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Definitely Not Harmless: The Supreme Court Holds that the Erroneous Disqualification of Retained Counsel Warrants Automatic Reversal in *United States v. Gonzalez-Lopez*

In *United States v. Gonzalez-Lopez*,[1] the United States Supreme Court held that the erroneous disqualification of a criminal defendant's retained choice of counsel violates the Sixth Amendment[2] to the United States Constitution and must result in the automatic reversal of the defendant's conviction.[3] In reaching this conclusion, the Court rejected the Government's argument that a defendant who is denied his choice of counsel must prove prejudice by showing the defendant's substitute counsel was ineffective within the meaning of *Strickland v. Washington*.[4] Instead, the Court concluded that because a complete violation of the Sixth Amendment's Counsel Clause occurs when a defendant is deprived of his right to counsel of choice, proving prejudice is unneces-

1. 126 S. Ct. 2557 (2006).
2. U.S. CONST. amend. VI.
3. *Gonzalez-Lopez*, 126 S. Ct. at 2566.
4. 466 U.S. 668 (1984).

sary.[5] *Gonzalez-Lopez* is an important decision because the Court's holding will deter trial judges from exercising their discretion in disqualifying attorneys due to scheduling conflicts, ethical violations, or conflicts of interest because trial judges will fear being reversed on appeal. Additionally, the decision in *Gonzalez-Lopez* is at odds with the Court's Sixth Amendment jurisprudence and is limited to those defendants with retained counsel, not court-appointed counsel, which illustrates the Court's willingness to treat rich and poor defendants disparately.

I. FACTUAL BACKGROUND

Cuauhtemoc Gonzalez-Lopez's family hired an attorney, John Fahle, to represent him on charges of conspiracy to distribute over one hundred kilograms of marijuana in the Eastern District of Missouri. After being arraigned, Gonzalez-Lopez hired Joseph Low, a California attorney, to represent him but did not fire Fahle. Fahle and Low represented Gonzalez-Lopez during an evidentiary hearing before a magistrate judge, who granted Low a provisional entry of appearance on the condition that Low immediately file for admission *pro hac vice*. However, the magistrate judge rescinded Low's provisional acceptance when Low violated a court rule during the hearing.[6]

Gonzalez-Lopez fired Fahle a week later, informing the court that Low would be his sole attorney. Low filed two applications for admission *pro hac vice*, which the court denied twice without comment. Low appealed by filing a writ of mandamus, which was dismissed by the United States Court of Appeals for the Eighth Circuit.[7]

Fahle moved to withdraw as counsel for Gonzalez-Lopez and for a show-cause hearing to consider sanctions against Low for violating the Missouri Rules of Professional Conduct.[8] Low moved to strike Fahle's motion, which the district court denied. The court granted Fahle's motion to withdraw, granted a continuance so Gonzalez-Lopez could find new representation, and explained its rationale for rejecting Low's motions for admission *pro hac vice*—in a previous case, Low violated the Missouri Rules of Professional Conduct.[9]

Although Gonzalez-Lopez wanted Low to represent him, the case proceeded to trial with Gonzalez-Lopez being represented by Karl Dickhaus, a local attorney. Low moved a third time for admission, but

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5. *Gonzalez-Lopez*, 126 S. Ct. at 2562.
6. United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2560 (2006).
7. *Id.*
8. *Id.* Fahle alleged Low had violated MO. RULES OF PROF'L CONDUCT R. 4-4.2 (1995).
9. *Gonzalez-Lopez*, 126 S. Ct. at 2560.

was unsuccessful. The court denied Dickhaus's request to have Low sit at the counsel table with him, ordering Low to sit in the audience and refrain from all contact with Dickhaus during the proceedings. A United States Marshal sat between Low and Dickhaus to enforce the court's instruction. During the trial, Low met with Gonzalez-Lopez only once, the night before the trial ended. Ultimately, the jury returned a guilty verdict.[10]

Following trial, the district court granted Fahle's motions for sanctions against Low.[11] The court also reiterated that it denied Low's motions for admission on the ground that Low had violated the same rule in a separate matter.[12]

