

72305-7

72305-7

NO. 72305-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ABDIRAHMAN WARSAME,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON  
SUPERIOR COURT  
NO. 72305-7  
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A. INTRODUCTION

Abdirahman Warsame grew disgruntled with his appointed attorney at the start of his trial and hired another lawyer to represent him. This lawyer assured the court she was ready and able to assist Mr. Warsame without any delay. Although she cautioned Mr. Warsame that it was not in his best interest to switch lawyers, Mr. Warsame insisted he wanted his retained attorney to represent him. The judge refused Mr. Warsame's request to be represented by counsel of choice. This erroneous deprivation of Mr. Warsame's right to representation by qualified retained counsel is a structural error that entitles Mr. Warsame to a new trial.

B. ASSIGNMENT OF ERROR

The court violated Mr. Warsame's right to counsel of choice as guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The constitutionally guaranteed right to counsel of choice prohibits a judge from refusing to let a qualified lawyer represent an accused person when the lawyer meets the baseline level of competence and the substitution would not cause undue delay. Mr. Warsame hired a

new lawyer and told the court that his choice was to have this lawyer represent him even after he was warned of the disadvantages of changing counsel. Did the court erroneously deprive Mr. Warsame of his right to counsel of choice?

D. STATEMENT OF THE CASE

Abdirahman Warsame was accused of hitting Idris Ali outside a community gathering area for local Somali citizens. 1RP 106.<sup>1</sup> Mr. Ali said Mr. Warsame swung at him for no reason, fracturing a bone near his eye. 1RP 114. According to Mr. Ali, Mr. Warsame fell on the ground after hitting him and Mr. Ali started to kick Mr. Warsame but two women stopped him. 1RP 116-17. Mr. Warsame came toward Mr. Ali again several minutes later while Mr. Ali was on the phone with 911, but Mr. Ali used his foot to hit Mr. Warsame, who fell to the ground. 1RP 130. Mr. Ali locked himself in his car. 1RP 131. Dahir Osman, a shop owner, encouraged Mr. Ali to leave. 2RP 63. Mr. Warsame struck Mr. Osman once but fell on the ground; Mr. Osman

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<sup>1</sup> The verbatim report of proceedings (RP) is contained in three volumes, referred to herein as follows:

1RP refers to May 21, 27, 28, and 29, 2014;

2RP refers to June 2 and 3, 2014;

3RP refers to June 4, 18, July 24, and August 1, 2014.

held him down. 2RP 64. Mr. Warsame threatened to get a gun from his car and kill him. 2RP 68-69.

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, at the last minute he decided not to testify. 2RP 166; 3RP 108. He later said he had been threatened by someone with a gun who told him not to testify. 3RP 126-28. He presented his version of 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 about the case to prepare for trial. 1RP 6. Due to Mr. Warsame's objection to delaying the trial, 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. He promised to advise the court and prosecution once he spoke to this witness. 1RP 67.

Before any trial testimony was presented, Mr. Warsame told the judge he had a new attorney he would “pay now” to represent him. 1RP 67, 70. He explained that he and his appointed lawyer had argued during jury selection when Mr. Warsame thought a juror should be disqualified but 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. Mr. Garrett agreed that he and Mr. Warsame had “a strong strategic disagreement.” 1RP 68. The prosecution objected to delaying the trial for a new lawyer. 1RP 69-70. The court denied Mr. Warsame’s request to be represented by a retained attorney based on the potential delay and said present counsel was doing an excellent job. 1RP 70-71.

After lunchtime recess this same day, Mr. Warsame told the judge he arranged for a new lawyer to represent him who 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 also said she discouraged Mr. Warsame from changing lawyers because his present counsel was better prepared, but 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. 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 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.*

Mr. Warsame was convicted as charged. CP 54-58. He received a standard range sentence of 14 months in prison. 3RP 175; CP 119-21. The court denied his request for an exceptional sentence below the standard range. 3RP 175.

