No. 05-352

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CUAUHTEMOC GONZALEZ-LOPEZ

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice requires automatic reversal of his conviction.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 399 F.3d 924. The opinion of the court of appeals in a related case, reversing the district court's imposition of sanctions against respondent's counsel of choice, is reported at 403 F.3d 558.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2005. Petitions for rehearing were denied on May 19, 2005. App., *infra*, 21a. On August 2, 2005, Justice Thomas extended the time within which to file a

petition for a writ of certiorari to and including September 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution 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.

STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Eastern District of Missouri on one count of conspiring to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 292 months of imprisonment. The court of appeals reversed, holding that the district court erred in denying the applications for admission *pro hac vice* of respondent's chosen attorney, thereby denying respondent his Sixth Amendment right to be represented by counsel of choice. The court of appeals further held that the district court's error was a structural defect that required automatic reversal of respondent's conviction. App., *infra*, 1a-20a.

1. On January 7, 2003, a grand jury sitting in the Eastern District of Missouri charged petitioner with

conspiring to distribute more than 100 kilograms of marijuana. Respondent's family hired Texas attorney John Fahle to represent respondent. Fahle thereafter appeared on respondent's behalf at the arraignment and detention hearing. App., *infra*, 2a.

Shortly after he was arraigned, respondent called California attorney Joseph Low to discuss the possibility of Low's either assisting Fahle or replacing him. Respondent had learned of Low's reputation as a trial attorney from the defendants in another drug conspiracy case in the same district. After meeting with Low at the jail in Farmington, Missouri, respondent retained him. App., *infra*, 2a.

On March 4, 2003, both Fahle and Low attended an evidentiary hearing on behalf of respondent. Although Low had not yet entered an appearance, the Magistrate Judge accepted Low's provisional entry on the understanding that Low would file a motion for admission *pro hac vice*. The Magistrate Judge subsequently rescinded Low's provisional entry when Low violated the court's rule restricting cross-examination of a witness to one lawyer. App., *infra*, 2a-3a.

One week later, respondent informed Fahle that he wanted Low to be his sole attorney. On March 17, 2003, Low filed an application for admission *pro hac vice*. The district court denied it the following day. Low filed a second *pro hac vice* application on April 14, 2003, which was also denied. Low then filed an application for a writ of mandamus in the court of appeals, seeking to compel the district court to admit Low. The court of appeals dismissed Low's application. App., *infra*, 3a.

On April 25, 2003, Fahle moved to withdraw as counsel for respondent and to continue respondent's trial. The district court granted both motions and ordered

respondent to retain new counsel by May 5, 2003.[1] On advice from Low, respondent retained local attorney Karl Dickhaus. Subsequently, the district court issued an order explaining why it had denied Low's motions for admission *pro hac vice*. App., *infra*, 3a-4a. The court indicated that in another case before it, Low had "contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting." *Id.* at 4a (quoting district court's June 3, 2003 order).

On July 7, 2003, respondent's trial commenced. That day the district court denied Low's third motion for admission *pro hac vice* and Dickhaus's request that Low be permitted to sit at counsel table. Instead, the district court limited Low to the public section of the courtroom and forbade contact between Low and Dickhaus during trial proceedings. Respondent himself was unable to meet with Low until the district court, upon learning that Low had been prevented from visiting respondent at the jail, ordered that jail visits by Low be permitted. On July 11, 2003, the jury found respondent guilty on the sole conspiracy count. App., *infra*, 5a.

2. The court of appeals reversed based on respondent's inability to have Low represent him at trial. App., *infra*, 1a-20a. The court addressed "only the primary argument raised by [respondent] challenging the

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[1] Fahle also moved for sanctions against Low, contending that Low had violated Missouri's rules of professional conduct by communicating with respondent without Fahle's permission. App., *infra*, 3a-4a. The district court granted Fahle's motion for sanctions on August 23, 2003, more than a month after respondent was convicted of the drug trafficking charge. *Id.* at 5a. The court of appeals reversed. See *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low).

district court's denial of admission pro hac vice to the attorney he selected to represent him in the criminal proceeding." *Id.* at 6a. The court initially observed that "[a] non-indigent criminal defendant's Sixth Amendment rights encompass the right to be represented by the attorney selected by the defendant." *Ibid.* At the same time, the court of appeals explained that the right to counsel of choice "is not absolute," *id.* at 7a, but rather must be "carefully balance[d] * * * against the court's interest in the orderly administration of justice," *ibid.* (internal quotation marks omitted).

The court of appeals found it "clear from the record in this case [that] the district court denied [Low's] application for pro hac vice admission because the court believed Low violated [Missouri Rule of Professional Conduct] 4.4-2 when Low communicated with the represented defendants in [*United States* v. *Serrano et al.*, No. 4:01CR450-JCH (E.D. Mo.)] without obtaining permission from the attorneys who represented them at the time." App., *infra*, 11a. As it explained in its companion decision, see *United States* v. *Gonzalez-Lopez*, 403 F.3d 558 (8th Cir. 2005) (appeal of Joseph Low), the court of appeals believed that the district court's interpretation of that Missouri Rule of Professional Conduct was "not correct," because the rule forbade contact only when the attorney was representing another party in the matter. App., *infra*, 11a.[2] In particular, the court of

[2] The court of appeals noted that "[t]here is no suggestion in the [district court's] order that Low was representing any other party in the case when he communicated with the [*Serrano*] defendants." App., *infra*, 10a. In fact, during the time at issue, Low did represent one of the defendants in the *Serrano* case. See Gov't Pet. for Panel Reh'g 3. The government nevertheless does not challenge in this Court the court of appeals' ruling that the district court's refusal to admit Low *pro hac vice* was unjustified.

appeals reasoned, "the district court's interpretation of Rule 4-4.2 would unjustifiably prevent parties in a litigation from consulting with other attorneys to obtain alternative advice, hire additional counsel, or hire different counsel." *Id.* at 12a.

