STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1438-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANNETTE MORALES-RODRIGUEZ,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE DAVID L. BOROWSKI, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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# BRIEF OF PLAINTIFF-RESPONDENT

## ISSUES PRESENTED

1. Did Morales-Rodriguez forfeit the novel claim that her volunteer attorneys violated her Sixth Amendment right to counsel of her choice when they withdrew from the case? Did Morales-Rodriguez also forfeit the claim that her retained lawyers were ineffective for withdrawing from the case, resulting in the loss of her counsel of choice?

Morales-Rodriguez did not present her novel constitutional challenge at trial. She waited to raise it for the first time in her postconviction motion. Morales-Rodriguez also presented her ineffective assistance challenge to the withdrawal of her volunteer attorneys for the first time in her postconviction motion.

The second set of attorneys appointed by the State Public Defender to represent Morales-Rodriguez at trial did not raise this novel constitutional claim before or at trial. Morales-Rodriguez does not claim that her second set of attorneys was ineffective for failing to interpose the novel objection that her first set of attorneys deprived her of the right to counsel of choice.

2. Did Morales-Rodriquez prove that her retained but unpaid volunteer attorneys were ineffective for withdrawing from the case against her wishes?

The trial court denied Morales-Rodriguez's postconviction motion without an evidentiary hearing. It held that her volunteer attorneys properly withdrew from the case due to serious potential conflicts of interest.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument. The briefs of the parties should adequately address the legal and factual issues presented.

Publication would be of benefit only if this court agrees that Morales-Rodriguez forfeited her denial-of-counsel-of-choice objection and, with the case now in an ineffective assistance posture, she must prove both deficient performance and actual prejudice caused by her attorneys' decision to withdraw. She does not get the windfall of automatic reversal that a timely objection would have preserved.

## STATEMENT OF THE CASE

Annette Morales-Rodriguez appeals (93) from a judgment of conviction (64; A-Ap. 1-2), and from an order denying direct postconviction relief (92; A-Ap. 3-10), both entered in the Circuit Court for Milwaukee County, Honorable David L. Borowski, presiding.

After a trial held September 17-20, 2012, a Milwaukee County jury returned verdicts finding Morales-Rodriguez guilty of the gruesome first-degree intentional homicide of Maritza Ramirez-Cruz, and of the first-degree homicide of Ramirez-Cruz's unborn child, while using a dangerous weapon, October 6, 2011, in violation of Wis. Stat. §§ 940.01(1)(a) and (b), and 939.63(1)(b). She was sentenced to two concurrent life terms in prison (55-56; 64).

Morales-Rodriguez filed a motion for new trial February 3, 2014 (78; A-Ap. 14-32), which was opposed by the state (80; 84), and denied by the trial court without an evidentiary hearing June 10, 2014 (92; A-Ap. 3-10).

## STATEMENT OF RELEVANT FACTS

Although indigent and eligible for public defender representation, Morales-Rodriguez was initially represented by three volunteer attorneys she had retained on a *pro bono* basis: Attorneys Rupich, Torphy and D'Arruda (4; 99:10-12; A-Ap. 33).

Concerned that there were potential conflicts of interest involving all three attorneys, the state filed on February 15, 2012, a pretrial motion to address the issue and, if necessary, to obtain Morales-Rodriguez's waiver on the record of her right to conflict-free representation if she so desired (11). The state later filed a brief in support of the motion (16). Defense counsel filed a demand for an evidentiary hearing on the state's motion March 20, 2012 (23).

The most significant of the potential conflicts revealed by the state were: (1) Attorney Rupich was simultaneously being prosecuted by the Milwaukee County District Attorney's office for operating a motor vehicle while intoxicated (third offense), operating without a license, and bail jumping; and (2) Attorney Torphy was representing Attorney Rupich on those pending charges (100:7-8). The state was concerned that this situation might cause defense counsel to curry favor with the prosecution to the detriment of Morales-Rodriguez's defense in hopes of favorable treatment in Rupich's pending cases (11:1-2; 16). The state also noted a potential conflict involving Attorney D'Arruda, who was an alleged victim in a pending domestic violence case also being prosecuted by the Milwaukee County District Attorney's office (*id.*).

