

No. 34271-5-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,
Respondent

v.

LISA DIANE CHAVEZ
Appellant

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 05-1-02595-8
The Honorable Katherine M. Stolz

Mary Kay High
WSBA No. 20123
Attorney for Appellant
917 Pacific Avenue, Suite 406
Tacoma, Washington 98402
(253) 572-6865

ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Chavez was denied her Sixth Amendment right to choice of counsel when the court denied her request to have a privately hired attorney represent her.
2. There was insufficient evidence Chavez's eluded a police officer because the State failed to present evidence of the essential element that the officers were in uniform at the time of the offense.
3. The Court miscalculated Ms. Chavez's offender score when it scored the current misdemeanor DUI offense as a felony "other current offense" even though RCW 9.94A.525(11) only directs scoring of *prior* serious traffic offenses.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Chavez denied her right to counsel when the court precluded her privately retained attorney from representing her? [Assignment of Error No. 1.]
2. Should Chavez's conviction for felony eluding be reversed and dismissed when the state failed to prove beyond a reasonable doubt all the essential elements of the crime, including the element of whether the pursuing officers were in uniform? [Assignment of Error No. 2]
3. Did the court miscalculate Chavez's offender score resulting in an erroneous sentence? [Assignment of Error No. 3]

B. STATEMENT OF THE CASE

On June 29, 2005 Lisa Chavez was re-arraigned on an Amended Information which charged her with the offenses of;

I) Attempting To Elude a Pursuing Police Vehicle contrary to RCW 46.61.024 (1);

II) Driving Under The Influence of Intoxicants contrary to RCWs 46.20.308; 46.61.5055; and 46.61.502(1)(b)(c);

III) Failure to Remain at an Injury Accident contrary to RCWs 46.52.020(1) and 46.52.020(4)(b);

IV) Duty in Case of Damage to Attended Vehicle contrary to RCWs 46.52.020(3); 46.52.020(2) and 46.52.020(5).

CP 5-8.

The Court denied Ms. Chavez's motion to dismiss Count 2, the Failure to Remain at an injury accident rejecting the defense argument the injury must be known at the time of the accident. RP 11/7/05 p. 9. The court again denied a similar "half-time" motion to dismiss. RP 123-24. The court also conducted a CrR 3.5 hearing, after which it determined her statements were admissible. RP 11/9/05 p. 23-24.

The jury returned guilt verdicts on all counts and a failure to submit to a breath test special verdict . RP 172, 42- 46, CP 42-46.

At sentencing the trial court granted defendant's motion to dismiss Count 4 – the duty in case of damage to an attended vehicle offense finding that it merged with the felony failure to remain at an injury accident charged in Count II. RP 11/7/05 p. 180. The trial court declined to accept the defense calculation of the offender score as a 6 based on the exclusion of the

other current misdemeanor offense of driving under the influence. RP 11/7/05 p. 180. The court, instead counted this offense as if it were a felony and scored Ms. Chavez as a 7 and imposed standard ranges sentences, declining the defendant's request for an exceptional downward sentence. RP 11/7/05 p. 180, 181, 183, CP 50-60, 61-62.

Substantive Facts

In the early evening hours of May 24, 2005 Ms. Josephine Cusumano, a nurse, was on her way to the Steilacoom Deli Pub. She was in her car behind stopped traffic when she heard a screeching sound, a crash and then felt a "thump". RP 59. She had been hit from behind by a car driven by Mr. Carlton Spuck, he in turn had been hit from behind by Ms. Chavez. RP 87. Ms. Cusumano was mad and got out of her car with her cell phone intending to confront the driver responsible for the accident. RP 60-61. Ms. Chavez, Ms. Cusumano and Mr. Spuck remained put, but after blocking traffic for approximately 5 minutes (RP 90) other motorists were demanding the parties move their cars if nobody was hurt and Ms. Cusumano returned to her car to move it so the other motorists could get by. RP 63. Instead of just moving her car out of the way, Ms. Chavez left without exchanging identification or insurance information. RP 63, 61, 90. Ms. Cusumano called 911 and reported the license plate number of the white Dodge being driven by

Ms. Chavez. RP 61, 62. Ms. Cusumano and Mr. Spuck waited another 5 minutes for the Steilacoom public safety officers to arrive. RP 90. While talking with police officers Ms. Chavez was seen driving past the site of the accident. RP 66, 91.

The day after being hit, Ms. Cusumano went to her chiropractor for back and neck pain. RP 75. She had sought chiropractic services before the accident for similar pain that she believed was stress induced. RP 81. She did not miss any work due to her alleged injuries. RP 84.

Steilacoom public safety officer Brian Weeks responded to the accident and while there was informed the driver responsible for the accident had just driven by. RP 66, 91. He got into his patrol car and attempted to catch up to the car driven by Ms. Chavez. RP 18. He describes his patrol car as being marked and testified he engaged the emergency lights and the siren. RP 18. Ms. Chavez did not immediately stop for the officer and is described as driving erratically. RP 20, 22. Ms. Chavez did not pull over until she turned down a dead end street, even though she other opportunities to do so. RP 21, 23. He and Officer Whelan made a felony stop with their guns drawn. RP 23, 41, 107. Ms. Chavez did not get out her car while the guns were pointed at her and Officer Whelan removed Ms. Chavez by pulling her out by the hair. RP 42, 108.

