# SUPREME COURT OF THE UNITED STATES

No. 05–352

UNITED STATES, PETITIONER *v.* CUAUHTEMOC GONZALEZ-LOPEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2006]

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

I disagree with the Court's conclusion that a criminal conviction must automatically be reversed whenever a trial court errs in applying its rules regarding *pro hac vice* admissions and as a result prevents a defendant from being represented at trial by the defendant's first-choice attorney. Instead, a defendant should be required to make at least *some* showing that the trial court's erroneous ruling adversely affected the quality of assistance that the defendant received. In my view, the majority's contrary holding is based on an incorrect interpretation of the Sixth Amendment and a misapplication of harmless-error principles. I respectfully dissent.

## I

The majority makes a subtle but important mistake at the outset in its characterization of what the Sixth Amendment guarantees. The majority states that the Sixth Amendment protects "the right of a defendant who does not require appointed counsel to choose who will represent him." *Ante*, at 3. What the Sixth Amendment actually protects, however, is the right to have *the assistance* that the defendant's counsel of choice is able to provide. It follows that if the erroneous disqualification of

a defendant's counsel of choice does not impair the assistance that a defendant receives at trial, there is no violation of the Sixth Amendment.[1]

The language of the Sixth Amendment supports this interpretation. The Assistance of Counsel Clause focuses on what a defendant is entitled to receive ("Assistance"), rather than on the identity of the provider. The background of the adoption of the Sixth Amendment points in the same direction. The specific evil against which the Assistance of Counsel Clause was aimed was the English common-law rule severely limiting a felony defendant's ability to be assisted by counsel. *United States* v. *Ash*, 413 U. S. 300, 306 (1973). "[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial," *id.*, at 309, and thereby "to assure fairness in the adversary criminal process," *United States* v. *Morrison*, 449 U. S. 361, 364 (1981). It was not "the essential aim of the Amendment . . . to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat* v. *United States*, 486 U. S. 153, 159 (1988); cf. *Morris* v. *Slappy*, 461 U. S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel").

There is no doubt, of course, that the right "to have the Assistance of Counsel" carries with it a limited right to be represented by counsel of choice. At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited,[2] that is how the

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[1] This view is consistent with the Government's concession that "[t]he Sixth Amendment . . . encompasses a non-indigent defendant's right to select counsel who will represent him in a criminal prosecution," Brief for United States 11, though this right is "circumscribed in several important respects," *id.*, at 12 (citation and internal quotation marks omitted).

[2] See Act of Apr. 30, 1790, ch. 9, §29, 1 Stat. 118 (providing for appointment of counsel in capital cases); *Betts* v. *Brady*, 316 U. S. 455,

right inevitably played out: A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure. But from the beginning, the right to counsel of choice has been circumscribed.

For one thing, a defendant's choice of counsel has always been restricted by the rules governing admission to practice before the court in question. The Judiciary Act of 1789 made this clear, providing that parties "in all the courts of the United States" had the right to "the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct cases therein." Ch. 20, §35, 1 Stat. 92. Therefore, if a defendant's first-choice attorney was not eligible to appear under the rules of a particular court, the defendant had no right to be represented by that attorney. Indeed, if a defendant's top 10 or top 25 choices were all attorneys who were not eligible to appear in the court in question, the defendant had no right to be represented by any of them. Today, rules governing admission to practice before particular courts continue to limit the ability of a criminal defendant to be represented by counsel of choice. See *Wheat,* 486 U. S., at 159.

The right to counsel of choice is also limited by conflict-of-interest rules. Even if a defendant is aware that his or her attorney of choice has a conflict, and even if the defendant is eager to waive any objection, the defendant has no constitutional right to be represented by that attorney. See *id.*, at 159–160.

Similarly, the right to be represented by counsel of choice can be limited by mundane case-management considerations. If a trial judge schedules a trial to begin on a particular date and defendant's counsel of choice is already committed for other trials until some time thereaf-

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467, n. 20 (1942) (surveying state statutes).

ter, the trial judge has discretion under appropriate circumstances to refuse to postpone the trial date and thereby, in effect, to force the defendant to forgo counsel of choice. See, *e.g.*, *Slappy*, *supra; United States* v. *Hughey*, 147 F. 3d 423, 428–431 (CA5 1998).

These limitations on the right to counsel of choice are tolerable because the focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation. Limiting a defendant to those attorneys who are willing, available, and eligible to represent the defendant still leaves a defendant with a pool of attorneys to choose from—and, in most jurisdictions today, a large and diverse pool. Thus, these restrictions generally have no adverse effect on a defendant's ability to secure the best assistance that the defendant's circumstances permit.

Because the Sixth Amendment focuses on the quality of the assistance that counsel of choice would have provided, I would hold that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received. This would not require a defendant to show that the second-choice attorney was constitutionally ineffective within the meaning of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Rather, the defendant would be entitled to a new trial if the defendant could show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial." *Rodriguez* v. *Chandler*, 382 F. 3d 670, 675 (CA7 2004), cert. denied, 543 U. S. 1156 (2005).