The trial court held a hearing on the state's motion March 8, 2012 (100). The trial court observed that the potential conflict caused by Attorney Rupich's pending charges "is the most glaring" (100:6). The court was concerned about the potential conflict with his client's interest caused by Rupich's pending criminal and civil charges. The court was also concerned about Rupich's apparent drinking problems and failure to follow court orders, as evidenced by the pending third-offense OWI and bail jumping charges, which might adversely affect his ability to defend Morales-Rodriguez (100:18-19, 21-22, 37-40). Attorney Rupich admitted that he was required to wear an electronic monitoring bracelet (100:37). The court admonished Rupich that if he had any further violations, he would be removed from this case. The court imposed a "zero tolerance" policy on him (100:40).

The court also noted that Attorney Torphy was representing both Rupich and Morales-Rodriguez (100:8, 22). Attorney Torphy expressed confidence in Rupich's ability to adequately defend Morales-Rodriguez, but acknowledged the court's legitimate concerns caused by the "significant" charges pending against Rupich, his drinking problems and failure to follow court orders, and

whether this might adversely impact Rupich's ability to adequately defend Morales-Rodriguez (100:20-22).[1]

When questioned by the court, Morales-Rodriguez said defense counsel explained the conflict to her "a little bit" but she did not understand the conflict or what it related to (100:13). It appears that the three attorneys made little or no effort to explain to her the potential conflicts of interest, to the great chagrin of the court (100:4-7, 15-17).[2]

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[1] In discussing Rupich's problems, the court explained to Torphy:

> I mean, let's be honest, counsel. I hate to say this. I can't have an attorney on a case that I'm concerned has a drinking problem because, if he can't comply with the terms of bail which require absolute sobriety, then I have serious concerns as to whether he can maintain himself and represent his client on this case.

(100:21-22).

[2] The trial court expressed its dismay at the failure of the three attorneys to fully disclose their potential conflicts to Morales-Rodriguez:

> [THE COURT:] I don't understand why it was apparently just discussed at minimal length today. That's what I'm gleaning from your client that it was just mentioned to her a few minutes ago in the bull pen.
>
> ATTORNEY TORPHY: That is correct, Your Honor.
>
> THE COURT: So, counsel, the State raises an issue – a significant potential issue three weeks ago, you filed responses to it, you and your colleagues speak to the media about it but you don't speak to your client about it until she sits in my bull pen five minutes before court. Seriously?

(100:15).

The trial court directed defense counsel to discuss the potential conflicts of interest with their client and then she would have to waive her right to conflict-free representation on the record, if she so desires (100:42).

There was no waiver hearing. Instead, defense counsel filed a joint motion to withdraw as counsel for Morales-Rodriquez March 28, 2012 (28). At a hearing on the same day, March 28, the trial court granted the motion to withdraw (102:4-5). Counsel moved to withdraw even over their client's wishes because, they believed, it would be in her best interests to have a "fresh start" with conflict-free counsel (102:3). The court agreed. In opposing the motion, Morales-Rodriguez said simply: "I don't believe there's any conflict of interest." (102:4). The court directed the State Public Defender to appoint new counsel for Morales-Rodriguez (102:5). The public defender appointed attorneys Reyna Morales and Debra Patterson to represent her (103:2; 104:2).

Attorneys Morales and Patterson litigated a number of pretrial motions (106-112). They did not, however, pursue the claim that, by withdrawing from the case, her previous counsel deprived their client of the right to counsel of her choice in violation of the Sixth Amendment, entitling her to automatic reversal if the trial were to proceed to conviction.

Morales-Rodriguez raised the counsel-of-choice issue for the first time in her postconviction motion for a new trial, presenting it in the guise of a claim that her unpaid volunteer attorneys were ineffective for withdrawing from the case, and prejudice must be presumed because their withdrawal deprived her of the right to counsel of choice (78; A-Ap. 14-32).

The trial court denied the motion. It held, in essence, that there is no law supporting the proposition that her attorneys' decision to withdraw amounts to the denial of counsel of choice. There was no action by the court that deprived her of that right. Also, Morales-

Rodriguez failed to understand why there was a potential for conflict, demonstrating her inability to voluntarily and intelligently waive her right to conflict-free representation (92:4-7; A-Ap. 6-9).

## SUMMARY OF ARGUMENT

Morales-Rodriguez twice forfeited her counsel-of-choice claim when: (1) her first set of attorneys decided to withdraw from the case against her wishes without raising the issue; and (2) when her second set of attorneys did not pursue any claim that her first set of attorneys denied her counsel of choice.

