No. 23-7185

IN THE UNITED STATES SUPREME COURT

LAWRENCE NORTHERN,

Petitioner,

vs.

LIZZIE TEGELS, Warden

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO REVIEW THE COURT OF APPEALS' DECISION

DATED MAY 10, 2022

QUESTIONS PRESENTED

1. Is State v. Machner Unconstitutional? Subsumed within this question is a subsidiary question: Have Alabama, Texas, Wisconsin and the Eleventh Circuit effectively overturned this Court's precedent, Strickland v. Washington, recognizing when a court is presented with an ineffective-assistance-of-counsel claim, the reviewing court should look to the full record presented by the defendant. However, Alabama, Texas, Wisconsin, and the Eleventh Circuit held (or seems to hold) that failure to call challenged counsel as a witness automatically doomes the ineffective-assistance claim: a rule that Wisconsin has followed at least since 1979's State v. Machner,

2. Did Wisconsin Attorneys Jeffrey Reitz and Timothy Provis Engage in Impremissible advocacy when Attorney Reitz filed a Notice of Appeals without Petitioner's knowledge or consent and then outsourced appellate briefing to Attorney Provis, who filed a defective appellate brief raising only unpreserved discovery issues, constituting a per se violation of the Sixth Amendment?

3. Did the Wisconsin Court of Appeals deprive Petitioner counsel of his choice with its refusal to dismiss Petitioner's (in name only) direct appeal, wherein, his pro se letter to the court asking for the appeal to be dismissed, Petitioner specifically explained that his retained counsel, without Petitioner's knowledge or consent, subcontracted out his appellate representation to an attorney, not affiliated with the Reitz's firm, and there was a substantial breakdown in communication - neither Reitz nor Provis conferred/consulted with Petitioner regarding the direct appeal?

LIST OF PARTIES

The caption of this case in this Court contains the name of all the parties.

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I. This court should grant certiorari review to bring Alabama, Texas, Wisconsin, and the Eleventh Circuit in line with the Court's precedent (i.e. Strickland v. Washington), recognizing that no testimony by challenged counsel is required in order to prove a claim of ineffective-assistance of counsel (whether at trial or direct appeal). Indeed, the right to effective assistance of counsel stems from the Sixth Amendment. Yet, nothing in Strickland or its progeny requires a prisoner seeking to prove ineffective assistance to call challenged counsel as a witness.

A. State v. Machner is unconstitutional. This case presents a good opportunity for this court to eliminate the "categorical rule" proscribed by State v. Machner required counsel's testimony before granting relief on any claim of ineffective assistance of counsel.

B. Attorney Reitz commenced a direct appeal without knowledge or consent of Client and then abandoned the direct appeal is a pre se violation of the Right to Counsel.

II. This court should grant certiorari review to remedy a judicially-inflicted harm that occurred more than two decades ago. In the present case, it should be pointed out that upon the state Court of Appeals refusal to dismiss the unconsented-to-direct appeal and petitioner became ensnared in representation by non-retained, disobedient, distant, and ineffective counsel.

III. This court should grant certiorari review to determine two novel questions: (1) Did the state Court of Appeals' refusal to dismiss petitioner's direct appeal; wherein his Notice for Voluntary Dismissal, petitioner, specifically explained to the Court of Appeals, that his retained counsel had subcontracted out his appellate representation without consent and violated petitioner's right

to counsel of choice? and (2) Did the state Court of Appeals, which erroneously denied petitioner his right to voluntarily dismiss his direct appeal, lack jurisdiction to decide the merit (or lack of merit) in the unconsented-to-direct appeal?

INDEX TO APPENDICES

10. The January 20, 2021 order of the Wisconsin Supreme Court in Appeal No. 2020AP1811-W denying motion for reconsideration and appears at Page 121-123 of Appendix to this petition.

