New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 237—NO. 11 WEDNESDAY, JANUARY 17, 2007 ALM

OUTSIDE COUNSEL

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# *Disqualification of Counsel After 'Gonzalez-Lopez'*

Traditionally, trial courts have been given broad discretion to determine whether a conflict of interest warrants disqualification of defense counsel in a criminal case. The resolution of conflict issues requires a court carefully to balance a defendant's right to counsel of his own choosing against the defendant's right to be represented by conflict-free counsel.

This process may have become more complicated as a result of the Supreme Court's June 2006 ruling in *United States v. Gonzalez-Lopez*,[1] which reversed a criminal conviction after the district court was found to have wrongly prevented an out-of-state attorney from representing the defendant at trial.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. The concept of effective assistance of counsel incorporates, but is not limited to, two separate rights: (1) the right to representation by counsel of one's choice, and (2) the right to representation by conflict-free counsel. These rights sometimes clash. Although the Sixth Amendment creates a "presumption in favor of [a defendant's] chosen counsel," the right to counsel of one's choosing is not absolute. The presumption can be overcome if the chosen counsel has a conflict, either actual or potential, in representing the defendant.[2] Although a defendant can waive the conflict in certain situations, an actual or substantial potential conflict cannot be waived when the conflict is of such a serious nature "that no rational defendant would knowingly and intelligently desire that attorney's representation."[3]

## Right to Counsel of Choice

The Supreme Court articulated the distinct right to be represented by counsel of one's choice in its 1988 decision in *Wheat v. United States*.[4] In *Wheat*, the district court refused the defendant's request to substitute counsel in his criminal trial because of potential conflicts involving the attorney, who previously had represented two individuals involved in the same drug conspiracy as that alleged against Mr. Wheat. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision. The Supreme Court granted certiorari to resolve "substantial disagreement [among the Courts of Appeals] about when a district court may override a defendant's waiver of his attorney's conflict of interest…."

*'Gonzalez-Lopez' takes a critical step: when a district court makes the wrong determination on an attorney disqualification motion, erroneously depriving a criminal defendant of his right to counsel of choice, reversal of conviction is mandated.*

While noting that the Sixth Amendment right to counsel included the right to counsel of one's choice, the Court observed that this right was circumscribed in several respects. For instance, an advocate who is not admitted to the bar may not assist a client at trial, and a defendant cannot insist that he be represented by an attorney who does not wish to be engaged in the case or by an attorney who has had a previous relationship with an opposing party. The question raised with respect to Mr. Wheat's case was "the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has [actual or potential conflicts]."

Rejecting the defendant's argument that his waiver of any and all conflicts resolved the issue, the Court stated that "[f]ederal courts have 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." For this reason, district courts must be allowed "substantial latitude" in examining and ruling on waivers of conflicts of interest, whether actual or potential. Finding that the district court in this case had acted within its discretion, the Court affirmed the decision.

The dissent, authored by Justice Thurgood Marshall and joined by Justice William Brennan, took issue with the broad discretion granted district courts by the majority's decision. Specifically, Justice Marshall noted that "although never explicitly endorsing a standard of appellate review, the [majority opinion] appears to limit such review to determining whether an abuse of discretion has occurred…[an approach that] accords neither with the nature of the trial court's decision nor with the importance of the interest at stake."[5] Instead, the dissent argued that conflict decisions were a mixed determination of law and fact and should be closely scrutinized by appellate courts in order adequately to protect a criminal defendant's right to counsel of his choice. Saying that the proposed representation

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in Mr. Wheat's case did not pose a substantial risk of a serious conflict of interest, the dissent believed that the district court had acted without authority and committed constitutional error demanding reversal.[6]

## The 'Gonzalez-Lopez' Decision

The decision in *Wheat* and subsequent appellate case law make clear that district courts have wide latitude in resolving disqualification motions and their decisions are reviewed for abuse of discretion. The recent decision in *Gonzalez-Lopez* takes the analysis a critical step further: when a district court makes the wrong determination on an attorney disqualification motion, erroneously depriving a criminal defendant of his right to counsel of choice, reversal of conviction is mandated.

