

8. *Sixth Amendment — Right to Counsel of Choice.* — In 1988, the Supreme Court established in *Wheat v. United States*¹ that the Sixth Amendment guarantee of “the Assistance of Counsel”² encompasses the right to choose one’s particular attorney.³ *Wheat*, however, did not determine what remedy a defendant would be entitled to upon an appeals court finding that a trial judge had erroneously deprived him of this right.⁴ Last Term, in *United States v. Gonzalez-Lopez*,⁵ the Supreme Court clarified the remedy, holding that erroneous denial of a criminal defendant’s counsel of choice warrants automatic reversal of his conviction.⁶ *Gonzalez-Lopez*’s reasoning and conclusion further highlighted the anomalous nature of the ineffective assistance doctrine in the Court’s Sixth Amendment jurisprudence. In its unsatisfying effort to distinguish the ineffective assistance and counsel of choice doctrines conceptually, the Court missed a valuable opportunity to reexamine and rejuvenate the right to effective assistance of counsel.

In 2003, Cuauhtemoc Gonzalez-Lopez was arrested and charged in the Eastern District of Missouri with conspiring to distribute more than 100 kilograms of marijuana.⁷ Shortly after his arraignment, Gonzalez-Lopez hired Joseph Low, a California attorney, to accompany John Fahle, the counsel Gonzalez-Lopez’s family had hired.⁸ A magistrate judge permitted Low to appear at an evidentiary hearing on the condition that he file for admission *pro hac vice* but later re-

¹ 486 U.S. 153 (1988).

² U.S. CONST. amend. VI.

³ See *Wheat*, 486 U.S. at 159 (“[T]he right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment.”).

⁴ Although *Wheat* did not address the consequences of such a finding, most circuits that addressed the question held that it requires automatic reversal. See *United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990); *Fuller v. Diesslin*, 868 F.2d 604, 610–11 (3d Cir. 1989); *United States v. Panzardi-Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987); *Wilson v. Mintzes*, 761 F.2d 275, 286–87 (6th Cir. 1985). But see *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002) (applying harmless error review to the erroneous denial of chosen counsel in the sentencing phase). The Supreme Court has also suggested in dicta that counsel of choice cases should be automatically reversed. See *Flanagan v. United States*, 465 U.S. 259, 267–68 (1984) (suggesting that, to the extent that the right to counsel of choice is similar to the right to self-representation, violation of the counsel of choice right would not be subject to prejudice analysis). But see *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 438 (1985) (noting that *Flanagan* did not decide whether prejudice is required in counsel of choice cases). The Seventh Circuit rejected its sister circuits’ approaches and adopted an “adverse-effect standard,” a middle ground between automatic reversal and requiring a showing of prejudice. See *Rodriguez v. Chandler*, 382 F.3d 670, 675 (7th Cir. 2004). Under this approach, a defendant need not show that the trial’s outcome would have differed with chosen counsel, but simply that there existed “an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represent[ed] the defendant at trial.” *Id.*

⁵ 126 S. Ct. 2557 (2006).

⁶ *Id.* at 2565.

⁷ *United States v. Gonzalez-Lopez*, 399 F.3d 924, 926 (8th Cir. 2005).

⁸ *Id.* at 926–27.

voked that permission on the ground that Low had violated a court rule by passing notes to Fahle.⁹ Soon thereafter, Gonzalez-Lopez decided he wanted Low to be his sole attorney.¹⁰ Low filed for admission pro hac vice, but the district court twice denied his application without explanation.¹¹ Fahle then filed motions to withdraw as counsel and for a show-cause hearing for sanctions against Low, alleging that Low had violated a local rule of professional conduct by independently communicating with Gonzalez-Lopez without Fahle's permission.¹² Low moved to strike Fahle's motion for sanctions; the district court denied Low's motion, explaining that Low had been denied admission pro hac vice because of pending ethical allegations similar to those leveled by Fahle.¹³ Gonzalez-Lopez proceeded to trial with a third attorney and was convicted on the indictment's sole count.¹⁴