Officer Weeks described Ms. Chavez as exhibiting behavior he associated with a person being under the influence of alcohol. RP 26. Both he and Officer Whelan opined, over objection, that she appeared to be under the influence of alcohol and drugs. RP 38, 115. Officer Weeks also testified he saw one empty and one full bottle of Mad Dog 20/20 on the passenger side floor of the car. RP 24. Ms. Chavez refused to provide a breath or blood sample or submit to a drug recognition assessment test. RP 30. Ms. Chavez instead requested she be permitted to talk to an attorney. RP 30, 45.

Officer Weeks did not testify he was in uniform.

Officer Whelan testified he assisted in the stop of Ms. Chavez. RP 101. He was behind Officer Weeks' vehicle. RP 102. He described his marked patrol vehicle and emergency equipment, but indicated he was not sure if Ms. Chavez could have seen his vehicle at the intersection. RP 103. Nor was able to tell if Ms. Chavez had looked in her rear view mirror. RP 117. He testified he typically works in his uniform but did not testify he was wearing his uniform on May 24, 2005 or that he was in uniform while he pursued Ms. Chavez. RP 99.

C. ARGUMENT

Issue No 1: Chavez Was Denied Her Sixth Amendment Right To Choice Of Counsel When The Court Denied Her Request To Have Privately Retained Counsel Represent Her.

As recently held in United States v. Gonzales-Lopez, __ S.Ct. __, 2006 WL 1725573 (June 26, 2006) (attached as Appendix A),

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Cf. Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (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”).

After discussing the Court’s recent decision in Crawford, the Gonzales-Lopez court stated,

So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. “The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.” *Strickland, supra*, at 684-685. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation “complete.”

The Gonzalez-Lopez Court further concluded the error is structural and not subject to a harmless error analysis. “We have little trouble

concluding that erroneous deprivation of the right to counsel of choice, “with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’”

Here, Mr. John O’Melveny appeared before the court as retained counsel. RP 11/7/06 p.10-11. Ms. Chavez requested a brief continuance to allow Mr. O’Melveny, the counsel of her choice, to represent her. RP 11/7/06 p. 11. Without any discussion of how the State would be prejudiced or how the court’s calendar would be inconvenienced the court denied the continuance and required Ms. Chavez to go to trial with Court appointed counsel, Mr. Johnson, rather than Mr. O’Melveny.

Whether Mr. Johnson was prepared or rendered effective assistance is not the issue. As held in in Gonzales-Lopez,

Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice-which is the right to a particular lawyer regardless of comparative effectiveness-with the right to effective counsel which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Such is the case here, Ms. Chavez was entitled to representation by counsel of her choice, Mr. O'Melveny and the court's perfunctory denial is in error requiring reversal of her convictions.

Issue No 2: Chavez's Conviction For Eluding A Police Officer Must Be Reversed And Dismissed With Prejudice Because The State Failed To Present Evidence Of Every Essential Element, Including Whether The Officers Were In Uniform On That Particular Day.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993), State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the State. Id.

The statute under which Chavez was charged, RCW 46.61.024, requires, as one of the elements of the crime, that "[t]he officer giving such a signal *shall be in uniform* and his vehicle shall be appropriately marked showing it to be an official police vehicle." [Emphasis added]. In State v. Hudson, 85 Wn. App. 401, 932 P.2d 714 (1997), the court made clear that proof an officer is in uniform is a necessary element of the crime of attempting to elude a pursuing police vehicle, and unless there is sufficient proof of this particular fact, the proof is insufficient to support a conviction

for this crime. The mere presence of police vehicles is insufficient to infer that the pursuing officer is in uniform. State v. Hudson, 85 Wn. App. at 403, 405; RCW 46.61.024.

A thorough review of the trial record in this case establishes that Officer Weeks was the officer directly behind Ms. Chavez. RP 19. He did not testify that he was in uniform that day. Officer Whelan, who was behind Officer Weeks, when asked about his various duties as a public safety officer, including those of an EMT, testified that he doesn't differentiate between which hat he is wearing because he works in the same uniform. RP 99. He did not specifically testify that he was in his uniform that particular day. RP 99.

Thus, record does not establish that the officers involved in the pursuit were in uniform on that day. The fact that the officers were in marked police vehicles, and Chavez probably knew that they were police officers, without more, is "insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that these officers were in uniform." State v. Hudson, 85 Wn. App. at 405. Thus, there was insufficient evidence as to one of the essential elements of the crime, and Chavez's conviction for attempting to elude a pursuing police vehicle must be reversed and dismissed.

Issue No 1: The Court Miscalculated Ms. Chavez's Offender Score When It Scored The Current Misdemeanor DUI Offense As A Felony "Other Current Offense" Even Though RCW 9.94A.525(11) Only Directs Scoring Of *Prior* Serious Misdemeanor Traffic Offenses.

RCW 9.94A.525(11) provides:

If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction.

The felony eluding and the felony hit and run convictions are both considered felony traffic offenses. RCW 9.94A.030(24).¹ The DUI is considered a "serious traffic offense" and is counted as a point towards Ms. Chavez's offender score when it is a *prior* conviction.

RCW 9.94A.030(40).²

The other current offense language at RCW 9.94A.589 only applies to felonies by its very language. It says "the sentence range

¹ RCW 9.94A.010 (24) - "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), or felony hit-and-run injury-accident (RCW 46.52.020(4)); ...