Gonzalez-Lopez appealed to the Eighth Circuit Court of Appeals, which vacated the conviction. The Eighth Circuit held that the district court erred in denying Low's motions for admission because the district court misinterpreted the Missouri Rules of Professional Conduct as prohibiting Low's conduct.[13] The court reasoned that the erroneous denials of Low's motions for admission constituted a violation of Gonzalez-Lopez's Sixth Amendment right to counsel of his choosing and was not subject to harmless-error review.[14] The United States Supreme Court granted certiorari to decide whether the erroneous disqualification of a criminal defendant's choice of counsel violates the Sixth Amendment to the United States Constitution.[15]

II. LEGAL BACKGROUND

A. *Overview*

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."[16] In England prior to 1836, a person charged with a felony or treason was permitted the aid of counsel, whose sole purpose was to answer legal questions posed by the defendant.[17] However, persons charged with misdemeanors or who were parties to a civil case

10. *Id.*
11. *Id.*
12. *Id.* at 2560-61.
13. *Id.* at 2561.
14. *Id.*
15. *Id.* at 2560. The Court's majority observed that the Government had conceded the district court erroneously deprived Gonzalez-Lopez of his right to counsel. *Id.* at 2563.
16. U.S. CONST. amend. VI.
17. Powell v. Alabama, 287 U.S. 45, 60 (1932). This case is often referred to as the "Scottsboro Boys Case."

were entitled to the full assistance of counsel.[18] Of course, the English common law rule was not without its critics. Blackstone denounced the rule, writing that it was inconsistent with the remainder of English law that provided for the humane treatment of prisoners.[19] In America, twelve of the thirteen colonies rejected the English common law rule, recognizing that the right to counsel should be available for all serious criminal prosecutions.[20] Throughout the United States Supreme Court's twentieth-century jurisprudence, the Court has frequently examined the protections afforded to criminal defendants through the Sixth Amendment. The Court's decision in *Gonzalez-Lopez* was merely another attempt to clarify its meaning and scope.

B. The Scope of the Sixth Amendment Prior to Gonzalez-Lopez

During the first half of the twentieth century, the United States Supreme Court recognized that the Sixth Amendment confers upon a criminal defendant the right to retain counsel as well as to have court-appointed counsel. The Court recognized this right in *Johnson v. Zerbst*.[21] There, the defendant appealed the denial of his writ of habeas corpus. Prior to his incarceration, the defendant and his codefendant were tried and convicted without the assistance of counsel for counterfeiting money.[22] The Court reversed the trial court's dismissal of the habeas petition,[23] holding that in all criminal proceedings in *federal court* where the penalty is the loss of life or liberty, the accused has the right to the assistance of counsel unless the accused waives that right.[24] While the Court had previously recognized the right to the assistance of counsel at trial was a fundamental right protected by the Fourteenth Amendment,[25] the Court for the first time in *Johnson* acknowledged that this same right is also protected by the Sixth Amendment.

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18. *Id.*

19. *Id.* (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (1769)).

20. *Id.* at 64-65.

21. 304 U.S. 458 (1938).

22. *Id.* at 460.

23. *Id.* at 469.

24. *Id.* at 463.

25. *See Powell*, 287 U.S. at 69. In *Powell* the Court surveyed the thirteen colonies' practices regarding a criminal defendant's right to the assistance of counsel. *Id.* at 61-64. The Court noted that of the thirteen colonies, twelve fully recognized the right to counsel in all criminal proceedings. *Id.* at 64-65. This led the Court to conclude that a federal or state court's denial of the right to counsel would violate the defendant's right to due process contained in the federal Constitution. *Id.* at 69.