This approach is fully consistent with our prior decisions. We have never held that the erroneous disqualification of counsel violates the Sixth Amendment when there is no prejudice, and while we have stated in several cases that the Sixth Amendment protects a defendant's right to

counsel of choice, see *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624–625 (1989); *Wheat*, *supra*, at 159; *Powell* v. *Alabama,* 287 U. S. 45, 53 (1932), we had no occasion in those cases to consider whether a violation of this right can be shown where there is no prejudice. Nor do our opinions in those cases refer to that question. It is therefore unreasonable to read our general statements regarding counsel of choice as addressing the issue of prejudice.[3]

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[3] *Powell* is the case generally cited as first noting a defendant's right to counsel of choice. *Powell* involved an infamous trial in which the defendants were prevented from obtaining any counsel of their choice and were instead constrained to proceed with court-appointed counsel of dubious effectiveness. We held that this denied them due process and that "a fair opportunity to secure counsel of [one's] own choice" is a necessary concomitant of the right to counsel. 287 U. S., at 53; cf. *id.*, at 71 ("[T]he failure of the trial court to give [petitioners] reasonable time and opportunity to secure counsel was a clear denial of due process"). It is clear from the facts of the case that we were referring to the denial of the opportunity to choose *any* counsel, and we certainly said nothing to suggest that a violation of the right to counsel of choice could be established without any showing of prejudice.

In *Wheat*, we held that the trial judge had not erred in declining the defendant's waiver of his right to conflict-free counsel, and therefore we had no need to consider whether an incorrect ruling would have required reversal of the defendant's conviction in the absence of a showing of prejudice. We noted that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," 486 U. S., at 159, but we went on to stress that this right "is circumscribed in several important respects," *ibid*., including by the requirement of bar membership and rules against conflicts of interest. *Wheat* did not suggest that a violation of the limited Sixth Amendment right to counsel of choice can be established without showing prejudice, and our statements about the Sixth Amendment's "purpose" and "essential aim"—providing effective advocacy and a fair trial, *ibid.*—suggest the opposite.

Finally, in *Caplin & Drysdale*, we held that the challenged action of the trial judge—entering an order forfeiting funds that the defendant had earmarked for use in paying his attorneys—had been proper, and, accordingly, we had no occasion to address the issue of prejudice. We recognized that "the Sixth Amendment guarantees a defendant the

## II

But even accepting, as the majority holds, that the erroneous disqualification of counsel of choice always violates the Sixth Amendment, it still would not follow that reversal is required in all cases. The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions. Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a), which instructs federal courts to "disregar[d]" "[a]ny error . . . which does not affect substantial rights." See also 28 U. S. C. §2111; *Chapman* v. *California,* 386 U. S. 18, 22 (1967). The only exceptions we have recognized to this rule have been for "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder* v. *United States,* 527 U. S. 1, 7 (1999) (quoting *Arizona* v. *Fulminante,* 499 U. S. 279, 309 (1991)); see also *Chapman*, *supra*, at 23. "Such errors . . . 'necessarily render a trial fundamentally unfair' [and] deprive defendants of 'basic protections' without which '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.'" *Neder*, *supra,* at 8–9 (quoting *Rose* v. *Clark,* 478 U. S. 570, 577–578 (1986) (second omission in original)); see also *ante*, at 9 (listing such errors).

Thus, in *Neder*, we rejected the argument that the omission of an element of a crime in a jury instruction "*necessarily* render[s] a criminal trial fundamentally unfair or

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right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds," 491 U. S., at 624–625, but we added that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel,'" *id.,* at 626 (omission in original).

an unreliable vehicle for determining guilt or innocence." 527 U. S., at 9. In fact, in that case, "quite the opposite [was] true: Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense . . . ." *Ibid.*

Neder's situation—with an impartial judge, the correct standard of proof, assistance of counsel, and a fair jury—is much like respondent's. Fundamental unfairness does not inexorably follow from the denial of first-choice counsel. The "decision to retain a particular lawyer" is "often uninformed," *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980); a defendant's second-choice lawyer may thus turn out to be better than the defendant's first-choice lawyer. More often, a defendant's first- and second-choice lawyers may be simply indistinguishable. These possibilities would not justify violating the right to choice of counsel, but they do make me hard put to characterize the violation as "*always* render[ing] a trial unfair," *Neder*, *supra*, at 9. Fairness may not limit the right, see *ante*, at 5, but it does inform the remedy.

Nor is it always or nearly always impossible to determine whether the first choice would have provided better representation than the second choice. There are undoubtedly cases in which the prosecution would have little difficulty showing that the second-choice attorney was better qualified than or at least as qualified as the defendant's initial choice, and there are other cases in which it will be evident to the trial judge that any difference in ability or strategy could not have possibly affected the outcome of the trial.