On appeal, Gonzalez-Lopez challenged the district court's refusal to admit his counsel of choice.¹⁵ The Court of Appeals for the Eighth Circuit agreed that this denial was erroneous.¹⁶ Although district courts have discretion over pro hac vice applications, the Eighth Circuit found that the district court had misinterpreted the local rule on which it had based its denial.¹⁷ The Eighth Circuit also expressed concern that "Gonzalez-Lopez's Sixth Amendment right played no part in the district court's decision to deny Low pro hac vice admission."¹⁸ The court further held that the erroneous deprivation of a criminal defendant's counsel of choice is not subject to harmless error review but instead requires automatic reversal.¹⁹ Consequently, the court vacated Gonzalez-Lopez's conviction and remanded the case for a new trial.²⁰ The government sought certiorari on the sole issue of whether Gon-

⁹ *Id.* at 927.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* Fahle alleged that Low violated Missouri Rules of Professional Conduct Rule 4-4.2, which states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MO. RULES OF PROF'L CONDUCT R. 4-4.2 (1993).

¹³ *Gonzalez-Lopez*, 399 F.3d at 927-28. Ultimately, "the district court ruled in favor of Fahle on the motion for sanctions against Low" and confirmed that "it had properly denied Low's motions for admission pro hac vice." *Id.* at 928.

¹⁴ *Id.* at 928.

¹⁵ *Id.*

¹⁶ *Id.* at 933.

¹⁷ *Id.* at 931. Specifically, the Eighth Circuit found that the district court had "read[] the words 'In representing a client' out of the Rule": although Low had communicated with Gonzalez-Lopez, he was not representing any other party in the case and thus had not violated Rule 4-4.2. *Id.*

¹⁸ *Id.* at 932.

¹⁹ *Id.* at 933.

²⁰ *Id.* at 935.

zalez-Lopez first had to show prejudice before a court could reverse his conviction.²¹

The Supreme Court affirmed. Writing for the majority, Justice Scalia²² rejected the government's contention that a criminal defendant must show that he was prejudiced by the erroneous deprivation of his counsel of choice to obtain reversal.²³ Although the Due Process Clause guarantees a fair trial, Justice Scalia explained, the right to counsel of choice "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."²⁴ Requiring a showing of prejudice for this right would render the Sixth Amendment little greater than "a more detailed version of the Due Process Clause."²⁵

Justice Scalia then distinguished the right to counsel of choice from the right to effective assistance of counsel by focusing on the purpose from which each right was derived. The right to choose counsel, he explained, "has been regarded as the root meaning of the constitutional guarantee."²⁶ It would therefore make little sense to require a defendant denied his counsel of choice to prove prejudice, as violation of the right is "complete" when the preferred counsel is denied, regardless of how the new counsel performs.²⁷ The right to effective assistance, on

²¹ See *Gonzalez-Lopez*, 126 S. Ct. at 2561 ("[T]he Government does not dispute the Eighth Circuit's conclusion . . . that the District Court erroneously deprived respondent of his counsel of choice.").

²² Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Scalia's opinion.

²³ *Gonzalez-Lopez*, 126 S. Ct. at 2562.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 2563. Justice Scalia's characterization of this right suggests an understanding that a major purpose of the Sixth Amendment is to grant the accused control over his own defense. This principle also underlies the Court's recognition of the corollary right to represent oneself pro se. See *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984) ("[T]he right to appear pro se exists to affirm the accused's individual dignity and autonomy."); *Faretta v. California*, 422 U.S. 806, 819, 833–34 (1975) (describing "the right to self-representation" as "implied by the structure of the [Sixth] Amendment" and necessary to the Founders' understanding of "the inestimable worth of free choice"). Notably, Justice Scalia did not refer to this "autonomy" purpose explicitly in *Gonzalez-Lopez*, nor was this purpose mentioned in *Wheat*, which Justice Scalia cited for the proposition that the counsel of choice right is not derived from the purpose of ensuring a fair trial. See *Gonzalez-Lopez*, 126 S. Ct. at 2563. However, courts since *Wheat* have taken up the suggestion in Justice Marshall's dissent, see *Wheat v. United States*, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting), that the right to choose counsel derives from the purpose of granting defendants control over their own defense. See, e.g., *United States v. Mendoza-Salgado*, 964 F.2d 993, 1014 (10th Cir. 1992) ("The right to privately retain counsel of choice derives from a defendant's right to determine the type of defense he wishes to present."); cf. Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: An Exercise in the Weighing of Unarticulated Values*, 43 S.C. L. REV. 345, 381–86 (1992) (observing that the *Wheat* Court did not articulate the values underlying the right to counsel of choice and urging the Court to clarify its reasoning, but suspecting that "the Court recognized the right because it is a manifestation of the value that the Sixth Amendment places upon individual autonomy and dignity").

