STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2014AP1438-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

ANNETTE MORALES-RODRIGUEZ,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON DECEMBER 13, 2012, AND THE ORDER DENYING POSTCONVICTION RELIEF FILED ON JUNE 10, 2014, IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI, PRESIDING.
MILWAUKEE COUNTY CASE NO. 2011CF4871

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted:

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STATEMENT OF THE ISSUE

I. WHETHER ANNETTE MORALES-RODRIGUEZ WAS ENTITLED TO AN EVIDENTIARY HEARING ON HER CLAIM THAT SHE WAS DENIED HER SIXTH AMENDMENT RIGHT TO THE COUNSEL OF HER CHOICE WHEN HER PRO BONO ATTORNEYS WITHDREW UNDER A MISAPPREHENSION OF THE RELEVANT LAW, WHICH THEY INCORRECTLY BELIEVED COMPELLED THEM TO WITHDRAW DESPITE MORALES-RODRIGUEZ'S UNEQUIVOCAL ASSERTION THAT SHE WANTED THEM TO REMAIN AS HER ATTORNEYS?

Morales-Rodriguez raised the above-stated issue in a Wis. Stat. (Rule) § 809.30 postconviction motion.

She asserted that her counsel's ignorance of the relevant law was deficient, *State v. Felton*, 110 Wis. 2d 485, 505-06, 329 N.W.2d 161, 170 (1983), and that their withdrawal—premised on that deficiency—caused a violation of her structural constitutional right to the counsel of her choice, *see United States v. Gonzalez–Lopez*, 548 U.S. 140, 150 (2006). She argued that prejudice should be presumed because of counsel's caused violation of her structural constitutional right, regardless of the effectiveness of the attorneys who actually represented her at trial. *Id.* She asked for an evidentiary hearing at which to address the issue of her counsel's deficient performance. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The circuit court denied her motion without a hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented poses novel questions of constitutional law that have not yet been decided by Wisconsin's appellate courts: (1) can counsel cause a violation of a defendant's right to counsel of choice and (2) if so, should prejudice be presumed. Oral argument would allow the panel to query counsel for both parties on any pertinent but unanswered questions that may arise, unbeknownst to counsel, during the panel's review of the briefing. Morales-Rodriguez believes that oral argument may therefore be

appropriate and would welcome the opportunity to present it, should this Court deem it warranted.

Morales-Rodriguez believes that the Court's opinion in the instant case will meet the criteria for publication because of the aforementioned novel legal questions. Wis. Stat. (Rule) § 809.23(1)(a)1. Additionally, the issue presented—whether counsel's deficient performance can cause the deprivation of a criminal defendant's right to the counsel of choice—is one of constitutional dimension with statewide applicability. Wis. Stat. (Rule) § 809.23(1)(a)5. She therefore requests it.

STATEMENT OF THE CASE

The State charged Morales-Rodriguez with two counts of first degree intentional homicide following an incident in which she attacked, subdued, and then forcibly withdrew the unborn child from Maritza Ramirez-Cruz's person, acts which proved fatal to both Ramirez-Cruz and her unborn child. (R.2.)

Following Morales-Rodriguez's initial appearance, Attorney Robert D'Arruda met with her at the Milwaukee County Jail. (*See* R.78:Ex. A, A. Ap. 33-34.) He offered to represent her pro bono. Morales-Rodriguez signed a contract consistent with that offer. (*Id.*) It read as follows:

> I hereby retain **D'ARRUDA LAW OFFICES**, 6714 West Fairview Avenue, Milwaukee, WI 53226, effective immediately, to represent and provide legal services for Annette Morales-Rodriguez, regarding handling a Criminal Case from Milwaukee County, Case Number 11CF004871.
>
> It is further agreed that a [*sic.*] D'Arruda Law Offices agrees to handle the case pro bono. Pro bono means that I will not charge Annette Morales-Rodriguez any money to handle her case. I will handle the case for free. No money will be charged by said law firm to handle the case, whether the case proceeds to a trial, dismissal or results in a plea.
>
> It is further agreed that client shall not pay any money for my legal services in the above captioned matter.

> This pro bono representation will encompass any and all work with regard to the matter with [*sic.*] D'Arruda Law Offices undertakes on this matter. It covers one trial, a plea, or dismissal, whatever occurs with the case.

(*Id.*)

Attorney D'Arruda enlisted the assistance of two other attorneys to help with Morales-Rodriguez's case: Attorneys Patrick Rupich and Michael Torphy. (R.4.)

Pretrial, the State filed a motion regarding potential conflicts of interests among the defense team of which it was aware. (R.11.) The State asserted that Attorney Rupich's potential conflict was his prosecution in then-pending Milwaukee County criminal and traffic matters. (R.11:1.) Attorney Torphy's potential conflict derived from his representation of Attorney Rupich in the aforementioned prosecutions. (*Id.*) Attorney D'Arruda was potentially conflicted because he was a victim in a domestic violence incident then being prosecuted in Milwaukee County. (*Id.*) The State's motion requested that Morales-Rodriguez be made aware of the conflicts so that she could waive them on the record. (*Id.* at 1-2.) The State did not then, nor would it ever, seek disqualification of Morales-Rodriguez's counsel; it simply wanted an on-the-record waiver to immunize the issue from appellate challenge.

The circuit court held a hearing on the State's motion. (R.100.) Attorney Torphy addressed the State's motion on behalf of the defense. (R.100:3.) He labeled it as "a stretch at best and at worst designed to possibly eliminate representation for Miss Morales-Rodriguez." (*Id.*) He contended that Attorney D'Arruda was an accomplished attorney and his status as a victim in a Milwaukee County case would not prevent his zealous representation. (R.100:3-4.) As for Attorney Rupich, his prosecution did not constitute a potential conflict. (R.100:8-9.) Attorney Torphy expressed his opinion that the State's motion had "no basis;" it was "a blue sky motion" because the purported conflicts were as likely to cause a problem in the case as was a meteor falling from the sky. (R.100:9.)

