

FILED
December 15, 2015
Court of Appeals
Division I
State of Washington

Supreme Court No. 92618-2
(COA No. 72305-7-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN WARSAME,

Petitioner.

FILED
E DEC 21 2015
WASHINGTON STATE
SUPREME COURT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 5

When an accused person hires a different lawyer without asking for any continuance or delay, the court impermissibly denies the right to counsel of choice by refusing to let his retained attorney represent him by comparing the attorneys' skills 5

1. An accused person has the right to retain his own lawyer 5

2. Because there would not be delay, and the new lawyer was available and qualified, the court could not refuse Mr. Warsame's retained lawyer based upon its opinion that current counsel was more prepared..... 9

F. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Hampton, _Wn.2d _, 2015 WL 7294538 (Nov. 19, 2015) 2, 8, 9, 10, 15

United States Supreme Court Decisions

Arizona v. Fulminate, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)..... 7

Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) 11

Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)..... 10

State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014)..... 11

United States v. Gonzalez–Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)..... 5, 7, 9, 14, 15

United States Constitution

Sixth Amendment 5

Washington Constitution

Article I, § 22..... 5

Court Rules

RAP 13.3(a)(1) 1
RAP 13.4(b)..... 1, 15

A. IDENTITY OF PETITIONER

Abdirahman Warsame, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Warsame seeks review of the Court of Appeals decision dated November 16, 2015, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

The constitutionally guaranteed right to counsel of choice prohibits a judge from refusing to let a qualified lawyer represent an accused person when the substitution would not cause undue delay. Mr. Warsame hired a new lawyer who did not ask for any continuance. He wanted the new lawyer to represent him even if his assigned attorney was more familiar with the case due to his substantial disagreements with the assigned attorney. The court refused to let the hired attorney represent Mr. Warsame.

In *State v. Hampton*,¹ this Court explained that a trial court's general authority over managing cases may permit it to deny a request for counsel of choice if it fully considers the harmful effects of the delay that would ensue. Unlike *Hampton*, the new attorney would not have delayed the trial. Did the court erroneously deprive Mr. Warsame of his Sixth Amendment right to counsel of choice by refusing to let a newly hired attorney appear even when it would not delay the proceedings?

D. STATEMENT OF THE CASE

Abdirahman Warsame was accused of hitting Idris Ali outside a community gathering area for local Somali citizens. 1RP 106. Mr. Ali said Mr. Warsame swung at him first, then he fell to the ground and Mr. Ali kicked him. 1RP 114, 116-17. Mr. Ali claimed Mr. Warsame came toward him again and he used his foot to hit Mr. Warsame, who fell to the ground. 1RP 130. Dahir Osman, a shop owner, intervened and said Mr. Warsame struck him once before falling on the ground, then he held Mr. Warsame down and Mr. Warsame threatened him. 2RP 64, 68-69.

¹ *State v. Hampton*, _Wn.2d_, 2015 WL 7294538, at *6 (Nov. 19, 2015).

Mr. Warsame was accused of second degree assault against Mr. Ali, fourth degree assault against Mr. Osman, and felony harassment against Mr. Osman. CP 107-08. Mr. Warsame intended to explain he acted in self-defense. 2RP 171; 3RP 106-08. However, during his trial he decided not to testify. 2RP 166; 3RP 108. He later said he was threatened by someone with a gun who told him not to testify. 3RP 126-28. He explained the events under oath at sentencing. 3RP 160-65.

Attorney Lucas Garrett was appointed to represent Mr. Warsame. 3RP 104. On May 21, 2014, Mr. Garrett asked for a one-week trial continuance, saying he had only interviewed two of the four eyewitnesses and did not know enough to prepare for trial. 1RP 6. The court granted defense counsel a six-day continuance. 1RP 10.

The parties selected a jury on Wednesday, May 28, 2014. The next day, Mr. Garrett said he learned of another witness he might call to testify about injuries Mr. Warsame suffered, but he had not yet interviewed this person. 1RP 66.