A 5-4 decision, the majority opinion in *Gonzalez-Lopez* is another in a line of decisions authored by Justice Antonin Scalia that takes a strict view of the Sixth Amendment and the protections it affords criminal defendants. In *Gonzalez-Lopez,* the Court addressed the question "whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction."

Mr. Gonzalez-Lopez was convicted of conspiring to distribute marijuana in the U.S. District Court for the Eastern District of Missouri. Initially, the defendant was represented by a local attorney, John Fahle. After his arraignment, the defendant wished to be represented jointly by Mr. Fahle and a California attorney, Joseph Low. At an evidentiary hearing, a magistrate judge accepted a provisional entry of appearance from Mr. Low, permitting him to participate in the hearing on the condition that he immediately file a motion for admission pro hac vice. The provisional acceptance was revoked during the hearing, however, after Mr. Low violated the court's rules by, apparently, passing notes to co-counsel during the cross-examination of witnesses.

After the hearing, Mr. Gonzalez-Lopez fired Mr. Fahle, retaining Mr. Low as his sole attorney. On two occasions, Mr. Low filed an application for admission pro hac vice. The district court denied both applications without comment. In separate litigation brought by Mr. Fahle, asserting that Mr. Low had violated Missouri Rule of Professional Conduct 4-4.2 by contacting the defendant while he was represented by Mr. Fahle without Mr. Fahle's consent, the district court explained that it had denied Mr. Low's applications for admission primarily because, in a separate case before the same judge, Mr. Low had violated the same rule.

Mr. Gonzalez-Lopez's case proceeded to trial at which he was represented by a third attorney. Mr. Low's repeated attempts to assist in the defendant's representation were denied. During the trial, the third attorney for Mr. Gonzalez-Lopez (Mr. Dickhaus) sought to have Mr. Low sit at counsel table but that request was denied, and Mr. Low was ordered "to sit in the audience and 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. [Gonzalez-Lopez] was unable to meet with Low throughout the trial, except for once on the last night."[7]

After the jury returned a guilty verdict, the defendant appealed his conviction. The U.S. Court of Appeals for the Eighth Circuit held that the district court had erred in interpreting Mr. Low's conduct as prohibited by Rule 4-4.2. Accordingly, the district court's denials of Mr. Low's motion for admission pro hac vice were erroneous and violated Mr. Gonzalez-Lopez's Sixth Amendment right to counsel of his choosing.

*Justice Alito wrote that the protection guaranteed was "the right to have the assistance that the defendant's counsel of choice is able to provide," rather than the right to counsel of one's choice.*

Before the Supreme Court, the government did not dispute the Eighth Circuit's determination that the district court had wrongly deprived the defendant his counsel of choice. Rather, the government argued that such a deprivation did not constitute a violation of the defendant's Sixth Amendment rights without some showing of prejudice. Specifically, the government asserted that Mr. Gonzalez-Lopez was required to show that his substitute counsel was ineffective within the meaning of *Strickland v. Washington*.[8] Justice Scalia rejected this argument, observing that ineffective assistance of counsel claims are derivative of the right to a fair trial, while right to counsel of choice claims are a specific right derived from the Sixth Amendment—one derived from the "root meaning of the constitutional guarantee."

"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 v iolation 'complete.'"

## The Majority View

In the majority's view, the deprivation is complete when a defendant is wrongly denied the lawyer he wants, regardless of the effectiveness of the representation received.[9]

Concluding that a constitutional error had occurred, the Court reviewed the difference between "trial errors" requiring appellate review for harmlessness and "structural errors" requiring automatic reversal. While trial errors may be "quantitatively assessed" to determine whether they were harmless beyond a reasonable doubt, structural errors cannot be so assessed because they "affec[t] the framework within which the trial proceeds." Holding that the erroneous deprivation of the right to counsel of choice was an unquantifiable structural error, the Court determined that Mr. Gonzalez-Lopez's conviction should be reversed.