² RCW 9.94A.030(40) "Serious traffic offense" means:

(a) Driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61. 500), or hit-and-run an attended vehicle (RCW

for each current offense shall be determined by using all other current offenses as if they were prior offenses for the purpose of the offender score.” RCW 9.94A.589(1). This language presumes that the current offense have a sentence range, which is only applicable to felonies. A DUI does not have a sentencing range, but rather only has a mandatory minimum sentence and a maximum possible sentence but no sentencing range. Consequently, RCW 9.94A.589 only refers to other current *felonies*.

Interpretation of a statutory provision is a question of law, and is reviewed de novo. In re Post Sentencing Review of Charles, 135 Wn.2d 239, 245, 955 P.2d 798 (1988). The statutory language of RCW 9.94A.030(40) is clear and unambiguous. A point is only added to the offender score if the serious traffic offense is a prior conviction. Thus, the court erred in scoring Ms. Chavez as a “7” instead of a “6”. Alternatively, if the court determines that the “other current offense language” permits the misdemeanor DUI to count a point in her felony offense score then the statute is susceptible to more than one reasonable meaning and under the rule of lenity, the Court also erred in adding one point to Ms. Chavez’s offender score. As held in State

46.52.020(5) ...

v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1994), “A statute is ambiguous if it is subject to two or more reasonable interpretations. See State v. Garrsion, 46 Wn. App. 52, 54, 728 P.2d 1102 (1986); cf. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733, 827 P.2d 1000 (1992) (in the insurance context, defining “ambiguous” as “fairly susceptible to two different interpretations, both of which are reasonable”).”

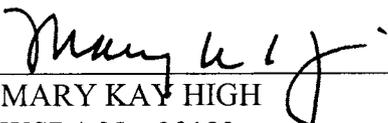
D. CONCLUSION

Chavez’s convictions must be reversed because she was denied her Sixth Amendment right to counsel of her choice. Moreover, the conviction on Count I must be reversed and dismissed with prejudice because the evidence adduced on this offense is insufficient. Moreover, the trial court in its calculations of Ms. Chavez’s offender requiring resentencing.

DATED this 12 of July, 2006.

Respectfully submitted,

THE LAW OFFICE OF MARY KAY HIGH

By 

MARY KAY HIGH
WSBA No. 20123
Attorney for Appellant

CERTIFICATE OF SERVICE

Mary Kay High hereby certifies under penalty of perjury under the laws of the State of Washington that on the 2nd day of March 2005, I delivered a true and correct copy of the Appellant' Opening Brief to which this certificate is attached by United States Mail, to the following:

Ms. Lisa Chavez, DOC 721838
Mission Creek Corrections center for Women
3420 NE Sand Hill Road
Belfair, WA 98528

And, I hand delivered a true and correct copy of the Appellant's Opening Brief and verbatim report of proceedings to which this certificate is attached, to:

Ms. Kathleen Proctor
Pierce County Dep. Pros. Atty.
930 Tacoma Avenue South, Rm. 946
Tacoma, WA 98402

Signed at Tacoma, Washington this 12th day of July 2006.



Mary Kay High

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CORRECTIONALS

APPENDIX A

HBriefs and Other Related Documents

Only the Westlaw citation is currently available.

Supreme Court of the United States
 UNITED STATES, Petitioner,
 v.
 Cuauhtemoc GONZALEZ-LOPEZ.
 No. 05-352.

Argued April 18, 2006.
 Decided June 26, 2006.

Background: Defendant was convicted of conspiring to distribute marijuana before the United States District Court for the Eastern District of Missouri, and he appealed. The Eighth Circuit Court of Appeals, 399 F.3d 924, vacated and remanded. Government petitioned for certiorari which was granted.

Holdings:The Supreme Court, Justice Scalia, held that:

3(1) where defendant's Sixth Amendment right to **counsel** of his **choice** was violated because the disqualification of his chosen counsel was erroneous, no additional showing of prejudice was required to make the violation complete, and

6(2) trial court's erroneous deprivation of defendant's Sixth Amendment right to **choice** of **counsel** entitled him to reversal of his conviction, as error qualified as a "structural error" not subject to review for harmlessness.

Affirmed and remanded.

Justice Alito filed dissenting opinion in which Chief Justice Roberts, and Justices Kennedy and Thomas joined.

[1] Criminal Law 110  641.10(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in

General

110k641 Counsel for Accused
110k641.10 Choice of Counsel
110k641.10(1) k. In General; Forcing
Counsel on Accused. Most Cited Cases
 An element of the Sixth Amendment right to counsel is the right of a defendant who does not require appointed counsel to choose who will represent him. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110  641.1

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
 General
110k641 Counsel for Accused
110k641.1 k. In General. Most Cited
Cases

Criminal Law 110  641.10(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
 General
110k641 Counsel for Accused
110k641.10 Choice of Counsel
110k641.10(1) k. In General; Forcing
Counsel on Accused. Most Cited Cases
 The Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110  641.10(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
 General
110k641 Counsel for Accused
110k641.10 Choice of Counsel
110k641.10(1) k. In General; Forcing
Counsel on Accused. Most Cited Cases

Criminal Law 110  641.12(1)

110 Criminal Law
110XX Trial

--- S.Ct. ----
 --- S.Ct. ----, 2006 WL 1725573 (U.S.)
 (Cite as: --- S.Ct. ----)