Although the Court in *Johnson* recognized that the Sixth Amendment guarantees criminal defendants the right to the assistance of counsel, the Court had not yet extended the Sixth Amendment's guarantee to indigent state court defendants in the absence of special circumstances. Twenty-five years after *Johnson*, the Court in *Gideon v. Wainwright*[26] held that a trial court's refusal to appoint counsel to an indigent defendant pursuant to the Sixth Amendment violated the defendant's right to due process of law.[27] The Court observed that "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."[28] The majority turned to language contained in *Powell*, decided thirty years earlier, to bolster its expansive interpretation of the Sixth Amendment. Justice Black, writing for the majority, quoted Justice Sutherland's rationale from *Powell*, noting that "'[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel.'"[29] Thus, the Court had come full circle by fully incorporating the Sixth Amendment to the states and ruling that regardless of socioeconomic status, defendants in all criminal matters must be allowed the assistance of counsel.

However, an indigent defendant's Sixth Amendment right to the assistance of counsel is not unlimited. In *Morris v. Slappy*,[30] the Court reversed the Ninth Circuit's grant of a habeas corpus petition to a defendant who complained that his constitutional rights were violated when the trial court denied his motion for a continuance based upon the substitution of one public defender for another.[31] The Ninth Circuit held that the Sixth Amendment protects a defendant's right to a "meaningful attorney-client relationship,"[32] which the trial court inhibited when it refused to consider allowing the defendant to be represented by his original public defender.[33] But as the Court observed, the Ninth Circuit's conclusion that the Sixth Amendment guarantees a right to a meaningful attorney-client relationship was

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26. 372 U.S. 335 (1963).

27. *Id.* at 339, 344 (overruling Betts v. Brady, 316 U.S. 455, 472, 473 (1942), where the Court held that the Due Process Clause of the Fourteenth Amendment only requires courts to appoint counsel to criminal defendants when extenuating circumstances exist that make such an appointment necessary for the defendant to receive a fair trial).

28. *Id.* at 344 (emphasis added).

29. *Id.* at 344-45 (quoting *Powell*, 287 U.S. at 68-69).

30. 461 U.S. 1 (1983).

31. *Id.* at 3, 15.

32. Slappy v. Morris, 649 F.2d 718, 720 (9th Cir. 1981).

33. *Morris*, 461 U.S. at 11.

"without basis in the law."[34] As a result, the Court ordered the court of appeals to reinstate the district court's judgment denying the writ of habeas corpus to the defendant.[35]

The Court took the next step in broadening the protections of the Sixth Amendment in *Faretta v. California*[36] by holding that the right to self-representation is within the purview of the Sixth Amendment, provided the defendant makes the decision to waive counsel voluntarily and intelligently.[37] In *Faretta* the defendant waived his right to counsel despite the trial judge's belief that the waiver was a mistake. Prior to the trial, the trial judge appointed a public defender to represent the defendant, finding that Faretta had not intelligently and knowingly waived his right to the assistance of counsel.[38] Furthermore, the trial judge decided Faretta did not have a constitutional right to conduct his own defense.[39] The California Court of Appeals affirmed the trial judge's decision, the California Supreme Court denied review, and the United States Supreme Court granted certiorari.[40]

In vacating the trial court's decision,[41] the Court observed that the right to self-representation is grounded in the nation's legal history and protected by the Judiciary Act of 1789, the Court's own jurisprudence, and numerous state constitutions.[42] Using these historical foundations for support, the Court concluded that although the right to self-representation is not explicitly contained in the Sixth Amendment, the right can be inferred.[43]

The Court explored the purpose of the Sixth Amendment in more detail in *Wheat v. United States*.[44] There, the defendant was charged with participating in a drug distribution conspiracy whereby he and his codefendants imported thousands of pounds of marijuana from Mexico into the United States. Prior to Wheat's trial, the prosecuting attorney objected to Wheat's attempt to substitute his counsel for another

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34. *Id.* at 13.
35. *Id.* at 15.
36. 422 U.S. 806 (1975).
37. *Id.* at 807.
38. *Id.* at 808, 809-10.
39. *Id.* at 810.
40. *Id.* at 811-12.
41. *Id.* at 836.
42. *Id.* at 812, 816-17. However, the right to self-representation on appeal is not protected by the Sixth Amendment. *See* Price v. Johnston, 334 U.S. 266, 285 (1948).
43. *Faretta*, 422 U.S. at 818-19. As the Court pointed out, "To thrust counsel upon [an] accused, against his considered wish, [would] violate[] the logic of the [Sixth] Amendment . . . . [C]ounsel [would] not be an assistant, but a master." *Id.* at 820.
44. 486 U.S. 153 (1988).

