

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 20, 2015, 4:04 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL
No. 90811-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MATTHEW HAMPTON,

Respondent.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

KATHLEEN A. SHEA
Attorney for Respondent

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



ORIGINAL

TABLE OF CONTENTS

A. SUMMARY OF APPEAL..... 1

B. ISSUE PRESENTED FOR REVIEW..... 1

C. FACTS 2

D. ARGUMENT 5

 Mr. Hampton was wrongfully denied his right to be represented by
 the attorney of his choice in violation of the Sixth Amendment. 5

 1. The root meaning of the Sixth Amendment is a defendant’s
 right to be represented by his counsel of choice. 5

 2. *United States v. Gonzalez-Lopez* prohibits a court from
 considering the adequacy of current counsel when a
 defendant requests a continuance in order to be represented
 by his counsel of choice. 8

 3. When the trial court denied Mr. Hampton’s request for a
 continuance so that he could be represented by his counsel
 of choice, it violated Mr. Hampton’s Sixth Amendment
 right. 14

 a. The trial court violated Mr. Hampton’s constitutional
 right to counsel of choice. 14

 b. The remedy is reversal. 19

E. CONCLUSION 20

TABLE OF AUTHORITIES

United States Supreme Court

Andersen v. Treat, 172 U.S. 24, 19 S.Ct. 67, 43 L.Ed.351 (1898) 8

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246,
112 L.Ed.2d 302 (1991)..... 20

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617,
109 S.Ct. 2646, 105 L.Ed.2d 528 (1989)..... 5

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792,
9 L.Ed.2d 799 (1963)..... 7

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019,
82 L.Ed. 1461 (1938)..... 7

Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157,
111 L.Ed.2d 666 (1990)..... 11

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55,
77 L.Ed.158 (1932)..... 7

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984)..... 7

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039,
80 L.Ed.2d 657 (1984)..... 7

United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557,
165 L.Ed.2d 409 (2006)..... passim

Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692,
100 L.Ed.2d 140 (1988)..... 8, 10, 11

Washington Supreme Court

State v. Aguirre, 168 Wn. 2d 350, 229 P.3d 669 (2010)..... 12, 15, 17

State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983)..... 6

<i>State v. Lynch</i> , 178 Wn.2d 487, 309 P.3d 482 (2013)	6
<i>State v. Rafay</i> , 167 Wn.2d 644, 222 P.3d 86 (2009).....	15
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	10

Washington Court of Appeals

<i>State v. Hampton</i> , 182 Wn. App. 805, 332 P.3d 1020 (2014).....	13, 15, 16, 19, 20
<i>State v. Price</i> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	10, 11
<i>State v. Roth</i> , 75 Wn. App. 808, 881 P.2d 268 (1994).....	8, 9

Other Courts

<i>State v. Ensign</i> , 491 F.3d 1109 (9 th Cir. 2007).....	14
<i>United States v. Rivera-Corona</i> , 618 F.3d 976 (9 th Cir. 2010).....	14

Constitutional Provisions

Const. art. I, § 22.....	5
U.S. Const. amend. VI.....	5
U.S. Const. amend. V.....	6
U.S. Const. amend. XIV	6

Washington Statutes

RCW 9.94A.507.....	14
--------------------	----

A. SUMMARY OF APPEAL

Facing an accusation that he had committed a very serious crime and a potential life sentence, Matthew Hampton hired a private attorney to replace his court-appointed counsel. When Mr. Hampton moved to substitute counsel and for a continuance to allow his private counsel to prepare for trial, the court denied his request for a continuance, forcing Mr. Hampton to proceed with appointed counsel.

The court denied Mr. Hampton's request to exercise his right to counsel of his choice based on the court's opinion that Mr. Hampton's public defender was a capable lawyer. The Court of Appeals reversed, relying on *United States v. Gonzalez-Lopez* to hold that a court may not consider the adequacy of counsel when evaluating a continuance request sought to allow a defendant his constitutional right to counsel of choice. This Court should affirm the Court of Appeals.

B. ISSUE PRESENTED FOR REVIEW

The Sixth Amendment and article I, section 22, of the Washington Constitution guarantee an accused the right to counsel. The root meaning of this guarantee is a defendant's right to counsel of his choosing. When considering a defendant's motion to substitute counsel and continue the trial date so the defendant may be represented by his counsel of choice, the court may not evaluate whether the defendant is adequately represented by

his current counsel. Did the trial court violate Mr. Hampton's Sixth Amendment right to his counsel of choice when it denied his motion to continue because the court found his appointed counsel to be a capable attorney?

