STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK M. SURIANO,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
Entered in the Door County Circuit Court,
the Honorable Todd D. Ehlers Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether the circuit court violated Mr. Suriano's constitutional right to counsel by finding that he forfeited his right to public representation without first warning him that forfeiture was a possibility.

2. Whether the circuit court violated Mr. Suriano's constitutional right to counsel by ruling on forfeiture less than a week before trial and refusing Mr. Suriano's request for additional time to secure an attorney.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the issues can be fully addressed through briefing. This case does not qualify for publication because it is a misdemeanor appeal. Wis. Stat. §§ 809.23(1)(b)4 and 751.31(2)(f).

STATEMENT OF THE CASE AND FACTS

Mr. Suriano was charged with and convicted of obstructing an officer, contrary to Wis. Stat. § 946.41(1).

Trial Facts

On October 30, 2013, at approximately 9:00 a.m., members of the Door County Sanitation Department, accompanied by two law enforcement officers, entered

Mr. Suriano's yard[1] to obtain a soil sample. (76:121). Sanitarian Gregory Thiede testified that Mr. Suriano had previously refused him access to the property. (76:122). Therefore, he asked corporation counsel to draft and obtain an inspection warrant (*see* Wis. Stat. § 66.0119). (76:123). Thiede testified that he received three copies of the warrant paperwork. He kept one copy and gave two copies to Deputy Mark Schwartz and Sergeant Bradley Moe for service. (76:126). Thiede testified that he looked over the copies and determined that they were identical. (76:126). He handed two copies to Deputy Schwartz, and assumed that he served Mr. Suriano with all of the pages. (76:159, 175-76). He did not personally serve the paperwork. (76:158). Deputy Schwartz did not testify.

The law enforcement officers approached Mr. Suriano's residence and spoke with Mr. Suriano. (76:196-98). The State asserted that, at that point, the officers presented Mr. Suriano with the warrant. However, Mr. Suriano testified that he was only given the warrant application, which did not have a judge's signature.[2] Sgt. Moe recalled that Mr. Suriano commented that there was no judge's signature. (76:199). Mr. Suriano was also upset that a backhoe was being driven on his property and was asking the excavator to avoid certain areas, which Sgt. Moe regarded as "verbal interference." (76:204).

As the sample was being taken, Mr. Suriano approached the group wearing a long coat with his hands in his pockets. (76:206-08). Sgt. Moe testified that Mr. Suriano

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[1] Mr. Suriano did not own the property, but he resided there. (76:299).

[2] In a pretrial motion, Mr. Suriano challenged the warrant on the grounds that it was based on hearsay, was stale, and named him as a respondent even though he did not own the property. His motion was denied.

was walking "briskly toward him," so he ordered Mr. Suriano to remove his hands from his pockets. He asked several times before Mr. Suriano complied. (76:208). He testified that Mr. Suriano subsequently placed his right hand back in his pocket, pulled out a camera, and stuck it in Sgt. Moe's face. (76:212). Sgt. Moe grabbed Mr. Suriano's arm and commanded him to remove his hands from his pockets. (76:214-216). Mr. Suriano tensed up and began to pull away. (76:217). Sgt. Moe forcefully pulled Mr. Suriano to the ground, and arrested him for obstructing an officer. (76:220-223). Mr. Suriano testified that he did not rush up to Sgt. Moe, but rather walked at a normal pace. (76:303-304). He denied getting in Sgt. Moe's face. (76: 307-08).

Statement of the Case

During pretrial proceedings, Mr. Suriano was represented by three different attorneys. Attorney Grant Erickson appeared at the initial appearance on December 16, 2013. (69). On January 9, 2014, he moved to withdraw. (70). His Notice of Motion asserted that, "the grounds for this motion are that the defendant and Attorney Grant. A. Erickson have differing opinions and objectives for the handling and resolution of this case." (13; App. 101). Mr. Suriano asked if he could question Attorney Erickson about the motion. (70:3; App. 104). The court agreed. Mr. Suriano asked Attorney Erickson why he was moving to withdraw. Attorney Erickson replied that he believed that they did not have the same objective for the case. (70:4-5; App. 105-106). When Mr. Suriano asked Attorney Erickson what he believed Mr. Suriano's objective was, Attorney Erickson replied that Mr. Suriano's objectives were to prove his innocence, to explore every legal or even nonlegal aspect of the case, and "to be an ass. You believe that you've been improperly charged and because of that you