The court of appeals acknowledged that "an attorney's past ethical violations may affect the administration of justice within the court and therefore outweigh the Sixth Amendment presumption in favor of the defendant's counsel of choice." App., *infra*, 13a. But the court found it "clear from the record [that respondent's] Sixth Amendment right played no part in the district court's decision to deny Low pro hac vice admission." *Ibid.* The court therefore concluded that "the district court erred in denying Low's application for admission pro hac vice." *Ibid.*

Next, the court of appeals held that the error "results in automatic reversal of the conviction." App., *infra*, 16a. The court acknowledged that "most constitutional errors in criminal trials do not require automatic reversal of the conviction," *id.* at 13a (citing *Neder* v. *United States*, 527 U.S. 1, 7-8 (1999)), and that *Neder* defined the category of structural errors narrowly to include only "a limited class of fundamental constitutional errors" that "are so intrinsically harmful as to require automatic reversal * * * without regard to their effect on the outcome," *id.* at 14a (quoting *Neder*, 527 U.S. at 7). The court of appeals further observed that this Court "has not decided whether harmless error review applies to the denial of the Sixth Amendment right to be represented by the attorney chosen by the defendant." *Id.* at 15a. The court nevertheless sided with "the majority of circuit courts" (*id.* at 16a) that held, before *Neder*, that "a criminal defendant who is denied the Sixth Amendment right to be represented

by his chosen attorney does not have to demonstrate prejudice to obtain reversal of the conviction." *Id.* at 15a-16a (citing cases).[3]

The court of appeals reasoned that "the denial of the right to counsel of choice clearly belongs in the class of fundamental constitutional errors which reflect a defect in the framework of the trial mechanism and 'defy analysis by harmless error standards.'" App., *infra*, 17a (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991)). The court first explained that, unlike "trial error[s]" that are properly subject to harmless-error review, *id.* at 16a, the denial of counsel of choice, "[l]ike the denial of the right to self-representation and the denial of the right to counsel, * * * infects the entire trial process," *id.* at 18a (internal quotation marks omitted), such that it cannot be "quantitatively assessed in the context of other evidence presented," *id.* at 16a. The court carried the analogy to the right to self-representation one step further, explaining that the denial of either right can "never be harmless," because both rights "reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id.* at 18a-19a (quoting *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984)).

Finally, the court of appeals concluded that "[r]equiring a criminal defendant to demonstrate prejudice from the denial of the right to be represented by his chosen counsel would essentially require the defendant

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[3] The court of appeals acknowledged that the Seventh Circuit rejected an automatic reversal rule. See App., *infra*, 16a (citing *Rodriguez* v. *Chandler*, 382 F.3d 670, 675 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005), and noting parenthetically that *Chandler* "adopt[ed] a middle-ground 'adverse effect' standard").

to demonstrate [that] the attorney who represented him at trial rendered deficient assistance." App., *infra*, 19a-20a. That, the court added, "would effectively obliterate the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, * * * by collapsing th[at] right * * * into the right to receive effective assistance of counsel at trial." *Id.* at 20a. Accordingly, the court of appeals vacated respondent's conviction and remanded for a new trial. *Ibid.*

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has held that the denial of a criminal defendant's right to counsel of choice constitutes a fundamental Sixth Amendment violation warranting automatic reversal of a conviction. That ruling conflicts with this Court's right-to-counsel decisions which hold generally that a criminal defendant cannot obtain reversal of his conviction unless he establishes that an alleged error implicating his Sixth Amendment right to counsel compromised his right to a fair trial. See *Strickland* v. *Washington*, 466 U.S. 668 (1984); *United States* v. *Cronic*, 466 U.S. 648 (1984). The court of appeals' decision also conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (2004), cert. denied, 125 S. Ct. 1303 (2005), which rejected a rule of automatic reversal for denial of the right to counsel of choice. The court's decision, if allowed to stand, will impair the effective administration of justice, because a rule requiring a retrial when the defendant received both the appearance and the reality of a fair trial imposes unnecessary burdens on both the government and the courts and creates an unjustified risk that guilty defendants will escape punishment. This Court should therefore grant certiorari to review the Eighth Circuit's decision.

1. The court of appeals' holding that the right to counsel of choice is so fundamental that its denial triggers automatic reversal cannot be reconciled with this Court's approach to alleged Sixth Amendment violations generally or with the secondary Sixth Amendment status this Court has accorded the defendant's qualified right to choose his counsel.

a. This Court's right-to-counsel cases make clear that a criminal defendant alleging a Sixth Amendment violation generally must establish that the alleged error deprived him of a fair trial. In *Strickland*, this Court held that a criminal defendant alleging that his counsel provided ineffective assistance must establish not only that "counsel's performance was deficient," but also that counsel's "deficient performance prejudiced the defense." 466 U.S. at 687. The Court explained that "[u]nless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Ibid.*

Strickland's requirement that a defendant demonstrate prejudice to establish a Sixth Amendment violation implemented the basic principle that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658. That rule reflects the fact that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Ibid.*; see *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002); *Wheat* v. *United States*, 486 U.S. 153, 159 (1988).

b. The court of appeals rejected this Court's general rule in this case, concluding that "the denial of the right to counsel of choice clearly belongs in the class of fun-

damental constitutional errors" requiring automatic reversal of a conviction. App., *infra*, 17a. That holding reflects a misunderstanding of the nature of a criminal defendant's right to counsel of choice. As this Court explained in *Wheat*, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the 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." 486 U.S. at 159. For that reason, "in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.'" *Ibid.* (quoting *Cronic*, 466 U.S. at 657 n.21); see *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.").

This Court has thus made clear that the right to counsel of choice lies at the periphery of the Sixth Amendment, not at its core. The right is qualified in several significant respects. As this Court explained in *Wheat*, the right can be trumped by concerns about, *inter alia*, the fairness of the trial and the administration of justice. 486 U.S. at 159-164. Indeed, a criminal defendant who desires representation has no right to choose an advocate who is not a lawyer, who is disqualified from practice in the relevant jurisdiction, whom "he cannot afford," or who has "an actual conflict" of interest or "a serious potential for [one]." *Id.* at 159, 164.