On Thursday, before any trial testimony had begun, Mr. Warsame told the judge he had a new attorney he was paying to represent him. 1RP 67, 70. His reasons for hiring a new attorney included that he and his appointed lawyer argued during jury selection

when Mr. Warsame thought a juror should be disqualified and his attorney would not listen to his repeated requests. 1RP 68. They also disagreed about the defense to the assault allegation and whether there was a broken bone. 1RP 67. Assigned attorney Mr. Garrett agreed he and Mr. Warsame had “a strong strategic disagreement.” 1RP 68. The court denied Mr. Warsame’s request to be represented by his new attorney. 1RP 70-71.

After lunchtime recess on this same day, Mr. Warsame told the judge his new lawyer representing him would appear in 15 to 30 minutes. 1RP 132. The judge refused to wait and told Mr. Warsame that he would need to bring any additional motions for a new lawyer at the end of the day. 1RP 133, 164.

Attorney Teri Rogers Kemp appeared telephonically at a hearing for new counsel. She said she was ready, willing, and able to represent Mr. Warsame. 1RP 190-91. She cautioned Mr. Warsame that his present counsel was better prepared, but she said she was an experienced felony attorney and could take over representation. 1RP 191-92. Since the court would not hold any trial proceedings on Friday, the case would not reconvene until the following Monday and she would have three days to prepare. 1RP 72, 189-90. Although she had

not been present in court, the proceedings were audio recorded and transcripts could be ordered if requested. 3RP 149. The attorneys had previously told the court that the events were “fairly contained” and there were not many witnesses. 1RP 15, 18.

The court conceded had the “utmost respect” for Ms. Rogers Kemp but denied Mr. Warsame’s request to have his newly retained attorney represent him. 1RP 193-94. The court ruled that Mr. Warsame’s request was too late and his current counsel was better prepared. *Id.* The Court of Appeals affirmed.

E. ARGUMENT

When an accused person hires a different lawyer without asking for any continuance or delay, the court impermissibly denies the right to counsel of choice by refusing to let his retained attorney represent him by comparing the attorneys’ skills

1. An accused person has the right to retain his own lawyer.

When a person accused of a crime is able to hire an attorney, the state and federal constitutions guarantee the right to be defended by the attorney the accused believes to be best. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)); U.S. amend. 6; Const. art. I, § 22.

The only limitations on an accused person's right to be represented by the retained lawyer of his choice are that the lawyer be "otherwise qualified," meaning a lawyer who is admitted to the bar, is willing to represent the accused, and has no conflict of interest that prevents her from representing the accused. *Id.* at 819-20. If an attorney is otherwise qualified, and the accused desires to hire her, the court does not have discretion to prohibit that attorney from representing the accused. *Id.*

The "root meaning" of the Sixth Amendment's guarantee is the "right to select counsel of one's choice." *Gonzalez-Lopez*, 548 U.S. at 147. "Deprivation of the right" occurs "when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Id.* at 148. The right to counsel of choice exists separately from the right to effective assistance of counsel and is not to be confused with "baseline requirement of competence" for a lawyer. *Id.*

If counsel of choice is erroneously denied, it has "consequences that are necessarily unquantifiable and indeterminate." *Id.* at 150. Because the choice of attorney affects a

myriad of decisions throughout the trial process and “bears directly on the ‘framework within which the trial proceeds,’” its denial is a structural error. *Id.* (quoting *Arizona v. Fulminate*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

In *Gonzalez-Lopez*, the accused hired an out-of-state lawyer, initially to jointly represent him with an in-state lawyer and later he asked this lawyer to represent him as sole counsel. 548 U.S. at 142. The trial court refused, apparently because the judge thought the defense attorney had violated a rule of professional conduct. *Id.* at 142-43. On appeal, the prosecution conceded that the judge should have let the retained attorney represent the accused, but argued that since the defendant received a fair trial, any error was harmless. *Id.* at 144.