Throughout the motion hearing, the State and circuit court explained that the basis for the motion was not to accuse the defense team of impropriety. (*See, e.g.*, R.100:10 ("No one is alleging that anyone on the defense table did anything wrong, but there is the appearance right now of possible impropriety . . .").) The State was not seeking to disqualify Attorneys D'Arruda, Rupich, and Torphy, but rather to ensure that Morales-Rodriguez knew of the potential conflicts and was willing to proceed with the defense team even in light of those potential conflicts. (R.100:10-12.) The State's purpose, said the circuit court, was to insulate the case from appellate challenge on the basis that Morales-Rodriguez unknowingly went to trial with attorneys who were conflicted and therefore should be entitled to a new trial. (R.100:16-17.)

Nonetheless, Attorney Torphy continued to address the motion as an attempt to disqualify counsel. He challenged the motion as baseless and as having been brought in bad faith. (*Id.*) And he defended the members of the defense team as capable of providing adequate representation of Morales-Rodriguez despite the State's asserted potential conflicts. (*Id.*)

When the circuit court addressed Morales-Rodriguez directly about the potential conflicts issue, she stated that she did not "understand the conflict that may exist relative to [her] attorneys in this case." (R.100:13.) Morales-Rodriguez informed the Court that her attorneys had "explained something to [her] a little while ago but a little bit." (*Id.*) The conflict of which she had been made aware was "a conflict -- conflict between the two attorneys," but she "d[id]n't know what it [was] in relation to." (*Id.*) It was obvious that a robust conversation regarding the nuances of the identified potential conflicts had not occurred between Morales-Rodriguez and her counsel.

The hearing ended without resolution of the State's motion. The circuit court set an adjourned date to further address the matter and advised the defense that it

> expect[ed] the attorneys to discuss thoroughly with Miss Morales-Rodriguez the potential conflicts that exist for the attorneys. As [the prosecutor] said earlier, I'm not necessarily saying there is a conflict. It's the potential conflict or an appearance of a conflict.

> Clearly that needs to be waived by Miss Morales-Rodriguez. If she does not waive it, then most likely the attorneys will have to be removed and a new attorney will be appointed or new attorneys will be appointed for Ms. Morales Rodriguez.
>
> No one, and there was an implication of this earlier, including [the prosecutor] or the Court, no one is in any way, shape or form preventing Ms. Morales-Rodriguez from having a defense in this case. . . .
>
> Ms. Morales-Rodriguez, you need to understand and discuss with your attorneys that they have potential -- the appearance of potential conflicts of interest. Mr. Rupich has criminal cases pending in Milwaukee County against him.
>
> I don't expect that he or Mr. Torphy will discuss every single fact of those cases other than there are criminal cases including an operating while intoxicated pending against Mr. Rupich.
>
> At the next hearing I am going to discuss with you you either waive or do not waive that potential conflict of interest. Do you understand, Miss Morales-[R]odriguez?
>
> THE DEFENDANT: Yes, I understand.

(R.100:42-43.)

Prior to the scheduled hearing date at which the circuit court was to address Morales-Rodriguez's waiver, the defense filed a motion for an evidentiary hearing on the State's potential conflicts motion. (R.23.) The defense therein requested an opportunity to present the testimony of an expert on legal ethics in opposition to the State's conflicts motion. (*Id.*) The State objected to the evidentiary hearing. (R.27.)

The next day, the defense attorneys filed a motion to withdraw. (R.28, A. Ap. 11-13.)

The defense team did not allege an acrimonious relationship with Morales-Rodriguez. (*See id.*) They did not assert deterioration of the lawyer-client relationship to the point that Morales-Rodriguez was unable or unwilling to assist them in her defense. (*See id.*) No allegation was made that

Morales-Rodriguez had stopped paying her bills; indeed, no such representation could have been made, given the contract for pro bono representation. (*See id.*) They did not suggest that Morales-Rodriguez was unhappy with their services. (*See id.*) No statement was made that Morales-Rodriguez wanted new counsel. (*See id.*) And no statement was made that the defense team no longer wanted to represent Morales-Rodriguez. (*See id.*) Additionally, the defense motion said nothing about Morales-Rodriguez's competency, an important omission the relevance of which will later be discussed in more detail. (*See id.*)

Instead, the only reasons offered as justification for withdrawal were: (1) forcing Morales-Rodriguez to waive the conflict issue would moot her ability to argue on appeal that she was represented by conflicted counsel; (2) the defense was under the impression that "Morales-Rodriguez suffers from a dual personality disorder. This would further cause trouble in any written waiver of conflict of interest. For example, was it [Morales-Rodriguez] or [her alternate personality] that waived any conflict of interest issues?"; and (3) "should counsel lose the case, appellate lawyers may insinuate in the appeals portion of the case that attorney Rupich, or attorney D'Arruda did tank the case to curry favor with the Milwaukee County District Attorney's Office." (R.28:1-2, A. Ap. 11-12.) "Ethical[ly] speaking," said the defense, "counsel [were] compelled to withdraw for the aforementioned reasons." (R.28:2, A. Ap. 12.)

