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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

Petitioner

v.

MATTHEW A. HAMPTON,

Respondent

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*Petitioner*  
SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

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## **I. ISSUES**

The Court granted review on the issue of whether, in a motion to continue trial in order to substitute counsel on or near the trial date, the trial court may consider the reasons for the defendant's dissatisfaction with counsel and if the defendant will be materially and substantially prejudiced if the continuance is not granted.

## **II. STATEMENT OF THE CASE**

The defendant was charged with one count of second degree rape. 1 CP 83. He was convicted at trial of the lesser included offense of third degree rape. 1 CP 60. The underlying facts of the case are adequately set out in the State's response brief in the Court of Appeals and that Court's decision. The State relies on those sources to the extent they are relevant to this appeal.

On the day the case was set for trial call the court considered the defendant's motion to continue the trial date<sup>1</sup> The motion was made in conjunction with a motion to substitute retained counsel, Anna Goykman, for assigned counsel Donald Wackerman.

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<sup>1</sup> August 31, 2012 was the Friday before Labor Day weekend. The trial court characterized the motion as made "essentially on the day of trial" although the trial was did not begin until the following Wednesday. 8/31/12 RP 6, 8.

The defendant wanted to retain Ms. Goykman because he did not believe he had a good relationship with Mr. Wackerman. The defendant said that he had not been able to retain counsel until shortly before trial when family members agreed to give him money for that purpose. Ms. Goykman was willing to substitute for Mr. Wackerman conditioned on the court granting the defendant's continuance motion. 8/31/12 RP 2-3. Mr. Wackerman represented that he was prepared to go to trial the following week. 8/31/12 RP 4-5.

The State opposed the continuance motion primarily because the defendant's son, Chance Hampton, had tried to get the victim to "drop the charges." The State believed that if Chance had more time to try and talk the victim out of trial it would jeopardize the State's case. 8/31/12 RP 6; 1 CP 92.

The court considered several factors including Mr. Wackerman's ability to try the case the following week, the reason for the request to substitute counsel, the timeliness of the motion, the impact on the victim and the number of prior continuances. The court concluded that no compelling reason to grant the motion made "essentially on the day of trial" when the case had already been continued once before. It granted Mr. Wackerman's motion to

have trial commence on the following Wednesday. It denied the motion for a further continuance without prejudice to renew should Mr. Wackerman be unable to interview a witness before trial began.  
8/31/12 RP 7-9.

### III. ARGUMENT

#### A. A TRIAL COURT RETAINS BROAD DISCRETION TO RULE ON CONTINUANCE MOTIONS WHICH HAS NOT BEEN LIMITED BY THE UNITED STATES SUPREME COURT DECISION IN UNITED STATES V. GONZALEZ-LOPEZ.

The Sixth Amendment right to counsel includes the right of a defendant who is able to afford an attorney to have counsel of his choice. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). The right is not absolute, and may be limited so that a defendant may not be represented by counsel who for whatever reason declines to represent him. Id. In addition trial courts have wide latitude in balancing the right to counsel of choice against the needs of fairness and the demands of its calendar. United States v. Gonzalez-Lopez, 548 U.S. 140, 152, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

A decision on a continuance motion to obtain new counsel is reviewed for an abuse of discretion. State v. Miles, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable

grounds or untenable reasons. In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 136 (1997). “[O]nly an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’ violates the right to assistance of counsel.” Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), quoting Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964).

The Court of Appeals articulated four factors a trial court may consider when addressing a continuance motion made in order to obtain new counsel in State v. Price, 126 Wn. App. 617, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005). They include (1) whether the court has granted previous continuances at the defendant’s request, (2) whether the defendant had some legitimate dissatisfaction with counsel, (3) whether available counsel is prepared to go to trial, (4) and whether the denial of the motion is likely to result in identifiable prejudice to the defendant’s case of a material and substantial nature. Id. at 632. The trial court employed these factors when it weighed the interests of the parties and the court and then denied the request for a continuance.

8/31/12 RP 7-8.