²⁷ *Gonzalez-Lopez*, 126 S. Ct. at 2562.

the other hand, was derived from the purpose of ensuring a fair trial, defined by *Strickland v. Washington*²⁸ as one whose outcome is just.²⁹ Thus, to establish a violation of the right to effective counsel, the defendant must show that the outcome was *not* just — that there is a reasonable likelihood the outcome would have differed had the attorney performed more competently.³⁰ Violation of the right is “complete” only if the attorney’s performance negatively impacted the outcome of the trial.³¹

Having determined that a constitutional violation of the right to counsel of choice does not require the defendant to show prejudice, the Court went on to hold that such a violation is not subject to harmless error review but instead necessitates automatic reversal of conviction.³² Explaining the difference between trial errors, which can be reviewed for harmlessness, and structural errors, which merit automatic reversal, the Court stated that it had “little trouble concluding that erroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as ‘structural error.’”³³ Unlike trial errors, Justice Scalia explained, the effects of the deprivation of chosen counsel are not easily quantifiable, making harmless error analysis “a speculative inquiry into what might have occurred in an alternate universe.”³⁴ Finally, the Court emphasized that its holding did not diminish the trial court’s broad discretion to exclude lawyers for proper reasons; it held simply that when a judge abuses her discretion in

²⁸ 466 U.S. 668 (1984).

²⁹ *Gonzalez-Lopez*, 126 S. Ct. at 2563.

³⁰ *Id.*

³¹ *Id.* Justice Scalia’s strict distinction between dignitary rights and rights existing purely to promote reliability may be far too simplistic, as many commentators have argued that the right to effective assistance itself contains a dignitary component. See, e.g., Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 95 (1986) (“Effective assistance itself . . . can be said to implicate dignitary values like procedural fairness and equality.”); Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 95–97 (1991) (arguing that there is a “link between dignitary values and effective assistance of counsel,” which the Court’s Counsel Clause jurisprudence has degraded); Stephen G. Gilles, Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1385 (1983) (“[A]ll formulations of [the right to effective assistance] are an amalgam of two characterizations, one procedural or dignitary, the other substantive.”).

³² *Gonzalez-Lopez*, 126 S. Ct. at 2564–65. *Chapman v. California*, 386 U.S. 18 (1967), held that “there may be some constitutional errors which . . . are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.” *Id.* at 22. Since *Chapman*, the Court “has recognized that most constitutional errors can be harmless.” *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Whether or not to apply harmless error review is a practical question based on whether the error’s effect may “be quantitatively assessed in the context of other evidence presented.” *Id.* at 308.

³³ *Gonzalez-Lopez*, 126 S. Ct. at 2563–64 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)) (internal quotation mark omitted).