C. FACTS

Matthew Hampton pleaded not guilty to a charge of indecent liberties at his arraignment on May 9, 2012. CP 98; 100. The court set a trial date of July 13, 2012. CP 100. On June 15, 2012, the State notified Mr. Hampton that if he did not plead guilty, it would amend the charge against him to the more serious offense of second degree rape, which requires a mandatory indeterminate sentence with a maximum of life in prison. CP 102. On July 13, 2012, the court entered an agreed trial continuance to August 31, 2012. CP 99.

The parties did not appear in court between July 13, 2012, and August 31, 2012. On August 31, 2012, Mr. Hampton appeared with his appointed counsel, Donald Wackerman, and the private counsel he had recently retained, Anna Goykhman. 8/31/12 RP 2. Ms. Goykhman filed a motion to substitute as trial counsel and continue the trial date. CP 93-95. The court indicated it would allow the substitution of counsel, but asked for argument on the continuance. 8/31/12 RP 2. As Ms. Goykhman explained orally in court and in a declaration attached to her motion, her

substitution for Mr. Hampton's appointed counsel was contingent on the trial court granting her motion for a continuance, as Mr. Hampton had recently retained her services and she was not prepared to immediately proceed with trial. 8/31/12 RP 2; CP 95. Mr. Wackerman was also not prepared to go to trial that day because, aside from the complaining witness, he had not had the opportunity to interview the State's witnesses. 8/31/12 RP 4. Mr. Wackerman informed the court he could be ready the following week as long as the State arranged the remaining interviews. 8/31/12 RP 5. The court did not ask Mr. Goykhman how long she would need to prepare.

The State ostensibly opposed Ms. Goykhman's request for a continuance, but not Mr. Wackerman's, stating "The victim is also opposed and is asking the Court to assign this out for trial next week." 8/31/12. However, the deputy prosecuting attorney immediately followed this statement with "The law is pretty clear that you have discretion to decide it either way, and nobody is really going to have a whole lot of complaint about that whatever you decide." 8/31/12 RP 7.

The trial court denied Ms. Goykhman's request for a continuance despite the fact the case was less than four months old and had been continued only once before by the agreement of both parties. 8/31/12 RP 8. Mr. Wackerman explained to the court that he and Mr. Hampton did

not have “the best relationship” and Mr. Hampton had indicated early on in the case that he hoped to retain private counsel. 8/31/12 RP 3-4.

However, the court found there was no “question that Mr. Wackerman is a highly qualified criminal defense attorney” and Mr. Hampton had failed to make a compelling record for a continuance. 8/31/12 RP 8. The court did not specify what a “compelling record” would look like, but the court’s comments suggested the motion was denied because Mr. Hampton did not provide a basis for dissatisfaction with his counsel that the court deemed legitimate. 8/31/12 RP 8.

The court granted Mr. Wackerman’s request for a continuance, and stated the denial of Ms. Goykhman’s request “would be conditioned on the State making the witnesses available” for the requested defense interviews. 8/31/12 RP 8. Mr. Hampton proceeded to trial, represented by Mr. Wackerman, the following week. Prior to jury selection, the State filed an amended information, charging Mr. Hampton with rape in the second degree. CP 83. The jury convicted Mr. Hampton of the lesser included charge of rape in the third degree. CP 31.

D. ARGUMENT

Mr. Hampton was wrongfully denied his right to be represented by the attorney of his choice in violation of the Sixth Amendment.

1. The root meaning of the Sixth Amendment is a defendant's right to be represented by his counsel of choice.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee a defendant the right to counsel.¹

U.S. Const. amend. VI; Const. art. I, § 22. This right “guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford or hire, or who is willing to represent the defendant even though he is without funds.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989)).

The right not merely to counsel, but to counsel of one's *choosing*, serves to protect the defendant from potential abuse of the State's vast power. In order “to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy” a defendant must be given the right to control his defense. *State v. Lynch*, 178 Wn.2d 487, 492, 309 P.3d

¹ The Sixth Amendment to the United States Constitution provides that, [i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence,” while article I, section 22 of the Washington Constitution provides that “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

482 (2013). Guaranteeing a defendant the right to choose who will represent him gives him a say in how he will mount his defense, as different attorneys will make different tactical decisions and present the case differently to a jury. *Gonzalez-Lopez*, 548 U.S. at 150. The outcome of a case may even hinge on who the defendant selects as his counsel, as “the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.” *Id.* Prohibiting the State from unjustifiably interfering with a defendant’s ability to select his attorney ensures the State may not exercise any form of supervisory veto over “the type of defense [the defendant] wishes to mount.” *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983).