Requiring a defendant to fall back on a second-choice attorney is not comparable to denying a defendant the right to be represented by counsel at all. Refusing to permit a defendant to receive the assistance of any counsel

is the epitome of fundamental unfairness, and as far as the effect on the outcome is concerned, it is much more difficult to assess the effect of a complete denial of counsel than it is to assess the effect of merely preventing representation by the defendant's first-choice attorney. To be sure, when the effect of an erroneous disqualification is hard to gauge, the prosecution will be unable to meet its burden of showing that the error was harmless beyond a reasonable doubt. But that does not justify eliminating the possibility of showing harmless error in all cases.

The majority's focus on the "trial error"/"structural defect" dichotomy is misleading. In *Fulminante*, we used these terms to denote two poles of constitutional error that had appeared in prior cases; trial errors always lead to harmless-error review, while structural defects always lead to automatic reversal. See 499 U. S., at 306–310. We did not suggest that trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors "affecting the framework within which the trial proceeds," *id.*, at 310, are structural. The touchstone of structural error is fundamental unfairness and unreliability. Automatic reversal is strong medicine that should be reserved for constitutional errors that "*always*" or "*necessarily*," *Neder*, *supra*, at 9 (emphasis in original), produce such unfairness.

## III

Either of the two courses outlined above—requiring at least some showing of prejudice, or engaging in harmless-error review—would avoid the anomalous and unjustifiable consequences that follow from the majority's two-part rule of error without prejudice followed by automatic reversal.

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. By contrast, a defendant whose attorney was ineffective in the constitutional sense (*i.e.*, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," *Strickland*, 466 U. S., at 687) cannot obtain relief without showing prejudice.

Under the majority's holding, a trial court may adopt rules severely restricting *pro hac vice* admissions, cf. *Leis* v. *Flynt*, 439 U. S. 438, 443 (1979) *(per curiam),* but if it adopts a generous rule and then errs in interpreting or applying it, the error automatically requires reversal of any conviction, regardless of whether the erroneous ruling had any effect on the defendant.

Under the majority's holding, some defendants will be awarded new trials even though it is clear that the erroneous disqualification of their first-choice counsel did not prejudice them in the least. Suppose, for example, that a defendant is initially represented by an attorney who previously represented the defendant in civil matters and who has little criminal experience. Suppose that this attorney is erroneously disqualified and that the defendant is then able to secure the services of a nationally acclaimed and highly experienced criminal defense attorney who secures a surprisingly favorable result at trial—for instance, acquittal on most but not all counts. Under the majority's holding, the trial court's erroneous ruling automatically means that the Sixth Amendment was violated—even if the defendant makes no attempt to argue that the disqualified attorney would have done a better job. In fact, the defendant would still be entitled to a new trial on the counts of conviction even if the defendant publicly proclaimed after the verdict that the second attorney had provided better representation than any other attorney in the country could have possibly done.

Cases as stark as the above hypothetical are unlikely, but there are certainly cases in which the erroneous dis-

qualification of a defendant's first-choice counsel neither seriously upsets the defendant's preferences nor impairs the defendant's representation at trial. As noted above, a defendant's second-choice lawyer may sometimes be better than the defendant's first-choice lawyer. Defendants who retain counsel are frequently forced to choose among attorneys whom they do not know and about whom they have limited information, and thus a defendant may not have a strong preference for any one of the candidates. In addition, if all of the attorneys considered charge roughly comparable fees, they may also be roughly comparable in experience and ability. Under these circumstances, the erroneous disqualification of a defendant's first-choice attorney may simply mean that the defendant will be represented by an attorney whom the defendant very nearly chose initially and who is able to provide representation that is just as good as that which would have been furnished by the disqualified attorney. In light of these realities, mandating reversal without even a minimal showing of prejudice on the part of the defendant is unwarranted.

The consequences of the majority's holding are particularly severe in the federal system and in other court systems that do not allow a defendant to take an interlocutory appeal when counsel is disqualified. See *Flanagan* v. *United States*, 465 U. S. 259, 260 (1984). Under such systems, appellate review typically occurs after the defendant has been tried and convicted. At that point, if an appellate court concludes that the trial judge made a marginally incorrect ruling in applying its own *pro hac vice* rules, the appellate court has no alternative but to order a new trial—even if there is not even any claim of prejudice. The Sixth Amendment does not require such results.

Because I believe that some showing of prejudice is required to establish a violation of the Sixth Amendment,

I would vacate and remand to let the Court of Appeals determine whether there was prejudice. However, assuming for the sake of argument that no prejudice is required, I believe that such a violation, like most constitutional violations, is amenable to harmless-error review. Our statutes demand it, and our precedents do not bar it. I would then vacate and remand to let the Court of Appeals determine whether the error was harmless in this case.