If a defendant who has demonstrated his counsel's objectively deficient performance must also establish that the deficiences had a "probable effect upon the trial's outcome," *Mickens*, 535 U.S. at 166; see *Strickland*, 466 U.S. at 693-694, then it makes no sense that,

as the court of appeals held, a defendant who receives objectively competent advice is entitled to a new trial without any showing of prejudice just by virtue of a denial of the subsidiary right to counsel of choice.

c. The court of appeals offered three justifications for its decision, none of which withstands scrutiny. First, the court held that the district court's error was structural because it did not "take[] place during the presentation of evidence to the jury," App., *infra*, 16a (internal quotation marks omitted) (citing *Neder* v. *United States*, 527 U.S. 1 (1999)), but rather "infect[ed] the entire trial process from beginning to end," *id.* at 18a (internal quotation marks omitted). It is undoubtedly true that the deprivation of counsel of choice cannot be temporally confined to a particular moment during the trial, but the same is true of other, more fundamental Sixth Amendment claims to which the rule of automatic reversal does not apply. As discussed above, in *Strickland*, 466 U.S. at 693-694, this Court held that a defendant whose counsel performs deficiently—a problem that may pervade the entire trial—must establish that such performance prejudiced him.[4] Similarly, in *Mickens*, 535 U.S. at 172-175, this Court held that a defendant alleging that his counsel labored

[4] In extreme cases of ineffective assistance, where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659, the Court applies a rule of automatic reversal. The Court does so because that kind of ineffective assistance "makes the adversary process itself presumptively unreliable." *Ibid.* The same cannot be said about the denial of counsel of choice, which could result in the defendant's receiving even *more* effective representation. See *Mickens*, 535 U.S. at 169 n.2 (characterizing the decision "to retain a particular lawyer" as "often uninformed") (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980)).

under a conflict of interest relating to a former client must show at the very least that the conflict adversely affected counsel's performance. That conflict is not temporally isolated but pervades the trial. See *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980) (defendant alleging that counsel who represented him and other co-defendants at separate trials and who did not object to the multiple representation must establish that the conflict had an adverse effect on counsel's performance). Thus, the mere fact that the denial of counsel of choice spanned the entire trial is an insufficient basis for applying automatic reversal.

This Court has applied a rule of automatic reversal to Sixth Amendment claims only in exceptional circumstances, such as "where assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens*, 535 U.S. at 166; see *Cronic*, 466 U.S. at 658-660; *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963). "When that has occurred," however, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166. See also *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (automatic reversal when counsel is forced to engage in joint representation of co-defendants over counsel's objection, unless the court determines that there is no conflict). That exception is inapplicable here, where there is *no* inherent likelihood that the verdict was rendered unreliable by the mere fact that respondent was represented by counsel who was not his first choice. Respondent has not argued that his counsel rendered ineffective assistance at trial, and had respondent lacked the resources to retain his chosen counsel, or if his desired counsel had a conflict, he would have had no complaint to make about his trial's fairness at all.

Second, the court of appeals reasoned that the right to counsel of choice is akin to the right to self-representation, the wrongful denial of which is subject to automatic reversal. See *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984). The court explained that "[b]oth rights 'reflect[] constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'" App., *infra*, 18a-19a (quoting *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984)). That analogy is flawed.[5]

The Sixth Amendment "grants to the accused personally the right to make his defense," *Faretta* v. *California*, 422 U.S. 806, 819 (1975), in order to "affirm the dignity and autonomy of the accused," *McKaskle*, 465 U.S. at 176-177. It follows that the violation of the right to self-representation is subject to automatic reversal, because the harm to personal autonomy that denial of the right accomplishes cannot be cured by a reliable jury verdict.

Unlike the right to self-representation—which necessarily reflects the primacy of autonomy over fairness,

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[5] The court of appeals' apparent reliance on *Flanagan* is also flawed. *Flanagan* did not state that the rights to self-representation and to counsel of choice are analogous. The quoted language came from a portion of the Court's opinion in which it *assumed* the two rights were analogous for the purpose of *rejecting* the petitioners' argument that interlocutory review of their pretrial challenge to the disqualification of their chosen counsel was available. See 465 U.S. at 267-269. The Court left open the question whether a defendant complaining about the disqualification of chosen counsel must demonstrate prejudice in order to establish a Sixth Amendment violation. *Ibid.* See *Richardson-Merell, Inc.* v. *Koller*, 472 U.S. 424, 438 (1985) (observing that the Court has not decided whether "prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases").

see *McKaskle*, 465 U.S. at 177 n.8 (exercise of the right to self-representation "usually increases the likelihood of a trial outcome unfavorable to the defendant")—the right to counsel of choice does not stand above procedural fairness concerns. This Court has emphasized that very distinction, pointing out that "[o]ur holding in *Faretta* * * *, that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel." *Wheat*, 486 U.S. at 159 n.3. To the contrary, concerns about procedural fairness and the effective administration of justice restrict a non-indigent defendant's choice of counsel in significant respects. See p. 10, *supra*. The court of appeals therefore erred in equating the right to counsel of choice with the right to self-representation.

Finally, the court of appeals reasoned that applying a rule of automatic reversal is necessary to prevent "collapsing the right to counsel of choice into the right to receive effective assistance of counsel," and thereby "obliterat[ing] the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, a right the Supreme Court recognized in *Wheat*." App., *infra*, 20a. That is incorrect. Even if a defendant could not obtain relief on appeal without establishing that substitute counsel was ineffective, the right to counsel of choice would not be "obliterated." Trial courts would still be under a Sixth Amendment obligation to apply a "presumption in favor of [a defendant's] counsel of choice," *Wheat*, 486 U.S. at 164, and those courts could be expected to carry out that responsibility conscientiously and in good faith, cf. *Mickens*, 535 U.S. at 173 (rejecting automatic reversal as a sanction "to induce * * * trial judges to follow the law" on conflicts

of interest). In those few instances in which the right to counsel of choice is improperly denied, with the result that the defendant proceeded to trial with his second-choice counsel, requiring proof of *that* counsel's ineffectiveness would be consistent with this Court's recognition that the Sixth Amendment right to the assistance of counsel "has been accorded[] * * * not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 166 (internal quotation marks omitted).

But even if *Wheat* is read as suggesting that protection of the right to counsel of choice demands a different showing of deficiency than required in a typical ineffectiveness case, the court of appeals was still incorrect in dispensing with *any* showing of prejudice. A court could apply a rule that vindicates the defendant's interest in retaining counsel of choice without losing sight of the ultimate concerns about the fairness of the trial and the administration of justice that traditionally apply in determining whether an alleged Sixth Amendment violation warrants a new trial.