11. The November 24, 2020 order of the Wisconsin Court of Appeals in Appeal No. 2020AP1811-W denying a petition for Writ of Habeas Corpus and appears at Page 124-127 of Appendix to this petition.

12. The November 2, 2020 Acknowledgement of filing of Writ/ Petition in Appeal No. 2020AP1811-W and appears at page 128 of Appendix to this petition.

13. The September 11, 2015 decision by the Wisconsin Supreme Court in Appeal No. 2015AP455-W denying motion for reconsideration and appears at Page 129-130 of Appendix to this motion.

14. The August 5, 2015 order by Wisconsin Supreme Court denying the petition for Supervisory Writ and appears at Page 131-132 of Appendix to this petition.

15. Petitioner's pro se, Petition for a Supervisory Writ, filed March 11, 2015 in Appeal No. 2015AP455-W and appears at Page 133-144 of Appendix to this petition.

16 The March 23, 2004 order of the Wisconsin Supreme Court in Appeal No. 2003AP0246-CR that denied the petition for review and appears at page 145 of Appendix to this petition.

17. The November 11, 2003 correspondence by Attorney Tim Provis attempting to extract additional funds from the petitioner and appears at page 146 of Appendix to this petition.

18. The November 4, 2003, opinion of the Wisconsin Court of Appeal in Appeal No. 2003AP0246-CR which affirmed the unauthorized direct appeal and unconsented-to-appellate-work by Attorney Provis, finding that Attorney Provis failed to preserve the issues he briefed for appellate review and appears at Page 147-153 of Appendix to this petition.

19. The October 27, 2003, letter from petitioner to Attorney Reitz and appears at Page 154 of Appendix to this petition.

20. The October 23, 2003, letter from Attorney Reitz to petitioner and appears at Page 155 of Appendix to this petition.

21. The October 22, 2003, ordered by the Wisconsin Court of Appeal in Appeal No. 2003AP0246CR, denying petitioner's pro se, Notice of Voluntary Dismissal and appears at page 156 of Appendix to this petition.

22. The October 17, 2003, Notice of Voluntary Dismissal filed by petitioner and explaining that he had not consent to the appeal and Attorney Provis' involvement and appears at Page 157 of Appendix to this petition.

23. The October 17, 2003 Correspondence from Attorney Reitz to petitioner and appears at Page 158 of Appendix to this petition.

24. The October 6, 2003, letter from petitioner to Attorney Reitz and appears at Page 159 of Appendix to this petition.

25. The October 1, 2003, letter from petitioner to Attorney Mandelman and appears at page 160 of Appendix to this petition.

26. The August 26, 2003, correspondence from Attorney Provis to petitioner and appears at Page 161 of Appendix to this petition.

27. The August 4, 2003, letter by petitioner sent to Attorney Reitz and appears at Page 162 of Appendix to this petition.

28. The July, 2003, Motion to Withdraw As Counsel, filed by Attorney Provis over a dispute with the Reitz-Mandelman law firm over funds and appears at Pages 163-170 of Appendix of this petition.

29. The January 23, 2003, Notice of Appeal filed by Attorney Reitz without knowledge or consent of petitioner and appears at Page 171-172 of Appendix of the petition.

30. The Wisconsin Supreme Court and Court of Appeals Docket Index for Appeal No. 2020AP1811-W and appears at Page 173-180 of Appendix to this petition.

31. The Wisconsin Supreme Court and Court of Appeals Docket Index for Appeal No. 2006AP2015-W and appears at Page 181-184 of Appendix to this petition

32. The Wisconsin Supreme Court and Court of Appeals Docket Index for Appeal No. 2003AP0246-CR and appears at Page 185-188 of Appendix to this petition.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

This action was initiated by Petitioner Lawrence Northern in the Wisconsin Court of Appeal. Specifically, petitioner filed a state petition for a Writ of Habeas Corpus arguing that he received ineffective assistance of appellate counsel on his first appeal as a right. On November 24, 2020, the state Court of Appeals entered an order denying relief, and the Court's order is reprinted in **Appendix App 124-27**. There is no official citation to that order. Petitioner then filed a motion for reconsideration which was denied by order dated January 20, 2021. The Court's January 20th order is reprinted in **Appendix App. 121-23**, and there is no official citation to that order.