That left Morales-Rodriguez with only a postconviction claim that her first set of attorneys was ineffective for withdrawing from the case. Morales-Rodriguez did not, however, argue that her second set of attorneys was ineffective for not preserving the claim that her first set of attorneys deprived Morales-Rodriguez of her right to counsel of choice when they withdrew.

Any challenge to the performance by her first set of attorneys was forfeited when the second set of attorneys made no issue of it. Any ineffective assistance claim against the second set of attorneys would have been doomed because the objection, had it been made, would have been rejected as meritless. There is no constitutional right to force representation by potentially conflicted volunteer attorneys who choose to withdraw from the case. Counsel is not ineffective for failing to raise meritless arguments, especially novel and meritless arguments.

Morales-Rodriguez does not get the windfall of automatic reversal based on an objection that her two sets of trial attorneys forfeited. Morales-Rodriguez failed to sufficiently allege deficient performance because the record conclusively shows that her unpaid volunteer attorneys reasonably decided to withdraw from the case

due to serious potential conflicts of interest. Morales-Rodriguez failed to sufficiently allege actual prejudice because she received a fair trial before an unbiased judge and a jury of her peers represented by competent appointed counsel. She makes no claim to the contrary. The trial court properly exercised its discretion to deny her postconviction motion without an evidentiary hearing.

## ARGUMENT

### I. HAVING TWICE FORFEITED HER DENIAL-OF-COUNSEL-OF-CHOICE CLAIM, MORALES-RODRIGUEZ IS NOT ENTITLED TO AUTOMATIC REVERSAL OF HER CONVICTION.

#### A. The law regarding the constitutional right to counsel of one's own choosing.

A criminal defendant has the right under the Sixth Amendment to retained and otherwise qualified counsel of her choice. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989); *Wheat v. United States*, 486 U.S. 153, 159 (1988); *State v. Peterson*, 2008 WI App 140, ¶ 7, 314 Wis. 2d 192, 757 N.W.2d 834; *United States v. Turner*, 651 F.3d 743, 748 (7th Cir.), *cert. denied*, 132 S. Ct. 863 (2011). The unjustified denial of that right is a structural error not amenable to harmless error analysis. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006). The right to counsel of choice is not, however, absolute. It may be limited by the need to ensure a fair trial. *Id.* at 148 n.3.

Morales-Rodriguez only had a "presumptive right" to retained counsel of her choice. *State v. Peterson*, 314 Wis. 2d 192, ¶ 7 (citing *Wheat v. United States*, 486 U.S. at 159, 164). That right is "'circumscribed in several important respects.'" *Id.* ¶ 13 (quoting *Wheat v.*

*United States*, 486 U.S. at 159). The trial court must balance the defendant's choice of counsel against the institutional interest in maintaining the integrity of the judicial system. *State v. Miller*, 160 Wis. 2d 646, 652-53, 467 N.W.2d 118 (1991). The presumption favoring a defendant's counsel of choice is overcome with proof of an actual conflict of interest or a serious potential for conflict. The court must evaluate the impact of the actual or potential conflict on the defendant's Sixth Amendment right to the effective assistance of counsel. *United States v. Turner*, 594 F.3d 946, 951-52 (7th Cir. 2010). *See State v. Peterson*, 314 Wis. 2d 192, ¶ 7 ("Thus, under the Sixth Amendment, a defendant has only a presumptive right to employ his or her own chosen counsel").

> An actual conflict or serious potential for conflict of interest imperils the accused's right to adequate representation and jeopardizes the integrity of the adversarial trial process and the prospect of a fair trial with a just, reliable result.

*State v. Miller*, 160 Wis. 2d at 653. *See State v. Peterson*, 314 Wis. 2d 192, ¶ 13.

A defendant may waive the right to conflict-free representation but may not demand that a court honor her willingness to waive the conflict. The court may disqualify counsel even in the face of the defendant's proffered waiver of a conflict. *Wheat v. United States*, 486 U.S. at 159-60; *State v. Peterson*, 314 Wis. 2d 192, ¶ 8 (citing *State v. Miller*, 160 Wis. 2d at 650); *United States v. Turner*, 651 F.3d at 747. The trial court has wide discretion to balance the defendant's right to counsel of choice against the need for fairness. *Wheat v. United States*, 486 U.S. at 163-64. This is because the trial court has an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160; *State v. Peterson*, 314 Wis. 2d 192, ¶ 7.