As will be described more fully below in argument, the asserted reasons for withdrawal lacked legal viability. Briefly, though, the first reason is internally inconsistent: the defense team's withdrawal would itself moot the conflict issue for appeal, and thus would have the same effect as Morales-Rodriguez's waiver of any potential conflicts. The second reason—Morales-Rodriguez's purported dual personalities—is unreasonable because (1) it is based on the opinion of a person wholly unqualified to diagnose a person as suffering from any mental disease or defect and (2) if accurate, it constitutes the belief that Morales-Rodriguez was incompetent to assist in her defense despite the fact that they never raised competency to the court, *contra State v. Johnson*, 133 Wis. 2d 207, 221, 395 N.W.2d 176, 183 (1986) (defense counsel

having reason to doubt the competency of a client must raise the issue with the court, strategic considerations notwithstanding). The final reason for withdrawal—an ethical concern regarding possible allegation on appeal of conflicted representation—would have been mooted by a successful waiver just as it would have been by the attorneys' withdrawal.

Nonetheless, the defense team appeared at court and asked to quit the representation (R.102) that it had agreed to provide to Morales-Rodriguez free-of-charge for "one trial, a plea, or dismissal, *whatever occurs with the case*" (R.78:Ex. A, A. Ap. 33-34 (emphasis added)).

Morales-Rodriguez objected. (R.102:4.) The circuit court asked her, "[W]hat do you have to say about the situation?" (*Id.*) She unequivocally answered, "I want them as my attorneys." (*Id.*) When asked to explain, Morales-Rodriguez told the court, "I want them to be my attorneys because as up to now I don't believe there's any conflict of interest." (*Id.*) Morales-Rodriguez's answers in open court thus demonstrated her willingness to waive any potential conflict of interest and continue with Attorneys D'Arruda, Rupich, and Torphy. (*See id.*) However, she was never given a chance.

The circuit court "grant[ed] [the defense's] request to be allowed to withdraw for the reasons stated in the motion and the record that's been made in this case up to today." (R.102:4-5.) Morales-Rodriguez was, at that moment, deprived of her right to the counsel of her choice.

New counsel was appointed for Morales-Rodriguez. (*See* R.103:3.) Following a jury trial, she was convicted of two counts of first-degree intentional homicide (R.55, R.56) and sentenced to life in prison without the possibility of release (R.120:33-34).

Morales-Rodriguez invoked her direct appeal rights (R.63) and filed a postconviction motion seeking a new trial on the ground that her counsel's misunderstanding of the law caused a deprivation of her structural constitutional right to the counsel of her choice (R.78, A. Ap. 14-32). She alleged her

counsel ineffective (R.78:2, A. Ap. 15), and asked for an evidentiary hearing (R.78:19, A. Ap. 32). *See State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409, 410 (Ct. App. 1998) ("read[ing] *Machner*" as standing for the proposition that "a hearing [is] required in every case" involving alleged ineffective assistance). The circuit court ordered briefing. (R.79.)

After full briefing (*see* R.80, R.81, R.84, R.89), the circuit court denied her motion without a hearing (R.92, A. Ap. 3-10). The court concluded "that [Morales-Rodriguez] was not constitutionally denied counsel of her choice based on any deficient performance by counsels, that a 'structural error' does not exist, and that a reasonable basis existed for granting counsels' motion to withdraw." (R.92:7, A. Ap. 9.)

She appealed. (R.93.)

ARGUMENT

Morales-Rodriguez's case comes before this Court on a limited issue: whether her ineffective assistance of counsel claim was sufficiently pled to warrant an evidentiary hearing. For cogency of her argument, Morales-Rodriguez first addresses the substance of the claim that she raised in her postconviction motion. Accordingly, she explains the structural constitutional right to counsel of one's choice, and then contends that prejudice must be presumed when counsel deficiently violates that right because the subsequent harm is immeasurable. Next, Morales-Rodriguez details how her counsel deficiently caused a violation of her structural constitutional right to the counsel of her choice, and thereby provided ineffective assistance. Lastly, she explains the sufficiency of her postconviction motion and why she is entitled to a hearing. She starts with a recitation of the relevant standards of review.

I. STANDARD OF REVIEW

The question of whether a defendant's postconviction motion warrants an evidentiary hearing is an issue of law that appellate courts review de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

The right to the effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, *Strickland v. Washington*, 466 U.S. 668, 685-85 (1984), and Article I, Section 7 of the Wisconsin Constitution, *State v. Thiel*, 2003 WI 111, ¶ 11, 264 Wis. 2d 595, 665 N.W.2d 305. A criminal defendant who is prejudiced by his or her attorney's deficient performance has received constitutionally ineffective assistance and is entitled to relief. *State v. Jenkins*, 2014 WI 59, ¶ 35, __ Wis. 2d __, 848 N.W.2d 786.

On review of an ineffective assistance claim, appellate courts evaluate the circuit court's factual findings for a clear error. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. The legal question of whether counsel was deficient or prejudicial is reviewed de novo. *Id.*

II. A CRIMINAL DEFENDANT HAS A STRUCTURAL CONSTITUTIONAL RIGHT TO COUNSEL OF HER CHOICE.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Part of that constitutional guarantee is the right to be represented by the counsel of one's choice. *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right to counsel of one's choice does not extend equally to defendants who obtain counsel without reliance on public funds and those who do. *State v. Jones*, 2010 WI 72, ¶ 38, 326 Wis. 2d 380, 797 N.W.2d 378. While defendants who secure an attorney's services without public appointment are entitled to the counsel of their choice, those who must have counsel appointed to represent them are not. *Id.* ¶ 41. Nonetheless, the right to counsel of one's choice applies equally to those defendants with retained counsel and those with volunteer attorneys. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989). The United States Supreme Court has repeatedly recognized 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*.'" *United States v. Gonzalez-*

Lopez, 548 U.S. 140, 144 (2006) (quoting *Caplin*, 491 U.S. at 624-625) (emphasis added); *see also Lane v. State*, 80 So. 3d 280, 295 (Ala. Crim. App. 2010) ("Just as a nonindigent defendant has a presumptive or qualified right to retain counsel of his or her own choosing, an indigent defendant who secures pro bono counsel at no expense to the State has a presumptive or qualified right to choose that counsel.") (citing *Caplin*).