Petitioner filed an appeal to the Supreme Court of Wisconsin. On appeal, the Supreme Court summarily vacated the court of appeals' 11/24/2020 order, remanded the case to the court of appeals with instructions to assign the matter to an entirely new panel of the court of appeals, and the petitioner was permitted to file an amended petition for a writ of habeas corpus. There is no official citation to that order. The Supreme Court's 12/15/2021 order is reprinted in the **Appendix App. 118-19**.

On May 10, 2022, the State Court of Appeals again denied the state habeas petition and again failed to address whether (1) Attorney Reitz was per se ineffective by filing a Notice of Appeal without petitioner's knowledge or consent; and (2) whether the Court of Appeals violated petitioner's right to counsel of choice with its refusal to dismiss the direct appeal as requested by Petitioner because he wasn't being represented by his counsel of choice. There is no official citation to that order. The Court's 5/10/2022 order is reprinted in **Appendix App. 111-17**.

Petitioner, pro se, appealed that order to the Wisconsin Supreme Court. On May 30, 2023, Wisconsin Supreme Court Commissioner Davis W. Runke sent the petitioner correspondence advising petitioner that "{t]he court {was] considering {[his] petition, but would like to receive a supplemental petitioner for review that would be submitted by attorneys on [his] behalf." The Commissioner also informed the petitioner that "Attorneys Robert E. Eales, Stephanie Ainbinder, and Alex Robledo of Cooley LLP and Attorney Nicholas C. Zales of Zales Law Office have agreed to represent {petitioner] on a pro bono basis in this matter." That 5/30/2023 correspondence is attached to the **Appendix App. 105-06**.

On August 7, 2023, recruited counsel for petitioner filed a supplemental petition for review. The state filed a supplemental response on September 7, 2023. The Wisconsin Supreme Court denied the petition for review over two **DISSENTING JUSTICES, ANN WALSH BRADLEY and REBECCA FRANK DALLET, J.J.,** The Court's 12/12/2023 order is reprinted in **Appendix App. 101**.

JURISDICTION IN THIS COURT

This action was filed in the Wisconsin Court of Appeals. The court denied relief on May 10, 2022. Petitioner timely appealed to the state Supreme Court. The Supreme Court of Wisconsin denied review on December 12, 2023. This petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to **28 U.S.C. 1254**.

Pursuant to Supreme Court Rule 149e), petitioner provides the following specific information.

(I) Date the judgment or order sought to be reviewed was entered:

December 12, 2023

(ii) Date of any order respecting rehearing/extension of time:

Not applicable to this Petition

(III) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. 1254(1)

(v) Rule 29.4 statement;

Not applicable to this Petition

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that "[i]n all prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

From its earliest origins, the right to Assistance of Counsel has been understood to preclude the government from unjustifiably refusing to allow the accused to be represented by the COUNSEL OF HIS OR HER CHOICE.

The Fourteenth Amendment to the United States Constitution provides that "[n]o States shall ... deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protections of the laws."

In Wisconsin, Right of Appeal to the state Court of Appeals is guaranteed by the Wisconsin Constitution. See Wis. Const. Arts. I, 21(1), §7, (5)(3), and §808.02 Wis. Stats. See also State v. Perry, 136 Wis.2d 92, 99, 401 N.W.2d 748 (1987)(recognizing defendant's right to appeal must be "a meaningful one.").