This conclusion echoes somewhat the argument advanced by Justice Marshall in the *Wheat* dissent. Justice Marshall took the position that appellate courts should closely scrutinize a district court's conflicts determination because the Sixth Amendment's right to counsel of choice was implicated. Similarly, the majority opinion in *Gonzalez-Lopez* assigns greater significance to counsel of choice claims, elevating counsel of choice errors to the same level as errors denying a criminal defendant the rights of counsel, self-representation or a public trial.[10] However, the dissent in *Gonzalez-Lopez* demonstrates that the constitutional significance of a claim of wrongful denial of chosen counsel remains a matter of dispute among the justices of the Court.

The dissenting opinion in *Gonzalez-Lopez* was written by Justice Samuel Alito and joined by Chief Justice John Roberts and Justices Anthony Kennedy and Clarence Thomas.[11] Finding fault with the majority's decision that the erroneous deprivation of a defendant's counsel of choice should result in an automatic reversal, the dissent said that a defendant should be required to show that the denial adversely affected the quality of the representation he received. In other words, the dissent did not believe a constitutional violation had occurred without evidence of prejudice resulting from the denial of a defendant's counsel of choice.

Focusing on the Sixth Amendment's language and purpose, Justice Alito wrote that the protection guaranteed was "the right to have *the assistance* that the defendant's counsel of choice is able to provide" (emphasis in original), rather than the right to counsel of one's choice.

Justice Alito took as his point of departure the words of the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." In Justice Alito's view, the right to counsel of choice is subordinate to the overarching right to effective assistance of counsel. It followed that, in order to demonstrate a constitutional violation, a defendant must show

that the assistance received from counsel other than the one he chose had a negative impact on his defense. "[T]he focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation." In determining whether the assistance received was adversely affected, a defendant need not make a showing of ineffectiveness as under a *Strickland* claim, but should show "'an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial.'"[12]

Finally, the dissenting justices stated that even if they were to accept that an erroneous deprivation of counsel of choice always violated the Sixth Amendment, these errors should be subject to a harmless error review, arguing that automatic reversal should be reserved for constitutional errors that "*always* or *necessarily*" result in unfairness (emphasis in original).

## Impact of 'Gonzalez-Lopez'

How will the majority's decision in *Gonzalez-Lopez*, effectively making the right to counsel of choice a paramount right under the Constitution, change the decision-making process engaged in by district courts when considering whether defense counsel should be removed because of a conflict? Until now, district judges have enjoyed "substantial latitude" in such matters. The majority in *Gonzalez-Lopez* recognizes this fact, writing:

> 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. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar.[13]

However, there is no question that the Court's decision in *Gonzalez-Lopez* will have an impact on disqualification decisions made at the trial court level. Judge Nicholas G. Garaufis' recent decision in *United States v. Liszewski*,[14] demonstrates this point. The defendant was charged with conspiracy to traffic in stolen motor vehicles along with eight co-defendants. The government moved to have Mr. Liszewski's attorney disqualified alleging multiple conflicts, including the attorney's prior representation of certain codefendants, unindicted coconspirators and cooperating witnesses, and his status as a potential witness at trial. After consulting with independent counsel and an evidentiary hearing before the Court, Mr. Liszewski attested that he wished to waive any conflicts.

Considering the government's motion to disqualify counsel, the Court noted that the right to counsel of choice "has taken on renewed significance in the last few weeks" given the Supreme Court's decision in *Gonzalez-Lopez*. Specifically, the Court focused on the fact that an erroneous deprivation of Mr. Liszewski's counsel of choice would result in an automatic reversal on appeal. Judge Garaufis stated:

> [I]n light of the Supreme Court's recent decision in *United States v. Gonzalez-Lopez*, I am acutely aware of my obligation to permit Liszewski to proceed with his counsel of his choice if at all possible. Indeed, by intensifying the consequences of an erroneous decision in *Gonzalez-Lopez*, the Supreme Court has heightened what was already an extraordinary burden placed on the trial court to assess whether a conflicted attorney must be removed. I must err on the side of nondisqualification, both because Liszewski has a constitutional right to counsel of his choice, and because to do otherwise would be to risk automatic reversal of any conviction that might ensue. In tension with these considerations is my duty to ensure that Liszewski is not represented by counsel that is overly conflicted such that his representation would be ineffective.[15]

After reviewing the various conflicts, the Court denied the government's motion, without prejudice to the government's ability to move for reconsideration at some later date.

