STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACK M. SURIANO,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction
Entered in the Circuit Court for Door County,
The Honorable D. Todd Ehlers Presiding

AMICUS CURIAE BRIEF AND APPENDIX OF WISCONSIN STATE PUBLIC DEFENDER

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ARGUMENT

The State Public Defender Asks That This Court, Consistent With Due Process and Holdings of Federal and Other State Court Decisions, (1) Require Court Warnings Before a Trial Defendant May Waive Counsel by Choice or by Conduct; (2) Limit Forfeiture of Counsel to Only Truly Extreme Situations, as a Last Resort, When a Court has No Other Reasonable Choice; and (3) Provide Guidance to Circuit Courts When a SPD-Appointed Trial Attorney Files a Motion to Withdraw.

Mr. Suriano had a right to State Public Defender representation for his criminal trial.[1] Three successive public defender-appointed attorneys filed motions to withdraw; none at Mr. Suriano's request. The motions were filed because Mr. Suriano took issue with some of his attorneys' legal conclusions and strategic decisions, as was his right. Apparently relying on this court's decision in ***State v. Cummings***, 199 Wis. 2d 721 (1996), the circuit court without first providing warnings ruled that Mr. Suriano forfeited his right to counsel. However, because ***Cummings*** does not address waiver-by-conduct and the attendant due process requirement of warnings, and at most the facts here

[1] Because the nature of the right to counsel on appeal is different from that at trial, and the procedure for an appointed postconviction attorney to withdraw and standards for granting withdrawal are different, *See* Wis. Stat. (Rule) § 809.30(4), ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 622-24 (1994), and ***State v. Evans***, 2004 WI 84, ¶¶ 30-31, 273 Wis. 2d 192, this brief focuses only on motions to withdraw filed by SPD-appointed trial-level attorneys prior to conviction.

implicate possible waiver-by-conduct, the lower courts' rulings that Mr. Suriano forfeited his right to counsel is error.

This court should also provide guidance to circuit courts when the basis for withdrawal is an alleged breakdown in the attorney-client relationship. This court should clarify that unless an actual legal conflict bars further representation, other than under the narrow provisions of Wis. Admin. Code § PD 2.04, disagreement over strategy or legal advice is not a basis for withdrawal and appointment of successor counsel. This court should further clarify that absent truly extreme circumstances (generally violence, threat of violence or extreme disruptive behavior in court) disagreements of this nature may in some extreme instances constitute waiver-by-conduct but never forfeiture of the right to counsel.

A. Waiver, Waiver-by-Conduct, and Forfeiture.

The Supreme Court has recognized that "[i]n an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." ***Lakeside v. Oregon***, 435 U.S. 333, 341 (1978). The 6th Amendment right to counsel is a safeguard "deemed necessary to insure fundamental human rights of life and liberty… It embodies a realistic recognition of the obvious truth that the average defendant does not have the…skill to protect himself when brought before a tribunal with power to take his life or liberty." ***Johnson v. Zerbst***, 304 U.S. 458, 462-63 (1938). It is the "most fundamental of rights" as it "affects [a defendant's] ability to assert any other rights he may have." ***Penson v. Ohio***, 488 U.S. 75, 84 (1988). There is a "strong presumption against the waiver of the constitutional right to counsel." ***Von Moltke v. Giles***, 332 U.S. 708, 723 (1948). The Court will "not presume acquiescence in the loss of [this] fundamental right." ***Johnson***, *Id.* at 464.

While the United States Supreme Court has recognized that defendants at trial have a limited right to waive counsel [*see* ***Faretta v. California***, 422 U.S. 806 (1975)], the Court has not weighed in on the issue of forfeiture. However, a number of federal circuit courts have ruled a defendant may forfeit his or her right to counsel. *E.g.* ***United States v. Leggett***, 162 F.3d 237 (3rd Cir. 1998); ***United States v. Thompson***, 335 F.3d 782 (8th Cir. 2003); *but cf.* ***United States v. Ductan***, 800 F.3d 642, 651 (4th Cir. 2015) ("While some circuits have held that a defendant can forfeit the right to counsel,…we have never endorsed the notion.").