attorney who had obtained an acquittal for one of Wheat's codefendants. The basis for the prosecuting attorney's objection was that the substitution would create a serious conflict of interest for the attorney Wheat wanted. Wheat emphasized that he had the right to have counsel of his own choosing and agreed to waive the conflict, but the prosecuting attorney argued that by allowing the conflict, Wheat would be denied effective assistance of counsel. Furthermore, if he were convicted, his conviction would surely be reversed on appeal.[45] The district court denied the requested substitution, the case proceeded to trial with Wheat's original counsel, and he was convicted.[46] The Ninth Circuit affirmed the conviction, noting the trial court acted within its discretion in denying Wheat's requested substitution.[47]

Because the courts of appeals were in disagreement as to when a district court could override a criminal defendant's waiver of his attorney's conflict of interest, the United States Supreme Court granted certiorari.[48] Although the Court affirmed the court of appeals and held that a presumption exists in favor of a defendant's choice of counsel, which can be overcome by showing a serious potential for conflict,[49] the Court's opinion is especially significant for what it said about the scope of the Sixth Amendment. Chief Justice Rehnquist, writing for the majority, noted that while the Sixth Amendment guarantees criminal defendants the right to select who will represent them, this is not the Amendment's central aim.[50] Instead, the Sixth Amendment's purpose "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."[51]

Thus, throughout the last century, the Court has frequently sought to clarify its Sixth Amendment jurisprudence by carefully examining the Amendment's meaning and purpose. As is readily apparent in the above-cited opinions, the Court frequently relies on historical precedent for guidance in deciding which rights the Sixth Amendment actually guarantees.

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45. *Id.* at 154-56.
46. *Id.* at 157.
47. *Id.*
48. *Id.* at 158.
49. *Id.* at 164.
50. *Id.* at 159 (citing *Morris*, 461 U.S. at 13-14).
51. *Id.* (citing *Morris*, 461 U.S. at 13-14).

C. *The Right to Appeal*

Generally, the final judgment rule bars a defendant from appealing a trial judge's decision until the defendant has been convicted.[52] However, some pretrial orders may be appealed immediately prior to the entry of final judgment because they are "'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'"[53] This exception is known as the *collateral order doctrine*.[54] In *Flanagan v. United States*,[55] the United States Supreme Court held that a trial judge's pretrial decision to disqualify a criminal defendant's chosen counsel is not a collateral order subject to immediate appeal.[56] There, the Court distinguished a pretrial denial of counsel of choice from other pretrial orders, stating that the pretrial disqualification of counsel of choice will not become moot after the defendant is convicted and sentenced.[57] As the Court itself recognized, this approach allowed it to avoid altogether the issue of whether the defendant must show the disqualification order was prejudicial.[58]

D. *The Consequences of Constitutional Errors*

The Supreme Court has created different remedies for constitutional errors that occur at a defendant's criminal trial. Some constitutional errors require the defendant to prove prejudice in order for the conviction to be reversed. Conversely, some constitutional errors are so significant that their presence at trial results in the automatic reversal of the defendant's conviction. First, this section examines the Court's adoption of the federal harmless error rule, which is generally used to assess the gravity of constitutional errors. Second, this section examines the two categories the Court has used to quantify constitutional errors that occur at trial.

Generally, absent a showing of prejudice by the defendant, insignificant constitutional errors that occur at trial will not result in the reversal of the defendant's conviction. In *Chapman v. California*,[59] the

52. 28 U.S.C. § 1291 (2000).
53. Will v. Hallock, 126 S. Ct. 952, 957 (2006) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).
54. *Id.*
55. 465 U.S. 259 (1984).
56. *Id.* at 270.
57. *Id.* at 266.
58. *Id.* at 269.
59. 386 U.S. 18 (1967).