Judge Garaufis' opinion demonstrates the additional burden faced by district courts as a result of *Gonzalez-Lopez*.[16] The reality is that trial judges may be inclined to allow potentially conflicted counsel to remain given that an erroneous disqualification may result in a reversal. That being said, Justice Antonin Scalia's opinion makes clear that district courts retain a great deal of latitude in deciding conflicts matters. In all likelihood, appellate courts will maintain their deferential review of district courts' discretionary decisions as to whether chosen defense counsel should be disqualified. Notwithstanding the reversal in *Gonzalez-Lopez*, findings of erroneous deprivation of the right to counsel of choice, and reversals of criminal convictions under the standard articulated in *Gonzalez-Lopez*, may be few and far between.

1. 126 SCt 2557, 165 L.Ed.2d 409 (2006).

2. See generally *United States v. Locascio*, 6 F3d 924 (2d Cir. 1993).

3. *United States v. Schwarz*, 283 F3d 76, 90-91 (2d Cir. 2002).

4. 486 US 153 (1988). The right to counsel of choice is enjoyed only by defendants who retain their own counsel. Independent defendants, for whom counsel is appointed by the court, do not have this right. See *United States v. Parker*, 469 F3d 57, 61-62 (2d Cir. 2006).

5. Id. at 166-167.

6. Id. at 172. Justice John Paul Stevens wrote a separate dissent, joined by Justice Harry Blackmun, which agreed with the majority's decision that district judges be afforded wide latitude on passing on conflicts motions, but opined that the district court had abused its discretion in Mr. Wheat's case.

7. Id. at 2560.

8. *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052 (1984) (to demonstrate ineffective assistance of counsel, defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense).

9. Following *Gonzalez-Lopez*, a district court denied a habeas petition relying in part on the distinction articulated by the majority between the right to effective assistance and the right to counsel of choice. *United States v. Fiorillo*, 2006 WL 2844564 (N.D.Cal. Oct. 2, 2006) (rejecting defendant's claim that trial counsel had unwaivable conflict of interest; court noted that all conflicts were waived by defendant after a full evidentiary hearing and that the right to counsel of choice was regarded as the "root meaning of the constitutional right to counsel whether or not that counsel was effective").

10. Id. at 2563-64.

11. Id. at 2566.

12. Id. at 2568 (citing *Rodriguez v. Chandler*, 382 F3d 670, 675 (7th Cir. 2004), cert. denied, 543 US 1156 (2005)).

13. Id. at 2565-66.

14. 2006 WL 2376382 (EDNY Aug. 16, 2006).

15. Id. at *10.

16. In addition to Judge Garaufis in *Liszewski*, several courts have cited *Gonzalez-Lopez* in deciding to permit chosen counsel to represent a defendant in a criminal case. See *United States v. Schafer*, 2006 WL 3271290 (E.D. Cal. Nov. 12, 2006) (court cited *Gonzalez-Lopez* in noting presumption in favor of criminal defendant's right to counsel of choice and finding that government had not met its burden of proof in demonstrating a conflict justifying disqualification of counsel where attorney shared office space with co-defendant's counsel and a third attorney who previously had represented a government witness); *United States v. Wilson*, 2006 WL 2990447 (D. Hawaii Oct. 29, 2006) (granting counsel's application for admission pro hac vice despite evidence that attorney had been indicted and admonished or sanctioned by a number of other federal and state courts; court cited *Gonzalez-Lopez* in recognizing the "importance of the defendant's right to counsel of his own choosing"); *United States v. Poulsen*, 2006 WL 2619852 (S.D. Ohio Sept. 12, 2006) (stating it was "increasingly wary of disqualifying an attorney in the face of murky evidence" in light of the Supreme Court's decision in *Gonzalez-Lopez*, court denied government's motion for disqualification of attorney who was a potential witness).