This court has squarely rejected the notion that the right to counsel of choice extends to attorneys who choose not to stay on the case and/or are conflicted out of it:

> The Supreme Court has provided guidance for courts who must recognize when a defendant is not entitled to counsel of choice; specifically, a defendant does not have the right to be represented by (1) an attorney he or she cannot afford, (2) *an attorney who is not willing to represent the defendant,* (3) *an attorney with a conflict of interest,* or (4) an advocate who is not a member of the bar.

*State v. Peterson*, 314 Wis. 2d 192, ¶ 13 (citing *Wheat v. United States*, 486 U.S. at 159) (emphasis added).

### B. Morales-Rodriguez forfeited any challenge to the denial of her counsel of choice by not timely raising it before or at trial.

Constitutional rights such as the right to counsel of choice may be forfeited by failure to timely object, even assuming that a timely objection would have preserved structural error requiring automatic reversal. *State v. Pinno* & *State v. Seaton*, 2014 WI 74, ¶¶ 7-8, 56-64, __ Wis. 2d __, 850 N.W.2d 207 (so holding with respect to failure to timely object to closure of the *voir dire* in violation of the Sixth Amendment right to a public trial that, had the objection been made, would have required automatic reversal).

It must be emphasized that Morales-Rodriguez does not claim that either the trial court or the prosecutor denied her counsel of choice. She argues only that *her own attorneys* deprived her of that right when they withdrew against her wishes long before trial. This, she concedes, is a "novel" constitutional issue. *See* Morales-Rodriguez's brief at 1-2.

Neither the trial court nor the prosecutor interfered with representation of her by the three volunteer attorneys. The state did not move to disqualify the lawyers; it just wanted a waiver hearing to make sure that Morales-Rodriguez was (a) aware of the potential conflicts, and then (b) voluntarily and intelligently waived on the record her right to conflict-free counsel if she wanted them to stay on.

Morales-Rodriguez's trial attorneys did not object before or at trial that she was denied her constitutional right to counsel of her choice, building in automatically reversible error, when her first set of attorneys withdrew. As with the Sixth Amendment public trial right in *Pinno & Seaton,* this stand-alone Sixth Amendment counsel-of-choice claim had to be preserved before trial to be reviewed on appeal and to reap the windfall of automatic reversal. *See State v. Gonzalez-Villarreal,* 2012 WI App 110, ¶¶ 4-6, 13, 344 Wis. 2d 472, 824 N.W.2d 161 (the trial court granted the state's pretrial motion to disqualify defense counsel because he could potentially become a trial witness, defense counsel objected and appealed the non-final pretrial disqualification order, this court granted leave to appeal and reversed). *See also State v. Kalk,* 2000 WI App 62, ¶¶ 15-16, 234 Wis. 2d 98, 608 N.W.2d 428 (when the conflict of interest claim is raised for the first time postconviction, defendant must prove by clear and convincing evidence that his attorney actively represented conflicting interests). Litigants are urged to raise conflict of interest issues at the earliest available opportunity to avoid disruption of the trial. *State v. Love,* 227 Wis. 2d 60, 72-73, 594 N.W.2d 806 (1999); *State v. Kaye,* 106 Wis. 2d l, 14, 315 N.W.2d 337 (1982); *State v. Kalk,* 234 Wis. 2d 98, ¶¶ 9-10.

Pretrial, a *potential* conflict of interest that could flower into an actual conflict at trial may require disqualification of the attorney as a preventative measure. *State v. Love*, 227 Wis. 2d at 72-73, 77 n.8. After trial, if the trial was fair, the conviction should not be overturned if the potential conflict never blossomed into an actual

conflict. *Id*. at 68-70, 82; *State v. Kaye*, 106 Wis. 2d at 7-8. "Once a trial has occurred, the focus should be on 'real deficiencies and real problems.'" *State v. Medina*, 2006 WI App 76, ¶ 29, 292 Wis. 2d 453, 713 N.W.2d 172 (citing Love, 227 Wis. 2d at 82). *Also see State v. Medina*, 292 Wis. 2d 453, ¶ 40 (Lundsten, J. concurring).