desire to make it difficult or frustrating for the court system to proceed." (70:5-6; App. 106-107). Mr. Suriano pressed him on this, suggesting that their objectives were the same, and they only had different ideas about how to handle the case. Ultimately, Mr. Suriano agreed to a new attorney, "anybody would probably be better so --," and the court granted the motion to withdraw. (70:7; App. 108). Attorney Linda Schaefer was also present in the courtroom. She explained that she had been appointed by the State Public Defender (SPD) as successor counsel, but had not yet met with Mr. Suriano. (70:8-9; App. 109-110).

At the next appearance, on February 17, 2014, Attorney Schaefer moved to withdraw. (71). In her motion to withdraw, she averred that "a significant conflict has developed between Mr. Suriano and myself with respect to the appropriate course of action going forward in this case." (19; App. 114). At the hearing, she did not elaborate further. And Mr. Suriano did not comment. (71:17; App. 117). The court granted the motion to withdraw, and advised Mr. Suriano that, "you will now be on your third attorney appointed with the public defender's office. I think they have a three strike rule. Talk to them about that." (71:6; App. 121).

Subsequently, Attorney Raj Singh was appointed as counsel. At his first appearance, on April 7, 2014, he informed the court that he was not getting along with Mr. Suriano. (72: 5-6; App. 126-127). He also told the court about confidential communications, revealing his opinion that Mr. Suriano's proposed legal issues were meritless. (72:4, 12-15). Mr. Suriano acknowledged that he was not satisfied with Mr. Singh's representation so far, but nothing much had happened yet. (72:8; App. 129). Mr. Suriano asked the court

about a court-appointed attorney.[3] (72:9; App. 130). The court stated it would first need to hear from the State Public Defender (SPD) that Mr. Suriano was not eligible for public defender representation. (72:10-11; App. 131-132). The court asked Mr. Suriano whether he wanted to "get rid" of Attorney Singh. Mr. Suriano replied that, "I hesitate to go around firing people, especially because there might be consequences. It wasn't my idea" but that "his representation of me so far…I don't think it's all that beneficial to me." (72:12; App. 133). Ultimately, Attorney Singh agreed there was no legal basis to withdraw at that time. (72:12; App. 133).

On May 14, 2014, Attorney Singh moved to withdraw again. (73). His motion was captioned "defendant's motion" and stated, "the defendant…does hereby move the Court for an order relieving the undersigned attorney." Mr. Suriano was upset that the motion was presented as his motion, because he did not ask for it to be filed. Attorney Singh explained that Mr. Suriano had written a letter to the SPD criticizing his representation. (73:3-4). Attorney Singh complained that Mr. Suriano wanted to micromanage him and had insulted him. (73:4). In response, Mr. Suriano stated that Attorney Singh was refusing to investigate witnesses and to litigate a motion to suppress. (73:8-9). Attorney Singh and Mr. Suriano disagreed about how to communicate about the case. Mr. Singh refused to communicate via email. (73:13-14).Mr. Suriano explained that the postal service was unreliable in his area, and he could not afford to maintain a phone reliably. (73:18-19). Attorney Singh claimed to be afraid of Mr. Suriano because of his hostility and anger.

[3] After a defendant has been found ineligible for the SPD, the court may use its inherent power to appoint counsel. ***State v. Kennedy***, 2008 WI App 186, ¶¶9, 10, 315 Wis. 2d 507, 762 N.W.2d 412.

(73:12). He wanted to meet in Green Bay, but Mr. Suriano could not afford to travel there. (73:5). Mr. Suriano stated that he was not firing Attorney Singh. (73: 10-11, 21). He stated, "he's making it look like I'm letting him go or firing him off which is going to be different when we get back to the public defender's office." (73:11). He maintained, "this is his idea" to withdraw. (73:21). The court granted Attorney Singh's motion to withdraw.