³⁴ *Id.* at 2565.

excluding a defendant's counsel of choice, the defendant's conviction must be reversed.³⁵

Justice Alito dissented.³⁶ He criticized the majority's "characterization of what the Sixth Amendment guarantees," arguing that the "Assistance of Counsel Clause focuses on what a defendant is entitled to receive ('Assistance'), rather than on the identity of the provider."³⁷ For this reason, Justice Alito would have required defendants to show that the "erroneous disqualification of counsel . . . diminishe[d] the quality of assistance that the defendant would have otherwise received."³⁸ In the alternative, even if the defendant need not show prejudice for the right to be violated, Justice Alito would require a harmless error analysis, as the denial of counsel of choice is "not comparable" to other violations that warrant automatic reversal.³⁹ Finally, Justice Alito argued that his reasoning would avoid "the anomalous and unjustifiable consequences" of the majority's holding.⁴⁰

Gonzalez-Lopez creates an incongruity between the counsel of choice doctrine and the effective assistance of counsel doctrine as established in *Strickland*. Under *Gonzalez-Lopez*, a criminal defendant who is erroneously denied his first-choice counsel receives a new trial, even if his second-choice attorney "performed brilliantly."⁴¹ In contrast, a defendant whose attorney performed severely below professional standards — for instance, by showing up to trial drunk⁴² — cannot receive a new trial unless he demonstrates that his attorney's poor performance negatively affected the trial's outcome.⁴³ This result is intuitively troubling because the trial in which the outcome is fairly

³⁵ *Id.*

³⁶ Chief Justice Roberts and Justices Kennedy and Thomas joined Justice Alito's dissent.

³⁷ *Gonzalez-Lopez*, 126 S. Ct. at 2566 (Alito, J., dissenting).

³⁸ *Id.* at 2568.

³⁹ *Id.* at 2570.

⁴⁰ *Id.* Justice Alito pointed to the tension with the effective assistance doctrine that is the subject of this comment as one such "anomalous and unjustifiable consequence[.]" *Id.* He also noted that trial courts that adopt generous rules for pro hac vice admissions run a greater risk of convictions being reversed than do courts that severely restrict such admissions. *Id.* Finally, Justice Alito described a situation in which a defendant is erroneously denied a first-choice attorney with "little criminal experience" and then secures "a nationally acclaimed and highly experienced attorney" who achieves acquittal on most but not all counts. *Id.* at 2570–71. In such a case, the defendant could receive a new trial "even if [he] publicly proclaimed after the verdict that the second attorney had provided better representation than any other attorney in the country could have possibly done." *Id.* at 2571.

⁴¹ *Id.* at 2570.

⁴² See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 426, 455–63 (1996) (describing cases in which no *Strickland* prejudice was found despite defense attorneys' manifest drug or alcohol use, mental illness, or somnolence).

⁴³ See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

reliable — in which the defendant was convicted despite having a top lawyer — gets reversed, while the trial in which reliability is questionable — in which the defendant did not have an attorney adequately presenting his case — is almost invariably upheld.

The majority did not endeavor to resolve this anomaly but instead explained it away by focusing on the rights' purposes: while the right to counsel of choice is a procedural right ensuring defendants' individual autonomy and dignity, the right to effective assistance exists solely to ensure fair and reliable trials.⁴⁴ The four dissenters, in contrast, recognized the tension and would have resolved it by treating the counsel of choice right like the effective assistance right: by requiring defendants to show prejudice before a court could find a violation of the right.⁴⁵ Notably, none of the Justices suggested resolving the anomaly in the other direction by removing the prejudice requirement from *Strickland* such that effective assistance operates more like the counsel of choice right. Given that *Gonzalez-Lopez* creates such an obvious incongruity with the *Strickland* doctrine, it bears considering whether *Strickland* should be reexamined in light of this latest elaboration of the Sixth Amendment's Counsel Clause.

Viewing the right to effective assistance as a procedural right, akin to counsel of choice, would create a more coherent conception of the Counsel Clause and of the Sixth Amendment more broadly. The Court has largely conceived of the Sixth Amendment as a sort of procedural checklist, each component of which must be present to satisfy the Due Process Clause's guarantee of a fair trial.⁴⁶ Thus, while the broad goal of the adversary system is to arrive at the truth,⁴⁷ achieving a correct trial result does not satisfy the Sixth Amendment if the gov-

⁴⁴ See *Gonzalez-Lopez*, 126 S. Ct. at 2563.