That rule would have relieved respondent of the burden to show that his substitute counsel rendered deficient performance under the first prong of the *Strickland* test, but would have required respondent to show that his counsel of choice would have pursued a different defense strategy, one that would have created a "reasonable probability that * * * the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Such a modified *Strickland* standard would not burden the defendant with establishing that his second-choice counsel was incompetent, yet would require a retrial only when the denial of the defendant's counsel of choice might well have made a difference to the outcome. Such an inquiry would have to be carried

out with due regard for the often speculative nature of determinations about how counsel of choice would have in fact conducted the defense. But it would avoid the unwarranted retrials required by the court of appeals' rule of automatic reversal (*e.g.*, automatically mandating a retrial on guilt if the defendant were denied a lawyer chosen for his sentencing expertise) and thus would, unlike the court of appeals' rule, respect this Court's "general rule that remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

2. The court of appeals' decision conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (2004), cert. denied, 125 S. Ct. 1303 (2005). There, the Seventh Circuit held that a prisoner collaterally attacking his conviction on the ground that the trial court erroneously disqualified one of his chosen attorneys is not entitled to automatic reversal of his conviction. *Id.* at 675. The court explained that "[a] rule of automatic reversal when the defendant does not get his first-choice lawyer, but requiring proof of prejudice when the defendant does not get even a competent lawyer, would not make sense," *id.* at 674, because "[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," *ibid.*[6]

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[6] The court recognized that "several circuits have held that the denial of the right to choice of counsel never may be deemed harmless." 382 F.3d at 674-675 (citing *United States* v. *Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987); *United States* v. *Voight*, 89 F.3d 1050 (3d Cir.), cert. denied, 519 U.S. 1047 (1996); *Wilson* v. *Mintzes*, 761 F.2d 275 (6th Cir. 1985); *Bland* v. *California*, 20 F.3d 1469 (9th Cir.), cert. denied, 513 U.S. 947 (1994), overruled on other grounds by *Schell* v. *Witek*, 218 F.3d 1017 (9th Cir. 2000)). The

Instead, the Seventh Circuit adopted an "adverse-effect standard" requiring the defendant to show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial," but not a difference so great as "to undermine confidence in the outcome." *Chandler*, 382 F.3d at 675 (characterizing the adverse-effect standard as "midway between automatic reversal and requiring proof of a likely difference in the litigation's outcome"). Recognizing that this Court has left open the question of whether a defendant claiming the denial of the right to counsel of choice must establish prejudice, *id.* at 673-674 (citing *Flanagan*, 465 U.S. at 268-269, and *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 438 (1985)), the court concluded that the "adverse-effect" standard "seems the closest match to situations in which the court wrongly strips the defendant of his preferred lawyer," *id.* at 675.[7]

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court pointed out (382 F.3d at 675), however, that all of those decisions preceded this Court's decisions in *Neder*, *supra*, and *Mickens*, *supra*, both of which emphasized that claims subject to the rule of automatic reversal are the rare exception. See *Neder*, 527 U.S. at 8-9; *Mickens*, 535 U.S. at 166. The First Circuit has acknowledged that it adopted its rule of automatic reversal before *Neder*, and that since that decision, courts have reached "somewhat varying results." *Young* v. *City of Providence ex rel. Napolitano*, 404 F.3d 4, 24 n.14 (2005). See also *United States* v. *Walters*, 309 F.3d 589, 592-593 (9th Cir. 2002) (rejecting rule of automatic reversal for denial of right to counsel of choice at sentencing), cert. denied, 540 U.S. 846 (2003).

[7] Athough *Chandler* addressed the Sixth Amendment claim on collateral review, the court's rejection of automatic reversal was not limited to the specific context or facts of the case. The court rejected the rationale for applying automatic reversal to an error implicating the right to counsel of choice irrespective of the procedural posture in which the claim is raised. See 382 F.3d at 674 ("It

3. This Court should grant certiorari to decide the question left open in *Flanagan*. The court of appeals' decision not only conflicts with this Court's long-standing approach to alleged Sixth Amendment violations and with the decision of another federal court of appeals, but it also compromises the effective administration of justice. Recent decisions of this Court have emphasized that rules of automatic reversal are highly disfavored and should be reserved for only the most egregious constitutional errors that fundamentally undermine the defendant's right to a fair trial.

For example, in *Neder*, this Court explained that the rule of automatic reversal applies "only in a very limited class of cases," namely, those in which the defect asserted "deprive[s] [the] defendant[] of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." 527 U.S. at 8-9. See *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997). This Court in

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is hard to see why violations of the qualified right to counsel of choice should lead to automatic reversal, when deprivation of the absolute right to a competent attorney leads to relief only if prejudice is demonstrable."). Indeed, the court placed reliance on cases decided on direct review, see *ibid.* (citing *United States* v. *Patterson*, 215 F.3d 776, 778-782 (7th Cir.), vacated in part on other grounds, 531 U.S. 1033 (2000), for the point that "the difficulty of showing prejudice from an error * * * does not justify automatic reversal"), and distinguished other circuit decisions applying automatic reversal on direct review not on the ground that those decisions arose on direct review, but on the ground that they preceded *Neder* and *Mickens*, see 382 F.3d at 674-675. Nor does the fact that the defendant in *Chandler* had two lawyers, only one of whom was disqualified, negate the conflict with the decision below. The court categorically rejected automatic reversal, see *id.* at 675, and merely noted that automatic reversal was "particularly" inappropriate on the facts of the case. *Id.* at 674.

Johnson and *Neder* identified only a handful of defects that rise to the level of structural error warranting automatic reversal—namely, a total deprivation of the right to counsel (*Gideon*, *supra*); a biased trial judge (*Tumey* v. *Ohio*, 273 U.S. 510 (1927)); the race-based exclusion of grand jurors (*Vasquez* v. *Hillery*, 474 U.S. 254 (1986)); the right to self-representation at trial *(McKaskle*, *supra*); the right to a public trial (*Waller* v. *Georgia*, 467 U.S. 39 (1984)); and the right to a correct reasonable doubt instruction (*Sullivan* v. *Louisiana*, 508 U.S. 275 (1993)). *Neder*, 527 U.S. at 8; *Johnson*, 520 U.S. at 469.

Proceeding to trial without counsel of choice, but with counsel recommended by counsel of choice, as respondent did here, cannot be said to have led to a trial that could not "reliably serve its function as a vehicle for determination of guilt." *Neder*, 527 U.S. at 9. It certainly does not rise to the level of the few intrinsically harmful errors that this Court has singled out for automatic reversal. Confining the rule of automatic reversal to those narrowly defined circumstances is necessary to "preserv[e] society's interest in the administration of criminal justice." *Rushen* v. *Spain*, 464 U.S. 114, 118 (1983) (per curiam). Because the court of appeals did not so confine the rule here, the decision merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3487

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

CUAUHTEMOC GONZALEZ-LOPEZ,
ALSO KNOWN AS TOMAS, DEFENDANT/APPELLANT

Submitted: Sept. 16, 2004
Filed: Mar. 8, 2005
Rehearing and Rehearing En Banc
Denied: May 19, 2005

OPINION

Before WOLLMAN, RICHARD S. ARNOLD,[1] and BYE, Circuit Judges.