Then, the State moved the court to find that Mr. Suriano had forfeited his right to public representation. (73:21-22; App. 135-136). Mr. Suriano replied, "well, that would be a real prejudice against me that because the attorneys decide to withdraw should not make my life harder or difficult or have me forego representation. I need to have an attorney represent me, preferably someone who actually wants to have a defense." (73:23; App. 137). He also stated "I think I need to have representation before I would have to defend against his motion. I don't think it's fair for me to be in here arguing a motion that's brought with no notice whatsoever and without any representation. If anything, the motion should be tabled until I get representation." (73:25; App. 139).

The court did not respond to Mr. Suriano's request to table the motion. Instead, the court began asking Mr. Suriano about his education. (73:25; App. 140). Mr. Suriano replied that he had completed college and some graduate school. (73:25-26; App. 140-141). The court then found:

> You forfeited, as far as I'm concerned, your right to have legal representation. That means, Mr. Suriano, if you want to go out and hire an attorney or you want to contact the state public defender's office and see if they will appoint another attorney for you, that is absolutely your right, sir. When I'm saying you forfeited your right

> to have an attorney, that doesn't mean you can't get an attorney, but I'm finding your actions have made it clear that you will not cooperate with any attorney.
>
> …
>
> Mr. Erickson gets appointed on your behalf. And in my 32 years of experience, I've never heard another attorney, or now as a judge for the last 14 years, an attorney in my court refer to his client as an ass, but Mr. Erickson on the record called you an ass. So clearly you couldn't work with him.
>
> Miss Schaefer, she also withdrew and now I hear about this relationship with you and Mr. Singh. And I'm not party to any of that, but clearly there is a problem with your relationship with any attorney, sir, and this is just—we had a trial date in this case set in March when Miss Schaefer withdrew. That trial date had to get rescheduled.
>
> We now have a trial date in this case on June 4th of 2014 and that is not coming off the calendar. You will be here, I guess, representing yourself if you don't get a new attorney between now and then, but this is a game. Yes. It's a game, Mr. Suriano, and I'm done playing it. This case is moving forward.

(73:27-29; App. 141-143).

Mr. Suriano asked whether the court would consider appointing counsel if the SPD denied his request for another attorney. (73:30-31; App. 144-145). The court said it would consider it. (73:31; App. 145).

On May 21, 2014, The Assigned Counsel Division of the SPD wrote to the court stating that Mr. Suriano's request for counsel had been denied. (30; App. 147). On May 23, 2014, Mr. Suriano filed a Petition for Appointment of an

Attorney in the circuit court. (31; App. 148-149). On May 27, 2014, Mr. Suriano, appeared *pro se*. The court explained that it had received a call from Attorney Eric Wimberger, who indicated that Mr. Suriano requested his representation. (74:3; App. 152). However, Attorney Wimberger was not available for the June 4, 2014, trial. (74:3; App. 152). The court denied Mr. Suriano's request for court-appointed counsel.

> I made it very clear to you when we were last on the record on the 14th of May that if you were going to be seeking out your own attorney or petitioning the Court to appoint an attorney for you make sure whoever you contact is available because I'm not moving the trial date again. So that's the status. I am denying your request for court-appointed counsel. I've already found you've forfeited your right to counsel…So if you want an attorney, you are going to need to hire one yourself.

(74:3-4; App. 152-153).

Mr. Suriano replied, "I was unaware that you wouldn't appoint somebody if I found somebody…this was the first guy that said he would do it and it took me until, like you indicate, shortly before I filed that on Friday before I could get him on board to do it." (74:4-5; App. 153-154). The court refused to change the trial date.

By motion filed May 29, 2014, Mr. Suriano asked the court to reconsider its denial of his request for court-appointed counsel. (34; App. 156). He explained that he had secured an attorney willing to represent him, and argued that the court's refusal to accommodate new representation violated his right to counsel. On June 2, 2014, the court denied the motion. (75:5-6; App. 161-162).

A jury trial took place two days later. (76). Mr. Suriano appeared without counsel. The court instructed

the jury that, "[t]he defendant has a constitutional right to represent himself. I have advised Mr. Suriano that the same rules apply whether a lawyer acts for him or he acts for himself. The defendant has decided to represent himself and this decision must not influence your verdict in any manner." (76:72).

During voir dire, the prosecutor also told the jury that Mr. Suriano had chosen to represent himself.

