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

BRIEF IN OPPOSITION

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November 18, 2005

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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STATEMENT

The government seeks review to press an argument that no court of appeals has ever accepted and that it did not even raise on the merits below: that a defendant who was denied his Sixth Amendment right to be represented at trial by the counsel of his choice is entitled to a new trial only if he can prove that the lawyer he was forced to use was constitutionally ineffective. Particularly in light of subsequent developments in this case, which show that respondent would have been entitled to reversal of his conviction under the existing law in every circuit, certiorari should be denied.

1. On January 7, 2003, the government charged respondent in the Eastern District of Missouri with conspiring to distribute marijuana. Immediately after the arrest, his family hired John Fahle – a Texas attorney who had never previously met respondent – to serve as respondent's counsel. The next day, Fahle appeared at respondent's detention hearing and arraignment. Pet. App. 2a.

Shortly thereafter, respondent telephoned Joseph Low, an attorney in California with a successful track record representing defendants in the Eastern District of Missouri. Pet. App. 2a. Low – a seasoned criminal defense lawyer and a Senior Instructor at Gerry Spence's Trial Lawyers College – has received several national awards for his excellence in the courtroom, including Trial Advocate of the Year from the American Board of Trial Advocates. See The Law Offices of Joseph H. Low IV, Curriculum Vitae, http://www.aggressivecriminaldefenselawyers.com/resume.html (last visited Nov. 16, 2005).

At respondent's request, Low promptly flew to Missouri to discuss the possibility of representing respondent, and ten days later was hired. On March 4, 2003, Low attended an evidentiary hearing on respondent's behalf. Although Low had not yet entered an appearance, the Magistrate Judge accepted Low's provisional entry on the understanding that he

would file a motion for admission pro hac vice. On March 11, 2003, respondent informed Fahle that he wanted Low to be his sole attorney and asked Fahle to withdraw from the case. Pet. App. 2a-3a.

On March 17, 2003, Low filed the first of three applications for admission pro hac vice. The district court denied the application the next day, without explanation. Pet. App. 3a, 8a. Low filed his second pro hac vice application on April 14, 2003, but it was similarly denied without explanation. As a result, Low filed an application for a writ of mandamus in the court of appeals on April 30, 2003, seeking to compel the district court to grant the pro hac vice motion, but that application, too, was denied. Additionally, Low filed a general application for admission to the Eastern District of Missouri. The district court tabled the application, and did not rule on it until several months after submission, well after respondent's trial. *Id.* at 3a.

On April 25, 2003, Fahle moved to withdraw as respondent's counsel and to continue respondent's trial. The district court indicated that it would permit a continuance to be granted only if another attorney entered an appearance on behalf of respondent by May 5, 2003. Accordingly, Karl Dickhaus, whom Low had recruited to serve as his local counsel, entered an appearance on behalf of respondent. Pet. App. 3a-4a. Dickhaus is primarily a consumer protection attorney specializing in "junk fax" law, prosecuting claims under the Telephone Consumer Protection Act. See Junk Fax Attorney Reference, http://www.junkfax.org/fax/basic_info/attorneys.htm (last visited Nov. 16, 2005). Before this case, Dickhaus had never tried a federal criminal case. Despite Dickhaus's lack of relevant experience, Pet. App. 5a, Low chose him to serve as local counsel because Dickhaus was the sole active graduate of Gerry Spence's Trial Lawyers College in the St. Louis area, and Low was confident that his own motion for admission pro hac vice ultimately would be

granted. On July 7, 2003, however, the district court denied Low's third motion for admission pro hac vice. *Ibid.*

2. Respondent's trial began that day. Despite Dickhaus's plea that Low at least be allowed to sit at counsel table to assist him, the court limited Low to the audience section of the courtroom and forbade contact between Low and Dickhaus during trial proceedings. The court even placed a United States Marshal between Dickhaus and Low. The district court did not permit respondent 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 even denied access to the detention facility where respondent was housed in the evenings. Not until the last night of the trial was respondent permitted to meet with Low, even outside the courtroom. Pet. App. 5a.