Supreme Court created the federal harmless error rule, which applies to inconsequential constitutional errors that occur at trial.[60] There, the defendants were tried and convicted of robbing, kidnapping, and murdering a bartender.[61] Throughout the trial, the prosecutor frequently commented upon the defendants' choices not to testify, a privilege granted to prosecutors by the California constitution.[62] Following their conviction but prior to appeal, the United States Supreme Court decided *Griffin v. California*,[63] where the Court declared unconstitutional the portion of the California constitution that permitted prosecutors to comment negatively on a defendant's decision not to testify at trial.[64]

On appeal to the United States Supreme Court, the defendants argued that *any* violation of their federal constitutional rights should result in the automatic reversal of their conviction.[65] Ultimately, the Court reversed the defendants' convictions, but refused to adopt their sweeping approach to analyzing constitutional errors.[66] Instead, the Court decided that "unimportant and insignificant" constitutional errors that have little or no likelihood of changing the result of the trial can be deemed harmless and will not result in the reversal of a conviction.[67]

A quarter of a century later in *Arizona v. Fulminante*,[68] the Court discussed the second category of constitutional errors—structural defects. There, the Court divided constitutional errors that occur at trial into two categories: (1) trial errors, which are subject to harmless error review and require the defendant to prove prejudice and (2) structural defects, which are not.[69] Trial errors are those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[70]

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60. *Id.* at 21-22.
61. *Id.* at 18-19.
62. *Id.* at 19.
63. 380 U.S. 609 (1965).
64. *Chapman*, 386 U.S. at 19-20.
65. *Id.* at 20.
66. *Id.* at 21-22, 26.
67. *Id.* at 22. According to the Court's opinion, one who seeks to prove the harmlessness of a constitutional error must do so beyond a reasonable doubt. *Id.* at 24.
68. 499 U.S. 279 (1991).
69. *Id.* at 307-08, 309-10. The Court also uses the prejudice test for other types of error. For example, the Court held in *Strickland v. Washington* that to prevail on an ineffective assistance of counsel claim, a defendant must show (1) that defense counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. 466 U.S. 668, 687 (1984).
70. *Fulminante*, 499 U.S. at 307-08.

Most constitutional errors are trial errors. These include an unconstitutionally overbroad jury instruction at the sentencing phase of a capital case; a jury instruction containing an erroneous conclusive presumption; the denial of the defendant's right to be present at trial; the denial of counsel at a preliminary hearing in violation of the Sixth Amendment; the trial judge's failure to instruct the jury on the presumption of innocence; and numerous other errors committed by a trial judge.[71]

Conversely, a structural defect in a criminal defendant's trial is not subject to the harmless error rule because the trial as a whole has been tainted. As Justice Rehnquist pointed out in *Fulminante*, structural defects are those "affecting the framework within which the trial proceeds" and are not merely "an error in the trial process itself."[72] The Court listed various structural defects in *Neder v. United States*.[73] Those defects germane to the Sixth Amendment are the complete denial of counsel and the denial of self-representation at trial.[74] Others include a biased trial judge, race discrimination in grand jury selection, the denial of a public trial, and a defective jury instruction as to reasonable doubt.[75] Thus, because structural defects shake the trial to the core, their presence indicates that the defendant's constitutional rights have been clearly violated.

As is clearly visible, the Court's Sixth Amendment jurisprudence has evolved rapidly during the twentieth century. First, in *Johnson* the Court recognized that the Sixth Amendment protects a criminal defendant's right to counsel in the federal system.[76] Years later, in the landmark case of *Gideon v. Wainwright*, the Court extended the protections of the Sixth Amendment to all criminal defendants, whether rich or poor, in all federal and state courts.[77] Next, the Court in *Faretta* expanded the Sixth Amendment's Assistance Clause to include the right to self-representation.[78] Of course, the Assistance Clause is not without its limits. The Sixth Amendment does not provide that criminal defendants shall have a meaningful relationship with their attorneys.[79] Nor does it permit a criminal defendant an unconditional choice of counsel, especially where the choice will result in a conflict of