This right to counsel of choice is separate from the right to the *effective* assistance of counsel. In addition to protecting a defendant’s right to select who will represent him, the Sixth Amendment gives effect to the broader purpose of the Fifth and Fourteenth Amendments, which guarantee that no person be “deprived of life, liberty, or property, without due process of law.” U.S. Const. amends. V; XIV; *Gonzalez-Lopez*, 548 U.S. at 145. From this right to a fair trial comes the right to the effective assistance of counsel. *Gonzalez-Lopez*, 548 U.S. at 147. “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.” *Id.* at 146 (quoting *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 long “recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.” *Strickland*, 466 U.S. at 684-85 (citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.158 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). This is because “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). If the trial becomes less than a confrontation between adversaries, the constitutional guarantee is violated. *Id.* at 656-57.

The right to counsel of choice, however, protects interests distinct from simply the guarantee of an adversarial process. A criminal defendant’s right to counsel of his choosing is not derived from the Sixth Amendment’s purpose of ensuring a fair trial, but is the *root meaning* of the Sixth Amendment’s constitutional guarantee. *Gonzalez-Lopez*, 548

U.S. at 147-48 (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *Andersen v. Treat*, 172 U.S. 24, 19 S.Ct. 67, 43 L.Ed.351 (1898)). “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. Whether the defendant would likely receive, or did receive, adequate representation by someone other than his first choice of counsel is not relevant to this Sixth Amendment analysis.

2. **United States v. Gonzalez-Lopez prohibits a court from considering the adequacy of current counsel when a defendant requests a continuance in order to be represented by his counsel of choice.**

Before the United States Supreme Court decided *Gonzalez-Lopez*, our Court of Appeals developed a four-factor test to evaluate whether the trial court abused its discretion when it denied a continuance sought to preserve the defendant’s right to be represented by his counsel of choice. *State v. Roth*, 75 Wn. App. 808, 823, 881 P.2d 268 (1994). Because the Court of Appeals developed the test prior to the United States Supreme Court’s explication of the Sixth Amendment right to counsel of choice in *Gonzalez-Lopez*, the *Roth* test fails to appreciate, or even contemplate, the constitutional right to counsel of choice as it is articulated in *Gonzalez-Lopez*.

In *Roth*, the defendant requested a continuance so that his lead counsel, who was currently in trial in another matter, could conduct jury selection. 75 Wn. App. at 823. The trial court continued the case for several days, but when lead counsel remained unavailable, the trial court denied the defendant's second request for a continuance and required him to proceed with co-counsel. *Id.*

The Court of Appeals relied on the following factors in order to evaluate whether the trial court's denial of the second continuance request unjustifiably interfered with the defendant's right to counsel of choice:

(1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

Id. at 825. Applying these factors, the Court of Appeals found the trial court granted the defendant's prior request for a continuance, the defendant had no cause for dissatisfaction with co-counsel, and co-counsel was a skilled defense attorney who was prepared to proceed with jury selection. *Id.* Holding that the trial court therefore did not abuse its discretion when denying the defendant's second request for a continuance, it affirmed. *Id.* at 826.

The Court of Appeals subsequently applied the *Roth* factors in *State v. Price* to reach the same result. 126 Wn. App. 617, 632, 109 P.3d 27 (2005). In *Price*, the defendant informed the court he wished to hire new counsel after the start of trial. *Id.* at 629. He represented to the court he had been “looking around” and that his mother was going to help him pay for private counsel. *Id.* at 629-30. However, his mother was not present in court and the defendant had not made any attempts to actually hire an attorney. *Id.* at 629. The trial court denied his request for a continuance and the Court of Appeals affirmed. *Id.* at 634.

In *Price*, the Court of Appeals correctly found that “a criminal defendant does not have an absolute, Sixth Amendment right to choose any particular advocate.” *Id.* at 632. As the United States Supreme Court explained in *Wheat*:

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.

486 U.S. at 159; *see also State v. Roberts*, 142 Wn.2d 471, 516, 14 P.3d 713 (2000) (finding that a defendant may not insist on representation by an

attorney he cannot afford or who declines to represent him).

