STATE OF WISCONSIN

IN SUPREME COURT

CASE NO. 2018AP004 CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

v.

DARWIN R. DAVIS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

DENNIS SCHERTZ
State Bar No. 1024409

Schertz Law Office
P.O. Box 133
Hudson WI 54016
(715) 377-0295

Attorney for the Defendant-
Appellant-Petitioner

TABLE OF CONTENTS

ISSUE PRESENTED

1. CAN A TRIAL COURT DENY A DEFENDANT HIS RIGHT TO COUNSEL WHEN THAT COUNSEL IS WORKING *PRO BONO*?

This issue was raised in the briefs in the court of appeals and that court found that Mr. Davis had forfeited his claim that the circuit court violated his right to counsel, as a result of which it did not address this issue.

CRITERION FOR REVIEW

The sole issue raises significant issues of constitutional law, the Sixth Amendment right to counsel. For this reason, the criterion of Rule 809.62(1)(a) is satisfied.

STATEMENT OF THE CASE

Statement of Facts

In a complaint filed February 24, 2015, the appellant, Darwin Davis, was charged with nine different counts, the most serious of which were three second-degree sexual assault charges alleged to have been committed against a 15-year-old girl, C. G. C. R.2. On February 27, 2015, the State Public Defender's office appointed attorney Paul Zilles to represent Mr. Davis after his first, privately retained attorney, Hank Schultz, was forced to withdraw from representation because of the possibility that he might be called to testify as a witness at Davis' trial in the future. R.118:5. The same was true for a second privately retained attorney, Dylan Schultz. *Id.*

After the jury was excused at the end of the second day of trial, the parties appeared before the court, at which time the prosecutor advised the court that the State was releasing attorneys Hank and Dylan Schultz from their subpoenas. R.122:3. At the end of the third day of trial, the State rested its case. R.124:123.

On the fourth day of trial, Attorney Zilles was discussing the statutory authority for the State's duty to disclose recent phone and video recordings when Attorney Schultz interjected with a comment. R.125:10. The discussion continued without additional comments from attorney Schultz, but after a brief recess the court stated:

> The other thing I have to say, I'm going to stop Attorney Schultz from saying anything more. He has a right as the public to be here. It does not involve your right to confer with the defense attorney. So if you expect to stay here, you say nothing more. Better change that. Say nothing more unless I ask you because I may. I should make that more clear.
>
> R.125:13.

Once the disclosure discussion ended with the State agreeing to turn over the recordings on discs so that defense counsel could review them with Mr. Davis, the prosecutor asked the court to prohibit Schultz from sitting in on this review with Davis and Attorney Zilles. R.125:19. Zilles told the court he understood his concern about Schultz being present

> and speaking on the record, but Mr. Schultz is assisting me in – in the case, and his – obviously his knowledge of the underlying case is – and facts is going to be invaluable. I guess it would be akin to allowing my – my investigator to be present when we deal with this. I mean, Mr. Schultz has – you know, as, I guess, basically my associate is bound by all the same rules and as an attorney would be bound by all the same rules as far as – "
>
> R.125:19.

The prosecutor then interrupted to disagree with this assertion, after which the court questioned whether Schultz could do so after having "had to withdraw under the circumstances?" *Id.* After the prosecutor suggested that there was no longer any attorney-client confidentiality between Davis and Attorney Schultz, the court agreed, even after Mr. Zilles stated that Schultz was acting *pro bono*, stating that because of the way Schultz had been "used by Mr. Davis in the manipulation of witnesses, and so I don't think – I don't think h''s got -- I don't think he has a privilege anymore. You can involve him if you're willing, and Mr. Davis, but I don't think he's got a privilege against disclosing anything, causing and – in this plan." R.125:20.