All of respondent's alleged co-conspirators entered into plea agreements prior to his trial, and several testified against him in return for sentencing recommendations or other consideration from the government. The government's star witness, Jorge Guillen, tied respondent to the conspiracy by testifying that he persuaded respondent to meet him at a mini-mart with money needed for his role in the drug deal. Although Guillen was wired during the interaction, the government claimed at trial that it had lost the tape, making Guillen's testimony critical. Dickhaus was unable to impeach this testimony during cross-examination. Indeed, the trial transcript reveals that Dickhaus's inexperience in federal criminal trials also limited his ability to challenge the government's case in even more fundamental respects. At one point, the court suggested that Dickhaus "[r]ead" the Federal Rules of Evidence after he had difficulty understanding the government's objection and court's evidentiary ruling. Trial Tr. vol. II, 183:2, July 8, 2003.

On July 11, 2003, the jury found respondent guilty of the sole count of the indictment. Pet. App. 5a. The district court sentenced him to 292 months in prison.

3. On appeal, the Eighth Circuit vacated respondent's conviction and remanded for a new trial. Pet. App. 20a. It held that the district court's refusal to allow Low to represent respondent violated respondent's Sixth Amendment right to proceed with the counsel of his choice. *Id.* at 13a. Having found this constitutional violation, the Eighth Circuit held that reversal was required. The court explained that conducting a harmless error analysis would effectively "obliterate" the Sixth Amendment right to be represented by counsel of choice by collapsing it into the right to receive effective assistance of counsel. *Id.* at 19a-20a.

4. After the Eighth Circuit issued this opinion, the government sought rehearing en banc, arguing for the first time that when the district court has violated a defendant's Sixth Amendment right to counsel of his choice, the defendant must show prejudice to obtain a reversal of his conviction. The Eighth Circuit unanimously denied rehearing without elaboration. Pet. App. 21a.

5. After the Eighth Circuit issued its mandate on March 8, 2005, the parties began preparing for a new trial. Low, now representing respondent, deposed Jorge Guillen, the government's key witness. Under intense questioning from Low, Guillen admitted under oath that he lied numerous times during the trial about respondent's involvement in the conspiracy. See, *e.g.*, Guillen Dep. 348:1-7, May 25-26, 2005. In addition to admitting outright lies, Guillen admitted that respondent met him with money on the night of the arrest not to fund a drug deal, but rather in response to Guillen's plea for money to support a sick relative. *Id.* at 301:20-304:4. Shortly thereafter, the government filed this petition for certiorari and convinced the trial court to stay remand proceedings pending this Court's disposition.

REASONS FOR DENYING THE WRIT

Having unanimously lost the primary argument it raised below – that the denial of counsel in this case did not violate the Sixth Amendment – and having recognized that that fact-

bound issue is hardly worthy of this Court's review, the government now seeks, in the absence of any actual split among the circuits, to persuade this Court to adopt an unprecedented rule respecting the proper remedy for this constitutional violation. That rule would require defendants, even after they have established one constitutional violation, also to prove another – namely that their trial attorneys provided ineffective assistance of counsel. The government provides no real reason why these two distinct constitutional rights should be collapsed into one. Nor has it provided any real reason why its novel argument is important enough to warrant this Court's attention. While the government may understandably wish to avoid a retrial at which respondent will be represented by expert counsel who has already demonstrated his ability to effectively cross-examine key government witnesses, that is hardly a legitimate reason to invoke this Court's certiorari power.

I. THERE IS NO CONFLICT OF AUTHORITY ON THE FACTS OF THIS CASE.

No disagreement among the circuits exists that would justify granting certiorari in this case. Every court of appeals that has addressed the question on direct appeal has held that a complete denial of the Sixth Amendment right to choose one's own counsel requires reversal. Although the government claims that the Eighth Circuit's opinion conflicts with the Seventh Circuit's decision in *Rodriguez* v. *Chandler*, 382 F.3d 670 (CA7 2004), cert. denied, 125 S.Ct. 1303 (2005), that is simply inaccurate. Not only did *Rodriguez* involve a different factual scenario arising in a different procedural posture, but respondent would have been entitled to a new trial even under the approach taken by the Seventh Circuit. Thus, there is no genuine conflict.

A. There is No Disagreement in the Lower Courts Concerning How to Remedy a Complete Denial of Counsel of Choice on Direct Review.