The Supreme Court held that the Sixth Amendment “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.” *Id.* at 146. The defendant has a right to receive assistance “from the counsel that he chose,” regardless of the performance of appointed counsel. *Id.* at 146 n.2. A violation of this

independently protected right does not rest on the quality of the representation received and reversal is required without weighing how it affected the outcome of the trial. *Id.* at 150.

Four days after the Court of Appeals issued its opinion in the case at bar, this Court explained that a trial court has discretion to deny a request for a new, retained, counsel of choice *if* the change is contingent upon granting a continuance and the court finds that the delay unduly impacts the efficient administration of the case.

State v. Hampton, _Wn.2d_, 2015 WL 7294538, at *6 (Nov. 19, 2015).

But *Hampton* only addresses the factors a court may consider when the right to counsel of choice hinges on delaying the trial. *Id.* at *6-7.

Unlike *Hampton*, Mr. Warsame's case does not involve a court's discretion over its calendar. Mr. Warsame did not ask to delay or postpone proceedings. This Court should grant review to decide an issue -- unanswered by *Hampton* and likely to recur -- regarding what factors a court must consider when a defendant knowingly and intelligently opts to have his current counsel replaced with a lawyer he has hired, who is licensed and able to accept the

case, simply because he or she is not be as well-versed in the case as current counsel.

2. *Because there would not be delay, and the new lawyer was available and qualified, the court could not refuse Mr. Warsame's retained lawyer based upon its opinion that current counsel was more prepared.*

The judge refused Mr. Warsame's request to be represented by an available retained attorney who did not ask for any continuances. Although the request came as the trial was starting, the retained attorney did not ask for any delay in the trial, unlike in *Hampton*. The judge denied the request based on current counsel's additional opportunity to prepare, but comparative effectiveness is not the standard for denying a defendant's right to counsel of choice. *Gonzalez-Lopez*, 548 U.S. at 147. Moreover, current counsel had conceded less than one week before trial that he had not interviewed all of the state's witnesses and he and Mr. Warsame had significant strategic disagreements. The court's refusal to permit the new attorney from representing Mr. Warsame violated his constitutionally guaranteed right to select his lawyer of choice.

In *Hampton*, this Court said that a trial court should examine all circumstances in deciding whether to grant a continuance for a new attorney to appear. 2015 WL 7294538, at *6-7. Here, the Court of Appeals falsely balanced Mr. Warsame's right to counsel of choice against the court's perception that the assigned attorney was better prepared, without weighing the evidence that Mr. Warsame and assigned counsel's relationship had irreparably deteriorated. This balancing was unreasonable, but the Court of Appeals opinion was issued without the benefit of this Court's decision in *Hampton*.

Mr. Warsame expressed dissatisfaction with his appointed lawyer at the start of the trial. IRP 66. He was upset during jury selection when his lawyer refused to listen to him during jury selection about jurors he believed should have been disqualified, even though he is constitutionally guaranteed the right to be present so that he may play a role in jury selection. IRP 68 A party's personal presence is necessary for the opportunity to give advice or make suggestions to her lawyer when assessing potential jurors. *Lewis v. United States*, 146 U.S. 370, 374, 376, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). Because his attorney would not listen to Mr. Warsame's jury

selection advice, Mr. Warsame was not meaningfully allowed to participate in jury selection, exacerbating the breakdown in the attorney-client relationship.

Mr. Warsame also disagreed with assigned counsel about trial strategy and said his lawyer “doesn’t want to talk about it.” IRP 67-68. Defense counsel conceded he and his client had a “strong strategic disagreement.” IRP 68. Although the court did not inquire further into this disagreement, defense counsel could not stipulate that the State proved any essential elements without Mr. Warsame’s affirmative consent. *State v. Humphries*, 181 Wn.2d 708, 716, 336 P.3d 1121 (2014). “An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy.” *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (internal citations omitted). This obligation would be meaningless if defense counsel was not required to adjust strategic decisions based on explicit objections by the accused. *See Humphries*, 181 Wn.2d at 718.