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.12 Deprivation or Allowance of Counsel

110k641.12(1) k. In General. Most

Cited Cases

Where defendant's Sixth Amendment right to **counsel** of his **choice** was violated because the disqualification of his chosen counsel was erroneous, no additional showing of prejudice was required to make the violation complete. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110  **641.10(1)**

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.10 Choice of Counsel

110k641.10(1) k. In General; Forcing Counsel on Accused. Most Cited Cases

Criminal Law 110  **641.12(1)**

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.12 Deprivation or Allowance of Counsel

110k641.12(1) k. In General. Most

Cited Cases

The Sixth Amendment right to counsel is violated when the erroneous disqualification of counsel impairs the assistance that a defendant receives at trial from the counsel that he chose. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110  **641.10(1)**

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k641 Counsel for Accused

110k641.10 Choice of Counsel

110k641.10(1) k. In General; Forcing Counsel on Accused. Most Cited Cases

Where the right to be assisted by **counsel** of one's **choice** is wrongly denied, it is unnecessary to

conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation, since the right to select **counsel** of one's **choice** is not derived from the Sixth Amendment's purpose of ensuring a fair trial; thus, deprivation of the right is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110  **1163(2)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1163 Presumption as to Effect of Error

110k1163(2) k. Conduct of Trial in General. Most Cited Cases

Criminal Law 110  **1166.10(1)**

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1166.5 Conduct of Trial in General

110k1166.10 Counsel for Accused

110k1166.10(1) k. In General. Most Cited Cases

Trial court's erroneous deprivation of criminal defendant's Sixth Amendment right to **choice** of **counsel** entitled him to reversal of his conviction, as error qualified as a "structural error" not subject to review for harmlessness. U.S.C.A. Const.Amend. 6. Syllabus ^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*1 Respondent hired attorney Low to represent him on a federal drug charge. The District Court denied Low's application for admission *pro hac vice* on the ground that he had violated a professional conduct rule and then, with one exception, prevented respondent from meeting or consulting with Low throughout the trial. The jury found respondent guilty. Reversing, the Eighth Circuit held that the District Court erred in interpreting the disciplinary rule, that the court's refusal to admit Low therefore violated respondent's Sixth Amendment right to paid counsel of his choosing, and that this violation was

not subject to harmless-error review.

Held: A trial court's erroneous deprivation of a criminal defendant's **choice of counsel** entitles him to reversal of his conviction. Pp. --- - ----3-12.

(a) In light of the Government's concession of erroneous deprivation, the trial court's error violated respondent's Sixth Amendment right to **counsel of choice**. The Court rejects the Government's contention that the violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 691-696, 104 S.Ct. 2052, 80 L.Ed.2d 674-*i.e.*, that his performance was deficient and the defendant was prejudiced by it-or the defendant can demonstrate that substitute counsel's performance, while not deficient, was not as good as what his **counsel of choice** would have provided, creating a "reasonable probability that ... the result ... would have been different," *id.*, at 694. To support these propositions, the Government emphasizes that the right to counsel is accorded to ensure that the accused receive a fair trial, *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291, and asserts that a trial is not unfair unless a defendant has been prejudiced. The right to **counsel of choice**, however, commands not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best. Cf. *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177. That right was violated here; no additional showing of prejudice is required to make the violation "complete." Pp. --- - ----3-7.

(b) The Sixth Amendment violation is not subject to harmless-error analysis. Erroneous deprivation of the right to **counsel of choice**, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S.Ct. 2078, 124 L.Ed.2d 182. It "def[ies] analysis by 'harmless error' standards" because it "affec[ts] the framework within which the trial proceeds" and is not "simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302. Different attorneys will pursue different strategies with regard to myriad trial matters, and the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial. It is impossible to know what different **choices** the rejected **counsel** would have made, and then to quantify the impact of those different choices

on the outcome of the proceedings. This inquiry is not comparable to that required to show that a counsel's deficient performance prejudiced a defendant. Pp. --- - ----8-11.

(c) Nothing in the Court's opinion casts any doubt or places any qualification upon its previous holdings limiting the right to **counsel of choice** and recognizing trial courts' authority to establish criteria for admitting lawyers to argue before them. However broad a trial court's discretion may be, this Court accepts the Government's concession that the District Court erred. Pp. --- - ----11-12.

*2 399 F.3d 924, affirmed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and KENNEDY and THOMAS, JJ., joined.

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

Michael R. Dreeben, for Petitioner.

Jeffrey L. Fisher, for Respondent.

Paul D. Clement, Solicitor General, Washington, D.C., for United States.

Pamela S. Karlan, Stanford, CA, Joseph H. Low, IV, Law Firm of Joseph H. Low, IV, Newport Beach, CA, Jeffrey L. Fisher, Davis Wright Tremaine LLP, Seattle, WA, Karl W. Dickhaus, J. Richard McEachern, McEachern & Dickhaus, LC, St. Louis, MO, Thomas C. Goldstein, Amy Howe, Kevin K. Russell, Goldstein & Howe, P.C., Washington, D.C., for Respondent. For U.S. Supreme Court briefs, see: 2006 WL 403665 (Pet. Brief) 2006 WL 838892 (Resp. Brief) 2006 WL 951122 (Reply. Brief)

Justice SCALIA delivered the opinion of the Court.