A violation of the right counsel of choice results in "consequences that are necessarily unquantifiable and indeterminate, [and thus] unquestionably qualifies as 'structural error.'" *Gonzalez-Lopez*, 548 U.S. at 150 (internal quotation marks and quoted authority omitted).

III. PREJUDICE SHOULD BE PRESUMED WHEN COUNSEL'S DEFICIENT PERFORMANCE RESULTS IN A VIOLATION OF A DEFENDANT'S RIGHT TO COUNSEL OF CHOICE BECAUSE THE HARM CAUSED BY THE VIOLATION CANNOT BE MEASURED.

Typically, proof of ineffective assistance of counsel necessitates proof of both deficiency and prejudice. *Strickland*, 466 U.S. at 687, 694. However, "[i]n certain instances, prejudice is presumed once deficient performance has been proven." *State v. Smith*, 207 Wis. 2d 258, 278, 558 N.W.2d 379, 387 (1997). "[T]he circumstances in which prejudice is presumed are rare," *State v. Pinno*, 2014 WI 74, ¶ 83, __ Wis. 2d __, 850 N.W.2d 207, but "[p]art of the rationale behind presuming prejudice is the difficulty in measuring the harm caused by the error or the ineffective assistance." *Smith*, 207 Wis. 2d at 280, 558 N.W.2d at 388. Thus, the Wisconsin Supreme Court "has presumed prejudice in the context of ineffective assistance of counsel in cases where the harm of the error in question could not easily be measured." *Pinno*, 2014 WI 74, ¶ 179 (Crooks, J., dissenting).

Denial of the right to counsel of choice is an error for which the harm cannot be easily measured:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And 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. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

Gonzalez-Lopez, 548 U.S. at 150 (quotation marks and quoted authority omitted). The Supreme Court has exempted from the harmless error analysis violations of the right to counsel of choice specifically because of the difficulty that exists in measuring the associated harm. *Id.* at 151-52. Thus, deprivation of the right to counsel of choice presents an error for which prejudice should be presumed.

Additionally, denial of the right to counsel of choice is an error that "'affect[s] the framework within which the trial proceeds,' and [is] not 'simply an error in the trial process itself.'" *Id.* at 148-49 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). As a structural error, denial of the right to counsel of choice "'infect[s] the entire trial process and *necessarily render[s] a trial fundamentally unfair*.'" *See State v. Ford*, 2007 WI 138, ¶ 42, 306 Wis. 2d 1, 742 N.W.2d 61 (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)) (emphasis added).

For that reason, if an attorney's deficient performance causes a violation of the defendant's right to counsel of choice, counsel's own actions will have necessarily rendered the trial fundamentally unfair. *Id.* That unfairness persists regardless of the abilities of subsequent counsel or the outcome of trial. *Gonzalez-Lopez*, 548 U.S. at 147-48.

"'[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *State v. Erickson*, 227 Wis. 2d 758, 771, 596 N.W.2d 749 (1999) (quoting

United States v. Cronic, 466 U.S. 648, 658 (1984)). "The test for the prejudice prong is whether counsel's errors deprived the defendant of a fair trial, a trial whose result is reliable." *State v. Marcum*, 66 Wis. 2d 908, 916-17, 480 N.W.2d 545, 550 (Ct. App. 1992). Prejudice should therefore be presumed whenever an attorney's deficient performance causes a violation of the right to counsel of choice because it is counsel's deficient performance that automatically prevents the defendant from receiving a fair trial. *See id.* at 148-49, *Ford*, 2007 WI 138, ¶ 42, *Erickson*, 227 Wis. 2d at 771. Whereas "[p]rejudice in th[o]se circumstances is so likely," a "case-by-case inquiry into prejudice is not worth the cost," *Strickland*, 466 U.S. at 692; it should be presumed, *see Gonzalez-Lopez*, 548 U.S. at 148-49, *Ford*, 2007 WI 138, ¶ 42, *Erickson*, 227 Wis. 2d at 771.

What is more, requiring proof of prejudice when deficient performance leads to a violation of the defendant's right to counsel of choice would be on par with subjecting a deprivation of counsel claim to the harmless error analysis. But the Supreme Court has clearly stated that counsel of choice violations are not susceptible to the harmless error analysis, and thus necessitating proof of prejudice would be inconsistent with *Gonzalez-Lopez*.

Morales-Rodriguez's ineffective assistance claim is thus one for which prejudice should be presumed upon a showing of deficient performance. She should therefore be entitled to a new trial if it can be shown that her attorneys performed deficiently. She asks this Court to reach the same conclusion.

IV. THE WITHDRAWAL OF MORALES-RODRIGUEZ'S COUNSEL WAS DEFICIENT PERFORMANCE.

A. The Wisconsin Supreme Court has previously recognized that the failure to be informed of relevant law constitutes deficient performance.

In *State v. Felton*, the Wisconsin Supreme Court reasoned that lawyers who operate with "a glaring deficiency in [their] knowledge of the law" cannot possibly "weigh alternatives and [] make a reasoned decision consistent with

the standard of performance expected of a prudent lawyer." 110 Wis. 2d 485, 505-06, 329 N.W.2d 161, 170 (1983). The court was then considering whether counsel's failure to know of a statutory defense available to his client and the related failure to investigate or adduce relevant evidence constituted ineffective assistance of counsel. *Id.* at 503, 329 N.W.2d at 169.