Assigned counsel’s strategic disagreement with Mr. Warsame further erodes the effectiveness of counsel’s assistance and

demonstrates the false premise of the court's ruling denying Mr. Warsame his counsel of choice. The conflict between Mr. Warsame and his attorney over trial strategy, Mr. Warsame's ability to effect decisions such as the highly personal selection of jurors and the right to testify, show that whatever balancing a court may do when confronted with a request for a new counsel, this balancing did not weigh in favor of disregarding Mr. Warsame's knowing, intelligent, and voluntary request to have his counsel of choice, even with the understanding that the assigned attorney was more familiar with the State's evidence.

Ms. Rogers Kemp explained that she "would be ready, willing, and able to step in as counsel." IRP 191. She is "an experienced trial and felony attorney." IRP 191. She was "familiar" with the case and had spoken to Mr. Warsame about it several months previously. *Id.* She had read the allegations in the probable cause certification but she had not interviewed witnesses or reviewed follow-up police reports. *Id.*² She expressed faith in her ability to

² The probable cause certification is 13 pages in length and details substantial police investigation about the incident, including interviews with the three eyewitnesses who testified at trial. CP 1-13.

pick up a file and ably perform at trial. 1RP 191-92. She also said that Mr. Warsame “has a right to choice of counsel.” 1RP 192.

When the court asked Mr. Warsame about his request, Mr. Warsame said, “I believe this is my choice. This is something to do with my life.” 1RP 194.

The judge ruled that Mr. Warsame had a choice of counsel but he needed to make such a choice “a while ago.” 1RP 194. Even though the judge had “the utmost respect” for Ms. Rogers Kemp, the judge said, “I cannot allow competent, prepared, effective counsel to be substituted by a counsel” who had not yet started preparing for trial. 1RP 194.

In denying Mr. Warsame’s request for a ready, willing, and able attorney to replace his present attorney, the court erroneously weighed the comparative preparation of the attorneys and disregarded the substantive complaints Mr. Warsame expressed about his exclusion from fundamental decisions. By focusing on current counsel’s better ability to prepare, rather than Mr. Warsame’s right to counsel of choice, the judge applied the wrong legal test. Furthermore, the judge’s belief that it would be difficult for a new

attorney to perform as competently as appointed counsel was unreasonable. One week before trial, Mr. Garrett admitted he had not spoken to two of the four witnesses and was not prepared for the case. 1RP 15. If Mr. Garrett could be fully prepared within one week for a trial about a “fairly contained” incident for which there “weren’t many witnesses,” there is no reason that Ms. Rogers Kemp could not prepare to complete the trial over the next three days when court would not be in session.

The Sixth Amendment right to counsel of choice provides a particular guarantee: that “the accused be defended by the counsel he believes to be best.” *Gonzalez-Lopez*, 548 U.S. at 146. This guarantee does not depend on the comparative qualifications or experience of counsel. *Id.* While a lawyer must possess “a baseline of competence,” the right to counsel of choice “is the right to a particular lawyer regardless of comparative effectiveness.” *Id.* at 148.

“Deprivation of the right [to counsel of choice] 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.” *Gonzalez-Lopez*, 548 U.S. at 148. Mr. Warsame was erroneously denied his right to counsel of choice. This Court should grant review to discuss the issues left unanswered in *Hampton* that are premised on protecting fundamental constitutional rights and for which there is substantial public interest in clarifying the trial court’s decision-making authority.

F. CONCLUSION

Based on the foregoing, Petitioner Abdirahman Warsame respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 15th day of December 2015.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner
(206) 587-2711
nancy@washapp.org

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

2015 NOV 16 AM 9:22
COURT OF APPEALS
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ABDIRAHMAN ABDIRAHMAN)
 WARSAME, a.k.a. ABDIRAHMAN)
 ABDIDAHIR WARSAME,)
)
 Appellant.)
 _____)

DIVISION ONE
No. 72305-7-1
UNPUBLISHED OPINION
FILED: November 16, 2015

DWYER, J. — Abdirahman Warsame appeals from the judgment entered on the jury's verdicts finding him guilty of assault in the second degree, assault in the fourth degree, and felony harassment. Warsame claims that the trial court erred in denying his request, made on the third day of trial, to replace his court appointed counsel with a newly retained private attorney. Finding no error, we affirm.