Pertinent facts are addressed in further detail in the relevant argument section below.

E. ARGUMENT

**The court impermissibly denied Mr. Warsame his right to counsel of choice by refusing to let his retained attorney represent him**

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

The state and federal constitutions guarantee an accused person the right to be defended by the attorney he believes to be best if he is able to hire counsel. *State v. Hampton*, 182 Wn.App. 802, 817, 332 P.3d 1020 (2014) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)); U.S. amend. 6; Wash. 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 does not hinge on the comparative effectiveness of attorneys. *Id.* It 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.

In *Hampton*, the defendant appeared at “trial call” and asked to replace his appointed attorney with retained counsel. 182 Wn.App. at 814. The newly retained attorney explained she could only substitute as counsel if the court granted a continuance so she would have time to prepare. *Id.* The judge denied the request to substitute counsel because appointed counsel was “very capable” and there was no compelling reason to grant a continuance. *Id.*

On appeal, this Court ruled the judge had denied the defendant his right to counsel of choice for impermissible reasons. It explained that “[p]roviding an effective court-appointed lawyer is not a constitutionally acceptable substitute for the defendant’s counsel of choice.” *Id.* at 818. The judge had denied the request based on whether the defendant’s complaints about his appointed counsel were legitimate. *Id.* at 822-23. But a defendant who hires an attorney retains the right to be represented by her without regard to the trial court’s assessment of the legitimacy of the defendant’s complaints about current counsel or how the replacement could affect the defendant’s case. *Id.* at 823. And while unreasonable delay could be a basis to deny a request for counsel of choice, the judge

had not inquired into the length of the additional time the attorney needed. *Id.* at 826-27. The court held that Hampton was denied his right to counsel of choice for impermissible reasons. *Id.* at 828.

2. *Mr. Warsame retained a lawyer who was ready to proceed without delay.*

Similarly to *Gonzalez-Lopez* and *Hampton*, the judge refused to grant Mr. Warsame's request to be represented by an available retained attorney. 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 her belief that the current counsel was more prepared than the retained attorney, but comparative effectiveness is not the standard for denying a defendant's right to counsel of choice. *Gonzalez-Lopez*, 548 U.S. at 147. The court's ruling violated Mr. Warsame's constitutionally guaranteed right to select his lawyer of choice.

Mr. Warsame expressed dissatisfaction with his appointed lawyer at the start of the trial. 1RP 66. He complained his lawyer refused to listen to him during jury selection about jurors he believed should have been disqualified. 1RP 68. He disagreed with defense

counsel about trial strategy and defense counsel “doesn’t want to talk about it.” 1RP 67-68. Defense counsel conceded he and his client had a “strong strategic disagreement.” 1RP 68. Mr. Warsame told the judge he spoke to a lawyer and was “going to pay now” to hire that person, but the prosecution argued that the court should reject any substitution that would cause delay. 1RP 68-70. The judge said current counsel “has performed ably” and refused to delay the proceedings for another attorney to appear. 1RP 71.

The first trial witness was a woman who saw Mr. Warsame acting oddly on the day of the incident. 1RP 82, 85. She did not see the alleged assaults. 1RP 90. The second witness was the named complainant in count 1, Idris Ali, whose testimony started at 11:14 a.m. 1RP 104; Supp. CP \_\_, sub. no. 36A (clerk’s minutes at 7). After recessing for lunch during Mr. Ali’s direct testimony, Mr. Warsame arranged for another attorney to represent him. 1RP 132. Mr. Warsame told the court that a new attorney would be arriving within 15 or 30 minutes after the lunch recess. *Id.* The court refused to wait and said, “I will hear this motion again if a lawyer shows up who is ready and able to take over the case.” 1RP 133.

When taking a break during Mr. Ali's testimony in the afternoon, the judge told Mr. Warsame he could not bring any further motions for new counsel until four p.m., when the trial proceedings ended for the day. 1RP 164.