> Okay. Now, moving on from the type of evidence you might hear, I've got to touch on something that's really staring us right in the face. Look over at that table. Mr. Suriano is sitting there alone. He doesn't have a lawyer with him. That's his right. That's a choice that he's made.

(76:56).

The prosecutor then questioned one of the jurors, "are you confident that you won't ever let any potential sympathy for this poor guy sitting there without a lawyer creep into and affect your - - the verdict that you might return as opposed to just listening to the evidence and basing your verdict on that." (76:58). He stated, "do you recognize the rules don't change whether you are experienced and comfortable in the courtroom like me or whether you are a person who's chosen to be without a lawyer like, Mr. Suriano." (76:59).

Outside the presence of the jury, Mr. Suriano expressed concern about the comments on his self-representation. "And also everybody's been using this concept that I chose not to have an attorney which is contrary to my petition which the Court decided against, and I didn't dismiss any attorneys. The Court dismissed them. I just can't fathom that we're telling the jury that I chose to be in the seat I'm in without an attorney." (76:90).

The jury convicted Mr. Suriano, and the court imposed a $100 fine. (61; App. 163-164).[4]

This appeal follows.

ARGUMENT

I. The Circuit Court Violated Mr. Suriano's Constitutional Rights by Ruling that he Forfeited his Right to Counsel.

A. Constitutional principles and standard of review.

A criminal defendant in Wisconsin is guaranteed the right to counsel by both article I, section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution. ***State v. Coleman***, 2002 WI App 100, ¶11, 253 Wis. 2d 693, 644 N.W.2d 283. "The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" ***Gideon v. Wainwright***, 372 U.S. 335 (1063) (citing ***Johnson v. Zerbst***, 304 U.S. 458 (1938)). In ***Gideon***, the Supreme Court held that a person who is too poor to hire an attorney cannot be assured a fair trial unless counsel is provided to him or her. The Court explained why the right to counsel is fundamental:

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[4] Mr. Suriano's judgment was stayed pending appeal. (67). In addition, Mr. Suriano filed a postconviction motion to vacate the DNA surcharge and commitment for failure to pay. (82). After a hearing held on April 10, 2015, the court granted the motion to vacate the DNA surcharge, but denied the motion to vacate the commitment. (83). Mr. Suriano does not appeal this ruling.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 343-345.

Whether a defendant has been deprived of his or her constitutional right to counsel is a question of constitutional fact. ***State v. Cummings***, 199 Wis. 2d 721, 546 N.W.2d 406 (1996). A question of constitutional fact presents a mixed question of fact and law reviewed with a two-step process. ***State v. Hajicek***, 2001 WI 3, 240 Wis. 2d 349, 620 N.W.2d 781. First, an appellate court reviews the circuit court's findings of historical fact under the clearly erroneous standard. Second, an appellate court reviews the circuit court's determination of constitutional fact de novo. ***Id.*** ¶15.

B. Under some circumstances, a court may find that a defendant forfeited his or her right to counsel.

In Wisconsin, a defendant may, by his or her conduct, forfeit the right to counsel. ***Cummings***, 199 Wis. 2d at 756. The forfeiture rule exists to prevent defendants from

manipulating or obstructing proceedings in order to disrupt the administration of justice. The triggering event for forfeiture is when the "court becomes 'convinced that the orderly and efficient progression of [the] case [is] being frustrated' " by the defendant's repeated dissatisfaction with his or her successive attorneys. ***Id.*** at 753 n. 15. "These situations are unusual, 'most often involving a manipulative or disruptive defendant....'" ***Id.*** at 752. "Forfeiture of counsel is a drastic remedy." ***State v. Coleman***, 2002 WI App 100, 253 Wis. 2d 693, 644 N.W.2d 283. "Forfeiture cannot occur simply because the effect of the defendant's conduct is to frustrate the orderly and efficient progression of the case. The defendant must also have the purpose of causing that effect." ***Id.*** ¶ 18.