I

On February 13, 2014, the State charged Warsame with assault in the second degree and assault in the fourth degree. Prior to trial, the State was allowed to amend the information to add a charge of felony harassment with the good samaritan aggravator,¹ and a charge of attempted robbery in the second

¹ The "good samaritan" aggravator, defined in RCW 9.94A.535(3)(w), permits that a sentence be imposed above the standard range when "[t]he defendant committed the offense against a victim who was acting as a good samaritan."

No. 72305-7-I/2

degree. Warsame pleaded not guilty to all four charges. Before the jury was impaneled and sworn, on the State's motion, the trial court dismissed the attempted robbery charge without prejudice.

On May 27, 2014, trial began and the parties completed pretrial motions. On May 28, the jury was selected, impaneled, and sworn, and the parties delivered their opening statements.² On May 29, immediately prior to the State's first witness being called to testify, Warsame requested that the trial court discharge his appointed counsel. Warsame stated that he would "[s]tarting as of now," look for a private lawyer to represent him. He stated that he had spoken to a lawyer and could "pay now" but did not name the attorney or state that he had actually retained the attorney's services.

The State objected to substitution of counsel because it would delay the trial. The prosecutor explained that three witnesses were present and ready to testify. Each witness was reluctant to participate and needed the assistance of a Somali interpreter. The interpreter was also present and ready to assist.

The trial court denied Warsame's request.

The trial went forward. The jury heard testimony from an eyewitness, Nasro Abubakar, and one of the alleged victims, Idris Osman Ali. During a recess in Ali's testimony, Warsame again indicated that he wished to replace his court-appointed counsel with a private attorney.

MR. GARRETT [Defense Counsel]: Well, perhaps the first and most important issue that may at least moot my involvement is Mr.

² In a criminal jury trial, jeopardy attaches when the jury is impaneled and sworn. Serfass v. United States, 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975) (Fifth Amendment); State v. Smith, 15 Wn. App. 725, 727, 551 P.2d 765 (1976) (CONST. art. I, § 9).

Warsame has indicated that he has another attorney who should be arriving within 15 minutes who presumably may be prepared to take over the case. I do not know.

MR. WARSAME: Can I speak?

THE COURT: Go ahead, sir.

MR. WARSAME: Your Honor, I believe more than 100 percent that my attorney, the public defender is not doing the best interest of my case. Because this is something to do with my life and I believe I have to take an action in a way that I need to get someone who is really humble, who's really serious, who really –

THE COURT: And who is this person?

MR. WARSAME: She's an attorney. She's on her way. She should be here in the next 30 minutes. And I let her know and she knows –

THE COURT: And she's ready to take over the case . . . ?

MR. WARSAME: I don't think [Mr. Garrett's] ready and he's been telling me he's not ready. That from the beginning of the trial and lately he been telling me I don't think you can win this case, I don't think you cannot [sic] win, and that kills my whole mind. And it's like a manipulation the way I feel, you know, and I just want somewhere and someone that I can feel comfortable and that I can pursue this trial.

In response, the trial judge stated that "I will hear this motion again if a lawyer shows up who is ready and able to take over the case."

At 3:10 p.m., during another recess in Ali's testimony, Warsame's newly-hired attorney arrived. The trial judge stated that, "I'm not going to hear any more motions about counsel until 4:00 [p.m.]. We'll deal with them after this [witness]." The newly-hired attorney then left the courtroom.

After Ali's testimony concluded, bringing the trial day to an end, Warsame renewed his motion to replace his court appointed counsel with his newly retained counsel, now identified as Teri Rogers Kemp. The court entertained the

No. 72305-7-1/4

motion with attorney Rogers Kemp participating by telephone, explaining that her schedule had not allowed her to remain in the courtroom from 3:10 p.m. until 4:00 p.m. that day.