The Court of Appeals held the trial court erred in denying the motion because it relied on a standard that had been partially abrogated after the United States Supreme Court decision in Gonzalez-Lopez. State v. Hampton, 182 Wn. App. 805, 822, 332 P.3d 1020 (2014). It found the second factor (whether defendant had a legitimate dissatisfaction with counsel) and the fourth factor (whether denying the motion will result in material or substantial prejudice) no longer applied to the inquiry. Id. Gonzalez-Lopez does not support that conclusion for three reasons. First, that case involved different facts and a different issue. Second, it reaffirmed the trial court's broad discretion to rule on continuance motions. And third, cases which have considered the issue presented in this appeal since Gonzalez-Lopez was decided have reaffirmed that those factors continue to play a part in the trial court's exercise of discretion when ruling on continuance motions in order to allow the defendant to retain substitute counsel.

Here the defendant sought to substitute counsel who was not prepared to go to trial on the scheduled trial date, and was unwilling to represent the defendant unless the court granted a continuance. Unlike the present case, the defendant in Gonzalez-Lopez sought to retain an attorney who at all times was prepared to

represent the defendant. The trial court in that case denied the defendant his right to counsel of choice based on an erroneous belief that counsel had violated the code of ethics. Id. at 143. Thus the question before the court in Gonzalez-Lopez was not whether the court's decision to deny a continuance resulted in an erroneous deprivation of right to counsel, but rather when an erroneous deprivation of right to counsel occurred, could the error be harmless. Gonzalez-Lopez, 548 U.S. at 148.

The Court's discussion regarding the nature of the Sixth Amendment right to counsel of choice led up to the conclusion that an erroneous deprivation of that right was a structural error. Id. at 150. The Court of Appeals in this case relied on that discussion to find that when considering a continuance motion to obtain counsel of choice the trial court's discretion had been limited. Hampton, 182 Wn App. at 823. This was incorrect because that discussion related to circumstances where the question of whether an erroneous deprivation of right to counsel had already been found. It did not relate to a discussion about the parameters of the trial court's discretion in ruling on motions to continue in order to obtain substitute counsel. It therefore did not decide what constituted an

erroneous deprivation of right to counsel under those circumstance, the issue presented in this case.

The Court of Appeals decision also erred because did not address the Supreme Court's express statement that its decision did not "casts any doubt or places any qualifications upon our previous holdings that limit the right to counsel of choice..." Gonzalez-Lopez, 548 U.S. at 151. The Court specifically stated that a trial court still retains wide latitude to balance the right of counsel of choice against the needs of fairness and against the demands of the court's calendar. Id. at 152. As an example the Court cited its decision in Morris, supra. Id.

In Morris a defendant's original public defender was replaced by a second public defender when the first attorney fell ill. The second attorney represented he was ready for trial. Morris, 461 U.S. at 6-7. The defendant requested continuances to permit counsel more time to prepare for trial. Id. at 8. The Court found the trial court did not abuse its discretion in denying the defendant's requests in part because the defendant did not express dissatisfaction with his attorney until the third day of trial. On that record the trial court could reasonably have concluded that the request for a continuance was a "transparent ploy for delay" rather

than a continuance motion made in good faith. Id. at 13. By citing Morris as an example of its prior decisions which were not altered by its decision in Gonzalez-Lopez, the Supreme Court signaled that the defendant's reasons for dissatisfaction with counsel continue to be a viable consideration when a trial court exercises its discretion in the circumstances presented in this case.

Since Gonzalez-Lopez was decided, courts have continued to recognize that trial courts have broad discretion in ruling on a motion to continue the trial for the purpose of securing counsel of choice. In balancing the defendant's interest against the demands of the court's calendar and the needs of fairness to the litigants the court may legitimately make decisions that effectively exclude counsel of choice as long as the court has not acted arbitrarily. United States v. Sellers, 645 F.3d 830, 834, 836 (7<sup>th</sup> Cir. 2011). Courts have articulated factors bearing on the exercise of that discretion which includes the factors that the Court of Appeals determined were invalidated by Gonzalez-Lopez. Those factors include whether legitimate reasons for delay exist, whether the defendant's actions contributed to the delay, whether other competent counsel was prepared to try the case, and if denying the motion would materially prejudice or substantially harm the

defendant's case. United States v. Flanders, 491 F.3d 1197, 1216 (10<sup>th</sup> Cir. 2007); United State v. Cordy, 560 F.3d 808 (8<sup>th</sup> Cir. 2009), cert. denied, 558 U.S. 878 (2009). In particular, one court has said “under our precedents, the trial judge had a duty to inquire into the problems” between defense counsel and the defendant when they were first raised. Miller v. Blacketter, 525 F.3d 890, 896 (9<sup>th</sup> Cir. 2008), cert. denied, 555 U.S. 1107 (2009).