The prosecutor then asserted that because of security purposes, with Davis being in custody at the jail, the jailers had a right to prohibit "nonattorneys" from being in a visitation room with an inmate. R.125:20-21. The court agreed, stating "He's a visitor like other visitors." R.125:21. After Attorney Zilles suggested that it

was an issue for the jail to determine, the prosecutor interrupted to ask where he was going to meet with Mr. Davis, and when Zilles said it would make sense to do it in the jail, the court stated "Do it now. But Attorney Schultz has no privilege anymore." *Id.*

During the lunch break after Davis testified, Attorney Schultz told the court that the district attorney had made a comment to him about talking with the defense investigator, then asked the court for a further clarification of the earlier limitations it imposed regarding his role in the defense. R.125:91. When the prosecutor stated that she believed Schultz was again consulting with the investigator and sending messages, the court stated "So I don't know if that was designed to develop questions, lines of questions, or things like that, but *it should not occur*." R.125:91-92 (emphasis added).

When Schultz asked the court if he was allowed to speak with Mr. Zilles about the case, the court responded "I guess you can, but if you're acting – but anything new, I think you're – you don't have a privilege anymore or these items (sic)." R.125:92. After the court agreed that it could not stop him from speaking "of application of the law," the prosecutor again claimed that messages were being sent back and forth and the court stated "Messages back and forth during the testimony would be active strategy, *that's acting as a second attorney, and I don't want that*." R.125:92-93 (emphasis added).

At the end of the fifth and final day of trial, the jury returned guilty verdicts on every count contained in the Information. R.126:103-04. In June 2017, Mr. Davis filed a postconviction motion for new trial in which he alleged the ineffective assistance of counsel and the denial of his right to a fair trial, as part of

which he alleged that the court had denied his right to counsel. R.92.

At the September 7, 2017 motion hearing, Mr. Davis testified about Mr. Zilles telling him, part way through trial, that because Hank Schultz had been released from his subpoena, he would be assisting Zilles in his defense of Davis, who stated that he was happy to have him back representing him in his case. R.128:18.

Before the State's cross-examination of Mr. Davis, attorney Hank Schultz took the stand and testified that once he was released from his subpoenas by the State and the defense, he showed up at the courthouse and began assisting Mr. Zilles in his representation of Darwin Davis. R.128:26. Before being cross-examined by the assistant district attorney, Schultz testified that he did not believe there was anything, legally or ethically, that would have prevented him from assisting in Davis' representation after being released from the subpoena. R.128:27. When asked if he considered the legal work he did for Davis after being released from his subpoena to have been *pro bono*, Schultz testified that he "was not intending to charge [Davis]." R.128:32-33.

After Mr. Davis' cross-examination, attorney Paul Zilles took the stand and told the court that after Hank Schultz had been released from his subpoena, Schultz provided more active assistance in the representation of Davis, which assistance was helpful because of Schultz' prior involvement in the case. R.128:50-51.

In a decision filed December 7, 2017, the trial court denied the postconviction motion, finding that Davis was not denied his right to a fair trial (or his right to counsel of his choice) and that there was no deficient performance by trial counsel. R.110. Mr. Davis appealed the judgment of conviction (R.76) and the order denying

his postconviction motion (R.110), on the grounds that the trial court erred, as a matter of law, when it denied his motion.

Procedural History

This is an appeal from the judgment of conviction, entered April 20, 2016 in the circuit court for Shawano County, James Habek, Judge (R.76), as well as the decision and order denying Mr. Davis's postconviction motion, entered December 7, 2017. R.110. In a decision filed February 12, 2019, the court of appeals affirmed the judgment and order. App., A101-13.

ARGUMENT

I. THIS COURT SHOULD TAKE REVIEW TO REAFFIRM A DEFENDANT'S RIGHT TO COUNSEL EVEN WHEN COUNSEL IS WORKING *PRO BONO*.

"A defendant's right to assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and Article I, sec. 7 of the Wisconsin Constitution." *State v. Cummings*, 199 Wis. 2d 721, 747-48, 546 N.W.2d 406 (1996). The violation of a defendant's right to counsel of his choice is a structural error, which means that it is not subject to harmless-error analysis. *United States v. Gonzalez–Lopez*, 548 U.S. 140, 148-51, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

The Sixth Amendment does not place a limit on the number of attorneys a defendant may have to assist him at trial. The trial court denied Mr. Davis his right to counsel when it prohibited Hank Schultz from continuing to fully assist Davis at his trial. Once Mr. Schultz was released from his subpoena, there was no reason he could not resume his representation of Davis and the trial court's decision to prohibit Schultz' continued representation, at the urging of the State, denied Mr. Davis this important constitutional right.

