STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP796CR
Outagamie County Case No. 13-CM-1611

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL STEEL, JR,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF OUTAGAMIE COUNTY, THE HONORABLE VINCENT R. BISKUPIC PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

ARGUMENT

I. STEEL DEMONSTRATED THAT THE TRIAL COURT EXERCISED ERRONEOUS DISCRETION WHEN IT DENIED STEEL'S RIGHT TO REPRESENTATION BY COUNSEL OF HIS CHOICE.

Steel asserts that the circuit court erroneously exercised its discretion when it denied Steel representation by counsel of his choice. The Sixth Amendment to the Constitution of the United States is very clear in providing that that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." ***U.S. Const.*** amend. VI. This tenet is elaborated in a number of cases, but one of particular import in this matter further teaches that "an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." ***United States v. Cuauhtemoc Gonzalez-Lopez,*** 547 US. 140, II, 126 S.Ct. 2557, 165 L.Ed.2d 409. (additional citations omitted.)

The State is correct in its assertion that Steel had appointed counsel and so, seemingly, would not have a right

to choose his counsel. However, this information alone presents a simplistic and incomplete presentation of Steel's situation. There is further elaboration of this right to be gleaned from case law. The court in ***US v. Gonzalez-Lopez***, citing ***Powell v. Alabama***, 287 U.S. 45, 53 (1932), teaches "…that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." ***US v.Gonzalez-Lopez*** at II.

Considering the directive of ***Powell v. Alabama***, cited above, Steel was clearly not afforded a fair opportunity to secure counsel of his own choice, because Judge Biskupic required the trial to continue on the same day that Steel raised this objection. He had no opportunity to retain his own counsel. There is no doubt that Steel maintained the right to counsel under the Constitution of the United States; however, the fair opportunity to secure counsel of his own choice was certainly denied through the decision of Judge Biskupic to continue trial over Steel's objections.

The State's "harmless error" analysis does not apply in this case because denial of the right of choice of counsel is not subject to harmless error analysis. ***US v. Gonzalez-Lopez*** provides further instruction in this case by providing that the remedy for the denial of the right of choice of counsel is a structural error that requires reversal without harmless error analysis. ***US v. Gonzalez-Lopez*** at III, IV. Here, if the Court correctly concludes that Steel was denied his right to counsel of his choice, then the error is not harmless and he is entitled to reversal of his conviction.

II. STEEL DEMONSTRATED THAT THE TRIAL COURT EXERCISED ERRONEOUS DISCRETION WHEN IT DENIED STEEL'S REASONABLE REQUEST TO RESCHEDULE HIS TRIAL.

An admittedly discretionary decision by the court to deny a continuance implicates the defendant's Sixth Amendment right to counsel as well as the Fourteenth Amendment to due process of law. Further, "[a] denial of a continuance potentially implicates the Sixth Amendment right to counsel and the Fourteenth Amendment right to due

process of law." ***State v. Wollman*****,** 86 Wis. 2d 459, 468, 273 N.W.2d 225, 230 (1979). The State is correct in arguing that the court must balance "the defendant's constitutional right to adequate representation by counsel [and due process] against the public interest in the prompt and efficient administration of justice." ***Id. State v. Wollman*** provides six factors for the trial court to consider in its balancing test. ***Id.*** at 470.

(1) The length of the delay requested. The State is correct that no specific amount of time was requested in Steel's request for a continuance. The facts of the case lean toward only a brief continuance, so that Steel would have time to review the discovery and so that Attorney Ditter would be able to schedule Steel's trial away from conflict with another trial. Apparently, Attorney Ditter rescheduled his other trial, but that is not significant in this analysis. Attorney Ditter's other client should not bear the brunt of this decision to deny a reasonable request for continuance of Steel's trial.

(2) Whether lead counsel has associates prepared to try the case in his absence. Attorney Ditter had no associates prepared to try the case if he was not available.

(3) Whether other continuances have been requested and received by the movant. Steel had not requested any previous continuances. It is important to note, however, that the State had requested, and been granted, an adjournment only a week or so before the trial date. When that date conflicted with Attorney Ditter's calendar, the court denied Attorney Ditter's request for a new date.

(4) The inconvenience to the parties, witnesses and the court. There is no dispute that rescheduling this trial may have caused some inconvenience to parties, witnesses, or court. However, inconvenience to these same people was not deemed sufficient earlier when the State made a similar request. The inconvenience was not materially greater as a result of Steel's request than it had been for the State's request. Courts routinely reschedule matters, and this

situation was not so unusual as to require an exceptional response to Steel's request.

(5) Whether the delay seems to be for legitimate reasons. The State is correct that witnesses to be called is a strategic decision and may not warrant delay in trial. However, Steel did not have sufficient time to review the discovery with his attorney. This is a worthy reason to delay the trial, and the court should have at least considered this factor in its decision. The State argues that Steel knew or should have known all of the facts of the case because he was there; however, the purpose of the trial is to prove that very fact. Until the State proves its case at trial, the State cannot *a priori* assume that Steel was "familiar with the facts of the case, having been present for all of the events…" (State's brief at 9).

(6) Other relevant factors. The State argues that Steel should not have the same standing with regard to his request for a continuance because of events during the pendency of the case. However, Attorney Ditter was newly appointed to

represent Steel, and Steel should have been granted the courtesy of adequate time to work with his attorney and prepare sufficiently for trial.

Attorney Ditter presented a reasonable request for a continuance of Steel's trial and Judge Biskupic exercised erroneous discretion when he denied that motion.

CONCLUSION

For all of the reasons stated above, Steel respectfully requests that this Court reverse his conviction in Outagamie County Case Number 13-CM-1611 on the basis of the two errors cited above: the denial of Steel's right to representation by counsel of his choice, and the denial of a trial continuance requested by Steel's attorney on his behalf.

Dated this 15th day of November, 2016.

Respectfully submitted,

/s/
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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 1,574 words.

There is no additional appendix attached to this brief.

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.

CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on November 15, 2016. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 15th day of November, 2016.

Signed:
/s/
LINDA J. SCHAEFER
Attorney for Defendant-Appellant