The same reasoning holds with respect to Morales-Rodriguez's denial-of-counsel-of-choice claim. Assuming she had a valid claim, Morales-Rodriguez would have avoided disruption of the trial, and automatic reversal of her conviction, by timely objecting. Consequently, Morales-Rodriguez's challenge is only reviewable now in the posture of a postconviction ineffective assistance of trial counsel challenge with the burden of proving both deficient performance and actual prejudice to her defense squarely on her. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *State v. Pinno* & *Seaton*, 2014 WI 74, ¶¶ 9, 81-86; *State v. Beauchamp*, 2011 WI 27, ¶¶ 14-15, 333 Wis. 2d 1, 796 N.W.2d 780; *State v. Miller*, 2005 WI App 114, ¶ 7, 283 Wis. 2d 465, 701 N.W.2d 47; *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31; *State v. Jones*, 2010 WI App 133, ¶ 25, 329 Wis. 2d 498, 791 N.W.2d 390; *State v. Haywood*, 2009 WI App 178, ¶ 15, 322 Wis. 2d 691, 777 N.W.2d 921. *See also Puckett v. United States*, 556 U.S. 129, 134-35 (2009) (because defense counsel did not object when the alleged plea agreement breach occurred, it is reviewable only for "plain error"); *United States v. Johnson*, 641 F. Supp. 2d 543, 548 n.4 (W.D. Va. 2009) (same). *Also see State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶ 26, 314 Wis. 2d 112, 758 N.W.2d 806. *Compare State v. Williams*, 2002 WI 1, ¶¶ 27-28, 249 Wis. 2d 492, 637 N.W.2d 733 (defense counsel immediately objected when the prosecutor's discussion of the presentence report, which recommended prison time, undermined the state's plea agreement to recommend probation; the circuit court sustained the defense objection).

As with an ineffective assistance claim based on trial counsel's failure to timely object to a public trial violation, an ineffective assistance claim based on trial counsel's failure to object to the denial of counsel of choice is not established unless and until the defendant proves actual prejudice. This must be so, otherwise there would never be any incentive to timely object; the defendant quietly builds error into the record, unbeknownst to the trial court, and wins automatic reversal even after he received a fair trial with the effective assistance of counsel.

> Given that prejudice is rarely presumed, an error does not automatically receive a presumption of prejudice merely because it is deemed structural. Indeed, a rule that prejudice must be presumed when counsel fails to object to the exclusion of the public would effectively nullify the forfeiture rule. *It would not matter that the defendant failed to object because he could demand a reversal on appeal based on ineffective assistance if he could prove his counsel was deficient.* As discussed above, the denial of the right to a public trial does not always lead to unfairness or prejudice. "Thus, only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Cronic*, 466 U.S. at 662, 104 S.Ct. 2039 (footnote omitted). Structural errors, generally, do not fall under one of those circumstances.

*State v. Pinno & Seaton*, 2014 WI 74, ¶ 86 (footnotes omitted; emphasis added).

This novel denial-of-counsel-of-choice-by-counsel claim was doubly forfeited here: (1) by the decision of the first set of attorneys to withdraw without raising it; and (2) by the failure of the second set of attorneys to raise it.

## II. MORALES-RODRIGUEZ FAILED TO PROVE THAT EITHER OF HER TWO SETS OF ATTORNEYS PERFORMED DEFICIENTLY, AND PREJUDICIALLY SO.

### A. Morales-Rodriguez failed to prove deficient performance on anyone's part.

Morales-Rodriguez's second set of attorneys did not perform deficiently for failing to preserve her novel claim because Morales-Rodriguez does not argue that they did. Morales-Rodriguez failed to prove her first set of attorneys performed deficiently because their decision to withdraw from the case was (a) entirely their prerogative, and (b) eminently reasonable.

#### 1. It was entirely within the prerogative of the volunteer attorneys to withdraw; the Sixth Amendment did not force them to stay on the case against their better judgment.

Morales-Rodriguez cites no law for the bizarre proposition that the Sixth Amendment right to retained counsel of one's choice may force a lawyer who wishes to withdraw for any reason to remain on the case. Whether the reason for counsel to withdraw is financial, physical, or due to perceived conflicts of interest, that decision is entirely within counsel's prerogative. The Sixth Amendment does not require an unwilling lawyer to stay on the case just because the client would prefer him over another lawyer.[3]

[3] The situation would, of course, be different if counsel withdrew on the eve of or in the midst of trial over his client's objection. But in (footnote continued)

"Similarly, a defendant may not insist on representation by an attorney he cannot afford *or who for other reasons declines to represent the defendant.*" *Wheat v. United States*, 486 U.S. at 159 (emphasis added). These attorneys declined to represent Morales-Rodriguez for a variety of reasons. That was their prerogative. If they were wrong, they were not constitutionally wrong.