1. The First, Third, Eighth, Tenth, and D.C. Circuits – all the courts of appeals that have addressed this issue on direct appeal – have concluded that the erroneous denial of a criminal defendant's right to counsel of choice warrants automatic reversal of the defendant's conviction.[1] See *United States* v. *Panzardi Alvarez*, 816 F.2d 813, 818 (CA1 1987) (holding that "[t]he right to choose one's counsel is an end in itself" and therefore "its deprivation cannot be harmless"); *United States* v. *Voigt*, 89 F.3d 1050, 1074 (CA3 1996) (stating that, although the particular defendant had not been denied his right to counsel of choice, "arbitrary denials of the right to counsel of choice mandate *per se* reversal"); *United States* v. *Mendoza-Salgado*, 964 F.2d 993, 1016 (CA10 1992) (stating that the court would apply an automatic reversal standard when a "trial court unreasonably or arbitrarily interferes with a defendant's right to counsel of choice") (emphasis omitted); *United States* v. *Childress*, 58 F.3d 693, 736 (CADC 1995) (remanding the case to the district court to determine whether the defendant was denied his counsel of choice, and directing that "the deprivation of his counsel of choice would entitle [defendant] to a reversal of his

[1] The government admits this point, but attempts to discredit these decisions because they predate this Court's opinions in *Neder* v. *United States*, 527 U.S. 1 (1999), and *Mickens* v. *Taylor*, 535 U.S. 162 (2002). See Pet. Cert. 16 n.6. But neither case in any way supports the government's proposal that criminal defendants whose constitutional rights have been violated be required to prove that the violation prejudiced them. To the extent that *Neder* reiterated the distinction between structural and trial errors, that distinction was well established by the time this Court announced its decision in *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), which predates most of these decisions, and has been implicit since *Chapman* v. *California*, 386 U.S. 18 (1967), which predates them all.

conviction as a matter of constitutional right"), cert. denied, 516 U.S. 1098 (1996).

2. While fully five circuits would apply automatic reversal in these circumstances, not a single circuit has squarely rejected that position. Petitioner argues that the Seventh Circuit's decision in *Rodriguez* creates a circuit conflict, Pet. Cert. 16, but *Rodriguez* is distinguishable on both legal and factual grounds.

As a legal matter, *Rodriguez* arose in a procedural posture in which courts are much less likely to require new trials. *Rodriguez* arose on a habeas appeal challenging a state court determination, whereas the Eighth Circuit's ruling here stems from direct review of a federal district court judgment. "The principle that collateral review is different from direct review resounds throughout [this Court's] habeas jurisprudence." *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993). Indeed, it should "hardly bear[] repeating that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Id.* at 634 (quoting *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979)). This is especially so where, as in *Rodriguez*, a petitioner is asking a federal court to upset a *state court* conviction.

Thus, when the Seventh Circuit in *Rodriguez* applied a test for assessing wrongful deprivations of a defendant's right to counsel of choice that required proof of some potential prejudice, the court expressly grounded that test in this Court's approach in *Brecht*, a case that has no bearing on a direct appeal in a federal criminal proceeding. See *Rodriguez*, 382 F.3d at 674. Nothing about *Rodriguez* shows that the Seventh Circuit would have imposed such a requirement on a federal defendant before the court on direct appeal. Especially given that the approach of every other circuit to have addressed the issue would support a rule of automatic reversal in cases on direct appeal, the Seventh Circuit's ruling should fairly be confined to the context in

which it arose. Unless and until a court squarely rejects the rule of automatic reversal already applied by five circuit courts, no circuit split exists on this issue.

As a factual matter, substantial differences between *Rodriguez* and this case belie the government's suggestion that the two decisions actually conflict. The district court in this case completely prevented respondent from using his chosen counsel, and ordered him instead to proceed to trial with an attorney whom respondent never chose to represent him – an attorney who was supposed to perform simply the ministerial role of local counsel. The court further refused to allow respondent's counsel of choice to sit at counsel table to assist the local counsel, who had never tried a federal criminal case; and it even forbade respondent's counsel of choice from visiting respondent at his detention facility until the last night of the trial. Pet. App. 5a. The Eighth Circuit emphasized in its opinion that completely denying respondent the opportunity to be represented by Low rose to the level of a structural error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 14a. Such a complete denial of one's Sixth Amendment right "infects the entire trial process from beginning to end," *id.* at 18a (internal quotation marks omitted), and thus warrants automatic reversal of conviction.