However, the Court of Appeals also relied on *Wheat* for the premise that “the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant will inexorably be represented by his or her counsel of choice.” *Price*, 126 Wn. App. at 631; *Wheat*, 486 U.S. at 159. As the United States Supreme Court clarified in *Gonzalez-Lopez*, ensuring an effective advocate is one of the purposes of the Sixth Amendment, but it is not the essential aim.

The root meaning of the Sixth Amendment is the right to select counsel of one’s choice. *Gonzalez-Lopez*, 548 U.S. at 147-48. The right to effective counsel, in contrast, is derived from its purpose of ensuring a fair trial. *Id.* at 147. When a court fails to draw this important distinction, it “abstracts from the right to its purposes, and then eliminates the right.” *Id.* at 145 (citing *Maryland v. Craig*, 497 U.S. 836, 862, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (Scalia, J., dissenting)). As the Court discussed in *Gonzalez-Lopez*:

A trial is not unfair and thus the Sixth Amendment is not violated, the Government reasons, unless a defendant has been prejudiced. Stated as broadly as this, the Government’s argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause – and then proceeds to give no effect to the details. It is true enough that the purpose of the rights set forth in

that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.

548 U.S. at 145.

The Court of Appeals' reliance on whether the defendant had a legitimate cause for dissatisfaction with his current counsel, and whether the denial of his request would likely result in identifiable prejudice, are appropriately considered when evaluating a due process claim. They are not properly considered when a defendant asserts his right to counsel of choice. Following *Gonzalez-Lopez*, this Court appeared to recognize this critical distinction in *Aguirre*, when it evaluated the denial of a defendant's motion to continue his sentencing hearing so that newly retained counsel could prepare. 168 Wn. 2d 350, 365, 229 P.3d 669 (2010).

In *Aguirre*, this Court balanced the defendant's constitutional right to counsel of his choosing against the length of the delay the continuance would cause and the victim's right to be present at sentencing. *Id.* Given that the defendant requested a two-month continuance shortly before the sentencing hearing, and the victim had already flown across the country to attend, this Court found the trial court did not abuse its discretion in denying the defendant's request for a continuance. *Id.* at 366. At no point did the Court consider whether the defendant was legitimately dissatisfied

with his current attorney or would likely be prejudiced by that attorney's continued representation.

In this case, the Court of Appeals also recognized its error and explicitly denounced the factors relied upon in *Roth* that conflict with *Gonzalez-Lopez*:

Unfortunately, the decisions in *Roth* and *Price*, which invite inquiry into whether the defendant has a legitimate dissatisfaction with appointed counsel (second factor) and whether the denial of the defendant's motion will result in material or substantial prejudice (fourth factor) are incompatible with the United States Supreme Court's explication of a defendant's right to counsel of choice.

State v. Hampton, 182 Wn. App. 805, 822, 332 P.3d 1020 (2014). This is because "a defendant who hires an attorney whom he or she prefers – subject to qualifications recognized in *Gonzalez-Lopez* – retains the Sixth Amendment right to be represented by an attorney without regard to a trial court's assessment of the legitimacy of the defendant's dissatisfaction with present counsel." *Id.* at 823.

This fundamental principle remains true regardless of whether the defendant asks for a continuance in order to be represented by his attorney of choice. Although a request for a continuance allows the court to consider the public's interest in the prompt and efficient administration of justice, it does not negate the individual's important constitutional right to counsel of choice, nor does it permit the court to dispense with the

defendant's Sixth Amendment right to counsel of choice altogether and engage in a fair trial inquiry instead. *See Aguirre*, 168 Wn.2d at 365-66; *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010) (“a defendant who can afford to hire counsel may have the counsel of his choice unless a contrary result is compelled by purposes inherent in the fair, efficient and orderly administration of justice”); *State v. Ensign*, 491 F.3d 1109, 1115 (9th Cir. 2007).

When a defendant requests a continuance, his constitutional right to his counsel of choice remains paramount. While the court may consider any delay previously caused by the defendant and the delay to be caused by the possible continuance, it may not consider the validity of the defendant's choice of counsel.

3. When the trial court denied Mr. Hampton's request for a continuance so that he could be represented by his counsel of choice, it violated Mr. Hampton's Sixth Amendment right.

a. The trial court violated Mr. Hampton's constitutional right to counsel of choice.

Mr. Hampton retained private counsel after learning he would face a second degree rape charge, and potential indeterminate life sentence, at trial. CP 102; RCW 9.94A.507(1)(a)(i). When Mr. Hampton sought to replace his appointed counsel with the attorney he selected to represent him on this extremely serious charge, his private counsel explained this

would only be possible with a continuance. CP 95. Despite the fact Mr. Hampton's case was less than four months old and had been continued only once by agreement of both parties, the trial court denied his request. 8/31/12 RP 7.