⁴⁵ Prior cases provide some support for treating the counsel of choice right like the right to effective assistance. *United States v. Cronin*, 466 U.S. 648 (1984), decided the same day as *Strickland*, suggested that all Counsel Clause cases should be thought of as effective assistance of counsel cases. See *id.* at 660 n.26 (noting that except in extreme circumstances, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt"). Even the complete denial of counsel was considered in *Cronin* as an effective assistance issue; in such a case, however, prejudice could be presumed because an absent attorney could not possibly be an effective one. See *id.* at 658–59; see also *Mickens v. Taylor*, 535 U.S. 162, 166 (2002).

⁴⁶ Ironically, the clearest elaboration of this principle, which the Court cited in *Gonzalez-Lopez*, comes from the language of *Strickland*: "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*, 466 U.S. at 684–85.

⁴⁷ See, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."); Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642 (1996) ("The deep principles underlying the Sixth Amendment's three clusters and many clauses (and, I submit, underlying constitutional criminal procedure generally) are the protection of innocence and the pursuit of truth.").

ernment's case has not been subjected to "meaningful adversarial testing."⁴⁸ The reliability of the trial is an inquiry wholly separate from whether a Sixth Amendment right has been violated.⁴⁹

Justice Scalia's recent majority opinion in *Crawford v. Washington*⁵⁰ subscribed to this theory explicitly. In *Crawford*, Justice Scalia characterized the Confrontation Clause as not simply a promise of reliability but more importantly as the Framers' decision "about how reliability can best be determined" — via cross-examination.⁵¹ Thus, while "the Clause's ultimate goal is to ensure reliability of evidence, . . . it is a procedural rather than a substantive guarantee."⁵² The previous doctrine under *Ohio v. Roberts*,⁵³ which held that hearsay evidence did not violate the Confrontation Clause as long as it was reliable,⁵⁴ therefore incorrectly "replace[d] the constitutionally prescribed method of assessing reliability with a wholly foreign one."⁵⁵ In overturning the *Roberts* rule, Justice Scalia emphatically declared: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."⁵⁶ Yet, this is precisely what *Strickland's* ineffective assistance doctrine pre-

⁴⁸ *Cronic*, 466 U.S. at 656; see also *id.* at 656–57 ("[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.")

⁴⁹ For all other Sixth Amendment rights belonging to what Professor Akhil Amar has termed the "cluster of fair trial rights," Amar, *supra* note 47, at 642–43, a finding of the right's violation occurs irrespective of the violation's effect on the trial outcome. See *Gonzalez-Lopez*, 126 S. Ct. 2557 (right to counsel of choice); *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (right to confront witnesses); *Faretta v. California*, 422 U.S. 806 (1975) (right to represent oneself); *Washington v. Texas*, 388 U.S. 14 (1967) (right to present witnesses in one's favor); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel generally).

The one apparent exception to this approach, aside from *Strickland*, is a case in which the defendant challenged the government's refusal to turn over the identity of possible witnesses and potentially exculpatory evidence as a violation of his compulsory process right. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 55 (1987). In that case, the Court stated that if the undisclosed file "contain[ed] information that probably would have changed the outcome of his trial," then the defendant was entitled to a new trial. *Id.* at 58. Importantly, however, the Court did *not* analyze this issue under the Sixth Amendment but rather under a general due process analysis. See *id.* at 56. Consequently, *Strickland* remains an outlier in the Court's approach to Sixth Amendment rights.

⁵⁰ 124 S. Ct. 1354 (2004).

⁵¹ *Id.* at 1370; see also *id.* (stating 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").

⁵² *Id.*

⁵³ 448 U.S. 56 (1980).

⁵⁴ See *id.* at 66.

⁵⁵ *Crawford*, 124 S. Ct. at 1370.

⁵⁶ *Id.* at 1371; cf. *Gonzalez-Lopez*, 126 S. Ct. at 2562 (stating that the counsel of choice right "commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by counsel he believes to be best").

scribes.⁵⁷ It sanctions trials that are missing a key procedural ingredient — a competent defense attorney — as long as the outcome of the trial is correct (that is, the defendant is obviously guilty).⁵⁸ Eliminating the prejudice prong from the *Strickland* test would thus bring the right to effective assistance of counsel more in line conceptually with the other Sixth Amendment rights.