The court of appeals did not address this issue because it found that Davis had forfeited this claim by not raising "the question of whether Schultz could have been reinstated as counsel or co-counsel of record ..." at the time of trial. App., A110-11. While defense counsel was probably blind-sided by the trial court's incremental limitation of Schultz' participation as the trial proceeded, it is submitted that he did make an attempt at objecting to the denial of his client's right to the assistance of

pro bono counsel during the fourth day of trial when he told the court that he understood its concern about Schultz being present

> and speaking on the record, but Mr. Schultz is assisting me in – in the case, and his – obviously his knowledge of the underlying case is – and facts is going to be invaluable. I guess it would be akin to allowing my – my investigator to be present when we deal with this. I mean, Mr. Schultz has – you know, as, I guess, basically my associate is bound by all the same rules and as an attorney would be bound by all the same rules as far as – "
>
> R.125:19.

In the end, there was no clear moment at which Schultz' involvement was completely "limited" by the trial court, as a result of which it is not even clear when Attorney Zilles was supposed to have formally objected as he was trying to present a defense for his client.

Even if it is determined that defense counsel failed to formerly object to the denial of his client's right to counsel of his choice, it is also true that the State failed to raise the forfeiture argument in the trial court and then attempted to raise it for the first time on appeal. It is somewhat similar to the situation faced by this court when a defendant was raising a constitutional claim regarding his right to a public trial, and that court "decided to reach the merits of the issue presented, rather than to assess comparative blame and address the effect of the defendant's failure at trial to raise the Sixth Amendment issue and the state's failure at the postconviction hearing to raise the defendant's waiver/forfeiture at trial of the Sixth Amendment issue." *State v. Ndina*, 2009 WI 21, ¶4, 315 Wis.2d 653, 761 N.W.2d 512. Is submitted that this court should again do so.

The State claims that Mr. Davis had no right to counsel of his choice because he was indigent, citing two Supreme Court cases for

this proposition. State's brief, pp.27-28. Ironically, the second case cited provides support for Davis' claim that he was denied his right to counsel; it's just that the State failed to cite the following language from that case:

> "[A] defendant may not insist on representation by an attorney he cannot afford." *Wheat, supra*, at 159, 108 S.Ct., at 1697. Petitioner does not dispute these propositions. Nor does the Government deny that the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or *who is willing to represent the defendant even though he is without funds*. Applying these principles to the statute in question here, we observe that nothing in § 853 prevents a defendant from hiring the attorney of his choice, or *disqualifies any attorney from serving as a defendant's counsel.*
>
> *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (emphasis added).

Mr. Davis was not trying to *substitute* his court-appointed attorney, Mr. Ziller, with Attorney Schultz. He was simply trying to proceed with two attorneys, the second of which was clearly willing to work *pro bono*, as acknowledged by the State in its brief (at p.28). A defendant certainly has a choice in regard to counsel he does not have to pay, who is willing to work with and assist appointed counsel. As the State points out in its brief, "reversal of the conviction is the proper remedy for violation of the right to counsel of choice." *See Jones*, 326 Wis.2d 380, ¶38." State's brief, p.27.

The record is clear that Henry Schultz was acting as counsel for Mr. Davis after he was released from his subpoena in the middle of trial and that he was doing so *pro bono*, as he had been doing before he was subpoenaed by the State. By preventing Schultz from continuing to represent Davis, it denied Davis' constitutional right

to the assistance of counsel of his choice, regardless of the number, as a result of which Davis is entitled to a new trial at which this important right is not denied.

CONCLUSION

For the foregoing reasons, this court should grant review.

RESPECTFULLY SUBMITTED this 7th day of March, 2019.

Schertz Law Office
Attorney for the Defendant-
Appellant-Petitioner

By: _____
Dennis S. Schertz
State Bar No. 1024409