The injury suffered by the defendant in *Rodriguez*, by contrast, was quite limited. There, the defendant had retained two lawyers, and the district court erroneously denied the defendant use of only one of them, based on an alleged conflict of interest. *Rodriguez*, 382 F.3d at 673. Despite this erroneous denial, the Seventh Circuit repeatedly emphasized that defendant was "represented at trial by at least one lawyer of his own choosing." *Id.* at 674; see also *ibid.* (noting that defendant went to trial "with another lawyer of his own choice"). This constitutional error thus had far less impact on "the entire trial process from beginning to end," *cf.* Pet. App. 18a, because the defendant there was not completely denied

representation by his chosen counsel in the same way respondent was.[2]

B. Even if the Seventh Circuit's "Difference in the Quality of Representation" Test Applied on Direct Review of Federal Convictions, Respondent Still Would Be Entitled to Reversal.

Even if a reviewing court were to apply the Seventh Circuit's potential prejudice inquiry test – which asks whether there is "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial," *Rodriguez*, 382 F.3d at 675 – to the facts of this case, respondent would

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[2] Nor does the Second Circuit's decision in *Lainfiesta* v. *Artuz*, 253 F.3d 151 (CA2 2001), cert. denied, 535 U.S. 1019 (2002), conflict with the Eighth Circuit's holding here. There, too, the case was on collateral review of a state-court conviction and the defendant was not completely denied his right to choice of counsel. See 253 F.3d at 157-58 (confining its analysis to only the question of whether a "*temporary*, arbitrary *deprivation of a second attorney* of choice" required automatic reversal) (emphasis added).

The Sixth Circuit's recent opinion in *United States* v. *Jamieson*, 427 F.3d 394 (CA6 2005), in which the court found no violation of the right to choice of counsel, but suggested that it would have considered the effects of the denial if it had occurred, does not create a split of authority either. There is no evidence that the Sixth Circuit would decide the facts of this case any differently than the Eighth Circuit, especially since Sixth Circuit precedent requires reversal when a defendant is erroneously denied his Sixth Amendment right to retain the counsel of his own choosing. See *Linton* v. *Perini*, 656 F.2d 207, 211-12 (CA6 1981) ("Evidence that a defendant was denied this right [to counsel of choice] arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice."), cert. denied 454 U.S. 1162 (1982). The dicta in *Jamieson* regarding prejudice does not overrule that longstanding circuit precedent.

still be entitled to a new trial. Accordingly, there is no actual conflict presented that requires this Court's intervention.

"A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, *based on their holdings in different cases with very similar facts.*" Robert L. Stern et al., Supreme Court Practice 226 (8th ed. 2002) (emphasis added). The conflict the government alleges does not meet this standard. The Seventh Circuit itself has indicated that "an identifiable difference in the quality of representation" exists when the defendant's chosen lawyer "had expertise that [the defendant's] other lawyer lacked," or if the chosen lawyer "had planned a line of defense that [the other lawyer] was unable to sustain on his own." *Rodriguez*, 382 F.3d at 675. Both criteria – either one of which would be sufficient to meet the Seventh Circuit's test – are present here.

1. Respondent would be entitled to a new trial in the Seventh Circuit because Low, respondent's disqualified counsel, undeniably "had expertise that [respondent's] other lawyer lacked." *Rodriguez*, 382 F.3d at 675. Low is an experienced, nationally recognized criminal defense attorney with proven success representing defendants in federal drug conspiracy cases within the Eastern District of Missouri. See Pet. App. 2a; *supra* at 1. Dickhaus, in contrast, is a civil consumer protection litigator "who was much less experienced with criminal trials" than was Low. Pet. App. 5a; see *supra* at 2. In fact, prior to representing respondent *in this case*, Mr. Dickhaus had never tried a federal criminal case. *Ibid.* Even without considering what actually happened at trial, the obvious differences in expertise between respondent's chosen lawyer and the lawyer forced upon him by the district court's erroneous refusal to admit his chosen lawyer pro hac vice are enough to satisfy the Seventh Circuit's requirement that there be "an identifiable difference

in the quality of representation" provided by the two lawyers. See *Rodriguez*, 382 F.3d at 675.