71. *Id.* at 306-07. The full text of the Court's opinion contains a more extensive list of trial errors.
72. *Id.* at 310.
73. 527 U.S. 1 (1999).
74. *Id.* at 8.
75. *Id.*
76. 334 U.S. at 463.
77. 372 U.S. at 339.
78. 422 U.S. at 818.
79. *Morris*, 461 U.S. at 13.

interest between the chosen counsel and the criminal defendant.[80] In deciding *United States v. Gonzalez-Lopez*,[81] the Court deemed the erroneous disqualification of a criminal defendant's chosen counsel to be such a violation of the Sixth Amendment that its occurrence constituted a structural defect in the trial, meriting an automatic reversal of the conviction.[82]

III. COURT'S RATIONALE

In *United States v. Gonzalez-Lopez*,[83] the Court granted certiorari to determine whether the erroneous disqualification of a criminal defendant's chosen counsel should result in the automatic reversal of the defendant's conviction.[84] The Court held that it should.[85]

A. *The Majority's Opinion*

Justice Scalia, who penned the majority opinion, broke from his usual bloc when deciding in favor of reversal.[86] After reviewing the facts, the Court outlined the Government's argument: Gonzalez-Lopez had to show that either (1) his substitute counsel was so deficient that he was prejudiced or (2) the trial court's denial of his choice of counsel was inherently prejudicial, even if the substitute counsel's representation was adequate.[87] The Court summarized the Government's argument, writing that "[a] trial is not unfair and thus the Sixth Amendment is not violated . . . unless a defendant has been prejudiced."[88] As the Court pointed out, the Government relied heavily on the Court's ineffective assistance of counsel jurisprudence to support its argument, specifically *Strickland v. Washington*.[89]

However, the Court distinguished a defendant's right to effective assistance of counsel from the right to select counsel.[90] The Court remarked that the former is derived from the Sixth Amendment's guarantee to a fair trial, while the latter can be "regarded as the root

80. *Wheat*, 486 U.S. at 164.
81. 126 S. Ct. 2557 (2006).
82. *Id.* at 2564, 2566.
83. 126 S. Ct. 2557 (2006).
84. *Id.* at 2560.
85. *Id.* at 2566.
86. Justices Stevens, Souter, Ginsburg, and Breyer joined in the majority opinion. *Id.* at 2559. Justice Alito wrote a dissent, which was joined by Chief Justice Roberts and Justices Kennedy and Thomas. *Id.* at 2566.
87. *Id.* at 2561.
88. *Id.* at 2562.
89. *Id.* at 2561-63; Strickland v. Washington, 466 U.S. 668 (1984).
90. *Gonzalez-Lopez*, 126 S. Ct. at 2562-63.

meaning of the [Sixth Amendment's] constitutional guarantee."[91] This difference meant a prejudice inquiry was unnecessary and inappropriate because the "[d]eprivation of the right [to choose] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received."[92]

Because the Government had previously conceded that the trial court's disqualification of attorney Low was erroneous,[93] and because, as the Court had already concluded, the erroneous deprivation of that right constitutes a violation of the Sixth Amendment,[94] the limited issue pending resolution by the Court was whether Sixth Amendment violations are subject to review for harmlessness.[95] To decide that issue, the Court resorted to the two categories of constitutional errors that it established in *Arizona v. Fulminante*.[96] Deciding that the consequences of an erroneous deprivation of a defendant's right to choice of counsel are speculative, the Court labeled the deprivation a structural error.[97] The Court's rationale for its decision was that the choice of one attorney over another could lead to a myriad of possibilities for the defendant at trial, including differences in jury selection, theory of the case, and whether to plea bargain, as well as a host of other possibilities.[98]

The Court further elaborated on the difference between ineffective assistance of counsel and the erroneous deprivation of the right to choice of counsel. In delineating the differences, the Court stated that if a defendant alleges ineffective assistance of counsel, the record will reveal "identifiable mistakes" that can be used to assess how the trial was affected.[99] However, if a defendant's choice of counsel is wrongfully denied, the best a reviewing court can do to evaluate the effect the disqualification had on the defendant's trial is to divine which matters the disqualified counsel would have handled differently.[100] The reviewing court would then need to guess as to the effect the different choices would have made on the defendant's trial.[101] The inability to identify the method for measuring the effect that the erroneous