In ***State v. Cummings***, 199 Wis. 2d 721 (1996), this court held that in Wisconsin a defendant may forfeit his or her right to counsel. The court was sharply divided as to whether a court had to first provide warnings before forcing a defendant to face government prosecutors and the court alone. In the 20 years since ***Cummings***, federal and state courts analyzing the constitutional underpinnings of non-express waiver of the right to counsel have drawn a distinction between waiver-by-conduct and forfeiture. These courts hold that for waiver-by-conduct, due process requirements mandate the type of warnings ***Cummings*** concluded were merely advisory, while forfeiture cases do not. *See e.g.* ***Smith v. Grams***, 565 F.3d 1037 (7th Cir. 2009); ***State v. Nisbet***, 134 A.3d 840 (Me. 2016); ***State v. Krause***, 817 N.W.2d 136 (Mn. 2012); ***State v. Holmes***, 302 S.W.3d 831 (Tn. 2010); ***Com. v. Means***, 907 N.E.2d 646 (Ma. 2009). Except in some circumstances when the conduct forming the basis for forfeiture occurs in court, procedural due process also requires a hearing and in some instances court-appointed adversary counsel. *See* ***Krause***, 817 N.W.2d at 146; ***Means***, 907 N.E.2d at 662; ***King v. Superior Court***, 107 Cal.App.4th 929 (2003).

Because of the magnitude of what is at stake, the extreme sanction of forfeiture is only available for "extreme conduct that imperils the integrity or safety of court proceedings, ...[should] be utilized only under 'extraordinary circumstances'…[as] a last resort in response to the most grave and deliberate misconduct," and only then when it is "not possible to take…other, less onerous, corrective measures." ***Holmes***, 302 S.W.3d at 847, quoting ***Means***, 907 N.E.2d at 658-60, and ***Gilchrist v. O'Keefe***, 260 F.3d 87, 89 (2nd Cir. 2001). Reviewing courts have generally upheld forfeiture decisions only in cases involving violence, threats of violence, or extremely disruptive in-court behavior that impedes the court's ability to proceed. *E.g.* ***United States v. Leggett***, 162 F.3d 237 (3rd Cir. 1998) (defendant punched, scratched and choked attorney at sentencing); ***United States v. McLeod***, 53 F.3d 322 (11th Cir. 1995) (defendant threatened to sue one attorney and kill another); ***Bultron v. State***, 897 A.2d 758, 760-61 (De. 2006) ("on-going abuse…just short of violence" during trial); *but see* ***Gilchrist***, J. Sotomayor, 260 F.3d at 100 ("we do not mean to suggest that any physical assault by a defendant on counsel will automatically justify constitutionally a finding of forfeiture of the right to counsel.").

Even in cases involving violence many courts have not found forfeiture constitutionally justified when less restrictive measures may have been available. *E.g.* ***Holmes***, 302 S.W.3d at 847 ("no evidence that other, less onerous corrective measures, such as shackling Defendant…would not have been adequate to insure…future safety."); *also see* ***Means***, 907 N.E.2d at 653 (defendant with bipolar and intermittent explosive disorder and other mental health ailments threatened to "physically assault, spit, kick, head-butt, etc." his lawyer); and ***State v. Hampton***, 92 P.3d 871 (Az. 2004) (death threats).

Whether reviewing courts uphold or reverse waiver/forfeiture decisions in cases such as Mr. Suriano's with no violence or threat of violence, generally turns on whether the lower court provided warnings. In ***Smith v. Grams***, 565 F.3d 1037 (7th Cir. 2009), the defendant fired two successive SPD-appointed attorneys and the SPD declined to appoint a third. When Smith inquired about his options the court told him "Well…you can represent yourself." *Id.* 1039 Smith made it clear he wanted an attorney but told the court if "I can't hire one, I guess I will be representing myself." *Id.* The ***Grams*** court reversed, holding that "the procedures followed by the Wisconsin state trial court [affirmed on appeal in reliance on ***Cummings***] were inadequate" because the court "never made any attempt to ensure that Smith knew his various options and was aware of the dangerous terrain into which he was entering." *Id.* 1047. *Also see* ***State v. Blakeney***, 782 S.E.2d 88, 96 (N.C. Ct. App. 2016) (defendant acting "rudely" "cannot be said to have forfeited his right to counsel in the absence of any warning by the trial court both that he might be required to represent himself and of the consequences of this decision.").

In ***McCollum v. State***, 186 So.3d 948, 954-55 (Miss. Ct. App. 2016), the court ruled:

> …we do agree that the great weight of authority holds that, *in the absence of prior warning*, a defendant will not be found to have forfeited his right to counsel based on conduct of the type involved in this case…McCollum was an uncooperative client who disparaged his court-appointed attorney and filed a bar complaint against him. We sympathize with the attorney…and agree with the trial judge that a defendant should not be able to use his right to counsel as a means to delay criminal proceedings against him. However, unless the defendant has been warned that his conduct may result in loss of

> the right to counsel or engages in egregious misconduct such as physical violence, there is no basis for an implied waiver or forfeiture of that right.

Also see, ***Kowalskey v. State***, 42 N.E.3d 97, 106 (Ind. Ct. App. 2015) (on facts nearly identical to those at bar, the court ruled "mindful that the law indulges every reasonable presumption against a waiver of the fundamental right to counsel, we conclude that the trial court erred in finding that Kowalskey, by his conduct, waived his right to pauper counsel.").