2. It was reasonable for counsel to withdraw because of their potential conflicts of interest.

Morales-Rodriguez's first set of lawyers did not perform deficiently when they withdrew from the case because their perception of the potential for conflict was, while late, real and valid. One defense attorney was facing multiple criminal and civil charges brought by the same prosecutor's office that was prosecuting Morales-Rodriguez. A second defense attorney was representing the first one on those pending charges against that same prosecutor's office. *See* SCR 20:1.7(a)(2) (2014) (a lawyer shall not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer").

The risk that Morales-Rodriguez's defense might suffer because of Attorney Rupich's "personal interest" in defeating his own serious pending charges, and Attorney Torphy's efforts to zealously and successfully defend his client/co-counsel against those serious charges, was

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that situation, the relevant Sixth Amendment challenge would not be denial of counsel of choice, but denial of the effective assistance of counsel; a claim that would require the defendant to prove both deficient performance and prejudice.

"significant." Consciously or subconsciously, Attorneys Rupich and Torphy might hope to curry favor with the Milwaukee County District Attorney's office by less aggressively defending Morales-Rodriguez. Or, they might decide to tread lightly in their defense of Morales-Rodriguez for fear that an aggressive, zealous defense of her in this well-publicized and emotionally-charged case might anger the prosecution; and that anger would later be taken out on Rupich. "Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, *even when the opposing party is the Government.*" *Wheat v. United States*, 486 U.S. at 159 (emphasis added). Rupich's "relationship" with his opposing counsel, the Milwaukee County District Attorney's office, in the form of pending charges was a valid reason for him to withdraw.

Also, Attorney Rupich's serious drinking problems and failure to abide by court orders called into serious question his ability to competently represent Morales-Rodriguez at trial. He was even wearing an electronic monitoring bracelet in court. *See* SCR 20:1.1 and SCR 20:8.4(b) (2014). There was a significant risk that Rupich would be removed from the case once the trial court told him it would have "zero tolerance" for any further infractions. If that occurred, there may well have been a mistrial.

Their representation of Morales-Rodriguez under these clouds would have opened the door to an ineffective assistance claim after conviction. A criminal defendant's right to effective assistance of counsel includes the corresponding right to representation that is free from conflicting interests. *State v. Street*, 202 Wis. 2d 533, 541, 551 N.W.2d 830 (Ct. App. 1996). A claim that a defense attorney labored under a conflict of interest is treated as a "subspecies" of an ineffective assistance of counsel claim. *State v. Love*, 227 Wis. 2d at 68.

Whereas the defendant claiming ineffective assistance must prove both deficient performance and

resulting prejudice, *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433, the defendant claiming his attorney was rendered ineffective by a conflict of interest need only prove deficient performance. Prejudice is presumed. *State v. Love*, 227 Wis. 2d at 70-71; *State v. Street*, 202 Wis. 2d at 542.

So, again, there was a serious risk that reversible error would be built into the record if Morales-Rodriguez went ahead with conflicted counsel at the helm of her defense. Also, she did not even understand what the conflict was or why it mattered. This was due in large part to the fact that her attorneys were slow to explain it to her. Rest assured, had potentially conflicted counsel been forced to represent Morales-Rodriguez against their own better judgment and despite her lack of complete information regarding the potential conflict, she would have had viable ineffective assistance claims against both her first set of attorneys who wanted off the case, and her second set of attorneys whose timely counsel-of-choice objection would have forced them to stay on the case. It was reasonable for her volunteer attorneys to withdraw rather than jeopardize their client's right to a fair trial with effective and conflict-free representation. It was reasonable for the second set of attorneys not to make an issue of their withdrawal.

### B. Morales-Rodriguez failed to prove actual prejudice to her trial defense.

Both sets of Morales-Rodriguez's attorneys forfeited the novel claim that her retained but unpaid volunteer lawyers violated her Sixth Amendment right to counsel of choice when they withdrew, and automatic reversal is the remedy. Because her novel claim was forfeited, Morales-Rodriguez bore the burden of proving actual prejudice to her trial defense caused by the withdrawal of her volunteer attorneys (assuming deficient performance). Morales-Rodriguez suffered no prejudice

because she was ably represented at no expense to her by competent appointed counsel who made sure that she received a fair trial before an unbiased judge and jury. She makes no claim to the contrary. The fairness of her trial and the competence of her counsel were, after all, the ultimate constitutional concerns:

> We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronic*, 466 U.S. 648, 657, n. 21, 104 S.Ct. 2039, 2046 n. 21, 80 L.Ed.2d 657 (1984). Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See *Morris v. Slappy*, 461 U.S. 1, 13–14, 103 S.Ct. 1610, 1617–1618, 75 L.Ed.2d 610 (1983); *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

*Wheat v. United States*, 486 U.S. at 159.

By forfeiting her stand-alone public trial challenge, Morales-Rodriguez may now only argue that her trial attorneys were ineffective for failing to preserve the claim, and their deficient performance adversely affected her right to a fair trial. She had to prove a reasonable probability of a different outcome at trial had her trial attorneys interposed a timely "denial of counsel of choice" objection. But, again, Morales-Rodriguez does not challenge the effectiveness of her second set of lawyers.

The pertinent issue should have been whether her second set of attorneys was ineffective for not moving pretrial: (a) for reinstatement of the first set of attorneys; or (b) for a mistrial, because their withdrawal deprived

Morales-Rodriguez of her Sixth Amendment right to volunteer *pro bono* counsel of her choice. But Morales-Rodriguez did not then and does not now challenge the effectiveness of her second set of lawyers in this or any other respect. This gap in her argument is fatal because, by their inaction, her second set of attorneys forfeited any stand-alone claim that her first set of attorneys denied Morales-Rodriguez her right to counsel of choice; and any indirect claim that they were ineffective for withdrawing because it denied her the right to counsel of choice. *See State v. Pinno & Seaton.* By failing to make the only argument that matters, Morales-Rodriguez forfeited any right to review of her constitutional challenge either directly or indirectly against only her first set of lawyers.

Morales-Rodriguez could not prove prejudice even if she had challenged the effectiveness of her second set of lawyers. Had she challenged their effectiveness for not raising the novel Sixth Amendment claim, Morales-Rodriguez would have lost. There is no merit to the claim that a criminal defendant has the constitutional right to force retained counsel to remain on the case especially when, as here, retained counsel is working for free and voluntarily withdraws because they rightly perceive potential conflicts of interest that may harm her defense. *State v. Peterson*, 314 Wis. 2d 192, ¶ 13 (citing *Wheat v. United States*, 486 U.S. at 159).

Morales-Rodriguez's volunteer attorneys were no longer willing to represent her because they realized that they were laboring under potential conflicts of interest that may well have flowered into actual conflicts at trial. It would mock the integrity of the judicial system to force volunteer *pro bono* counsel to remain on the case after they thought it better to withdraw and give their client a "fresh start" with conflict-free counsel. Their decision was eminently reasonable.

Having failed to prove that either set of trial attorneys performed deficiently, and having failed to prove actual prejudice, Morales-Rodriguez failed to prove

her attorneys were ineffective for not preserving her novel but obviously meritless "denial of counsel of choice by defense counsel" claim. Trial counsel is not as a matter of law ineffective for failing to raise a meritless objection. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110; *State v. Quarzenski*, 2007 WI App 212, ¶ 18, 305 Wis. 2d 525, 739 N.W.2d 844; *State v. Swinson*, 2003 WI App 45, ¶ 59, 261 Wis. 2d 633, 660 N.W.2d 12; *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

The trial court properly exercised its discretion in denying Morales-Rodriguez's postconviction motion without an evidentiary hearing because her motion does not allege sufficient facts to warrant a hearing, and the record conclusively shows she is not entitled to relief on her ineffective assistance of counsel claim. *State v. Pinno & Seaton*, 2014 WI 74, ¶ 38; *State v. Balliette*, 2011 WI 79, ¶ 50, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Allen*, 274 Wis. 2d 568, ¶ 9. The record conclusively shows that her underlying constitutional claim was forfeited and her motion failed to allege deficient performance and a reasonable probability of a different outcome had her trial attorneys timely objected. The motion failed to allege with factual specificity that she was denied the effective assistance of counsel at her trial or that she was denied a fair trial.

## CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin, this 13th day of October, 2014.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,507 words.

Dated this 13th day of October, 2014.

_____
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Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 13th day of October, 2014.

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