We must decide whether a trial court's erroneous deprivation of a criminal defendant's **choice of counsel** entitles him to a reversal of his conviction.

I

Respondent Cuauhtemoc Gonzalez-Lopez was charged in the Eastern District of Missouri with conspiracy to distribute more than 100 kilograms of marijuana. His family hired attorney John Fahle to represent him. After the arraignment, respondent called a California attorney, Joseph Low, to discuss whether Low would represent him, either in addition

to or instead of Fahle. Low flew from California to meet with respondent, who hired him.

Some time later, Low and Fahle represented respondent at an evidentiary hearing before a Magistrate Judge. The Magistrate Judge accepted Low's provisional entry of appearance and permitted Low to participate in the hearing on the condition that he immediately file a motion for admission *pro hac vice*. During the hearing, however, the Magistrate Judge revoked the provisional acceptance on the ground that, by passing notes to Fahle, Low had violated a court rule restricting the cross-examination of a witness to one counsel.

The following week, respondent informed Fahle that he wanted Low to be his only attorney. Low then filed an application for admission *pro hac vice*. The District Court denied his application without comment. A month later, Low filed a second application, which the District Court again denied without explanation. Low's appeal, in the form of an application for a writ of mandamus, was dismissed by the United States Court of Appeals for the Eighth Circuit.

Fahle filed a motion to withdraw as counsel and for a show-cause hearing to consider sanctions against Low. Fahle asserted that, by contacting respondent while respondent was represented by Fahle, Low violated Mo. Rule of Professional Conduct 4-4.2 (1993), which prohibits a lawyer “[i]n representing a client” from “communicat[ing] about the subject of the representation with a party ... represented by another lawyer” without that lawyer's consent. Low filed a motion to strike Fahle's motion. The District Court granted Fahle's motion to withdraw and granted a continuance so that respondent could find new representation. Respondent retained a local attorney, Karl Dickhaus, for the trial. The District Court then denied Low's motion to strike and, for the first time, explained that it had denied Low's motions for admission *pro hac vice* primarily because, in a separate case before it, Low had violated Rule 4-4.2 by communicating with a represented party.

*3 The case proceeded to trial, and Dickhaus represented respondent. Low again moved for admission and was again denied. The Court also denied Dickhaus's request to have Low at counsel table with him and ordered Low to sit in the audience and to have no contact with Dickhaus during the proceedings. To enforce the Court's order, a United States Marshal sat between Low and Dickhaus at trial. Respondent was unable to meet with Low

throughout the trial, except for once on the last night. The jury found respondent guilty.

After trial, the District Court granted Fahle's motion for sanctions against Low. It read Rule 4-4.2 to forbid Low's contact with respondent without Fahle's permission. It also reiterated that it had denied Low's motions for admission on the ground that Low had violated the same Rule in a separate matter.

Respondent appealed, and the Eighth Circuit vacated the conviction. 399 F.3d 924 (2005). The Court first held that the District Court erred in interpreting Rule 4-4.2 to prohibit Low's conduct both in this case and in the separate matter on which the District Court based its denials of his admission motions. The District Court's denials of these motions were therefore erroneous and violated respondent's Sixth Amendment right to paid counsel of his choosing. See *id.*, at 928-932. The Court then concluded that this Sixth Amendment violation was not subject to harmless-error review. See *id.*, at 932-935. We granted certiorari. 546 U.S. ---- (2006).

II

[1][2] The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Cf. *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (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**”). The Government here agrees, as it has previously, that “the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.” *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989). To be sure, the right to **counsel** of **choice** “is circumscribed in several important respects.” *Wheat, supra*, at 159. But the Government does not dispute the Eighth Circuit's conclusion in this case that the District Court erroneously deprived respondent of his **counsel** of **choice**.

[3] The Government contends, however, that the

Sixth Amendment violation is not “complete” unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 691-696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)-i.e., that substitute counsel's performance was deficient and the defendant was prejudiced by it. In the alternative, the Government contends that the defendant must at least demonstrate that his **counsel of choice** would have pursued a different strategy that would have created a “reasonable probability that ... the result of the proceedings would have been different,” *id.*, at 694-in other words, that he was prejudiced within the meaning of *Strickland* by the denial of his **counsel of choice** even if substitute **counsel's** performance was not constitutionally deficient.^{FN1} To support these propositions, the Government points to our prior cases, which note that the right to counsel “has been accorded ... not for its own sake, but for the effect it has on the ability of the accused to receive a fair trial.” *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (internal quotation marks omitted). A trial is not unfair and thus the Sixth Amendment is not violated, the Government reasons, unless a defendant has been prejudiced.

^{FN1}. The dissent proposes yet a third standard-viz., that the defendant must show “ ‘an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial.’ ” *Post*, at 4 (opinion of Alito, J.). That proposal suffers from the same infirmities (outlined later in text) that beset the Government's positions. In addition, however, it greatly impairs the clarity of the law. How is a lower-court judge to know what an “identifiable difference” consists of? Whereas the Government at least appeals to *Strickland* and the case law under it, the most the dissent can claim by way of precedential support for its rule is that it is “consistent with” cases that never discussed the issue of prejudice. *Id.*

*4 Stated as broadly as this, the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause-and then proceeds to give no effect to the details. It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as

the trial is, on the whole, fair. What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)) with regard to the Sixth Amendment's right of confrontation-a line of reasoning that “abstracts from the right to its purposes, and then eliminates the right.” *Maryland v. Craig*, 497 U.S. 836, 862, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (Scalia, J., dissenting). Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore “indicia of reliability,” the Confrontation Clause was not violated. See *Roberts*, *supra*, at 65-66. We rejected that argument (and our prior cases that had accepted it) in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), saying that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.*, at 61.