The SPD agrees with the Attorney General that the Maine Supreme Court's decision in ***State v. Nisbet***, 134 A.3d 840 (Me. 2016), provides an excellent framework for analyzing waiver-by-conduct and forfeiture of counsel cases. (AG's brief, cited *passim*) (App. 101-11). In ***Nisbet*** the defendant's first three attorneys were permitted to withdraw due to the defendant's "hostil[ity]" and loss of confidence in his attorneys. The court then appointed two attorneys as co-counsel, but warned Nisbet that this was the final appointment. When Nisbet later again tried to fire his attorneys the court denied the motion, warned Nisbet "he was 'at the end of the line on attorneys' and explained the dangers of proceeding without counsel." *Id.* at 846. (App. 102-03)

When Nisbet's attorneys later filed their own motion to withdraw, citing Nisbet's insistence that "they engage in unethical conduct," Nisbet's belief that "they were working against him," and that "the attorney-client relationship had broken down," the court again advised Nisbet of his options and the dangers and disadvantages of self-representation. *Id.* at 847-48. With Nesbit stating he would not "waive effective counsel" and demanding the attorneys "present my case the way I want to present it," the court denied the motion, ruling "Nisbet's 'loss of confidence' and 'lack of trust' in his

attorneys did not justify withdrawal over Nisbet's objection." *Id.* at 848. (App. 103-04)

Nisbet's attorneys again moved to withdraw after Nisbet threatened physical violence. *Id.* at 849. At the conclusion of a hearing the court with "extreme reluctance" ruled Nisbet by his "behavior, including his threats against counsel" forfeited his right to counsel. *Id.* at 850. (App. 104-05)

The ***Nisbet*** court made clear "[t]he starting point for the court's analysis" regarding forfeiture was Nisbet's "direct and graphic threat of future physical harm" to his attorneys. *Id.* at 855. (App. 108) The court noted the trial court's "commendable patience and persistence" in repeatedly explaining to Nisbet the dangers and difficulty of self-representation and warning that no other attorney would be appointed. *Id.* at 856-57. (App. 109) Despite the tumultuous attorney-client relationship, the circuit court properly denied the various motions to discharge or withdraw until Nisbet's threat of violence rendered continued representation impossible. The ***Nisbet*** court concluded that the trial court's "measured" ruling after a full hearing that "no alternatives remained" was correct and that the trial court "acted within its authority" in concluding Nisbet forfeited his right to counsel. *Id.* at 857. (App. 109)

The ***Nisbet*** court also concluded that "Nisbet waived [-by-conduct] his right to counsel because he willfully engaged in misconduct that the court warned him would result in the loss of representation and because when he engaged in the misconduct that directly resulted in the withdrawal of his attorneys, Nisbet understood his right to counsel and the perils of proceeding without representation." *Id.* at 857. (App. 110)

Because contrary to ***Nisbet*** the court in Mr. Suriano's case did not provide warnings, the record does not support a finding of waiver-by-conduct. The record also does not show any conduct remotely close to that which would justify the extreme sanction of forfeiture. While Mr. Suriano may have been a demanding client who, as was his right, had strong opinions about his case and how his appointed attorneys were performing, there does not appear to be anything that could reasonably be construed as extreme conduct or a threat of violence. Moreover, the circuit court was not without options. There was no legal conflict requiring withdrawal. The court could (and should) have simply denied Mr. Suriano's third attorney's motion to withdraw.

B. Motions to Withdraw in SPD Trial Cases.

Mr. Suriano's three SPD-appointed attorneys filed motions to withdraw, alleging generally attorney-client relationship issues, all of which the circuit court granted. Granting the first may have been justified as Mr. Suriano acquiesced when his attorney referred to him as an "ass" in open court. However there does not appear to have been a basis for granting the other two, and especially the third.

While the 6th Amendment to the U.S. Constitution guarantees indigent persons the right to a state-paid attorney "[i]n all criminal prosecutions," for an indigent person the right to counsel does not encompass a right to an attorney of choice or to successive appointments. ***U.S. v. Gonzalez-Lopez***, 548 U.S. 140, 151 (2006). However, Wis. Admin. Code § PD 2.04 provides SPD clients a limited right to one substitution request.[2] The Court has also ruled

[2] Specifically, § PD 2.04 provides that a defendant may request appointment of substitute counsel provided "[i]t is the only such request made by the person" and the SPD or court determine "[s]uch change in

that defendants with appointed attorneys retain "the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." ***Jones v. Barnes***, 463 U.S. 745, 751 (1983). Other decisions affecting the case "including the objections to make, the witnesses to call, and the arguments to advance" are "of practical necessity" the appointed attorney's responsibility. ***Gonzalez v. U.S.***, 553 U.S. 242, 250 (2008). As the Court noted "[t]he adversary process could not function effectively if every tactical decision required client approval." *Id.*