2. Low clearly would have advanced "a line of defense that [Dickhaus] was unable to sustain on his own." See *Rodriguez*, 382 F.3d at 675. Since the Eighth Circuit reversed respondent's conviction and remanded the case for a new trial, Low has been representing respondent in preparation for the retrial. In that time, Low has deposed the prosecution's main witness in the first trial, and extracted from him repeated admissions that he had perjured himself on the stand. In particular, he elicited an admission that the witness had lied about respondent's role in the alleged conspiracy. See *supra* at 4. Whereas Dickhaus's trial cross-examination was unable to shake the witness's story and was replete with examples of Dickhaus's inexperience in the criminal trial setting, see *supra* at 3, Low's deposition has so completely discredited the witness that he likely would no longer be a valuable witness for the prosecution.

II. THE GOVERNMENT FAILED PROPERLY TO RAISE THE QUESTION PRESENTED IN THE COURT BELOW.

Certiorari also is inappropriate here for the additional reason that the government failed to raise the argument that it seeks to advance before this Court in a timely manner below. Before the Court of Appeals, respondent expressly argued that the trial court had erred in denying him the right to be represented by Low *and that this error required automatic reversal.* See Appellant's Br. 24. In its responsive brief on the merits, the government argued primarily that this case involved no Sixth Amendment error. See Appellee's Brief at 13-31. Buried in the middle of a paragraph was a single sentence suggesting that "any error was harmless because defendant was represented by able counsel throughout all of the proceedings." *Id.* at 28.

Through its petition for certiorari, the government now advances an entirely different position. It argues that

defendants who have been denied the right to counsel of choice must show prejudice. This is simply too late in the day. Absent "exceptional circumstances" that do not exist here, it is inappropriate for a party to ask this Court to consider the legitimacy of a legal rule that it did not propose below. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); see also *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004) (deeming argument waived when, *inter alia*, party "did not * * * seek consideration of the argument in th[e] court [below]"); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (refusing to hear an argument that, *inter alia*, the party had "failed to raise * * * below"). Prudence "dictates awaiting a case in which the issue was fully litigated below, so that [this Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992).

III. THE QUESTION PRESENTED DOES NOT ARISE WITH SUFFICIENT REGULARITY TO MERIT THIS COURT'S REVIEW.

The government concedes that there are but "few instances" of the problem that has arisen in this case: the complete, erroneous denial of counsel of choice. Pet. Cert. 15. The government, which is of course a party in *every* criminal prosecution in federal court, can identify only a half-dozen published cases over a twenty-year period that have addressed the question on which it seeks review. *Id.* at 16 n.6.

The rarity of such cases is hardly surprising. "A defendant's right to secure counsel of his choice is cognizable only insofar as defendant is able to retain counsel with private funds." *United States* v. *Collins*, 920 F.2d 619, 625 n.8 (CA10 1990), cert. denied, 500 U.S. 920 (1991). As this Court has made clear, "a defendant may not insist on representation by an attorney he cannot afford." *Wheat* v.

United States, 486 U.S. 153, 159 (1988). Because the vast majority of federal defendants are unable to afford privately retained counsel, and thus are represented by appointed counsel, see United States Department of Justice, Bureau of Justice Statistics, Indigent Defense Statistics (2001), http://www.ojp.usdoj.gov/bjs/id.htm#defendants (last visited Nov. 17, 2005), the right at issue in this case is entirely irrelevant to most criminal cases. Cf. *Morris* v. *Slappy*, 461 U.S. 1 (1983) (holding that a defendant represented by appointed counsel was not entitled to a continuance that would have enabled him to be represented by the particular attorney within the public defender's office whom he preferred).