BYE, Circuit Judge.

Cuauhtemoc Gonzalez-Lopez was convicted by a jury of conspiring to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846. On appeal, he argues his conviction should be vacated because the district court violated his Sixth Amendment right to be represented by the counsel of his

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[1] The Honorable Richard S. Arnold died on September 23, 2004. The case has been decided by the remaining members of the panel pursuant to 28 U.S.C. § 46(d) and 8th Cir. R. 47E.

choice at trial by refusing to grant his attorney's applications for admission pro hac vice. Finding a Sixth Amendment violation, we vacate the conviction and remand the case for a new trial.

I

We begin our discussion with a presentation of the background facts.[2] On January 7, 2003, Gonzalez-Lopez was charged with conspiring to distribute more than 100 kilograms of marijuana in the Eastern District of Missouri. Immediately after the arrest, some of his family members hired Texas attorney John Fahle to represent him on the criminal charges. On January 8, 2003, Fahle appeared at the defendant's detention hearing and arraignment. Shortly after the arraignment, Gonzalez-Lopez telephoned California attorney Joseph Low to discuss the possibility of Low either assisting Fahle or assuming the representation. Apparently he had learned of Low's trial prowess from the defendants in an earlier unrelated drug conspiracy trial in the Eastern District of Missouri. At Gonzalez-Lopez's request, Low met with him at the jail in Farmington, Missouri, between January 8 and 10, 2003. Within ten days of this meeting, Gonzalez-Lopez hired Low.

On March 4, 2003, Low traveled to Missouri to attend an evidentiary hearing in the case conducted by the magistrate judge. Fahle also attended the evidentiary hearing on behalf of Gonzalez-Lopez. As of March 4, 2003, Low had not entered his appearance in the case.

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[2] The facts and issues in this case are closely related to those in *Joseph Low, IV v. John Fahle*, 2003 WL 23911038, No. 03-3200 (8th Cir. 2005), in which we examine the district court's imposition of sanctions against Joseph Low, Gonzalez-Lopez's attorney of choice.

The magistrate judge initially accepted Low's provisional entry and permitted Low to participate in the hearing based on Low's assurance he would file a motion for admission pro hac vice. However, during the hearing the magistrate judge rescinded the provisional approval after Low violated the court's rule restricting the cross-examination of a witness to one lawyer by passing notes to Fahle.

Gonzalez-Lopez informed Fahle on March 11, 2003, that he wanted Low to be his sole attorney and asked Fahle to stop representing him. On March 17, 2003, Low filed an application for admission pro hac vice to the Eastern District of Missouri. The district court denied Low's application the next day without providing any oral or written explanation. On April 14, 2003, Low filed a second application for admission pro hac vice. The district court denied the application again without explanation. On April 30, 2003, Low filed a writ of mandamus in our court seeking to compel the district court to grant Low's motion for admission pro hac vice. The application for a writ was dismissed. Additionally, Low applied by general application for admission to the Eastern District of Missouri, which was not ruled on until after the conclusion of Gonzalez-Lopez's trial.

On April 25, 2003, Fahle filed motions to continue the trial, withdraw as counsel, and for a show cause hearing for sanctions against Low. In the motion for a show cause hearing, Fahle accused Low of violating the rules of professional conduct, specifically Missouri Rule 4-4.2,[3] by communicating with Gonzalez-Lopez about the

[3] Rule 4-4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party he knows to be represented by another lawyer in the matter,

criminal prosecution without Fahle's permission even though Low knew Fahle represented Gonzalez-Lopez in the matter. At the hearing that day, the court granted Gonzalez-Lopez until May 5, 2003, to retain new counsel and continued the trial setting until July 7, 2003. Gonzalez-Lopez, through Low, retained St. Louis attorney Karl Dickhaus as local counsel for trial. On May 2, 2003, Dickhaus entered his appearance for Gonzalez-Lopez, and the court granted Fahle's motions to continue the trial date and leave to withdraw.

The first time the district court provided Gonzalez-Lopez with an explanation for the denial of Low's applications for admission pro hac vice was on June 3, 2003, in the court's memorandum and order denying Low's motion to strike Fahle's motion for sanctions. In the June 3, 2003, memorandum and order, the district court stated:

> In denying [the motions for admission pro hac vice], the Court considered Mr. Low's conduct before the Court in *United States v. Serrano et al.*, 4:01CR450 JCH. The record in that proceeding indicates that Mr. Low contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting.

In the same order, the district court noted: "Mr. Low has sought admission into this Court by every means available. He has been denied admission *pro hac vice* because of allegations of ethical improprieties-the very

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unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Mo. Rules of Prof'l Conduct R. 4-4.2.

improprieties that are the subject of the motion for sanctions."

On July 7, 2003, the first day of trial, Low again moved for admission and was denied. Dickhaus requested Low be permitted to sit at the table for the defense to assist Dickhaus, who was much less experienced with criminal trials. The district court denied the request, ordered Low to remain in the audience, and forbid Low to have any contact with Dickhaus during the trial proceedings. A United States Marshal sat between Dickhaus and Low during the trial. Gonzalez-Lopez was also unable to meet with Low in the morning before the start of trial, during breaks, during lunch, or after the trial concluded for the day. Low was denied access to the detention facility where Gonzalez-Lopez was housed in the evenings. However, after he complained to the district court about being prohibited from receiving visits from Low in the evenings, the district court ordered the visits to be permitted. He was able to meet with Low on the last night of the trial. The jury found Gonzalez-Lopez guilty of the sole count of the indictment on July 11, 2003.

On August 23, 2003, the district court ruled in favor of Fahle on the motion for sanctions against Low. The court held Low violated Missouri Rule 4-4.2 by communicating with Gonzalez-Lopez about the criminal charges against him without Fahle's permission even though Low knew Fahle represented him. Additionally, in the same memorandum and order, the district court stated it had properly denied Low's motions for admission pro hac vice. The court explained: "These denials were premised on the conduct of Mr. Low that surfaced during the *Serrano* trial, specifically Mr.