91. *Id.* at 2563.
92. *Id.*
93. *Id.* at 2561, 2563.
94. *Id.*
95. *Id.* at 2563.
96. 499 U.S. 279, 307-08, 309-10 (1991).
97. *Gonzalez-Lopez*, 126 S. Ct. at 2564.
98. *Id.* at 2564-65.
99. *Id.* at 2565.
100. *Id.*
101. *Id.*

disqualification would have on a criminal defendant weighed heavily on the Court, which stated simply, "The difficulties of conducting the two assessments of prejudice [for ineffective assistance of counsel versus erroneous disqualification] are not remotely comparable."[102]

The Court concluded by reminding lower courts that its holding will do nothing to limit their authority to schedule trials or to decide whether to disqualify an attorney.[103] Finally, the Court limited its holding only to those defendants who do not require court-appointed counsel.[104]

B. Justice Alito's Dissent

Justice Alito, along with Chief Justice Roberts, Justice Kennedy, and Justice Thomas, wrote a dissent critical of the majority's interpretation of the Sixth Amendment. First, Justice Alito took issue with the way the majority characterized the guarantees of the Sixth Amendment.[105] According to the dissenters, the Sixth Amendment's focus is on the effectiveness of representation a criminal defendant receives at trial, not "the identity of the provider."[106] The dissent posited that its interpretation is more in line with the purpose for which the Amendment was enacted, namely, to dismantle the English common law rule that limited a criminal defendant's ability to be assisted by counsel.[107] The dissent suggested its own holding, writing that in the absence of "'an identifiable difference in the quality of representation between the disqualified counsel and the attorney who [actually] represents the defendant at trial,'" reversal is inappropriate because there has been no violation of the Sixth Amendment.[108]

Next, the dissent assumed *arguendo* that the erroneous disqualification of counsel of choice always violates the Sixth Amendment, but refused to agree that reversal is always required.[109] Instead, the dissent suggested that the appropriate remedy for the erroneous disqualification of counsel is governed by Federal Rule of Criminal Procedure 52(a),[110] not the Constitution, which does not mandate remedies for the violations of its provisions.[111] Under Rule 52(a), an

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102. *Id.*
103. *Id.* at 2565-66.
104. *Id.* at 2565.
105. *Id.* at 2566 (Alito, J., dissenting).
106. *Id.*
107. *Id.* at 2566-67.
108. *Id.* at 2568 (quoting Rodriguez v. Chandler, 382 F.3d 670, 675 (7th Cir. 2004)).
109. *Id.* at 2569.
110. FED. R. CRIM. P. 52(a).
111. *Gonzalez-Lopez*, 126 S. Ct. at 2569 (Alito, J., dissenting).

error not affecting a party's substantial rights should be disregarded.[112]

The dissent next speculated that the majority's approach could lead to the reversal of a defendant's conviction where the second-choice counsel proved to be better than the first.[113] Justice Alito observed the difference between imposing a back-up attorney on a criminal defendant and completely denying the defendant the right to be represented by any counsel.[114] He noted that the latter is the "epitome of fundamental unfairness . . . as far as the effect on the outcome is concerned," while the former may be harmless.[115]

The dissent elaborated on this scenario, proposing a hypothetical situation to illustrate the anomalous outcomes that may result from the majority's decision.[116] In the hypothetical, a criminal defendant's first choice of counsel, a person with little criminal law experience, is erroneously disqualified.[117] The second choice, a nationally acclaimed criminal defense expert, obtains acquittals for the defendant on most but not all counts.[118] If the defendant appeals, his conviction will be automatically reversed, even if he admits that the second attorney provided better representation than any other attorney in the country could have provided.[119] Surely, argued the dissent, such a result could not be what the Sixth Amendment mandates.[120]