Even within the small fraction of criminal cases in which defendants are able choose their lawyers, the question of remedy arises only in the rare instances when a trial judge erroneously denies a defendant his right to counsel of choice. Trial courts enjoy substantial "discretion to limit the exercise of the right to counsel of choice when insistence upon it would disproportionately disadvantage the government or interfere with the ethical and orderly administration of justice." *United States* v. *Diozzi*, 807 F.2d 10, 12 (CA1 1986). Furthermore, the district court's decision to deny the defendant counsel of choice is afforded "substantial latitude." *United States* v. *Stites*, 56 F.3d 1020, 1024 (CA9 1995) (quoting *Wheat*, 486 U.S. at 163), cert. denied, 516 U.S. 1138 (1996); see also *United States* v. *Spears*, 965 F.2d 262, 275 (CA7) ("Our review of the district court's decision to remove * * * counsel [of choice] is * * * deferential * * *."), cert. denied, 506 U.S. 989 (1992). As a result, the vast majority of claims alleging erroneous denial of counsel of choice are rejected on the merits.[3]

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[3] See, *e.g.*, *United States* v. *Childress*, 58 F.3d at 734-35 (affirming denial of counsel of choice to avoid the potential for conflict); *United States* v. *Mastroianni*, 749 F.2d 900, 913-14 (CA1 1984) (finding district court acted within discretion by denying

Finally, even in the few instances in which courts of appeals have required new trials to remedy denials of the Sixth Amendment right to counsel of choice, the government provides no support whatsoever for its assertion that these new trials have unduly burdened the justice system or "creat[ed] an unjustified risk that guilty defendants will escape punishment." Pet. Cert. 8. It is hard to understand why being required to re-try one defendant once every several years unduly burdens the government's resources. Nor is it apparent why being required to do so creates a serious risk that the guilty will escape punishment. On the other hand, the proceedings on remand in this case sharply demonstrate why the government's proposed rule would create an unacceptable risk of punishing innocent people. See *supra* at 3-4.

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choice of counsel when it would result in delay); *Sampley* v. *Attorney General*, 786 F.2d 610, 613-16 (CA4) (same), cert. denied, 478 U.S. 1008 (1986); *United States* v. *Silva*, 611 F.2d 78, 79 (CA5 1980) (same); *United States* v. *Dinitz*, 538 F.2d 1214, 1219-24 (CA5 1976) (finding district court acted within discretion by denying choice of counsel because counsel acted improperly), cert. denied, 429 U.S. 1104 (1977); *Ross* v. *Reda*, 510 F.2d 1172 (CA6), (same), cert. denied, 423 U.S. 892 (1975); *United States* v. *Horton*, 845 F.2d 1414, 1418 (CA7 1988) (holding that magistrate did not abuse his discretion in denying defendant's motion to substitute counsel when communication barrier that existed between defendant and counsel was primarily result of defendant's refusal to cooperate and his "stonewalling" effort to select counsel of his choice); *United States* v. *O'Malley*, 786 F.2d 786, 789-93 (CA7 1986) (affirming district court's decision to deny choice of counsel when it would endanger attorney-client privilege); *United States* v. *Castro*, 972 F.2d 1107, 1109 (CA9 1992) (holding that district court properly denied motion to replace counsel when the motion was made only three days before commencement of trial), overruled on other grounds by *United States* v. *Jimenez Recio*, 537 U.S. 270 (2003).

IV. THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

The Eighth Circuit held, and the government assumes in its petition, that the trial court violated respondent's Sixth Amendment right to representation by counsel of his choice in wrongfully denying counsel's application for admission pro hac vice. The government now seeks to impose a dual burden upon respondent like none found anywhere else in constitutional law. This new burden would require respondent to prove, in addition to the violation of his Sixth Amendment right to counsel of choice, that the violation prejudiced him by causing another constitutional violation: the delivery of ineffective assistance of counsel.

The government's proposed rule finds no support in this Court's precedents. This Court has held that courts reviewing constitutional errors in criminal trials on direct review should apply one of two approaches. First, "structural errors," which "infect the entire trial process" and distort "the framework within which the trial proceeds," require automatic reversal. *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citations omitted).

Second, "trial errors," which "occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed" in the context of the entire record, *Arizona* v. *Fulminante*, 499 U.S. 279, 307-08 (1991), warrant reversal when the "harmless error" test announced in *Chapman* v. *California*, 386 U.S. 18 (1967), is not met. Under *Chapman*, a constitutional error requires reversal of a defendant's conviction unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24).