Felton was charged with first degree murder. *Id.* at 487, 329 N.W.2d at 162. At trial, "[h]er defense was that she was a 'battered' spouse who acted in self-defense." *Id.* at 488, 329 N.W.2d at 162. Despite that theory, Felton's counsel failed to present evidence of or request an instruction regarding a related statutory defense because he did not know that it applied to her case. *Id.*

At a hearing on Felton's postconviction motion, her trial counsel "acknowledged that he was ignorant of the possible defense." *Id.* at 496, 329 N.W.2d at 166. Nonetheless, the trial court denied Felton's motion, holding that counsel was not deficient because he had made a "strategic choice" to not pursue it: "[T]here may have been some shortcomings in the matters handled during the trial, but very often that is a matter of trial strategy. . . . [T]he defenses [Felton's attorney] put forth were a matter of choice and of trial strategy, and not grounds for a new trial." *Id.* at 498, 329 N.W.2d at 167.

However, the supreme court rejected that reasoning. Because counsel was ignorant of the available statutory defense, said the supreme court, "he never was in a position even to consider whether, in light of the facts, [it] was an appropriate defense" in the case. *Id.* at 505, 329 N.W.2d at 170. The court explained that "a prudent lawyer must be 'skilled and versed' in criminal law. . . . Trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied." *Id.* at 502, 329 N.W.2d at 169. Counsel's failure to recognize the defense and its applicability to the facts in Felton's case constituted deficient performance:

> The failure to be informed of this defense in the circumstances of this case constitutes a glaring deficiency in trial counsel's knowledge of the law. Without that knowledge, it was impossible for him to weigh alternatives and to make a reasoned decision consistent

> with the standard of performance expected of a prudent lawyer.

Id. at 506, 329 N.W.2d at 169. The fact that counsel's deficiencies deprived Felton "of the benefit of two crucial defenses" to which she would otherwise have been entitled constituted prejudice and required reversal. *Id.* at 504, 329 N.W.2d at 170.

The ruling should be the same in the instant case. As detailed below, Morales-Rodriguez's counsel withdrew on the basis of a misapprehension of law. Their withdrawal, which occurred over Morales-Rodriguez's objection, was therefore deficient.

B. The asserted bases for the withdrawal of Morales-Rodriguez's counsel are indefensible in light of the law and facts of the case.

1. Withdrawing to salve the conflict issue for appeal makes no sense when the withdrawal itself prevented the conflict issue from being raised on appeal.

In the first paragraph of counsel's withdrawal motion, they reasoned that their withdrawal was necessitated because the circuit court had made it clear that their continued representation was premised on Morales-Rodriguez's waiver of her right to conflict-free counsel. Counsel then asserted, "We do not want [Morales-Rodriguez] to give up any of her appellate rights at this time." (R.28:1, A. Ap. 11.) In other words, counsel was asserting that withdrawal was appropriate to ensure that Morales-Rodriguez could later claim on appeal that she had received the assistance of conflicted counsel. (*Id.*)

The right to conflict free counsel is inherent to the Sixth Amendment. *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."). On appeal, a defendant who was unknowingly represented by conflicted counsel may be entitled to reversal of his or her conviction. *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). However, a defendant who

went to trial with conflict-free counsel cannot allege a violation of the right to conflict free counsel. *See id.* (constitutional violation requires proof that "actual conflict of interest adversely affected [defense] lawyer's performance"). Likewise, a defendant who waives the right to conflict free counsel will be prevented from later succeeding on appeal in a claimed constitutional violation requiring a new trial. *State v. Harvey*, 139 Wis. 2d 353, 358, 407 N.W.2d 235, 237 (1987) ("[E]ven if a conflict of interest did in fact exist, the defendant knowingly and voluntarily waived that conflict.").

Thus, from an appellate perspective, a defendant who knowingly chooses to proceed with counsel in light of identified conflicts and executes a waiver to that end is on the same footing as a defendant who goes to trial with conflict-free counsel. For that reason, the claim that Morales-Rodriguez's attorneys were protecting her right to appeal on conflict grounds by withdrawing is untenable. Whether they withdrew or Morales-Rodriguez waived their conflict, her ability to assert their conflicted representation as grounds for a new trial would have been unavailable for appellate challenge.

2. Withdrawing because Morales-Rodriguez could not effectuate a valid waiver in light of her dissociative identity disorder has no support in the record.

First and foremost, the claim that Morales-Rodriguez suffered from dissociative identity disorder was derived from a report drafted for the defense by Anne Speckhard, a person who the State has recognized was "not qualified in both experience and academic training to render a psychological opinion." (R.26:2.) Even Morales-Rodriguez's second defense team recognized Speckhard's conclusions as meritless. (R.120:21.) At sentencing, the second defense team reminded the circuit court that Speckhard's "report had already been prepared and filed" prior to their involvement and her conclusion that Morales-Rodriguez suffered from dissociative identity disorder was "not a diagnosis that ha[d] been advanced by [them]." (*Id.*)

Although the circuit court was never given an opportunity to vet Speckhard pursuant *Daubert*[1] because Morales-Rodriguez's second defense team abandoned her conclusions, it did note a prior court's conclusion that Speckhard "has no credentials in psychology; her Ph.D. was earned in Family Social Science. None of her work has been peer-reviewed; none of it was shown to enjoy acceptance in the scientific community." *Karlin v. Foust*, 975 F. Supp. 1177, 1227 (W.D. Wis. 1997), rev'd on other grounds 188 F.3d 446 (7th Cir. 1999); (*see also* R.100:33 ("If [Speckhard]'s already been rejected in the federal courts, . . . it would be rather persuasive to [the circuit court] if [a federal jurist] already rejected her as an expert."), R101:9-10 (referencing *Karlin* and reiterating substance of prior quotation)). The circuit court again expressed its opinion that Speckhard was unqualified during sentencing when the State complained that the PSI writer had commented on Speckhard's report:

> There was reference to Dr. Speckhard [in the PSI]. She was not qualified as an expert by this Court. I don't believe she is an expert for the purposes of this proceeding. I read it. I'll let both sides comment on it if you deem it appropriate. And I can give it what weight, if any, and in this case probably none that it deserves.