A court contemplating forfeiture should first warn the defendant that forfeiture is possible and advise him or her of the consequences. In ***Cummings***, the Wisconsin Supreme court recommended that trial courts follow four steps recommended for determining when a defendant has forfeited the right to counsel:

> (1) [provide] explicit warnings that, if the defendant persists in [specific conduct], the court will find that the right to counsel has been forfeited....;
>
> (2) [engage in] a colloquy indicating that the defendant has been made aware of the difficulties and dangers inherent in self-representation;
>
> (3) [make] a clear ruling when the court deems the right to counsel to have been forfeited; and
>
> (4) [make] factual findings to support the court's ruling....

Coleman, 253 Wis. 2d 693, ¶22 (citing ***Cummings*** at 764).

This Court analyzed those factors in detail in ***State v. Coleman***, 253 Wis. 2d 693. In ***Coleman***, the trial court found that Coleman forfeited his right to counsel at sentencing. At the preliminary hearing, Coleman asked for new counsel because his attorney was always "too busy" to talk to him. ***Id.*** ¶3. The court granted the request, and told Coleman, "and you have to understand, Mr. Coleman, with the appointment of attorneys that's two strikes and you're out so if you don't like the second one, then you go it alone. You understand that?" ***Id.*** Successor counsel was appointed and Coleman entered a guilty plea. Two days before the sentencing hearing, defense counsel filed a motion to withdraw. ***Id.*** ¶7. The court advised Coleman to contact the SPD for appointment of subsequent counsel. Coleman appeared at sentencing without an attorney. ***Id.*** ¶8. He indicated that he still wished to have an attorney. The circuit court denied the request because "this matter's gone on long enough and I think that the delays and some of the problems that have occurred have occurred because of your attitude and your unwillingness to cooperate with people you had trying to help you." ***Id.***

This Court reversed, finding that that the record did not suggest that Coleman discharged his attorney for purposes of delaying the proceedings. Moreover, the trial court did not specifically warn Coleman that if he continued to be dissatisfied with his attorneys, his right to counsel would be forfeited. Finally, the trial court did not conduct a colloquy to determine that Coleman understood the difficulties of proceeding without counsel. ***Id.*** ¶26.

The trial court did warn Coleman that he could lose his right to a public defender. However, this Court found that

warning insufficient, stating, "[t]hat warning was not clear that Coleman was in danger of altogether forfeiting his right to counsel. Rather, it arguably was a warning that the public defender would not appoint a third attorney." ***Id.*** ¶29.

C. The circumstances of this case did not justify forfeiture of counsel.

The circuit court never warned Mr. Suriano that his conduct could result in a forfeiture of his right to counsel. Mr. Suriano argued that he should have been given notice and an opportunity to prepare a defense to the State's motion for forfeiture. The court denied his request. As in ***Coleman***, the court did advise that the State Public Defender had a limit on how many attorneys it would appoint a defendant, which the court referred to as the "three-strike rule." However, as the ***Coleman*** court stated, this type of warning fails to provide adequate notice that the defendant is "in danger of altogether forfeiting his right to counsel." ***Id.*** ¶29.

In addition, the court did not engage in a colloquy with Mr. Suriano to explain the difficulties and dangers in self-representation, as directed by ***Coleman***, 253 Wis. 2d at ¶22. This case is not like ***State v. McMorris***, 2007 WI App 231, 306 Wis. 2d 79, 742 N.W.2d 322, in which the defendant "received ample notice that his behavior was obstructing efficient progression of the trial and he was warned of the complexities of legal representation and that he would be held to the same standard as a licensed attorney." ***Id.*** ¶26.

Moreover, the conduct of Mr. Suriano's attorneys largely contributed to the forfeiture finding. When attorneys are easily permitted to withdraw, it places the defendant in a difficult position. As the ***Coleman*** court explained:

> An attorney who represents a defendant in a criminal case may indeed have to continue representing the defendant even after the defendant no longer desires the services of the attorney. An attorney is not entitled to withdraw simply because a defendant makes that request. See ***State v. Johnson***, 50 Wis.2d 280, 283, 184 N.W.2d 107 (1971). This is especially true when the defendant clearly wants to be represented by counsel.