Doing so would also eliminate the precarious relationship between the right to effective assistance and the Court's harmless error doctrine. In *Chapman v. California*,⁵⁹ the Court recognized that some constitutional violations should be analyzed for their harmful effect before warranting reversal of a conviction.⁶⁰ *Strickland's* prejudice prong, however, effectively incorporated the harmless error analysis into the very definition of the violation of the right to effective assistance.⁶¹ This move created a redundancy in that the harmless error inquiry occurs *after* a finding that a right has been violated, and yet in *Strickland* it is part of the violation itself. Removing the prejudice prong from *Strickland* and defining a violation of the right to effective assistance solely on the basis of the lawyer's performance would elimi-

⁵⁷ And, indeed, it is what Justice Marshall originally criticized in his *Strickland* dissent: "The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree." *Strickland v. Washington*, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting).

⁵⁸ See Richard L. Gabriel, Note, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1261, 1272–81 (1986) ("[T]he *Strickland* test emasculates the sixth amendment by substituting for the procedural guarantee of that amendment a substantive inquiry into the fundamental fairness of the result of the trial.").

⁵⁹ 386 U.S. 18 (1967).

⁶⁰ *Id.* at 22. In justifying the harmless error doctrine, the Court has cited Judge Traynor for the notion that "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (quoting ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 50 (1970)) (internal quotation marks omitted); see also *Rose v. Clark*, 478 U.S. 570, 577 (1986) (same).

⁶¹ See William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 131–33 (1995) ("In spite of the Court's recent pronouncement that *Strickland's* application does not involve harmless error analysis, the contrary is obviously true. *Strickland* involves 'unarticulated harmless-error' . . ." (footnote omitted) (quoting *Ulster County Court v. Allen*, 442 U.S. 140, 177 (1979) (Powell, J., dissenting))). The Court has insisted that *Strickland* does not contain a harmless error standard:

Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed. And under *Strickland v. Washington*, an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice. Our opinion does nothing more than apply the case-by-case prejudice inquiry that has always been built into the *Strickland* test.

Since we find no constitutional error, we need not, and do not, consider harmlessness.

Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993) (citation omitted). The Court's semantic distinction between the *Strickland* prejudice standard and a harmless error analysis is incongruous: if the Court *had* found constitutional error — in other words, prejudice — what would its subsequent consideration of harmlessness look like? A finding of *Strickland* prejudice in effect renders a *Chapman* harmless error analysis redundant.

nate this conceptual oddity. The Court could then decide to submit such a violation to harmless error review.

In addition to making the Court's Sixth Amendment jurisprudence more conceptually coherent, eliminating the prejudice prong from *Strickland* would breathe life into a waning Counsel Clause guarantee. By placing a nearly insurmountable burden of proof on defendants, the *Strickland* doctrine has eroded the Sixth Amendment's guarantee of "the Assistance of Counsel" to the point that the vast majority of criminal defendants⁶² are guaranteed little more than the physical presence of an attorney.⁶³ This erosion is problematic for two reasons. First, because the Sixth Amendment's procedural guarantees serve to ensure reliable outcomes,⁶⁴ the erosion of the right to counsel will threaten the reliability of trials over time.⁶⁵ Second, the more the right to counsel appears to be a sham — making trials appear both unfair and unreliable — the greater the likelihood that the public will lose trust in the criminal justice system.⁶⁶ Eliminating the *Strickland*

⁶² Roughly eighty percent of criminal defendants in state courts are indigent. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (reporting that eighty-two percent of state felony defendants in the nation's seventy-five most populous counties in 1996 and sixty-six percent of federal felony defendants in 1998 had publicly appointed counsel).

⁶³ See Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1857–66 (1994) (discussing the extremely low level of competence required to qualify as effective assistance under *Strickland*); Geimer, *supra* note 61 (arguing that *Strickland* has undermined the Sixth Amendment right to counsel).