(R.120:4-5.) During sentencing remarks, the circuit court again referenced Speckhard, saying that her report "offer[ed] opinions in areas she's completely unqualified to talk about, particularly the allegation that basically Ms. Morales-Rodriguez has a split personality." (R.120:32.)

As demonstrated by the espoused opinions of all the parties to this case but for Morales-Rodriguez's original defense team, the proposition that Morales-Rodriguez suffers from dissociative identity disorder is untenable, and the belief in its veracity is unreasonable.

Furthermore, it has been the rule in Wisconsin since 1986 that "strategic considerations do not eliminate defense counsel's duty to request a competency hearing" when counsel has "a reason to doubt [the defendant's] competency." *Johnson*, 133 Wis. 2d at 221, 395 N.W.2d at 183. If counsel has any reason

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *see also* Wis. Stat. § 907.02 (evidentiary rule regarding expert testimony).

at all to doubt that a defendant "lacks substantial mental capacity to understand the proceedings or *assist in his or her own defense*," Wis. Stat. § 971.13(1) (emphasis added), the issue must be raised and addressed pursuant to Wis. Stat. § 971.14. *Johnson*, 133 Wis. 2d at 221, 395 N.W.2d at 183.

A person is competent to stand trial if he or she has a "substantial mental capacity to understand the proceedings [and] assist in his or her own defense." Wis. Stat. § 971.13(1) (statute is codification of *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), as recognized in *State v. Byrge*, 2000 WI 101, ¶ 28, 237 Wis. 2d 197, 614 N.W.2d 477). To the contrary, a person who "lacks substantial mental capacity to understand the proceedings *or assist in his or her own defense*" is incompetent. Wis. Stat. § 971.13(1) (emphasis added). The "modest aim" of the competency requirement is "to ensure that [a defendant] has the capacity to understand the proceedings and to assist counsel." *Byrge*, 2000 WI 101, ¶ 31 (internal quotation marks and quoted authority omitted) "To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings." *Id.*

A defendant who cannot, because of a mental illness, execute a valid waiver of a constitutional right cannot be competent. *See State v. Farrell*, 226 Wis. 2d 447, 454, 595 N.W.2d 64, 67-68 (Ct. App. 1999). For, a defendant cannot who cannot make decisions with regard to applicable constitutional rights cannot assist in his or her defense. *Id.* ("'The test must be whether he [or she] has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational—and whether he [or she] has a rational as well as factual understanding of the proceedings against him [or her].'" (quoting *State v. Weber*, 146 Wis. 2d 817, 827, 433 N.W.2d 583, 587 (Ct. App. 1988).)

The criminal process involves many of a defendant's constitutional rights. *See, e.g., State v. Seymour*, 183 Wis. 2d 683, 694, 515 N.W.2d 874, 879 (1994) (right to jury trial includes right to unanimous verdict). The ability to validly waive those rights is absolutely necessary for a defendant to assist counsel in his or her defense. *See State v. Albright*, 96 Wis. 2d 122, 129-30,

291 N.W.2d 487, 490 (1980) (defendant must personally waive right to testify).

For example, at some point in any criminal prosecution, the defendant must choose whether he or she will go to trial or take a guilty plea. Either is constitutionally allowed, and the choice of either necessitates the subsequent, valid waiver of additional constitutional rights. If a defendant pleads guilty, he or she must then validly waive—to name but one of many—the right to a jury trial. *See State v. Anderson*, 2002 WI 7, ¶ 10, 249 Wis. 2d 586, 638 N.W.2d 301 (right to jury trial is fundamental but may be waived), *State v. Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 766 N.W.2d 906 (proper plea colloquy mandates advising defendant of constitutional rights being waived). If a defendant cannot validly waive that constitutional right, he or she cannot validly enter a guilty plea. *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12, 19 (1986) ("the constitutional validity of a plea must be measured in terms of whether it was entered knowingly, voluntarily, and intelligently"). If a defendant cannot validly waive his or her constitutional rights, then the defendant cannot enter a guilty plea, and thus cannot assist counsel in knowing how the matter should be resolved.

Likewise, if a defendant chooses to go to trial, he or she must, during trial, choose to exercise one of two coequal but contradictory rights: the right to testify or the right not to testify. *State v. Denson*, 2011 WI 70, ¶ 49, 335 Wis. 2d 681, 799 N.W.2d 831 ("A criminal defendant's corollary rights to testify and not to testify are guaranteed by both the United States Constitution and the Wisconsin Constitution."). A defendant cannot make it through a constitutionally valid trial without exercising one of those two rights and waiving the other. *See id.* ¶ 55 (waiver must be knowing, intelligent, and voluntary), *State v. Weed*, 2003 WI 85, ¶ 2, 263 Wis. 2d 434, 666 N.W.2d 485 (same). So, again, a defendant unable to validly waive a constitutional right cannot assist in his or her defense.

As those two examples demonstrate, if a defendant is unable to validly waive a constitutional right, he or she cannot assist defense counsel in deciding how the case should proceed (plea or trial) or how it will be presented to the jury (will the defendant testify or not). The defendant is thus incompetent

because it is not possible to be both competent (*viz.*, able to assist) and simultaneously unable to validly waive a constitutional right due to mental illness. *See* Wis. Stat. § 971.13(1).

In the instant case, the fact that Morales-Rodriguez's counsel did not request that she be evaluated for competency demonstrates the unreasonableness of their assertion that she was unable to waive her constitutional right to conflict free counsel. Pursuant to settled Wisconsin law, if defense counsel has any reason to believe that a defendant is operating under an "incapacity" that renders him or her incompetent, *id.*, it is incumbent upon defense counsel to inform the court of that incapacity and to request the defendant be evaluated pursuant to Wis. Stat. § 971.14, *Johnson*, 133 Wis. 2d at 221, 395 N.W.2d at 183. If Morales-Rodriguez's counsel had reached the conclusion that her purported dissociative identity disorder prohibited her from knowingly, intelligently, and voluntarily effectuating a waiver of her right to conflict-free counsel, then they had reached the conclusion that she could not assist in her defense and was not competent to stand trial. *See* Wis. Stat. § 971.13(1).