Here, the court allowed Attorney Erickson and Attorney Schaefer to withdraw without good cause. When Attorney Erickson moved to withdraw, Mr. Suriano questioned him extensively about why he would not continue to work with him. (70:4-8). Attorney Erickson's motion had simply stated that he and the Mr. Suriano had "differing opinions and objectives for the handling and resolution of this case." (13; App. 101). After Attorney Erickson called him an "ass," Mr. Suriano acquiesced saying, "Anyone would probably be better so --." (70:7). Apparently, Attorney Erickson withdrew because Mr. Suriano was difficult to work with. This is true in many, many cases. After all, a defendant's liberty is on the line, and emotions run high. Simply not getting along with a client is not a basis to withdraw from representation.

Next, Attorney Schaefer's motion to withdraw simply averred that "a conflict has developed with respect to the appropriate course of action going forward in this case." (2/17 at 6). Simply disagreeing about how a case should proceed is not a basis for withdrawal. ***State v. Darby***, 2009 WI App 50, ¶29, 317 Wis. 2d 478, 766 N.W.2d 770 ("Mere disagreement over trial strategy does not constitute good cause to require the court to permit an appointed attorney to withdraw.")

The record is more developed as to the relationship breakdown between Attorney Singh and Mr. Suriano. They could not agree on how to communicate about the case. Attorney Singh was offended that Mr. Suriano had complained about his representation to the SPD. However, the court did not make a finding that Mr. Suriano was completely at fault. Instead, with regard to the issue of forfeiture in general, the court stated, "while I'm not placing 100 percent of the blame on you, clearly you are an active participant in why those situations went haywire for lack of a better word." (74:6).

Mr. Suriano was clear and consistent that he wanted to be represented by counsel, and he did not initiate any of the withdrawals. In ***State v. Woods***, 144 Wis. 2d 710, 424 N.W.2d 730 (Ct. App. 1988), this Court affirmed the circuit court's finding that the defendant forfeited his right to counsel. There, the defendant dismissed five different court-appointed attorneys, the last one the day before trial. Here, Mr. Suriano never asked the court to dismiss any of his attorneys. Moreover, in ***Woods***, the circuit court required the final attorney to stay on the case as standby counsel.[5] In this case, the court apparently never considered appointing standby counsel.

"Forfeiture of counsel is a drastic remedy." In ***State ex rel. Burnett v. Burke***, 22 Wis.2d 486, 492, 126 N.W.2d 91 (1964), the Supreme Court observed:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at

[5] Trial courts have the inherent authority to appoint counsel to assist a defendant in a *pro se* defense. ***State v. Lehman***, 137 Wis. 2d 65, 403 N.W.2d 438 (1987).

> stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. (Internal citation omitted.)

The circumstances of this case did not warrant the drastic remedy of forfeiture of counsel, and Mr. Suriano is entitled to a new trial with representation of counsel.

II. The Circuit Court Violated Mr. Suriano's Constitutional Right to Counsel by Refusing to Provide Reasonable Time for Mr. Suriano to Obtain an Attorney.

The circuit court's denial of Mr. Suriano's request for an adjournment was unreasonable in this case. Mr. Suriano was not provided with reasonable notice that the court would deny his motion for court-appointed counsel. Moreover, the circuit court made its decision on the matter a mere five business days ahead of trial and refused to postpone the trial to allow Mr. Suriano to obtain an attorney.

A circuit court's decision to grant or deny an adjournment is discretionary. ***Hales Corners Savings & Loan v. Kohlmetz***, 36 Wis. 2d 627, 634, 154 N.W.2d 329, 333 (1967). However, whether a defendant has been deprived of his or her constitutional right to counsel is a question of constitutional fact, which is subject to the aforementioned two-part review. ***Cummings***, 199 Wis. 2d 721; ***Hajicek***, 240 Wis. 349. An appellate court reviews the circuit court's findings of historical fact under the clearly erroneous

standard; however, it reviews the circuit court's determination of constitutional fact de novo.