This Court reviews the trial court's ruling for an abuse of discretion. *Aguirre*, 168 Wn.2d at 365. A trial court necessarily abuses its discretion when it bases its ruling on an erroneous view of the law or when it applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). As the Court of Appeals held, the trial court abused its discretion when it "applied a method of analysis precluded by controlling United States Supreme Court precedent." *Hampton*, 182 Wn. App. at 827-28.

Although the trial court did not cite to *Roth* or *Price* when it denied Mr. Hampton's request to continue the trial date, it effectively applied the four factors endorsed by the Court of Appeals prior to *Gonzalez-Lopez* and relied most heavily on the two invalidated factors. In denying Mr. Hampton's motion for a continuance, the court stated:

I guess I'm not so persuaded. I know Mr. Wackerman is a very capable attorney. It wouldn't be the first time he's represented someone who may not have always been happy with Mr. Wackerman. I think that happens for most of the defense attorneys that they occasionally have a client who would rather have a different attorney appointed. I don't think that would in any way impair his ability to represent

his client zealously and capably, and I don't think there's any question that Mr. Wackerman is a highly qualified defense attorney.

And I'm not really being given much reason other than apparently some other source decided to provide the funds today when it was still a serious case. These cases, [sic] uniquely the Court is asking to take into consideration the victim's position on a continuance and for the same reasons that I'm being urged to continue on behalf of the defendant would apply also to the victim.^[2] This is a case that's difficult for everybody. I assume it has some impact on the family situation for the defendant. And I don't think that a compelling record has been made as to why the Court essentially on the day of trial should grant a continuance of a case that has already been continued. And frankly, we have a lot of cases that are even older. This case is past its original speedy trial period and it's been continued at least once already.

8/31/12 RP 7-8. The court then added:

I guess if these interviews cannot happen that need to happen before Wednesday, that would be grounds for continuance. But I'm not inclined to grant this continuance at this late of [sic] stage when there is competent counsel who is prepared to go forward. And while it's a very serious charge from what I read, it's not a complicated case in terms of the number of witnesses and there's no experts I don't think involved in the case.

8/31/12 RP 9.

² At one point, the State argued it was pushing to go forward with trial because Mr. Hampton's son had been "interfering with the State's case" and if he had "any more time to get inside the victim's head and try to talk her out of it, it jeopardizes the State's case." 8/31/12 RP 6. However, as the Court of Appeals noted, the State presented no evidence of this and the trial court did not appear to consider this allegation when denying the motion to continue. *Hampton*, 182 Wn. App. at 827. This is unsurprising given that the State summarized its position as "nobody is really going to have a whole lot of complaint about [the court's ruling on Ms. Goykhman's motion to continue] whatever you decide." *Id.*; 8/31/12 RP 7.

When the court considered the age of Mr. Hampton's case, or the first *Roth* factor, it found the case had "been continued at least one time," but did not determine exactly how many times a continuance had been granted, or at whose request. 8/31/12 RP 3. In fact, in a period of less than four months since Mr. Hampton's arraignment, the case had been continued only once, by agreement of both parties. CP 99. That the case remained relatively young was evident when the court later commented "frankly, we have a lot of cases that are even older." 8/31/12 RP 8.

In regards to the third factor, whether available counsel was prepared to go to trial, Mr. Wackerman represented he would be ready for trial the following week as long as the State made certain witnesses available for interviews. 8/31/12 RP 4-5. The court granted Mr. Wackerman's request for a continuance, but stated it was "not inclined to grant [Ms. Goykhman's request for a] continuance at this late of [sic] stage when there is competent counsel who is prepared to go forward," unless Mr. Wackerman could not proceed to trial the following week. 8/31/12 RP 8-9. Unlike in *Aguirre*, the court never asked Ms. Goykhman how long a continuance she would need in order to prepare for trial, making it impossible to consider the degree of the delay the requested continuance would cause relative to the request made by Mr. Wackerman. 168 Wn.2d at 365. In addition, the court noted that although the charge

was serious, it was “not a complicated case” due to the limited number of witnesses and lack of experts, suggesting that the amount of time an experienced attorney like Ms. Goykhman would need to prepare for trial was relatively brief. 8/31/12 RP 9.