The government's petition for certiorari abandons this existing jurisprudence. It does not argue simply that the Eighth Circuit erred by treating denials of the right to counsel

of choice as structural – rather than trial – error. Even persuading this Court to treat denials of the constitutional right to counsel of choice as trial errors would not help the government in this case. The proceedings already conducted on remand demonstrate unequivocally what a properly conducted harmless-error analysis would have concluded: the district court's wrongful exclusion of Low contributed to the verdict obtained. See *supra* at 4, 10-11.

And so the government demands that this Court go even further. Put simply, the government proposes that this Court abandon *Chapman* and this Court's longstanding commitment to harmless-error review and shift the inquiry from whether the *government* can show that a constitutional error was harmless beyond a reasonable doubt to whether the *defendant* can prove not only that constitutional error occurred, but that the constitutional error was harmful. That has never been the law – with respect to any type of constitutional error – and the government provides no reason why it should be. The only rationale the government offers for this radical transformation of constitutional doctrine is that in an area of Sixth Amendment law distinct from that at issue in this case – effective assistance of counsel – this Court has required a defendant, as part of establishing a constitutional error in the first place, to show prejudice. The fact that prejudice may be an element of a quite distinct Sixth Amendment *violation*, however, says absolutely nothing about whether proof of prejudice should be required for a defendant who establishes a Sixth Amendment violation that does not itself require proof of prejudice to receive a *remedy*.

A. The Sixth Amendment Right to Counsel of Choice Is Distinct from the Sixth Amendment Right to the Effective Assistance of Counsel Once Chosen or Appointed.

This Court has long recognized that the Sixth Amendment protects a non-indigent criminal defendant's

right to choose his own counsel. See *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *Glasser* v. *United States*, 315 U.S. 60, 70, 75 (1942); *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954); *Wheat* v. *United States*, 486 U.S. 153, 159 (1988).

That right, like the right of self-representation, is more than simply a sub-element of the defendant's interest in receiving competent representation. The framers of the Sixth Amendment understood "the inestimable worth of free choice." *Faretta* v. *California*, 422 U.S. 806, 834 (1975). Among other things, they were well aware that in the notorious 1735 trial of John Peter Zenger, Zenger's original attorneys were disbarred by the court for vigorous advocacy, see *United States* v. *Barnett*, 376 U.S. 681, 715 (1964), and that the court had initially tried to force him to trial with an inferior lawyer. See James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal 21 (Stanley N. Katz ed. 1972). Forcing upon a paying defendant a lawyer other than his legitimate first choice "can only lead [the defendant] to believe that the law contrives against him." *Faretta*, 422 U.S. at 834.

The right to counsel of choice thus differs from the right to effective assistance in two critical respects. First, the former protects a defendant's autonomy and dignity interests in making a fundamental threshold decision as to who will represent him and how his defense will be presented. The right to effective assistance, by contrast, does not address these concerns. It applies regardless of whether the defendant wishes to secure the representation of any given lawyer.

Second, the choice of trial counsel affects the entire framework within which a defendant's trial occurs. An attorney is responsible, either in consultation with his client or pursuant to his own judgment, for a host of strategic and tactical choices that are impossible to discern after the fact.

An error at this threshold stage is simply not amenable to the type of fine-grained parsing of the trial transcript associated with reviewing claims of ineffective assistance. See, *e.g.*, *Rompilla* v. *Beard*, 125 S.Ct. 2456 (2005).[4]

Contrary to the government's suggestions, nothing this Court said in *Wheat* v. *United States* suggests that these separate Sixth Amendment rights are cut from the same cloth. In reaffirming that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," this Court in *Wheat* also reaffirmed the distinction between that right and the right to effective assistance. 486 U.S. at 159. True, as the government notes, *Wheat* adverted to the requirement of effective assistance in explaining why the defendant had not *improperly* been denied access to his counsel of choice. But that reference does not support the government's argument in this case. *Wheat* simply held that a defendant's choice of counsel cannot override the government's "independent" interest in ensuring that a defendant's choice will not undercut the requirement of effective representation. See *id.* at 160, 162. Thus, under *Wheat* a defendant's interest in choosing his counsel may have to give way when that choice poses a danger of precipitating a later ineffectiveness claim. Of course, the government does not, and cannot, suggest that any such danger existed in this case, since no one has ever suggested a risk that Low would have been ineffective.