[4] So also with the Sixth Amendment right to **counsel of choice**. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best. “The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.” *Strickland*, *supra*, at 684-685. In sum, the right at stake here is the right to **counsel of choice**, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation “complete.”^{FN2}

^{FN2}. The dissent resists giving effect to our cases' recognition, and the Government's concession, that a defendant has a right to be defended by counsel of his choosing. It argues that because the Sixth Amendment guarantees the right to the “assistance of counsel,” it is not violated unless “the erroneous disqualification of a defendant's **counsel of choice** ... impair[s] the assistance that a defendant receives at trial.” *Post*, at 1-2 (opinion of Alito, J.). But if our cases (and the Government's concession) mean anything, it is that the Sixth Amendment is violated when the erroneous disqualification of counsel “impair[s] the assistance that a defendant receives at trial [from the counsel

that he chose].”

*5 The cases the Government relies on involve the right to the effective assistance of counsel, the violation of which generally requires a defendant to establish prejudice. See, e.g., *Strickland, supra*, at 694; *Mickens, supra*, at 166; *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The earliest case generally cited for the proposition that “the right to counsel is the right to the effective assistance of counsel,” *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), was based on the Due Process Clause rather than on the Sixth Amendment, see *Powell*, 287 U.S., at 57 (cited in e.g., *McMann, supra*, at 771, n. 14). And even our recognition of the right to effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel “is critical to the ability of the adversarial system to produce just results.” *Strickland, supra*, at 685. Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. See *Mickens, supra*, at 166. The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be “ineffective” unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not “complete” until the defendant is prejudiced. See *Strickland, supra*, at 685.

[5] The right to select **counsel** of one's **choice**, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial.^{FN3} It has been regarded as the root meaning of the constitutional guarantee. See *Wheat*, 486 U.S., at 159; *Andersen v. Treat*, 172 U.S. 24, 19 S.Ct. 67, 43 L.Ed. 351 (1898). See generally W. Beaney, *The Right to Counsel in American Courts* 18-24, 27-33 (1955). Cf. *Powell, supra*, at 53. Where the right to be assisted by **counsel** of one's **choice** is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to **counsel** of **choice**—which is the right to a particular lawyer regardless of comparative

effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

FN3. In *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988), where we formulated the right to **counsel** of **choice** and discussed some of the limitations upon it, we took note of the overarching purpose of fair trial in holding that the trial court has discretion to disallow a first **choice** of **counsel** that would create serious risk of conflict of interest. *Id.*, at 159. It is one thing to conclude that the right to **counsel** of **choice** may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair.

III

*6 [6] Having concluded, in light of the Government's concession of erroneous deprivation, that the trial court violated respondent's Sixth Amendment right to **counsel** of **choice**, we must consider whether this error is subject to review for harmlessness. In *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), we divided constitutional errors into two classes. The first we called “trial error,” because the errors “occurred during presentation of the case to the jury” and their effect may “be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.” *Id.*, at 307-308 (internal quotation marks omitted). These include “most constitutional errors.” *Id.*, at 306. The second class of constitutional error we called “structural defects.” These “defy analysis by ‘harmless-error’ standards” because they “affect[] the framework within which the trial proceeds,” and are not “simply an error in the trial process itself.” *Id.*, at 309-310.^{FN4} See also *Neder v. United States*, 527 U.S. 1, 7-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Such errors include the denial of counsel, see *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the denial of the right of self-representation, see *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the denial of the right to public trial, see *Waller v. Georgia*, 467 U.S. 39, 49, n. 9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124

L.Ed.2d 182 (1993).

FN4. The dissent criticizes us for our trial error/structural defect dichotomy, asserting that *Fulminante* never said that “trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors affecting the framework within which the trial proceeds are structural,” *post*, at 8 (opinion of Alito, J.) (internal quotation marks and citation omitted). Although it is hard to read that case as doing anything other than dividing constitutional error into two comprehensive categories, our ensuing analysis in fact relies neither upon such comprehensiveness nor upon trial error as the touchstone for the availability of harmless-error review. Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. See *Waller v. Georgia*, 467 U.S. 39, 49, n. 9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (violation of the public-trial guarantee is not subject to harmless review because “the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance”); *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (“[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained”). The dissent would use “fundamental unfairness” as the sole criterion of structural error, and cites a case in which that was the determining factor, see *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoted by the dissent, *post*, at 6). But this has not been the only criterion we have used. In addition to the above cases using difficulty of assessment as the test, we have also relied on the irrelevance of harmless review, see *McKaskle v. Wiggins*, 465 U.S. 168, 177, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (“Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to ‘harmless error’ analysis”). Thus, it is the dissent that creates a single, inflexible criterion, inconsistent with the reasoning of our precedents, when it asserts that *only*

those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural, *post*, at 8.

