right to choice of counsel reversible error regardless of whether prejudice shown), *overruled in part* by *Schell v. Witek*, 218 F.3d 1017, 2000 (9th Cir. 2000) (en banc); *United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987) (reasoning deprivation of right to choose counsel cannot be harmless); *Wilson v. Mintzes*, 761 F.2d 275, 285 (6th Cir. 1985) (concluding *Strickland*’s prejudice prong not applicable to choice of counsel cases).

30. *Rodriguez v. Chandler*, 382 F.3d 670, 674 (7th Cir. 2004) (holding no automatic reversal of conviction where trial court erred in disqualifying preferred counsel). The Seventh Circuit reasoned that “[i]t is hard to see why violations of the qualified right to counsel of choice should lead to automatic reversal, when

erroneous denial of first-choice counsel had an “adverse effect” on his representation at trial to receive an automatic reversal of conviction.<sup>31</sup>

In *United States v. Gonzalez-Lopez*, the Supreme Court considered whether a district court’s wrongful denial of a criminal defendant’s qualified right to be represented by counsel of choice requires automatic reversal of his conviction.<sup>32</sup> The majority found it impracticable to review the prejudice caused by a wrongful denial of choice of counsel because the consequences of the denial were not quantifiable and harmless-error analysis in such a context would constitute pure speculation.<sup>33</sup> The Court concluded that denying the right to choice of counsel is not subject to harmless-error analysis because it constitutes a structural defect, the most serious kind of constitutional mistake.<sup>34</sup> Thus, the Court held that the denial of a defendant’s Sixth Amendment right to private counsel based on the erroneous disqualification of counsel requires automatic reversal.<sup>35</sup>

While the Court interpreted the Sixth Amendment’s right to counsel provision to protect a defendant’s choice of counsel, Justice Alito’s dissent correctly acknowledged that the Amendment’s text and history indicate that it merely protects a defendant’s right to assistance that was as effective as his choice of counsel would have been.<sup>36</sup> The purpose of the Sixth Amendment is “to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.”<sup>37</sup> In addition, the right to counsel of choice can be trumped by concerns about the fairness of the trial and the administration of justice.<sup>38</sup>

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deprivation of the absolute right to a competent attorney leads to relief only if prejudice is demonstrable.” *Id.* (pointing out flaws in other circuits’ analyses).

31. See *Rodriguez v. Chandler*, 382 F.3d 670, 675 (7th Cir. 2004) (establishing standard for denial of first-choice counsel violation). The court explained that the adverse-effect standard is midway between automatic reversal and the *Strickland* standard, which requires proof of a likely difference in the litigation’s outcome. See *id.* at 675 (characterizing “adverse effect” as “identifiable difference in the quality of representation”).

32. See 126 S. Ct. at 2560 (examining whether Sixth Amendment requires new trial where defendant erroneously denied first-choice counsel).

33. See *id.* at 2565 (focusing on difficulty in predicting hypothetical outcome of case). The Court stated that “[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.” *Id.*

34. See *id.* at 2564 (reasoning erroneous denial of counsel “bears directly on the framework within which the trial proceeds” (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991))).

35. See *id.* (deciding defect was structural because entire proceeding unfair and unreliable). In concluding that the trial was fundamentally unfair, the Court emphasized that the consequences of the district court’s error were “necessarily unquantifiable and indeterminate.” *Id.*

36. See 126 S. Ct. at 2566 (Alito, J., dissenting) (explaining Sixth Amendment focuses on quality of assistance, not who provides assistance).

37. *Wheat v. United States*, 486 U.S. 153, 159 (1988); see also *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (rejecting notion that “the Sixth Amendment guarantees a ‘meaningful relationship’ between an accused and his counsel”); *Dreeben*, *supra* note 21, at 352 (criticizing majority for placing right to counsel of choice at pinnacle of Sixth Amendment protections).

38. See *supra* text accompanying note 21 (explaining limitations on Sixth Amendment right to counsel of

The majority erred in declining to require prejudice for a denial of first-choice counsel claim, and the Court should have adopted the adverse-effect standard of *Rodriguez*.<sup>39</sup> As the dissent in *Gonzalez-Lopez* explained, “Under the majority’s holding, a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly.”<sup>40</sup> In addition, this holding “poke[s] a finger in the eye of indigent criminal defendants,” who are required to show prejudice for an ineffective assistance of counsel claim.<sup>41</sup>

Even assuming a wrongful denial of counsel always violates the Sixth Amendment, this does not necessarily mean that reversal should be automatic.<sup>42</sup> Automatic reversal of a conviction should be avoided if possible because it entails substantial social costs, such as expenditures of time, energy, and other resources.<sup>43</sup> If the Court did not require a showing of prejudice, the Court should have applied harmless-error analysis under Rule 52(a) of the Federal Rules of Criminal Procedure.<sup>44</sup> Finally, a denial of first-choice counsel violation does not rise to the level of the few intrinsically harmful errors that the Court has singled out for automatic reversal.<sup>45</sup>

In *United States v. Gonzalez-Lopez*, the United States Supreme Court considered whether a wrongful denial of a criminal defendant’s choice of counsel entitles him to automatic reversal of his conviction. The Court erred in declining to require prejudice for a denial of first-choice counsel claim and in failing to apply harmless-error analysis. As a result, the Court created a nonsensical rule that will result in substantial social costs and wasted resources.

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choice).

39. See 126 S. Ct. at 2568 (Alito, J., dissenting) (contending Court should have required showing of prejudice); *supra* note 31 and accompanying text (describing *Rodriguez*’s adverse-effect standard).

40. See 126 S. Ct. at 2570 (Alito, J., dissenting) (criticizing majority’s holding as nonsensical); see also *Rodriguez v. Chandler*, 382 F.3d 670, 675 (7th Cir. 2004) (reasoning defendant with inept attorney in worse position than one with competent but non-preferred counsel); Dreeben, *supra* note 21, at 352 (asserting rule makes little sense).

41. See Dreeben, *supra* note 21, at 350, 352 (arguing majority incorrectly interpreted Sixth Amendment to protect counsel of choice for wealthy). It seems unjust to require indigent defendants to show prejudice while non-indigent defendants need not show any prejudice to obtain relief under the Sixth Amendment. See *id.*

42. See *Neder v. United States*, 527 U.S. 1, 7-8 (1999) (explaining most constitutional errors in criminal trials do not require automatic reversal of convictions).

43. See *supra* note 4 (noting social costs of automatic reversal).

44. See 126 S. Ct. at 2570 (Alito, J., dissenting) (arguing majority’s rule results in “anomalous and unjustifiable consequences”); see also FED. R. CRIM. P. 52(a).

45. See 126 S. Ct. at 2569-70 (Alito, J., dissenting) (contending defect not structural because trial not necessarily rendered fundamentally unfair). The Court has required reversal where there was a “complete denial of counsel,” a “biased trial judge,” “racial discrimination in [the] selection of [the] grand jury,” a “denial of self-representation at trial,” a “denial of public trial,” and a “defective reasonable-doubt instruction.” *Neder v. United States*, 527 U.S. 1, 8 (1999).