At the end of Mr. Ali's testimony, the judge told the jurors they would not need to come to court until the following Monday, a preplanned three-day adjournment. 1RP 72, 189-90. At that point, the court held a hearing on Mr. Warsame's request to have his appointed counsel replaced with hired attorney Ms. Rogers Kemp. Ms. Rogers Kemp appeared by telephone. 1RP 190.

Ms. Rogers Kemp explained that she "would be ready, willing, and able to step in as counsel." 1RP 191. She also said she did not think it was in Mr. Warsame's best interest to switch lawyers and encouraged him to keep his appointed lawyer who is "more versed in these matters" at present. 1RP 192. She said that if Mr. Warsame is willing to have an attorney who is "not as competent as present counsel," she would step in as counsel. 1RP 191. She assured the court that she was very experienced, capable of performing competently, and would not need any continuances. 1RP 191-92.

When asked to further explain whether she would need more time to prepare, Ms. Rogers Kemp said 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.*<sup>2</sup> She expressed faith in her ability to pick up a file and ably perform at trial. IRP 191-92. She also said that Mr. Warsame “has a right to choice of counsel.” IRP 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.” IRP 194.

The judge ruled that Mr. Warsame had a choice of counsel but he needed to make such a choice “a while ago.” IRP 194. Even though the judge had “the utmost respect” for Ms. Rogers Kemp, the judge said, “I cannot allow competent, prepared, effective counsel to

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<sup>2</sup> 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.

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. 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. *Hampton*, 182 Wn.App. at 822-23.

Furthermore, the judge’s belief that it would be difficult for a new attorney to perform as competently as appointed counsel was misguided. 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. The prosecutor agreed that there were not many witnesses to the events and it would be a fairly quick trial once it started. 1RP 18. During the trial, defense counsel located a witness he had not spoken to before. 1RP 66. This witness is Mr. Warsame’s brother. 2RP 151. The deteriorated relationship between Mr. Warsame and Mr. Garrett may have resulted in Mr. Garrett’s belated preparation and Mr. Warsame’s failure to testify, when this

testimony had been the central premise of Mr. Garrett's trial strategy. 3RP 108, 110. In any event, 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.

Regardless of his assigned attorney's familiarity with the case, Mr. Warsame and he had a "strong strategic disagreement" over trial strategy and Mr. Garrett refused to follow Mr. Warsame's requests when selecting the jury. 1RP 68. The communication difficulties likely led to defense counsel giving an opening statement premised on Mr. Warsame's testimony, and then when Mr. Warsame did not testify, defense counsel was forced to ask the jury to disregard his opening statement. 3RP 55. As Mr. Warsame informed the judge, replacing his lawyer was his choice and he would be the person who lived with the consequences of his decisions. 1RP 193.

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.

3. *The court’s refusal to allow Mr. Warsame to replace his appointed attorney with retained counsel entitles him to a new trial.*

The deprivation of the right to counsel of choice “qualifies as structural error.” *Gonzalez-Lopez*, 548 U.S. at 150. Due to the different strategies that attorneys may pursue, it is too speculative to inquire “into what might have happened in an alternative universe.” *Id.*

Mr. Warsame retained a lawyer who was ready, willing, and able to represent him. IRP 191-93. Even when warned of the disadvantages of changing counsel during trial Mr. Warsame explained that it was his choice and he understood that the consequences of his

decision would fall on him. 1RP 194. Because Mr. Warsame had hired a qualified lawyer who promised not to delay the trial, and he understood the disadvantages of changing counsel, the court lacked authority to deny him his right to be represented by his counsel of choice. Due to this structural error, he is entitled to a new trial.

*Gonzalez-Lopez*, 548 U.S. at 150.

F. CONCLUSION

Mr. Warsame's convictions should be reversed and a new trial ordered.

DATED this 4<sup>th</sup> day of February 2015.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72305-7-I
v.	)	
	)	
ABDIRAHMAN WARSAME,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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