We have little trouble concluding that erroneous deprivation of the right to **counsel of choice**, “with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” *Id.*, at 282. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the “framework within which the trial proceeds,” *Fulminante, supra*, at 310—or indeed on whether it proceeds at all. It is impossible to know what different **choices** the rejected **counsel** would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

The Government acknowledges that the deprivation of **choice of counsel** pervades the entire trial, but points out that counsel's ineffectiveness may also do so and yet we do not allow reversal of a conviction for that reason without a showing of prejudice. But the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*. A **choice-of-counsel** violation occurs *whenever* the defendant's choice is wrongfully denied. Moreover, if and when counsel's ineffectiveness “pervades” a trial, it does so (to the extent we can detect it) through identifiable mistakes. We can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of **choice of counsel**, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel-in matters ranging from questions asked on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have

to speculate upon what matters the rejected counsel would have handled differently-or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.^{FN5}

FN5. In its discussion of the analysis that would be required to conduct harmless-error review, the dissent focuses on which counsel was "better." See *post*, at 7-8 (opinion of Alito, J.). This focus has the effect of making the analysis look achievable, but it is fundamentally inconsistent with the principle (which the dissent purports to accept for the sake of argument) that the Sixth Amendment can be violated without a showing of harm to the quality of representation. Cf. *McKaskle, supra*, at 177, n. 8. By framing its inquiry in these terms and expressing indignation at the thought that a defendant may receive a new trial when his actual counsel was at least as effective as the one he wanted, the dissent betrays its misunderstanding of the nature of the right to **counsel of choice** and its confusion of this right with the right to effective assistance of counsel.

IV

*7 Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to **counsel of choice** and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. As the dissent too discusses, *post*, at 3, the right to **counsel of choice** does not extend to defendants who require counsel to be appointed for them. See *Wheat*, 486 U.S., at 159; *Caplin & Drysdale*, 491 U.S., at 624, 626. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. See *Wheat*, 486 U.S., at 159-160. We have recognized a trial court's wide latitude in balancing the right to **counsel of choice** against the needs of fairness, *id.*, at 163-164, and against the demands of its calendar, *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). The court has, moreover, an "independent interest in

ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat, supra*, at 160. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first **choice of counsel**. However broad a court's discretion may be, the Government has conceded that the District Court here erred when it denied respondent his **choice of counsel**. Accepting that premise, we hold that the error violated respondent's Sixth Amendment right to **counsel of choice** and that this violation is not subject to harmless-error analysis.

* * *

*8 The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

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

I

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

choice is able to provide. It follows that if the erroneous disqualification of a defendant's **counsel of choice** does not impair the assistance that a defendant receives at trial, there is no violation of the Sixth Amendment.^{FN1}

FN1. This view is consistent with the Government's concession that "[t]he Sixth Amendment ... encompasses a non-indigent defendant's right to select counsel who will represent him in a criminal prosecution," Brief for United States 11, though this right is "circumscribed in several important respects," *id.*, at 12 (citation and internal quotation marks omitted).

The language of the Sixth Amendment supports this interpretation. The Assistance of Counsel Clause focuses on what a defendant is entitled to receive ("Assistance"), rather than on the identity of the provider. The background of the adoption of the Sixth Amendment points in the same direction. The specific evil against which the Assistance of Counsel Clause was aimed was the English common-law rule severely limiting a felony defendant's ability to be assisted by counsel. *United States v. Ash*, 413 U.S. 300, 306, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). "[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial," *id.*, at 309, and thereby "to assure fairness in the adversary criminal process," *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). It was not "the essential aim of the Amendment ... to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); cf. *Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel").

There is no doubt, of course, that the right "to have the Assistance of Counsel" carries with it a limited right to be represented by **counsel of choice**. At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited,^{FN2} that is how the right inevitably played out: A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure. But from the beginning, the right to **counsel of choice** has been circumscribed.

FN2. See Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 118 (providing for appointment of counsel in capital cases); *Betts v. Brady*, 316 U.S. 455, 467, n. 20, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) (surveying state statutes).

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

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

Similarly, the right to be represented by **counsel of choice** can be limited by mundane case-management considerations. If a trial judge schedules a trial to begin on a particular date and defendant's **counsel of choice** is already committed for other trials until some time thereafter, the trial judge has discretion under appropriate circumstances to refuse to postpone the trial date and thereby, in effect, to force the defendant to forgo **counsel of choice**. See, e.g., *Slappy, supra*; *United States v. Hughey*, 147 F.3d 423, 428-431 (C.A.5 1998).

These limitations on the right to **counsel of choice** are tolerable because the focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation. Limiting a defendant to those attorneys who are willing, available, and eligible to represent the defendant still leaves a defendant with a pool of attorneys to choose from-and, in most

jurisdictions today, a large and diverse pool. Thus, these restrictions generally have no adverse effect on a defendant's ability to secure the best assistance that the defendant's circumstances permit.

Because the Sixth Amendment focuses on the quality of the assistance that **counsel of choice** would have provided, I would hold that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received. This would not require a defendant to show that the second-choice attorney was constitutionally ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Rather, the defendant would be entitled to a new trial if the defendant could show “an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial.” *Rodriguez v. Chandler*, 382 F.3d 670, 675 (C.A.7 2004), cert. denied, 543 U.S. 1156, 125 S.Ct. 1303, 161 L.Ed.2d 124 (2005).