While giving little regard to information relevant to the *Roth* factors that survived *Gonzalez-Lopez*, the trial court focused on whether Mr. Hampton would receive adequate assistance of counsel if forced to proceed with his appointed attorney. Mr. Wackerman informed the court that he and Mr. Hampton “have perhaps not had the best relationship,” and that Mr. Hampton had indicated early on in the case that he was hoping to retain private counsel once he could obtain the funds to do so. 8/31/12 RP 3-4. But the court relied on its own assessment of Mr. Wackerman, citing how capable Mr. Wackerman was and pointing out that it “happens for most of the defense attorneys that they occasionally have a client who would rather have a different attorney appointed.” 8/31/12 RP 7. The court found Mr. Hampton would suffer no prejudice because Mr. Wackerman was “a highly qualified criminal defense attorney.” 8/31/12 RP 8. It concluded it was “not really being given much reason [to grant Mr. Hampton’s request for a continuance] other than apparently some other source decided to provide the funds today when it was still a serious case.” 8/31/12 RP 8.

The Court of Appeals, applying the Court's analysis in *Gonzalez-Lopez*, evaluated Mr. Hampton's request for a continuance much differently. When reviewing the trial court's decision, the Court of Appeals concluded:

It is unsurprising that a defendant who is without sufficient funds to hire a private attorney when he is arraigned could, over a period of several months, acquire such funds – especially upon learning that the charge against him is to be amended from indecent liberties to the more serious offense of rape in the second degree. Indeed, at the first court appearance after the sole continuance was granted (and before the information was actually amended), Hampton appeared in court with newly retained counsel (consistent with his intent from the outset as expressed to his court-appointed lawyer) requesting a continuance to allow his chosen attorney time to prepare.

Hampton, 182 Wn. App. at 826-27. Whether Mr. Hampton was legitimately dissatisfied with Mr. Wackerman was irrelevant, as “Providing an effective court-appointed lawyer is not a constitutionally-acceptable substitute for the defendant's counsel of choice.” *Id.* at 818. When the trial court ruled to the contrary, it violated Mr. Hampton's Sixth Amendment right. *Id.* at 828.

b. *The remedy is reversal.*

When a court unlawfully deprives an individual of his Sixth Amendment right to counsel of choice, reversal is required. “[T]he erroneous denial of counsel bears directly on the ‘framework within which

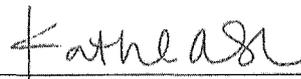
the trial proceeds’ – or indeed on whether it proceeds at all.” *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 112 L.Ed.2d 302 (1991)). In order to determine the effect of the wrongful denial of the counsel of choice, a court would be forced to examine not what mistakes were made, but what differences in the defense occurred. *Gonzalez-Lopez*, 548 U.S. at 151. This type of speculative endeavor would be an impossible task for a court to achieve with any assurance of accuracy. Because the consequences are necessarily unquantifiable and indeterminate, the erroneous deprivation of the right to counsel of choice constitutes structural error. *Id.* at 150; *Hampton*, 182 Wn. App. at 828.

E. CONCLUSION

Mr. Hampton respectfully asks this Court to affirm the Court of Appeals and remand his case to the superior court for further proceedings because the trial court violated his Sixth Amendment right to counsel of choice, a structural error.

DATED this 20th day of March, 2015.

Respectfully submitted,



KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project
Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 90811-7
)	
MATTHEW HAMPTON,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF RESPONDENT** 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:

- | | | | |
|-----|--------------------------------------|-----|---------------|
| [X] | MARY KATHLEEN WEBBER, DPA | () | U.S. MAIL |
| | [kwebber@co.snohomish.wa.us] | () | HAND DELIVERY |
| | SNOHOMISH COUNTY PROSECUTOR'S OFFICE | (X) | E-MAIL |
| | 3000 ROCKEFELLER | | |
| | EVERETT, WA 98201 | | |
| [X] | MATTHEW HAMPTON | (X) | U.S. MAIL |
| | C/O 1116 121 ST PL SE | () | HAND DELIVERY |
| | EVERETT, WA 98208 | () | _____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 20TH DAY OF MARCH, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: kwebber@co.snohomish.wa.us; Kathleen Shea
Subject: RE: 908117-HAMPTON-BRIEF

Received 3-20-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Friday, March 20, 2015 3:57 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: kwebber@co.snohomish.wa.us; Kathleen Shea
Subject: 908117-HAMPTON-BRIEF

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Respondent

Kathleen A. Shea - WSBA #42634
Attorney for Respondent
Phone: (206) 587-2711
E-mail: kate@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.