MR. GARRETT: Your Honor, Luke Garrett for Northwest Defenders. It is my understanding that [Mr.] Warsame does still wish to discharge me and have Ms. –

MR. DOYLE [Prosecutor]: Rogers Kemp.

MR. GARRETT: Ms. Rogers Kemp?

MR. DOYLE: Kemp.

MR. GARRETT: – take my place.

THE COURT: Do we have Ms. Rogers Kemp on the phone is that correct?

MS. ROGERS KEMP: Yes, ma'am. Good afternoon, judge, counsel. Good afternoon.

MR. DOYLE: Good afternoon.

THE COURT: And we are mid-trial on this case. Are you ready, able and willing to take this case on Monday and complete the trial?

MS. ROGERS KEMP: Your Honor, I had a discussion with Mr. Abdi(ph) [sic] and while I am an experienced trial and felony attorney and I could very well be willing, ready and able to step in on Mr. Abdi's case I have expressed that I do not believe this is in the best interest, that his present counsel in whatever state is more versed in these matters, he has been familiar with this matter, the facts, the interviewing of the witnesses, the contents of the witness interviews, et cetera and et cetera. He is in present state more able. If Mr. Abdi is willing to have an attorney who is – because of the timing just not as competent as present counsel and if there is understanding that this is the case then yes I would be ready, willing, and able to step in as counsel. But I do not believe that this is in his best interests. I think that his present counsel is more familiar with this case than I am.

MR. DOYLE: Okay. I just want the record to reflect – this is William Doyle on behalf of the State – you're referring to Mr. Warsame; correct?

MS. ROGERS KEMP: I am.

THE COURT: State wish to be heard?

MR. DOYLE: I guess perhaps if the Court could ask Ms. Rogers Kemp, so regardless of her opinions as to whether it's in the best interests of the defendant, is Ms. Rogers Kemp saying that she would be prepared to continue this trial on Monday and actually provide effective assistance of counsel?

MS. ROGERS KEMP: And that is the issue. I am an experienced felony attorney. I believe that I can pick up a file and I can walk into a courtroom and do a trial. But I have – I'm familiar with the facts of the case because I spoke with my potential client 3 months ago. That's the extent, though. I've only read the [certification] for probable cause. I have not interviewed any witnesses, I have not read any supplemental follow-up police reports, I haven't spoken with any of the police officers.

I believe that the accused has a right to choice of counsel but I also believe that the accused would be able to, if you will, consent to the type of defense that he would have.

I am sensitive to the accused's position. I can do a trial and I can be as prepared as possible, but I don't think I would be as competent. And so I don't want to say no I wouldn't do it; I just want to say I don't believe it's a good idea. And I haven't had a chance to have a full on discussion with Mr. Abdi about this. I just don't think it would be a good idea.

But I can do a trial. Hand me a file and I can do a trial. That's essentially what would be happening. I haven't interviewed any witnesses, I haven't read any police reports or any follow-up report.

THE COURT: Okay. I think I understand your position.

MR. DOYLE: Can I ask one other thing for the record, Your Honor?

THE COURT: Yes.

MR. DOYLE: I also just want the record to reflect, and, Ms. Rogers Kemp, just ask for your agreement on this, because we don't have a record of this yet, you did not sit through opening statements or any of the witness testimony so you couldn't speak [to] the demeanor of the witnesses as they testified, and you would not be

able to assess that from simply listening to a recording because you have not been present at this trial throughout any of the testimony today; is that correct?

MS. ROGERS KEMP: Yes.

MR. DOYLE: Okay.

THE COURT: Did you wish to be heard?

MR. GARRETT: Your Honor, I will happily step back, I will happily finish this trial, however this court decides. I will say whether or not it's Mr. Warsame's choice at this point I think that this is getting ridiculous. That's what I'll say.

THE COURT: Anything you want to say, sir?

MR. WARSAME: I believe this is my choice. This is something to do with my life. And if I felt comfortable with different counsel it's my choice. Nobody make [sic] the choice for me, Your Honor.

THE COURT: All right. Anything further from the State?