*10 This approach is fully consistent with our prior decisions. We have never held that the erroneous disqualification of counsel violates the Sixth Amendment when there is no prejudice, and while we have stated in several cases that the Sixth Amendment protects a defendant's right to **counsel of choice**, see *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989); *Wheat, supra*, at 159; *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932), we had no occasion in those cases to consider whether a violation of this right can be shown where there is no prejudice. Nor do our opinions in those cases refer to that question. It is therefore unreasonable to read our general statements regarding **counsel of choice** as addressing the issue of prejudice.^{FN3}

^{FN3} *Powell* is the case generally cited as first noting a defendant's right to **counsel of choice**. *Powell* involved an infamous trial in which the defendants were prevented from obtaining any **counsel of their choice** and were instead constrained to proceed with court-appointed counsel of dubious effectiveness. We held that this denied them due process and that “a fair opportunity to secure **counsel of [one's] own choice**” is a necessary concomitant of the right to counsel. 287 U.S., at 53; cf. *id.*, at 71 (“[T]he failure of the trial court to give

[petitioners] reasonable time and opportunity to secure counsel was a clear denial of due process”). It is clear from the facts of the case that we were referring to the denial of the opportunity to choose *any* counsel, and we certainly said nothing to suggest that a violation of the right to **counsel of choice** could be established without any showing of prejudice.

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

Finally, in *Caplin & Drysdale*, we held that the challenged action of the trial judge—entering an order forfeiting funds that the defendant had earmarked for use in paying his attorneys—had been proper, and, accordingly, we had no occasion to address the issue of prejudice. We recognized that “the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds,” 491 U.S., at 624-625, but we added that “[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond ‘the individual's right to spend his own money to obtain the advice and assistance of ... counsel,’ “ *id.*, at 626 (omission in original).

II

But even accepting, as the majority holds, that the erroneous disqualification of **counsel of choice** always violates the Sixth Amendment, it still would not follow that reversal is required in all cases. The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions. Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a), which instructs federal courts to “disregar[d]” “[a]ny error ... which does not affect substantial rights.” See also 28 U.S.C. § 2111; Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The only exceptions we have recognized to this rule have been for “a limited class of fundamental constitutional errors that ‘defy analysis by “harmless error” standards.’” Neder v. United States, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting Arizona v. Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)); see also Chapman, *supra*, at 23. “Such errors ... ‘necessarily render a trial fundamentally unfair’ [and] deprive defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.’” Neder, *supra*, at 8-9 (quoting Rose v. Clark, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (second omission in original)); see also *ante*, at 9 (listing such errors).

Thus, in Neder, we rejected the argument that the omission of an element of a crime in a jury instruction “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” 527 U.S., at 9. In fact, in that case, “quite the opposite [was] true: Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder’s defense. ...” *Ibid*.

*11 Neder’s situation—with an impartial judge, the correct standard of proof, assistance of counsel, and a fair jury—is much like respondent’s. Fundamental unfairness does not inexorably follow from the denial of first-choice counsel. The “decision to retain a particular lawyer” is “often uninformed,” Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); a defendant’s second-choice lawyer may thus turn out to be better than the defendant’s first-choice lawyer. More often, a defendant’s first- and second-choice lawyers may be simply indistinguishable. These possibilities would

not justify violating the right to **choice of counsel**, but they do make me hard put to characterize the violation as “always render[ing] a trial unfair,” Neder, *supra*, at 9. Fairness may not limit the right, see *ante*, at 5, but it does inform the remedy.

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

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

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

III

*12 Either of the two courses outlined above-

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

Under the majority's holding, a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly. By contrast, a defendant whose attorney was ineffective in the constitutional sense (*i.e.*, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment," Strickland, 466 U.S., at 687) cannot obtain relief without showing prejudice.

Under the majority's holding, a trial court may adopt rules severely restricting *pro hac vice* admissions, cf. Leis v. Flynt, 439 U.S. 438, 443, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) (*per curiam*), but if it adopts a generous rule and then errs in interpreting or applying it, the error automatically requires reversal of any conviction, regardless of whether the erroneous ruling had any effect on the defendant.

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

Cases as stark as the above hypothetical are unlikely, but there are certainly cases in which the erroneous disqualification of a defendant's first-choice counsel neither seriously upsets the defendant's preferences nor impairs the defendant's representation at trial. As

noted above, a defendant's second-choice lawyer may sometimes be better than the defendant's first-choice lawyer. Defendants who retain counsel are frequently forced to choose among attorneys whom they do not know and about whom they have limited information, and thus a defendant may not have a strong preference for any one of the candidates. In addition, if all of the attorneys considered charge roughly comparable fees, they may also be roughly comparable in experience and ability. Under these circumstances, the erroneous disqualification of a defendant's first-choice attorney may simply mean that the defendant will be represented by an attorney whom the defendant very nearly chose initially and who is able to provide representation that is just as good as that which would have been furnished by the disqualified attorney. In light of these realities, mandating reversal without even a minimal showing of prejudice on the part of the defendant is unwarranted.

The consequences of the majority's holding are particularly severe in the federal system and in other court systems that do not allow a defendant to take an interlocutory appeal when counsel is disqualified. See Flanagan v. United States, 465 U.S. 259, 260, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984). Under such systems, appellate review typically occurs after the defendant has been tried and convicted. At that point, if an appellate court concludes that the trial judge made a marginally incorrect ruling in applying its own *pro hac vice* rules, the appellate court has no alternative but to order a new trial-even if there is not even any claim of prejudice. The Sixth Amendment does not require such results.

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

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