A trial court abused its discretion when it denied a motion to continue by applying a blanket rule to the defendant's continuance motion that substitute counsel “must take the case as he finds it” without weighing any factors specific to the defendant's case in Sellers, 645 F.3d at 835. The Court also found fault with the trial court when it failed to consider the defendant's reasons for wanting to terminate his attorney's representation in favor of hiring a different lawyer. Id. at 839.

In contrast a trial court did not abuse its discretion when it denied the defendant's continuance motion to obtain new counsel in United States v. Sinclair, 770 F.3d 1148 (7<sup>th</sup> Cir. 2014). One of the factors the trial court relied on in ruling on the motion was that his complaints about his public defender were vague, and that to date the assigned attorney had provided effective assistance of

counsel. Id. at 1152. The reviewing court rejected the defendant's argument that it was error to focus on that factor. It noted that it had previously found an abuse of discretion when a trial court did not inquire into the reasons the defendant was dissatisfied with counsel. Id. at 1156.

These precedents indicate that whether the defendant has a legitimate dissatisfaction with counsel continues to be a valid factor a trial court may rely on when ruling on a motion to continue for the purpose. In fact such an inquiry is often necessary to determine whether the defendant's continuance motion is made in good faith, or whether it is simply a delay tactic. Morris, 461 U.S. at 13; Cordy, 560 F.3d at 816; United States v. Robinson, 662 F.3d 1028 (8<sup>th</sup> Cir. 2011).

Whether the defendant will suffer material or substantial prejudice also remains a legitimate factor to consider in ruling on a continuance motion after Gonzalez-Lopez as well. In Flanders the Court relied on the defendant's failure to articulate how trial preparation or defense strategy was affected when the trial court denied his motion to continue to hire new counsel to find the trial court had not abused its discretion. Flanders, 491 F.3d at 1216. On the other hand a trial court did abuse its discretion when it did

not consider the resulting prejudice from denying a motion to continue in Sellers. There the decision put the defendant in the position of proceeding to trial either with an attorney he did not want, but who was marginally prepared for trial, or with an attorney that he did want, who was completely unprepared for trial. Sellers, 645 F.3d at 839.

Here the trial court considered the two reasons defense counsel gave for the continuance; from the beginning of his representation the defendant did not think he had a good relationship with assigned counsel, and he had only recently been given money to hire retained counsel. 8/31/12 RP 3-5. The court discounted the first reason on the basis that defendants commonly are unhappy with their assigned counsel. The court relied on the representation that Mr. Wackerman was a competent attorney who was capable of trying the defendant's case with the appropriate zeal despite any dissatisfaction the defendant had with him with only a one day continuance in order to complete his investigation. The court did not arbitrarily insist on trial going forward as it allowed that if Mr. Wackerman could not complete his investigation in the allotted time, the motion to continue would be reconsidered. 8/31/12 RP 7-8. The foregoing authorities demonstrate that these

were permissible considerations in weighing the interests of the defendant against fairness to the parties and the administration of the court.

#### IV. CONCLUSION

For the foregoing reasons the State asks the Court to reverse the Court of Appeals and reinstate the defendant's conviction for Third Degree Rape.

Respectfully submitted on March 20, 2015.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*  
KATHLEEN WEBBER WSBA #16040  
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On this day I mailed a ~~properly stamped envelope~~ addressed to the attorney for the defendant that contained a copy of this document.  
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Please accept for filing the attached: Supplemental Brief of Petitioner

Let me know if there is a problem opening the attachment.

Thanks.

Diane.

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