However, Morales-Rodriguez's attorneys never raised competency. Certainly, the issue of whether she could be deemed legally responsible for her conduct was addressed, *see* Wis. Stat. §§ 971.15, 971.16 (NGI statutes), but neither her private attorneys nor her SPD appointed counsel requested that she be examined for competency.

Thus, in light of the record, the assertion that Morales-Rodriguez's dissociative identity disorder prohibited her from validly waiving any potential conflicts is unsustainable. Speckhard's diagnosis is unqualified and unbelievable. And, if Morales-Rodriguez's attorneys believed that she lacked substantial mental capacity to understand and effectuate the waiver because of it, then her attorneys had simultaneously concluded that she could not assist in her defense by virtue of her substantial mental illness. Upon reaching that conclusion, Morales-Rodriguez's attorneys were required by law to raise competency. *Johnson*, 133 Wis. 2d at 221, 395 N.W.2d at 183. Insofar as her attorneys did not raise competency, their purported uncertainty about the validity of any conflict waiver

that she may sign is an unsustainable basis on which to have reasonably withdrawn. The withdrawal of Morales-Rodriguez's counsel was thus deficient.

3. Withdrawing because of the fear that appellate counsel may assert a violation of trial counsels' ethical obligation not to provide conflicted representation is contradictory to (1) counsels' position that they were not conflicted and (2) the ethical rule that allows a client to waive conflicts of interest.

Counsels' claim that they were ethically obligated to withdraw is directly contradictory to their March 20, 2012, pleading in which they demanded the opportunity to present evidence from "an expert on legal ethics" in opposition to the State's position that counsel were conflicted. (*See* R.23.) It is also contrary to the relevant rule of professional conduct, which allows a client to proceed with representation that involves a "concurrent conflict of interest," so long as the "client gives informed consent, confirmed in a writing signed by the client." Wis. SCR 20:1.7(a) & (b)(4). If Morales-Rodriguez had signed a written waiver of her Sixth Amendment right to not be represented by conflicted counsel, then counsel could have proceeded with their representation without violating the rules of professional responsibility. *See id.*

C. Morales-Rodriguez's attorneys were deficient in their withdrawal.

For all of the aforementioned reasons, the asserted grounds for withdrawal demonstrate the failure of Morales-Rodriguez's attorneys to understand the relevant law and to act reasonably in light of the facts of the case in relation to the relevant law. The result of the deficiency analysis should therefore be the same in the instant case as it was in *Felton*.

Like the lawyer in *Felton*, Morales-Rodriguez's counsel operated under a "a glaring deficiency in [their] knowledge of the law." *Felton*, 110 Wis. 2d at 505, 329 N.W.2d at 170. It is apparent from the reasons asserted in counsel's motion to

withdraw that they did not understand the law governing conflicts of interest, waiver, or their client's ability to waive her rights. Without understanding that law, "it was impossible for [Morales-Rodriguez's attorneys] to weigh alternatives and to make a reasoned decision consistent with the standard of performance expected of a prudent lawyer." *Id.* at 506, 329 N.W.2d at 170. In that regard, Morales-Rodriguez's counsel were deficient when they withdrew.

V. MORALES-RODRIGUEZ'S STRUCTURAL CONSTITUTIONAL RIGHT TO THE COUNSEL OF HER CHOICE WAS VIOLATED BY HER ATTORNEYS' DEFICIENT PERFORMANCE.

A. Morales-Rodriguez was willing to waive the potential conflicts identified by the State.

"Deprivation of the right [to counsel of choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Gonzalez-Lopez*, 548 U.S. at 147-48.

Morales-Rodriguez averred in her postconviction motion that her attorneys discussed with her the potential conflicts once they were ordered to do so by the circuit court. (R.78:17, A. Ap. 30.) She referenced Attorney Rupich's recollection of a lengthy meeting with her at the jail during which he explained the potential conflicts. (*Id.*; *see also* R.78:Ex. B, A. Ap. 35 (jail visitors list)). She explained that Attorney Rupich asked her at that meeting whether she wanted the defense team to continue as her attorneys, and she said yes. (R.78:17, A. Ap. 30.)

The record further demonstrates that Morales-Rodriguez was willing to waive the conflicts. First, she sat through a lengthy motion hearing at which the potential conflicts were discussed in great detail. (*See* R.100.) Second, the circuit court ordered her attorneys "to discuss thoroughly with [her] the potential conflicts that exist for the attorneys" so that it could later determine whether she would "waive that potential conflict of interest." (R.100:42-43.) Lastly, when Morales-Rodriguez next appeared before the circuit court on this issue, she unequivocally answered that she "want[ed]

them to be [her] attorneys because as up to now I don't believe there's any conflict of interest." (R.102:4.)

Despite Morales-Rodriguez's desire to proceed with her attorneys in light of their potential conflicts and espoused willingness to waive any potential conflicts, her attorneys nonetheless withdrew.

B. Morales-Rodriguez's attorneys provided her with the ineffective assistance of counsel; she is entitled to a new trial.

Morales-Rodriguez was deprived of her right to the assistance of counsel of her choice at the moment that her counsel deficiently withdrew. *Gonzalez-Lopez*, 548 U.S. at 147-48. The violation of her structural constitutional right was complete at that moment, and it constitutes prejudice regardless of the performance of the attorneys that were subsequently appointed to represent her. *Id.*, *see also Marcum*, 166 Wis. 2d at 917, 480 N.W.2d at 550. She is therefore entitled to a new trial.