Attorneys owe a duty of undivided loyalty to their client and an attorney with an actual legal conflict of interest breaches that duty. ***Strickland v. Washington***, 466 U.S. 668, 692 (1984). However, client complaints about an appointed attorney's performance or disagreements over strategy do not create a legal conflict requiring appointment of substitute counsel. ***United States v. Volpentesta***, 727 F.3d 666, 673-74 (7th Cir. 2013). A defendant does not create a legal conflict by expressing dissatisfaction with his attorney to the court or bar. ***United States v. Velazquez***, 772 F.3d 788, 798-99 (7th Cir. 2014); ***United States v. White***, 174 F.3d 290, 296 (7th Cir. 1999). A breakdown in communication generally should not require withdrawal unless caused "as a result of neglect or ineptitude by counsel." ***United States v. Wallace***, 753 F.3d 651, 675 (7th Cir. 2014).

Ideally defendants and their SPD-appointed attorneys work collaboratively and harmoniously, and in most cases they do. But a defendant's constitutional right to counsel is not contingent on his or her cooperation with or positive

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counsel will not delay the disposition of the case or otherwise be contrary to the interest of justice."

attitude toward counsel. As this court noted, the "Sixth Amendment does not guarantee 'a friendly and happy attorney-client relationship,' but rather effective assistance of counsel." ***State v. Jones***, 2010 WI 72, ¶ 4, 326 Wis. 2d 380. The U.S. Supreme Court put it more bluntly, stating "we reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his client." ***Morris v. Slappy***, 461 U.S. 1, 14 (1983).

In ***Cummings*** this court ruled "[i]t makes little sense to require the continuance of an attorney-client relationship which is not contributing to the preparation of a defendant's defense" and that "[s]uch a relationship neither furthers the underlying principles of the 6th Amendment nor the public's interest." 199 Wis. 2d at 749. But ***Cummings*** overlooks that a key function of 6th Amendment counsel is "to adequately test the government's case." ***Penson v. Ohio***, 488 U.S. 75, 84 (1988). Regardless of a defendant's cooperation, it is often counsel's most important role to hold the state to its burden of proof at trial within the controlling rules of law.

When a defendant seeks to discharge his or her appointed attorney based upon disagreement over procedure or strategy, the circuit court should clarify for the defendant and counsel which decisions are the client's and which decisions are the attorney's to make. If the defendant has already utilized his or her one § PD 2.04 substitution, the court should advise the defendant of the dangers and disadvantages of self-representation and inform the defendant that should he or she choose to discharge his or her second attorney, no other attorney will be appointed. If the defendant declines to waive counsel, in most situations the court should deny the motion.

The SPD further asks this court to clarify that when an appointed attorney moves to withdraw on his or her own initiative, the attorney should not disclose confidential information unless authorized by the client or by court rule. Just as SPD clients do not have a right to choose their attorney, SPD attorneys must take clients as they come. Many public defender clients suffer from mental health issues, lack of impulse control, are depressed, have language deficiencies, have otherwise challenging personalities and generally have had their lives dramatically disordered. As the Minnesota Public Defender in ***Krause*** noted, at times it "is the 'nature' of the public defender 'business' to be 'verbally assailed, screamed at and disrespected," 817 N.W.2d at 142.

Regardless of the difficulty an SPD-appointed attorney must find a way to work with a challenging client. A client aggressively disagreeing with an attorney's strategic decisions, or the attorney disagreeing with a client on matters that are the client's prerogative to decide, should not be the basis for an attorney's withdrawal. Multiple successive appointments made under these circumstances place great strain on SPD appointment staff and drain scarce resources from clients seeking first appointments. Once a second attorney has been appointed pursuant to § PD 2.04 the same problems tend to persist in the third, fourth or fifth attorney-client relationship. Under such circumstances after a first motion has already been granted, a defendant's motion to appoint substitute counsel or an attorney's motion to withdraw based upon disagreement over strategy or breakdown in the attorney-client relationship should be denied. Of course should a court otherwise find good cause for granting withdrawal the SPD would appoint successor counsel. But there generally is no basis for appointing a third, fourth or fifth attorney based upon disagreement over strategy or personality conflict.

CONCLUSION

The SPD asks this court to rule that waiver-of-counsel by choice or by conduct require court warnings, and limit forfeiture of counsel to truly extreme circumstances, as a last resort when no other option exists. The SPD also asks this court to provide guidance to circuit courts when SPD-appointed attorneys file motions to withdraw.

Dated this 15th day of November, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,996 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of November, 2016.

Signed:

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