Low's meeting with represented codefendants without the prior consent of their attorneys."

II

Gonzalez-Lopez raises several arguments on appeal challenging his conviction and sentence. We address only the primary argument raised by the defendant challenging the district court's denial of admission pro hac vice to the attorney he selected to represent him in the criminal proceeding.

A non-indigent criminal defendant's Sixth Amendment rights encompass the right to be represented by the attorney selected by the defendant. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932). As a general rule, "'defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice.'" *United States v. Lewis*, 759 F.2d 1316, 1326 (8th Cir. 1985) (quoting *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978)). "The right to privately retain counsel of choice derives from a defendant's right to determine the type of defense he wishes to present." *United States v. Mendoza-Salgado*, 964 F.2d 993, 1014 (10th Cir. 1992) (citations omitted); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (citations omitted). "Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." *Mendoza-Salgado*, 964 F.2d at 1015-16 (internal quotations and citations omitted). Furthermore, "'[a] defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*.'" *United States v. Ries*, 100 F.3d 1469, 1471 (9th Cir. 1996) (quoting *United States* v. *Lillie*, 989 F.2d

1054, 1056 (9th Cir. 1993)). Thus, "a decision denying a *pro hac vice* admission necessarily implicates constitutional concerns." *Panzardi-Alvarez v. United States*, 879 F.2d 975, 980 (1st Cir.1989) (citation omitted).

"[W]hile an accused who is financially able to retain counsel of his own choosing must not be deprived of a reasonable opportunity to do so, the right to retain counsel of one's choice is not absolute." *United States v. Vallery*, 108 F.3d 155, 157 (8th Cir. 1997) (citing *Urquhart* v. *Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984)). "The right to choice of counsel must not obstruct orderly judicial procedure or deprive courts of their inherent power to control the administration of justice." *Id.* (citing *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988)). Thus, the district court must carefully balance the defendant's right to be represented by the counsel of his choice against the court's interest in "'the orderly administration of justice.'" *Urquhart*, 726 F.2d at 1319 (quoting *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981)). This issue typically arises when a criminal defendant seeks to substitute counsel shortly before trial or during the trial. *Panzardi-Alvarez*, 879 F.2d at 980 (citations omitted). "It is also appropriate, however, for the court to consider the effect of the attorney's past actions (especially past ethical violations) on the administration of justice within the court." *Id.*

It is the government's position that we should defer to the district court's decision to deny Low admission pro hac vice because the district court judge in the instant case also presided over the *Serrano* case and was therefore in the better position to observe Low's conduct in that case. We disagree. It is clear from the record the district court's decision to deny Low admission pro hac vice was based on conduct occurring out-

side the presence of the judge, namely Low's communication with represented parties. *See United States v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990) (revocation of attorney's admission pro hac vice reviewed de novo where attorney was disqualified based on pleadings not conduct in open court). Furthermore, the record reflects the district court's decision to deny Low's applications for admission pro hac vice turned on the district court's interpretation of the law. We therefore review the issues in this case de novo. *See Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001) (stating "even under the abuse of discretion standard, a district court's rulings on issues of law are reviewed de novo") (citation omitted); *Lamb Eng'g & Const. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1434 (8th Cir. 1997) (citation omitted).

We also reject the government's suggestion that the district court was not required to provide an explanation for denying Low's application for admission pro hac vice. A district court which denies an application for admission pro hac vice submitted by the attorney for a criminal defendant must articulate the reason for the denial "for the benefit of the defendant and the reviewing court." *Ries*, 100 F.3d at 1472; Collins, 920 F.2d at 628 (citing *Laura*, 607 F.2d at 60). The district court denied Low's applications for admission pro hac vice on March 18, 2003, and April 14, 2003, without providing written or oral explanation.[4] However, the district

[4] Relying on Eleventh Circuit and Fifth Circuit case law, Gonzalez-Lopez argues the district court was required to hold an evidentiary hearing before denying Low admission pro hac vice and the district court should not be able to deny an attorney admission pro hac vice unless the attorney engages in unethical conduct sufficient to warrant disbarment. *See Schlumberger Techs., Inc. v.*

court provided its explanation for denying Low's applications for admission pro hac vice in two subsequent orders relating to the motion for sanctions against Low.

The first time the district court provided an explanation for denying Low's applications was in the court's June 3, 2003, memorandum and order in which the court denied Low's motion to strike Fahle's motion for sanctions against Low. In the background section of the June 3, 2003, order, the court explained it had denied Low's application for admission pro hac vice because of Low's conduct in the *Serrano* case. According to the court, "[t]he record in that proceeding indicates that Mr. Low contacted a criminal defendant with pre-existing legal representation, interfered with the criminal defendant's representation, and attempted to circumvent the Court's ruling on a continuance of the trial setting." The court also noted in the order: "[Mr. Low] has been denied admission *pro hac vice* because of allegations of ethical improprieties-the very improprieties that are the subject of the motion for sanctions." The court provided no further explanation or details.

The district court provided a more detailed explanation for denying Low's applications in the court's August 23, 2003, memorandum and order ruling on the motion for sanctions against Low. The order provided the following description of Low's conduct in the *Serrano* case which the court found to violate Rule 4-4.2:

> The transcript of the January 6, 2003 pre-tr[ia]l motions hearing in *United States v. Serrano et al.* establishes that on January 2, 2003 Mr. Low and Mr.

Wiley, 113 F.3d 1553, 1159 (11th Cir. 1997); *In re Evans*, 524 F.2d 1004, 1007-08 (5th Cir. 1975). The Eighth Circuit has not adopted a similar rule, and we decline to adopt such a rule at this time.

> Alarid met with the criminal Defendants Jose Serrano, Francisco Serrano, Eduardo Serrano, and Raymundo Aguilar Sanchez, as a group in the Francois County jail. At this time Francisco Serrano was represented by Grant Shostak; Eduardo Serrano was represented by Scott Furstman; and Raymundo Aguilar Sanchez was represented by Raymond Bolourtchi. None of these attorneys was present for the meetings between the Defendants and Mr. Low and Mr. Alarid, and Mr. Shostak and Mr. Bolourtchi testified that they did not give these attorneys permission to meet with their clients. Moreover, Mr. Low and Mr. Alarid did not notify Mr. Shostak and Mr. Bolourtchi that they were meeting with their clients.