Here, the circuit court gave confusing and sometimes contradictory information to Mr. Suriano about the possibility of a court-appointed attorney. First, on April 7, 2014, after Attorney Singh indicated he was considering withdrawing, Mr. Suriano asked the court about a court-appointed attorney. The court stated it would first need to hear from the SPD that Mr. Suriano was not eligible for another public defender. (72:10-11). "Well, I first have to hear from the public defender's office that they are going to refuse to appoint an attorney on your behalf. Because you understand a public defender attorney is at no expense to yourself, sir, so I'm not going to go and appoint a Court-appointed counsel if you are still eligible for public defender representation." (72:10). Mr. Suriano asked, "If I end up getting dumped by the public defender's office you would entertain the idea of appointing counsel." The court responded, "I will take up your petition when it's filed. I'm not saying I will grant it or I won't grant it." (72:11). The court did not mention that the reason for the SPD's denial would need to be financial ineligibility.

On May 14, 2014, after Attorney Singh withdrew, the court told Mr. Suriano that the court would consider a petition for court-appointed counsel; however, Mr. Suriano would first need to provide documentation that the public defender was refusing to appoint another attorney. (73:31). This time, however, the court did differentiate between ineligibility due to conduct versus financial inability. (73:32). The court advised that it would only appoint counsel if it was the latter. Also, the court stated it would not move the June 4, 2014, trial date.

The next hearing was held on May 27, 2015. (74). The court acknowledged that Mr. Suriano had obtained confirmation from SPD that another attorney would not be appointed. In addition, Mr. Suriano had filed a petition, as directed by the court. Moreover, Mr. Suriano had found an attorney who agreed to represent him, Attorney Eric Wimberger. Nevertheless, the court stated:

> I had my judicial assistant indicate to Attorney Wimberger that I wasn't going to take up your request for appointment of an attorney until one was filed. He indicated he was not available today to represent you on your pending motion to suppress. He further indicated to my judicial assistant that he was not available for the June 4th trial in this case. I thought I made it very clear to you when we were last on the record on the 14th of May that if you were going to be seeking out your own attorney or petitioning the Court to appoint an attorney for you make sure whoever you contact is available because I'm not moving the trial date again. So that's the status. I am denying your request for court-appointed counsel. I've already found you've forfeited your right to counsel. We've received, as you did, a letter from the public defender's office advising that they, because you've gone through three attorneys, are not going to assign counsel on your behalf. So if you want an attorney, you are going to need to hire one yourself.

(74:3-4).

Mr. Suriano responded:

> Well, I was unaware that you wouldn't appoint somebody if I found somebody. I knew that you needed to have a denial from public defender's office which I secured, and I've been around with a bunch of attorneys and most of them won't work for appointment money anyway. This was the first guy that said he would do it

> and it took me until, like you indicate, shortly before I filed that on Friday before I could get him on board to do it.

(74:4).

The court again stated "I'm not appointing an attorney for you." By motion filed May 29, 2014, Mr. Suriano asked the court to reconsider its denial of his request for court-appointed counsel. (74:34). He explained that he had secured an attorney willing to represent him, and argued that the court's refusal to accommodate new representation violated his right to counsel. (34; App. 156). On June 2, 2014, the court denied the motion. (75:5-6). The trial took place two days later. In total, Mr. Suriano had five business days after the court denied his petition for court-appointed counsel to hire a lawyer whom would be prepared for trial. He was unable to do so, and was forced to represent himself.

The circuit court did not provide sufficient time for Mr. Suriano to hire an attorney. In ***State v. Cummings***, the circuit court found that the defendant forfeited his right to counsel and placed the burden on the defendant to ask the SPD for subsequent counsel and/or to hire an attorney. The defendant did not take the initiative to contact SPD. Furthermore, in ***Cummings***, the court gave the defendant nearly a month to secure counsel before trial. The court ruled that counsel had been forfeited on August 18, 1992, and the trial took place on September 21, 1992. (Brief of Defendant-Appellant, 31, Appeal No. 94-0218-CR, *available at* 1995 WL 17050484). Here, not only did Mr. Suriano take the initiative to contact the SPD, he also diligently searched for and found an attorney to take his case. Moreover, whereas the defendant in ***Cummings*** had a month to make arrangements, Mr. Suriano only had five business days.

The court's denial of an adjournment to allow Mr. Suriano to obtain an attorney was erroneous and violated Mr. Suriano's constitutional right to counsel.

CONCLUSION

For the reasons stated above, Mr. Suriano respectfully asks the Court to reverse the judgment of conviction and sentence, and remand the case for a new trial.

Dated this 3rd day of August, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,653 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of August, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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