Finally, the dissent concluded by commenting on the severity of the consequences the majority's holding will have in the federal court system and other court systems that disallow defendants from making interlocutory appeals until a final judgment is entered.[121] Referencing *Flanagan v. United States*,[122] the dissent commented that in such systems, a full trial must first be conducted before the appeal may be heard.[123] If the trial judge erred in disqualifying the defendant's first

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112. *Id.*
113. *Id.* at 2569.
114. *Id.* at 2570.
115. *Id.* Justice Alito mentioned that often the prosecution may not be able to prove beyond a reasonable doubt that the erroneous disqualification of counsel was harmless. Nonetheless, he objected to the majority's wholesale elimination of the possibility of proving harmlessness. *Id.*
116. *Id.* at 2570-71.
117. *Id.*
118. *Id.* at 2571.
119. *Id.*
120. *Id.*
121. *Id.*
122. 465 U.S. 259 (1984).
123. *Gonzalez-Lopez*, 126 S. Ct. at 2571.

choice, the appellate court has no choice but to order a new trial, regardless of a showing of prejudice.[124]

IV. IMPLICATIONS

The implications of *United States v. Gonzalez-Lopez*[125] on trial courts will be felt immediately. First, judges must now take greater care in deciding whether to disqualify a criminal defendant's chosen counsel. Formerly, a trial judge had broad discretion to disqualify an attorney due to scheduling conflicts, ethical violations, and conflicts of interest. Now, a judge may fear disqualifying too quickly a criminal defendant's counsel of choice for fear of being reversed on appeal. While the majority's holding may seem like a good result at first glance, the Court's decision has in all likelihood created a chilling effect on judges' ability to exercise their discretion.

Second, the Court's rationale conflicts with its past decisions, especially *Wheat v. United States*.[126] In *Wheat* the Court interpreted the Sixth Amendment as guaranteeing the right of a criminal defendant to have an effective advocate.[127] While the Court recognized that the right to select one's advocate was protected by the Sixth Amendment, the Court specifically noted in *Wheat* that the protection of such a right was not the primary focus of the Amendment.[128] However, in *Gonzalez-Lopez*, the majority specifically disregarded this language and stated that the "right to select counsel of one's choice . . . has been regarded as the root meaning of the [Sixth Amendment's] constitutional guarantee."[129] Anyone reading *Wheat* with an unbiased view will surely conclude that this is not how the Court in *Wheat* interpreted the protections of the Sixth Amendment.

Third, the Court's decision fails to protect the rights of indigent criminal defendants. As Justice Scalia noted, the reversal of a conviction due to the erroneous disqualification of counsel does not apply to those requiring court-appointed counsel.[130] However, as the Court observed, the erroneous disqualification of one's lawyer is a structural error that goes to the heart of the criminal proceeding.[131] Absent from the majority's opinion is any explanation for why this right is sacrosanct.

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124. *Id.*
125. 126 S. Ct. 2557 (2006).
126. 486 U.S. 153 (1988).
127. *Id.* at 159.
128. *Id.*
129. *Gonzalez-Lopez*, 126 S. Ct. at 2563 (citing *Wheat*, 486 U.S. at 159).
130. *Id.* at 2565.
131. *Id.* at 2564.

If the right to choose one's counsel is such an integral part of the trial process that the erroneous disqualification of one's attorney undermines the trial as a whole, why should this right not apply equally to rich and poor alike?

Perhaps the issue is one of both convenience and economics. Of course, those who protested years ago against *Gideon's* requirement that all indigent criminal defendants be entitled to legal representation likely argued that requiring the states to supply all criminal defendants with legal representation would impose an impossible financial burden on the states. Nonetheless, because the right to counsel was fundamental, all states had to protect the right no matter the cost. Thus, if the Court truly believes that the right to counsel of choice is a fundamental right worthy of protection, it should be willing to extend that right to *all* persons, regardless of the financial imposition.

Clearly, the dissent is more persuasive in light of these considerations. As noted above, *Gonzalez-Lopez's* full impact has not yet been fully realized. Perhaps that is a good thing for the criminal justice system.

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