There is no suggestion in the court's order that Low was representing any other party in the case when he communicated with the defendants on January 2, 2003. The court concluded: "After its experience with Mr. Low in *United States v. Serrano et al.*, specifically with respect to his contact with represented parties, the Court properly exercised its discretion in denying Mr. Low *pro hac vice* status in *United States v. Cuauhtemoc Gonzalez-Lopez*."

Also in the August 23, 2003, memorandum and order, the court held Low violated Missouri Rule 4-4.2 by communicating with Gonzalez-Lopez without Fahle's permission. There is similarly no indication in the court's order that Low was representing any other party in the case when he spoke with Gonzalez-Lopez about the possibility of becoming his lawyer. The district court stated that, in deciding to impose sanctions against Low for communicating with Gonzalez-Lopez, the court considered testimony concerning Low's con-

duct of contacting represented parties in the *Serrano* case, noting the "inextricable nature of the two cases."

It is clear from the record in this case the district court denied Gonzalez-Lopez's attorney's application for pro hac vice admission because the court believed Low violated Rule 4.4-2 when Low communicated with the represented defendants in the *Serrano* case without obtaining permission from the attorneys who represented them at the time. It is also clear from the record the court did not consider or find relevant whether Low was representing any other party in the case when he communicated with the *Serrano* defendants about their case. The district court interprets Rule 4-4.2 to prohibit any attorney from speaking to any party represented by counsel in a matter about that matter without permission from the party's attorney even if the attorney is not representing any other party in the case.

The government argues the district court's interpretation of Missouri Rule 4-4.2 is correct. As we discuss in our opinion in the companion case, *Joseph Low, IV v. John Fahle*, 2003 WL 23911038, No. 03-3200 (8th Cir. 2005), the district court's interpretation of Rule 4-4.2 is not correct. Rule 4-4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party he knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Mo. Rules of Prof'l Conduct R. 4-4.2. Under the district court's interpretation of Rule 4-4.2, an attorney with no involvement in a case is prohibited from speaking to represented parties in a case about the case without the permission of preexisting counsel. This interpretation effectively reads

the words "In representing a client" out of the Rule. It is also not supported by the purpose of the Rule, which is to protect represented parties from overreaching by the attorneys representing other parties in the matter.

Furthermore, the district court's interpretation of Rule 4-4.2 would unjustifiably prevent parties in a litigation from consulting with other attorneys to obtain alternative advice, hire additional counsel, or hire different counsel. This is particularly problematic in the context of criminal cases in which defendants have a Sixth Amendment right to be represented by the attorney they select. For example, in the present case, immediately after Gonzalez-Lopez was charged with conspiring to distribute marijuana on January 7, 2003, his family retained Fahle to represent him. Fahle appeared on Gonzalez-Lopez's behalf at the hearing and arraignment which was held the very next day. Understandably, after being charged with the criminal complaint on January 7 and prior to the arraignment on January 8, Gonzalez-Lopez may not have had a chance to select an attorney. Soon after the arraignment, he did contact California attorney Joseph Low, whom he had heard favorable things about and whom he was interested in hiring to represent him either in place of Fahle or in addition to Fahle. Prior to receiving Gonzalez-Lopez's call, Low had no involvement in the criminal case. Between January 8 and 10, 2003, they met at Gonzalez-Lopez's request, and within ten days he selected Low to represent him in the criminal proceeding. Under the district court's interpretation of Rule 4-4.2, after January 8, 2003, no other attorney was allowed to speak with Gonzalez-Lopez about the case without Fahle's permission.

We are further troubled by the fact that in the two district court orders discussing the denial of Low's application for admission pro hac vice there is no mention of the effect of the denial on Gonzalez-Lopez's Sixth Amendment right to representation by counsel of his choice. Instead, the court's discussions of its reason for denying Low's applications address the effect of the denial on Low's rights only. In the June 3, 2003, order, when the district court provided its reasons for denying Low's application, the district court noted its "'power to control admission to its bar,'" but did not mention Gonzalez-Lopez's Sixth Amendment right to choice of counsel. In the August 23, 2003, order, the court discussed and rejected Low's argument that due process entitled Low to a hearing before the court denied him pro hac vice admission. While an attorney's past ethical violations may affect the administration of justice within the court and therefore outweigh the Sixth Amendment presumption in favor of the defendant's counsel of choice, it is clear from the record Gonzalez-Lopez's Sixth Amendment right played no part in the district court's decision to deny Low pro hac vice admission.

We conclude the district court erred in denying Low's application for admission pro hac vice.

III

Next, we consider whether the deprivation of the right to counsel of choice is subject to harmless error review. It is well established most constitutional errors in criminal trials do not require automatic reversal of the conviction. *Neder v. United States*, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the Supreme Court held "there may be some constitutional errors which in the setting of a particular

case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction." In *Arizona v. Fulminante*, 499 U.S. 279, 306-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), the Supreme Court held constitutional errors occurring in a criminal proceeding fall into one of two categories: "trial errors" or errors reflecting "structural defects." "Trial error 'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" *Brecht v. Abrahamson*, 507 U.S. 619, 629, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (quoting *Fulminante*, 499 U.S. at 307-08, 111 S. Ct. 1246). In such cases, the conviction will not be reversed if the government can demonstrate "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed .2d 182 (1993) (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. 824).

The second category consists of "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder*, 527 U.S. at 7, 119 S. Ct. 1827 (quoting *Fulminante*, 499 U.S. at 309, 111 S. Ct. 1246). These constitutional errors "are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Id.* In these cases, the error causes a "'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* at 8, 119 S. Ct. 1827 (quoting *Fulminante*, 499 U.S. at 310, 111 S. Ct. 1246). The Supreme

Court has not decided whether harmless error review applies to the denial of the Sixth Amendment right to be represented by the attorney chosen by the defendant. In *Flanagan v. United States*, 465 U.S. 259, 268, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984), however, the Court hinted that the denial of the right to counsel of choice may result in automatic reversal by comparing the right to rights which if violated result in automatic reversal.