VI. MORALES-RODRIGUEZ SUFFICIENTLY PLED HER CLAIM TO ENTITLE HER TO AN EVIDENTIARY HEARING.

In *State v. Love*, the Wisconsin Supreme Court repeated the well-established standard for deciding when an evidentiary hearing should be held on a postconviction motion:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion."

2005 WI 116, ¶ 26, 284 Wis. 2d 111, 700 N.W.2d 62 (quoting *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433) (internal citations omitted). "[A] postconviction motion will be sufficient [to trigger a hearing] if it alleges within the four corners of the document itself 'the five "w's" and one "h"; that is who, what, where, when, why, and how.'" *Id.* ¶ 27 (quoting *Allen*, 2004 WI 106, ¶ 23). "[T]he motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *Allen*, 2004 WI 106, ¶ 21 (quoting *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50, ___ (1996)). To meaningful assess a defendant's claim, the court must be presented with "facts that are material to the issue presented to the court." *Id.* ¶ 22.

An evidentiary hearing is required even if the court questions the believability of the defendant's alleged material facts. *Id.* at ¶ 12 n.6. Indeed, "[i]f the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court *must hold a hearing*. *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony)." *Allen*, 2004 WI 106, ¶ 12 n.6 (emphasis added).

Insofar as a reviewing court assumes the veracity of the facts asserted in the defendant's postconviction motion, the mere allegation of sufficient facts can alone be sufficient to entitle a defendant to an evidentiary hearing. *Id.* The omission of extrinsic evidence proving the defendant's claims is in no way fatal to the defendant's right to an evidentiary hearing. *Id.*

In the instant case, Morales-Rodriguez alleged that her conviction was the result of the ineffective assistance of counsel. (R.78, A. Ap. 14-32.) Namely, she asserted that (1) her trial counsel acted deficiently when they concluded that they were "compelled" to withdraw as her counsel and (2) their withdrawal prejudiced her by causing a violation of her structural constitutional rights. (*Id.*) To trigger an evidentiary hearing, Morales-Rodriguez must have alleged sufficient material facts to allow this Court to meaningfully assess her ineffective assistance claim. She has done that.

The circuit court denied Morales-Rodriguez's motion without a hearing in part because it "interpret[ed]" the

motivation behind "trial counsels' motion" to withdraw differently than Morales-Rodriguez had alleged in her postconviction motion. (R.92:5, A. Ap. 7.) In so doing, the circuit court erred.

When assessing whether an evidentiary hearing is warranted, a reviewing court must assume true the defendant's factual allegations. *Allen*, 2004 WI 106, ¶ 12 n.6. Facts that appear to lack credibility or reliability do not scuttle a defendant's right to an evidentiary hearing. *Leitner*, 2001 WI App 172, ¶ 34. Instead, if the defendant's factual assertions are "questionable in their believability, the circuit court must hold a hearing." *Allen*, 2004 WI 106, ¶ 12 n.6.

Given the procedural posture of Morales-Rodriguez's case, the circuit court should not have interpreted the motivations behind counsel's motion to withdraw contrary to the allegations Morales-Rodriguez made in her postconviction motion. *Allen*, 2004 WI 106, ¶ 12 n.6. If the court found Morales-Rodriguez's allegations lacking believability, the relevant law necessitates an evidentiary hearing at which evidence may be presented and the credibility of those allegations tested. *Leitner*, 2001 WI App 172, ¶ 34. Thus, when the circuit court explained that Morales-Rodriguez was not entitled to relief because it "d[id] not find its interpretation of counsels' motion erroneous" (R.92:6, A. Ap. 8), the court applied the wrong legal standard.

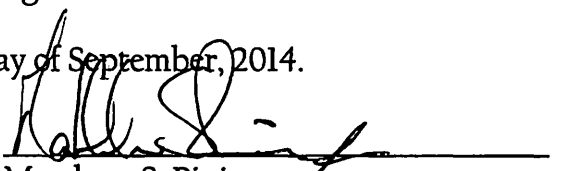
Morales-Rodriguez cited to the record and to extraneous information attached as exhibits to her postconviction motion to establish the who, what, when, where, why, and how of her ineffective assistance claim. (R.78, A. Ap. 14-32.) Her allegations were not conclusory. And, as the circuit court's opinion demonstrates, it found at least some of her allegations unbelievable. For all those reasons, Morales-Rodriguez can thus satisfy the *Love* test and is entitled to a hearing. *See also Machner*, 92 Wis. 2d at 804, 285 N.W.2d at 908 ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies.").

She asks this Court to reach the same conclusion.

CONCLUSION

For the aforementioned reasons, Morales-Rodriguez asks this Court to hold that she was entitled to an evidentiary hearing on her motion and remand her case to the circuit court for consistent proceedings.

Dated this 9th day of September, 2014.



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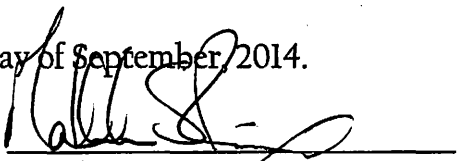
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a 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, maximum of 60 characters per full line of body text. The length of this brief is 7,761 words, as counted by the commercially available word processor Microsoft Word.

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 9th day of September, 2014.



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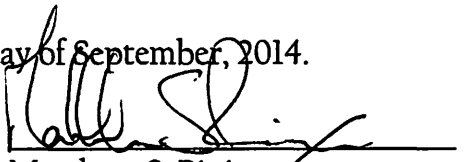
CERTIFICATION OF APPENDIX CONTENT

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 Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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.

Dated this 9th day of September, 2014.



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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on September 9, 2014. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 9th day of September, 2014.

Matthew S. Pinix
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