MR. DOYLE: I guess because this is an area, as the Court's aware, that is ripe for appeal and I just want to make sure. It sounds like what we're hearing from Ms. Rogers Kemp that she is saying that because she has not interviewed any witnesses, she did not appear for testimony, and didn't – wasn't able to assess the credibility of witnesses *that she would have a difficult time as of Monday resuming this trial and providing effective assistance of counsel. Is that correct, Ms. Rogers Kemp?*

MS. ROGERS KEMP: Yes.

MR. DOYLE: Okay. Thank you.

(Emphasis added.)

Immediately following this discussion, the trial judge ruled:

Sir, while it is undoubtedly your choice if you had made this choice a while ago, it is simply not your choice when we are mid-trial. I cannot allow competent, prepared, effective counsel to be substituted by a counsel who I have utmost respect for, but one who has not been at this trial, not observed the witnesses, cannot argue about what the witnesses testified, has no ability in two days

to do all the things your lawyer has, has not read the police reports, has not done witness interviews. There is absolutely no way she can be prepared to be an effective advocate. *And I cannot substitute an advocate who is not in a position to give you effective assistance of counsel.*

So I am not going to be allowing this substitution midstream in trial with an attorney, although I have great respect for, is simply not in a position to give you effective representation. So I would deny the request at this time. If you had done this months earlier certainly it could be done. It cannot be done mid-trial. So that request is denied.

(Emphasis added.)

The trial continued. The jury found Warsame guilty of all three counts and found that the aggravating factor had been proved. Warsame was sentenced to concurrent standard range sentences of 14 months of confinement on the assault in the second degree conviction, 12 months of confinement on the felony harassment conviction, and 364 days of confinement on the assault in the fourth degree conviction.

Warsame now appeals.

II

Warsame contends that the trial court violated his Sixth Amendment right to be represented by his counsel of choice by denying his motion—made at the end of the third day of trial—to substitute his newly retained private attorney for his appointed counsel as his legal representative. We disagree.

“The Sixth Amendment and article 1, section 22 of the Washington Constitution guarantee the accused the right to counsel.” State v. Hampton, 182 Wn. App. 805, 817, 332 P.3d 1020 (2014), review granted, 182 Wn.2d 1002, 342

No. 72305-7-1/8

P.3d 327 (2015); accord State v. Roberts, 142 Wn.2d 471, 515, 14 P.3d 713 (2000). Indeed,

the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. 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 v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

“The United States Supreme Court has found the counsel clause to have two distinct elements: ‘the right to the effective assistance of counsel’ and ‘[t]he right to select counsel of one’s choice.’” State v. Sanchez, 171 Wn. App. 518, 541, 288 P.3d 351 (2012) (alteration in original) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 146-48, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)). The effective assistance element “envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” Strickland, 466 U.S. at 685.

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the “ample opportunity to meet the case of the prosecution” to which they are entitled.

Strickland, 466 U.S. at 685 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942)). The knowledge, skill, and effectiveness of counsel is of utmost importance because

[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that “the right to counsel is the right to the effective assistance of counsel.”

Strickland, 466 U.S. at 685-86 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

The counsel of choice element, in contrast, refers to the ability of a defendant to have a choice among those attorneys who are capable of providing constitutionally effective assistance. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Because each element of the counsel clause is distinct, neither can be substituted for the other. Gonzalez-Lopez, 548 U.S. at 148.

The right to counsel of choice “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.” Gonzalez-Lopez, 548 U.S. at 144 (quoting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-625, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989)). In essence, it is “the right of a defendant who does not require appointed counsel to choose who will represent him.” Gonzalez-Lopez, 548 U.S. at 144. “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.” Gonzalez-Lopez, 548 U.S. at 146. “It has been regarded as the root meaning of the constitutional guarantee.” Gonzalez-Lopez, 548 U.S. at 147-48.

In the event that a deprivation of this constitutional guarantee occurs, the deprivation 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.

Gonzalez-Lopez, 548 U.S. at 148.