The Eighth Circuit has never directly decided this issue. In *Lewis*, we considered the issue of "whether a solvent defendant who is denied chosen counsel and who is not impeding the administration of justice, must show prejudice from this denial in order to obtain relief." 759 F.2d at 1326. Noting the Ninth Circuit to be the only court to have addressed the issue at that time, we found "merit" in the Ninth Circuit's view that denial of the right does not require a showing of prejudice for reversal. *Id.* at 1326-27 (citing *United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984)). We did not decide the issue in *Lewis* because we found the defendant in that case failed to request alternate counsel and was therefore not denied his right to counsel of choice. *Id.* at 1327. Additionally, in *United States v. Villegas*, an unpublished per curiam opinion, we noted in dicta that a violation of the right to choice of counsel does not require a demonstration of prejudice. 8 Fed. Appx. 597, 598 (8th Cir. 2001) (unpublished per curiam) (citing *Lewis*, 759 F.2d at 1326-27).

We recognize that nearly all the circuit courts to address this issue have held a criminal defendant who is denied the Sixth Amendment right to be represented by his chosen attorney does not have to demonstrate prejudice to obtain reversal of the conviction. *See*

United States v. Voigt, 89 F.3d 1050, 1074 (3d Cir. 1996); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995) (per curiam); *Bland v. California*, 20 F.3d 1469, 1478 (9th Cir. 1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1015-16 (10th Cir. 1992); *United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987); *Wilson v. Mintzes*, 761 F.2d 275, 285-86 (6th Cir. 1985). *But see Rodriguez v. Chandler*, 382 F.3d 670, 675 (7th Cir.2004) (adopting a middle-ground "adverse effect" standard); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002) (holding harmless error review applies to denial of counsel of choice at sentencing phase only because denial was not a complete denial of counsel of choice).

We join the majority of circuit courts and hold the denial of a criminal defendant's Sixth Amendment right to be represented by the attorney he selected results in automatic reversal of the conviction.

The denial of the right to counsel of one's choice does not fit in the category of cases reflecting a "trial error" which takes place "during the presentation of evidence to the jury" and can therefore be "quantitatively assessed in the context of other evidence presented." *See, e.g., Neder*, 527 U.S. at 8-9, 119 S. Ct. 1827 (omission of element of offense in jury instruction subject to harmless error review); *Fulminante*, 499 U.S. at 306-07, 111 S. Ct. 1246 (listing, among other examples, the following "trial errors" subject to harmless error review: *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (erroneous conclusive presumption in jury instruction); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (erroneous rebuttable presumption in jury instruction); *Delaware*

v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (improper restriction on defendant's right to cross-examine witness for bias); *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (improper comment at trial about defendant's silence); *Moore v. Illinois*, 434 U.S. 220, 232, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977) (erroneous admission of identification evidence); *Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (improper admission of non-testifying co-defendant's out-of-court statement)).

Instead, the denial of the right to counsel of choice clearly belongs in the class of fundamental constitutional errors which reflect a defect in the framework of the trial mechanism and "defy analysis by 'harmless error standards.'" *Fulminante*, 499 U.S. at 309, 111 S. Ct. 1246. In *Fulminante*, the Supreme Court described this class of fundamental constitutional errors as follows:

> One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), was the total deprivation of the right to counsel at trial. The other violation, involved in *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The 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. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the follow-

> ing: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) ; the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n.9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

Fulminante, 499 U.S. at 309-10, 111 S. Ct. 1246; *see also Sullivan*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (deficient reasonable doubt jury instruction is structural error which defies harmless error review).

Like the denial of the right to self-representation and the denial of the right to counsel, the denial of the right to be represented by one's selected attorney "infects the entire trial process" from "beginning to end." As the Third Circuit recognized in *United States v. Laura:* "Attorneys are not fungible." 607 F.2d at 56. Within the range of effective advocacy, attorneys will differ as to their trial strategy, oratory style, and the importance they place on certain legal issues. *Id.* They may also differ with respect to expertise in certain areas of law, and experience or familiarity with opposing counsel and the judge. These differences will impact a trial in every way the presence or absence of counsel impacts a trial.

Moreover, like the denial of the right to self-representation, the unwarranted denial of the right to choice of counsel can "never be harmless." Both rights "reflect[ ] constitutional protection of the defendant's free choice independent of concern for the objective fairness

of the proceeding." *Flanagan*, 465 U.S. at 268, 104 S. Ct. 1051 (citing *McKaskle*, 465 U.S. at 177 n.8, 104 S. Ct. 944); *see Panzardi Alvarez*, 816 F.2d at 818; *Wilson*, 761 F.2d at 286. The criminal defendant's right to select the attorney of his choice to represent him, like the right to self-representation, derives from the Sixth Amendment principle wherein the defendant has the right to decide the type of defense he will mount. *See Laura*, 607 F.2d at 56 (citations omitted); *Collins*, 920 F.2d at 625 (citation omitted). "The Sixth Amendment . . . grants to the accused personally the right to make his defense . . . . for it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (footnote omitted). As several courts have recognized, "the most important decision a defendant makes in shaping his defense is his selection of an attorney." *Laura*, 607 F.2d at 56; *accord Collins*, 920 F.2d at 625.

> Not only does the selection of an attorney demark the sphere of defense strategies a defendant will have presented to him; with his selection he may also give his attorney the authority to make decisions for him. For once a lawyer has been selected 'law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.'
>
> *Laura*, 607 F.2d at 56 (quoting *Faretta*, 422 U.S. at 820, 95 S.Ct. 2525).

Finally, as other courts have pointed out, harmless error analysis is not amenable to the denial of the right to counsel of choice. Requiring a criminal defendant to demonstrate prejudice from the denial of the right to be represented by his chosen counsel would essentially

require the defendant to demonstrate the attorney who represented him at trial rendered deficient assistance, the same showing the defendant would have to make in asserting a claim that he was denied the right to the effective assistance of counsel. Thus, applying harmless error analysis to the denial of the right to counsel of choice would effectively "obliterate" the criminal defendant's Sixth Amendment right to be represented by counsel of his choice, a right the Supreme Court recognized in *Wheat*, by collapsing the right to counsel of choice into the right to receive effective assistance of counsel at trial. *Wilson*, 761 F.2d at 286; *Fuller v. Diesslin*, 868 F.2d 604, 610 (3d Cir. 1989).

IV

We vacate the entry of judgment of conviction against Gonzalez-Lopez and remand the case for a new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3487

UNITED STATES OF AMERICA, APPELLEE

v.

CUAUHTEMOC GONZALEZ-LOPEZ,
ALSO KNOWN AS TOMAS, APPELLANT

May 19, 2005

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit