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 REPLY BRIEF

Respectfully submitted:

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I. THE STATE FORFEITED ITS FORFEITURE ARGUMENT WHEN IT DID NOT ASSERT THAT ARGUMENT BELOW IN EITHER OF THE TWO BRIEFS THAT IT FILED REGARDING THE ISSUE THAT MORALES-RODRIGUEZ NOW PURPORTEDLY FORFEITED.

Morales-Rodriguez raised in her postconviction motion the very issue that she has asserted on appeal. In response, the circuit court ordered the State to file a response brief, which it did. Nowhere in that brief did the State allege forfeiture resulting from the failure of Morales-Rodriguez's publicly appointed attorneys to raise the issue of her pro bono attorneys' ineffectiveness.

After Morales-Rodriguez replied—in accordance with the court ordered briefing schedule—to the arguments the State had adduced, the State then filed an unsolicited supplemental response brief in which it again set forth facts and law with the purpose of defeating Morales-Rodriguez's ineffective assistance claim. As before, the State was mute with regard to forfeiture.

In its response brief to this Court, the State has, for the first time, argued that Morales-Rodriguez forfeited her ineffective assistance claim.

The supreme court has consistently expressed its displeasure with parties' attempts to assert claims for the first time on appeal. *See State v. Dowdy*, 2012 WI 12, ¶ 5, 338 Wis. 2d 565, 808 N.W.2d 691. It has explained that, "[a]s a general rule, issues not raised in the circuit court will not be considered for the first time on appeal." *Id.* (citing *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980)). "The reason for this general rule is to give trial courts the opportunity to correct errors, thus avoiding appeals." *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997). "[W]hen a party seeks review of an issue that it failed to raise before the circuit court, issues of fairness and notice, and judicial economy are raised." *State v. Caban*, 210 Wis. 2d 597, 605, 563 N.W.2d 501, 505 (1997). The forfeiture rule applies both to the appellant and to the

respondent. *See Van Camp*, 213 Wis. 2d at 144, 569 N.W.2d at 584.

By its failure to assert forfeiture in either of the two briefs that it filed in the trial court, the State forfeited its right to argue forfeiture before this Court. *See id.*, 213 Wis. 2d at 144, 569 N.W.2d at 584 ("We are unpersuaded that justice would be served here by entertaining the State's arguments where the trial court was not afforded an opportunity to do so."). Insofar as the State failed to raise the forfeiture argument until its response brief to this Court, giving Morales-Rodriguez the opportunity to respond to it only in reply, she believes that "issues of fairness and notice, and judicial economy" favor the conclusion that it has been forfeited. *Caban*, 210 Wis. 2d at 605, 563 N.W.2d at 505

She asks this Court to reach the merits of her claim despite the purported forfeiture.

II. THE STATE'S FORFEITURE ARGUMENT FAILS ON THE MERITS.

The State makes two claims regarding Morales-Rodriguez's purported forfeiture: (1) her pro bono attorneys forfeited the claim that they were ineffective in their withdrawal by not asserting their own ineffectiveness and (2) her publicly-funded successor counsel forfeited her ineffective assistance claim when they did not assert it pretrial. St.'s Br. at 13.

The first claim warrants only limited response. It cannot possibly be said that Morales-Rodriguez's pro bono attorneys were required to assert their own ineffectiveness in order to preserve for appeal the claim that they were ineffective.

As for the second proposition—that successor counsel is required to raise the effectiveness of prior counsel or else forfeit the client's right to subsequently assert it—the State points this Court to no authority supporting it. *See* St.'s Br. at 10-13.

Surely, the State has argued that it was incumbent upon Morales-Rodriguez to assert any counsel-of-choice argument

prior to her trial or else lose the right to later complain of error, St.'s Br. at 11 (stating that her "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"), but that is neither consistent with applicable law nor determinative of the assertion that she forfeited her ineffective assistance claim by not raising it before trial.

As for the State's suggestion that a counsel of choice claim must be raised before trial to be eligible for review, the United States Supreme Court has before decided to the contrary. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 143-44, 152 (2006). The defendant in *Gonzalez-Lopez* hired two attorneys to represent him. *Id.* at 142. After the district court prohibited one of the defendant's attorneys from representing him, the second withdrew. *Id.* at 142-43. A third attorney was retained, and the case proceeded to trial. *Id.* at 143. The court continued to disallow the defendant's first attorney to participate. *Id.* It was not until after he was convicted that the defendant asserted that the court's prohibition of his first attorney's representation violated his right to counsel of choice. *Id.* No rule was recognized in *Gonzalez-Lopez* requiring—as the State would have it—the pre-trial litigation of a counsel-of-choice claim to avoid its postconviction forfeiture. Instead, the Court decided *Gonzalez-Lopez* in the defendant's favor even though his counsel of choice claim was not litigated before trial. *Id.* at 143-44, 152.

The reasoning and rule of *Gonzalez-Lopez* lead to the following conclusion: the failure of successor counsel to assert a violation of the defendant's right to counsel of choice does not result in its forfeiture, and thus need not be reviewed under the rubric of ineffective assistance. *See id.*; *cf. State v. Koller*, 2001 WI App 253, ¶ 25, 248 Wis. 2d 259, 635 N.W.2d 838 (defendant's "claims were waived and are, therefore, appropriately addressed in the context of ineffective assistance of counsel").

But the real meat of the State's forfeiture challenge in the instant case is a desired rule that, upon a change of attorneys, successor counsel must litigate before trial the issue of prior counsel's effectiveness in order to salve for appeal any claim that prior counsel was ineffective. The State would have

that rule because of its concern that a defendant with ineffective prior counsel might nonetheless have a fair trial with successor counsel. St.'s Br. at 13.

The State's proposed rule asks too much. By it, the State would have this Court place on every successor counsel's shoulders the substantial burden of obtaining and reviewing transcripts of all proceedings that occurred before counsel's involvement for potential attorney errors that might constitute a basis for an ineffectiveness claim. That responsibility would be heaped upon counsel in addition to the already substantial task of preparing for trial. The State would open the door to substantial pretrial litigation on the matter of ineffectiveness any time that there is a change in attorneys.

And what would we to do on appeal? Is to be the rule that postconviction success can be achieved only by a two-tiered claim of ineffective assistance any time successor counsel fails to litigate a viable claim of prior counsel's ineffective assistance? Will preservation mandate an interlocutory appeal from an adverse ruling on successor counsel's ineffective assistance claim? Remember, it is the State's position that a subsequently fair trial would render moot any purported ineffectiveness, and thus a forfeiture rule should be adopted. St.'s Br. at 11-12.

Fortunately, deciding this case does not require this Court to sail into those perilous waters.

If Morales-Rodriguez's pro bono attorneys were deficient because their withdrawal caused a violation of her right to the counsel of her choice, then she cannot have enjoyed a fair trial regardless of the performance of her successor counsel. *Gonzalez-Lopez*, 548 U.S. at 148-49, *State v. Ford*, 2007 WI 138, ¶ 42, 306 Wis. 2d 1, 742 N.W.2d 61, *State v. Erickson*, 227 Wis. 2d 758, 771, 596 N.W.2d 749 (1999). Thus, by virtue of the claim that Morales-Rodriguez has raised, her success would render moot the State's underlying concern that she may nonetheless have received a fair trial and thus should be deemed to have forfeited her right to argue her pro bono counsels' effectiveness by virtue of an ensuing fair tral.

Under the facts of the instant case, Morales-Rodriguez's publicly-funded attorneys did not forfeit her right to assert on appeal the ineffectiveness of her pro bono attorneys. She asks this Court to decide her case on the merits.

III. THE STATE'S COUNTERARGUMENT REGARDING HER COUNSEL'S DEFICIENCY ERRANTLY ENGAGES IN POST HOC RATIONALIZATION OF COUNSEL'S CONDUCT, AND SHOULD THEREFORE FAIL, *SEE HARRINGTON V. RICHTER*, 131 S. CT. 770, 790 (2011); IT ALSO DEMONSTRATES THE NEED FOR AN EVIDENTIARY HEARING.

Morales-Rodriguez has argued that her attorneys were deficient because they withdrew under a mistaken belief that their withdrawal was compelled by the facts and law set forth in their motion to withdraw. In her opening brief, Morales-Rodriguez detailed how her attorneys' espoused reasons for withdraw did not actually compel them to withdraw. She further explained that because her attorneys erroneously believed that they were compelled to withdraw when indeed they were not, they labored under a misunderstanding of the relevant law. As such, said Morales-Rodriguez, when her attorneys' acted under the compulsion of their errant belief, their performance fell below an objective standard of reasonableness. For that reason, she said, her attorneys were deficient.

The State's response brief does not address that argument. Instead, the State says that Morales-Rodriguez's pro bono attorneys

> did not perform deficiently when they withdrew from the case because their perception of the potential for conflict was, while late, real and valid. . . . 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.

St.'s Br. at 15, 17.

While it is appropriate to evaluate counsel's purported deficiency under an objective standard of reasonableness, "courts may not indulge 'post hoc rationalization' for counsel's decision making that contradicts the available evidence of

counsel's actions." *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)). Such post hoc rationalization is precisely what the State engages in when arguing that counsel was not deficient in the instant case. At one point, the State writes, "These attorneys declined to represent Morales-Rodriguez for a variety of reasons." St.'s Br. at 14. There is nothing in the record proving that counsel was declining to represent Morales-Rodriguez.

Morales-Rodriguez's attorneys never said that they were withdrawing because they no longer wanted to represent her. (*See* R.78:Ex. A, A. Ap. 11-13.) They never claimed that they were withdrawing because of an actual or potential conflict of interest. (*Id.*) They never told the court that they did not want to be her attorneys. (*Id.*; *see also* R.102:3.) Nothing was ever said about declining continued representation. (*Id.*; *see also* R.102:3.)

The motion that they filed contains the clear assertion that they believed they were "compelled to withdraw" for the three reasons Morales-Rodriguez addressed in her opening brief. (*Id.*) And then, in open court, counsel reiterated the opinion that they "were compelled to make th[eir] motion to the Court." (R.102:3.)

The reasons that counsel set forth in their motion to withdraw and then in open court must be true. *See* Wis. SCR 20:3.3 (candor toward the tribunal). The record contains no other evidence of additional reasons for counsel's withdrawal. While it is true that counsel expressed the opinion, both in the motion to withdraw and on the record, that "a fresh start where new lawyers are conflict free" "would be the best for [Morales-Rodriguez]," that was not asserted as a basis for withdrawal. (R.102:3.) Nor does it change the fact that counsel believed, erroneously, that the facts and law compelled their withdrawal and they were withdrawing because of that compulsion. (*Id.*)

Such belief and counsels' actions under it constituted deficient performance. *State v. Felton*, 110 Wis. 2d 485, 505-06, 329 N.W.2d 161, 170 (1983). Whether other reasons may be proffered that would, themselves, constitute objectively reasonable grounds for withdrawal is irrelevant to the deficiency analysis as applied. *Harrington*, 131 S. Ct. at 790. To

generate purported reasons that counsel may have withdrawn and then hold them up as proof that counsel was not deficient, as the State does in its argument, is simply contrary to the Supreme Court's rule against post hoc rationalization. *Id.*

What is more, the State's suggestion of additional reasons outside the record that may prove the reasonableness of counsels' withdrawal demonstrates the need for an evidentiary hearing in the instant case. If the asserted reasons for withdrawal cannot be believed, then the circuit court should have held an evidentiary hearing.

Facts that appear to lack credibility or reliability do not scuttle a defendant's right to an evidentiary hearing. *See 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). Instead, if the defendant's factual assertions are "questionable in their believability, the circuit court must hold a hearing." *State v. Allen*, 2004 WI 106, ¶ 12 n.6, 274 Wis. 2d 568, 682 N.W.2d 433.

Thus, even under the State's own argument, Morales-Rodriguez should be entitled to the relief that she seeks by this appeal: remand to the circuit court for an evidentiary hearing on the matter of her counsels' ineffectiveness.

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 27th day of October, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant

CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Reply Brief 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 October 27, 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 27th day of October, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant

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 2,267 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 27th day of October, 2014.

Matthew S. Pinix
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