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[4] Of course, in some rare circumstances a deficiency in counsel can be so pervasive as to make it likely that "counsel failed to function in any meaningful sense as the Government's adversary." *United States* v. *Cronic*, 466 U.S. 648, 666 (1984). In these rare cases, the Court also has presumed prejudice without inquiry into actual performance at trial. *Id.* at 659-61 (citing *Davis* v. *Alaska*, 415 U.S. 308 (1974), and *Powell* v. *Alabama*, 287 U.S. 45 (1932)).

B. The Government's Proposed *Strickland* Standard Is Incompatible with the Nature of the Independent Right to Counsel of Choice.

Although it is plain that a defendant's right to counsel of choice is distinct and independent from his right to effective assistance of counsel, the government proposes here to collapse the two rights together. The Eighth Circuit properly recognized that no good reason exists to subordinate the right to counsel of choice in this manner.

This Court in *Strickland* required defendants to prove both deficient performance by counsel and prejudice because it included both as elements necessary to show a *violation* of the constitutional right to effective assistance. See *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984) ("any deficiencies in counsel's performance must be prejudicial to the defense in order to *constitute* ineffective assistance under the constitution") (emphasis added). This followed from the Court's conclusion that the right to effective assistance has been violated only where a conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

Here, however, there is no dispute that the Sixth Amendment was violated. The government has not sought review of the Eighth Circuit's determination that respondent's Sixth Amendment right to choice of counsel was *violated* when the district court improperly denied Low's application for admission pro hoc vice.

That being so, inquiring into prejudice would be inconsistent with the understanding that the right to counsel of choice, like the right to self-representation, "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984); see also *McKaskle* v. *Wiggins*, 465 U.S. 168, 198 n.6 (1984) (White, J., dissenting). The right to choose one's

counsel "is either respected or denied; its deprivation cannot be harmless." *McKaskle*, 465 U.S. at 177 n.8.

Indeed, in the only other remotely analogous field of Sixth Amendment law – the conflict-of-interest doctrine – this Court also has found violations to constitute structural error. In *Holloway* v. *Arkansas*, 435 U.S. 475, 488 (1978), this Court required automatic reversal where codefendants were forced to accept joint representation over a timely objection on grounds of conflict of interest. See also *Mickens* v. *Taylor*, 535 U.S. 162, 168 (2002). Such cases, like those involving the selection of counsel of choice, also involve defendants who must make an important threshold decision – namely, whether to pursue a coordinated defense or a conflicting defense vis-à-vis their codefendants. "To determine the precise degree of prejudice sustained [when a defendant is denied his choice to pursue a conflicting defense] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Holloway*, 435 U.S. at 488 (quoting *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942)). Requiring a defendant, in short, to prove that an error that pervaded his entire trial "prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application." *Holloway*, 435 U.S. at 490.

C. Important Practical Considerations Favor the Eighth Circuit's Approach.

Lest there be any remaining doubt concerning the legitimacy of the Eighth Circuit's decision, the balance of burdens on the criminal defendant and government favors reversing in cases like this. If defendants such as respondent could remain convicted of federal crimes for which their counsel of choice would have been able to obtain an acquittal, the defendants would have to serve years in federal prisons. This punishment would be especially hard to bear in light of

the fact that the government would admittedly have deprived these defendants of their fundamental right to choose their attorneys. In this case, for example, respondent would serve his prison sentence knowing that his counsel of choice would have been able to expose the lies of the government's key witness in a way that his other lawyer was unable to do.

By contrast, the burden imposed on the government by automatic reversal of a conviction in the rare case where a defendant was erroneously denied counsel of his choice is comparatively light. In the "few instances" where a court improperly denies a defendant his counsel of choice, Pet. Cert. 15, the government will simply be required to retry him. If the defendant's first trial was in fact not affected by the denial, then the government is likely to secure an outcome identical to the original one, except that its legitimacy will not be stained by the fundamental unfairness inherent in denying the defendant his counsel of choice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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