As with most constitutional guarantees, however, the constitutional guarantee to be represented by counsel of choice is not absolute. State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010) (“A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate.” (quoting State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997))). In fact,

while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983); Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

The Sixth Amendment right to choose one’s own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government.

Wheat, 486 U.S. at 159 (footnote omitted). Indeed, where a lawyer cannot perform to the “baseline requirement of competence” imposed by the Sixth

Amendment, Gonzalez-Lopez, 548 U.S. at 148, that lawyer fails to constitute "Counsel" within the guarantee of the Sixth Amendment. Strickland, 466 U.S. 686 ("the right to counsel is the right to the effective assistance of counsel" (quoting McMann, 397 U.S. at 771 n.14)).

Because a lawyer who cannot provide effective assistance of counsel does not constitute Sixth Amendment counsel,³ a defendant has no right to choose to be represented by that lawyer (thus forfeiting the right to Sixth Amendment effective assistance of counsel). In this regard, a lawyer who cannot perform to the baseline requirement of competence is disqualified from being the defendant's "choice" on the same basis that a lawyer with a conflict of interest is so disqualified. See Wheat, 486 U.S. at 159. In neither instance will the lawyer's performance provide the right guaranteed by the Sixth Amendment. Thus, in neither instance does the lawyer constitute Sixth Amendment "Counsel."

By the time that attorney Rogers Kemp appeared on the scene, and the court ruled on Warsame's request, the jury had been sworn (meaning that jeopardy had attached), opening statements had been given, the third day of trial had concluded, and two witnesses had completed their testimony (including one of the alleged victims). Warsame did not want a continuance but, rather, wanted to "pursue this trial" with his new lawyer.

³ "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685.

Armed with the knowledge that Warsame wished to proceed, and honoring his right to do so, the trial judge inquired into the current level of knowledge and skill possessed by his newly retained counsel. During this inquiry, attorney Rogers Kemp, while offering that “I can pick up a file and I can walk into a courtroom and do a trial,” candidly admitted that she could not guarantee that she would provide constitutionally effective assistance of counsel, instead agreeing that “she would have a difficult time” doing so under the circumstances.

After hearing from all three attorneys—the prosecutor, Warsame's appointed counsel, and Warsame's proposed counsel—the trial court found that, “[t]here is absolutely no way [attorney Rogers Kemp] can be prepared to be an effective advocate. And I cannot substitute an advocate who is not in a position to give you effective assistance of counsel.”

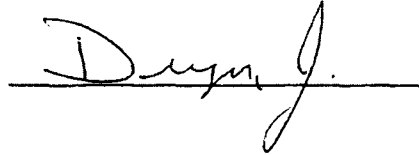
The trial court's ruling was sound. Warsame had a right to proceed with the trial before the jury that was then serving. He was insisting on preserving that right. He also had a right to the effective assistance of counsel, which he could not waive so as to accommodate a constitutionally deficient performance by his counsel of choice. Wheat, 486 U.S. at 162. Because the court found that Warsame's proposed attorney could not function as Sixth Amendment counsel, that attorney was not eligible to be chosen by him to serve as his counsel.

When a lawyer performs at an “unconstitutionally *ineffective*” level, “he no longer functions as ‘counsel.’” Maryland v. Kulbicki, No. 14-848, 2015 WL 5774453, at *1 (U.S. Oct. 5, 2015). Recognizing this, the trial judge herein ruled

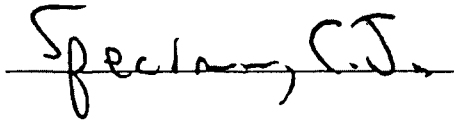
No. 72305-7-1/13

thoughtfully and correctly. There was no abuse of discretion and no denial of Warsame's Sixth Amendment right to counsel of choice.

Affirmed.

A handwritten signature in cursive script, appearing to read "Dwyer J.", written over a horizontal line.

We concur:

A handwritten signature in cursive script, appearing to read "Specter, C.J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Applegate J.", written over a horizontal line.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72305-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Stephanie Knightlinger, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[stephanie.knightlinger@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 15, 2015