⁶⁴ See *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

⁶⁵ Our adversarial system is premised on a principle that John Rawls termed "imperfect procedural justice." JOHN RAWLS, A THEORY OF JUSTICE 74–75 (1999). A "fair" criminal justice system is one in which the guilty are convicted and the innocent are not. Societies establish procedures that are best geared toward achieving the goal of fairness; our society has chosen the adversarial process. It is impossible, however, to design the procedures such that they *always* lead to the correct result — in some cases the guilty will go free, while in others the innocent will be convicted. Nevertheless, despite the occasional flaws in individual cases, we retain the procedures because we believe they are the most likely *in the aggregate* to produce fair results. *Id.*

⁶⁶ *Cf.* *Mickens v. Taylor*, 535 U.S. 162, 207 n.12 (2002) (Souter, J., dissenting) ("What is clear . . . is that the right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings."). Of course, public trust may be threatened even more by a perception that guilty defendants can get off easily on technicalities. This concern, however, is an argument for applying harmless error review to violations of effective assistance, not for eviscerating the effective assistance right at its core. *Cf.* *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (noting that harmless error doctrine "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error").

prejudice prong would counteract these effects by ensuring that every criminal defendant has access to a minimally adequate lawyer.⁶⁷

Despite these several compelling reasons to treat the right to effective assistance as a procedural right, similar to the right to choice of counsel, none of the Justices in *Gonzalez-Lopez* argued for a reexamination of *Strickland*. This lack of consideration is almost certainly due to the efficiency concerns that originally motivated the creation of the prejudice prong: the *Strickland* majority likely feared that setting the bar for finding a violation too low would open the floodgates to ineffective assistance claims and result in the retrying of scores of guilty defendants.⁶⁸ Yet, as noted above, elimination of *Strickland*'s prejudice prong would not require automatic reversal of convictions; courts could still submit violations of the right to harmless error review.⁶⁹ Although such review would shift the heavy burden of showing no prejudice onto the government, this review would take place only once the defendant has shown the attorney's performance fell below a reasonable standard. Shifting this burden onto the government would likely prompt a clarification of what defense lawyers must do to be minimally adequate and ultimately improve the quality of representation that indigent defendants receive.

Gonzalez-Lopez ensured that the right to counsel of choice adheres to the Court's general understanding of the Sixth Amendment as guaranteeing procedural rights. Yet, the Court evaded an opportunity to reexamine *Strickland*, the sore thumb in the Court's Sixth Amendment jurisprudence. Until the Court is willing to view effective assistance as a procedural right, comparable to the other Sixth Amendment guarantees, the right to truly meaningful representation will continue to elude the vast majority of criminal defendants.

⁶⁷ The baseline for lawyer competence under *Strickland* is "reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Court has since interpreted this term as being defined by the American Bar Association Standards for Criminal Justice. See *Rompilla v. Beard*, 125 S. Ct. 2456, 2466 (2005) ("[W]e long have referred [to these ABA Standards] as guides to determining what is reasonable." (second alteration in original) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)) (internal quotation marks omitted)).

⁶⁸ See *Garcia*, *supra* note 31, at 82 ("The Court's overriding concern in *Strickland* was the potential adverse systemic effect of a broadening of the reasonably competent model. As the majority stressed, '[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.' Indeed, the *Strickland* Court raised the specter of pervasive 'second trials'" (alteration in original) (quoting *Strickland*, 466 U.S. at 690)).

⁶⁹ Professor William Geimer has advocated this approach as "a middle ground between the automatic reversal urged by Justice Marshall in *Strickland*, and the unjust framework established by the *Strickland* majority." Geimer, *supra* note 61, at 136 (footnote omitted). It was also Judge Bazelon's approach in *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1979), a pre-*Strickland* ineffective assistance case. See *id.* at 275 (Bazelon, J., dissenting); see also Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752, 770-72 (1980) (advocating Judge Bazelon's approach).