STATEMENT OF THE CASE

Twenty-three years ago, petitioner was convicted and sentenced to 30 years confinement for cocaine possession with intent to distribute. In 2002, petitioner hired the Reitz, Mandalman law firm (with Jeffrey Reitz as lead attorney) to represent him in seeking postconviction relief from his drug convictions. Attorney Reitz filed a Notice of Appeal without first filing a postconviction motion and Mandelman then subcontracted with Attorney Tim Provis to file an appellate brief on the petitioner's behalf. Provis filed a brief raising several unpreserved discovery claims without ever contacting the petitioner.

Petitioner sent the state Court of Appeals a pro se request to withdraw his appeal on the grounds that he had not authorized Attorney Provis to file it and he had other issues he wanted to raise - including filing a postconviction motion alleging ineffective assistance of trial counsel. **App. page 160**. On October 22, 2003, the Court of Appeals denied the motion on the ground that the court would not entertain pro se motions from represented litigants. **App, page 156**. The court then affirmed the convictions on the ground that the discovery issues Attorney Provis raised had been waived by the lack of a postconviction motion. (**App. pages 147-53**).

From 2005 until 2020, the petitioner repeatedly and unsuccessfully sought postconviction and appellate relief on a pro se basis. Specifically, on March 1, 2005, the petitioner filed a pro se motion for a new trial in the state trial court under § 974.06 Wis, Stats. On April 20, 2005, the trial court summarily denied relief without explanation. Petitioner appealed to no avail. **App. page 112**.

On August 18, 2006, petitioner filed his first petition for a writ of habeas corpus in the state Court of Appeals, under State v. Knight, alleging ineffective assistance of appellate counsel and commonly referred to as "Knight Petition." That petition was quickly denied for failure to serve the State and for failure to state grounds for relief. The court did not address the merits of that petition. **App. 113, 181-84**.

On February 29, 2016, petitioner filed a second Knight petition, asserting he was denied the counsel of his choice through Attorney Provis unconsented-to work on his first appeal. The court denied the petition. Relying on State ex rel. **Smalley v. Morgan**, 211 Wis.2d 795, 798-99, 565

N.W.2d 805, 807-08 (Ct. App. 1997), the court concluded that petitioner's second Knight petition was untimely. **App. 114**.

However, **Smalley v. Morgan** was subsequently OVERRULED by the Wisconsin Supreme Court in 2019. See **State ex rel. Lopez-Quintero v. Dittmann**, 2019 WI 58, ¶ 10, 387 Wis.2d 50, 61, 928 N.W.2d 480, 485 ("... this case resolves whether the court of appeals may deny an otherwise sufficiently pled habeas petition ex parte, without a hearing or a response from the State, solely because the court of appeals deem it to be untimely. We hod that the court of appeals may not deny a habeas petition ex parte on the ground the petitioner failed to demonstrate he sought relief in a prompt and speedy manner. We OVERRULE **Smalley**.").

On November 2, 2020, petitioner filed his third Knight petition, which was subsequently denied on procedural grounds. **App. 124-27**. Petitioner appealed that order to the Wisconsin Supreme Court, arguing that Judge Stark, who ruled on motions in the petitioner's case when she was a trial court judge, erred in not recusing herself.

On December 15, 2021, the Wisconsin Supreme Court ***VACATED*** the November 24, 2020 Court of Appeals order and ***REMANDED*** the case so that a new panel may rule on the habeas petition.

With the assistance of counsel, an amended habeas petition was filed raising five grounds for relief: **(1)** whether petitioner's right to counsel of his choice was violated when the court of appeals was notified that the Reitz, Mandelman law firm had subcontracted work on petitioner's appeal without consent to Attorney Provis and the court of appeals refused to dismiss the appeal, **(2)** whether Attorney Reitz was ineffective for filing a Notice of Appeal *without* petitioner's consent and *without* first seeking postconviction relief, **(3)** whether Attorney Provis was ineffective for raising unpreserved discovery claims in petitioner's (in name only) direct appeal and failing to challenge other clear errors by Attorney Reitz and petitioner's trial counsel, **(4)** whether the court of appeals erred by denying petitioner's motion to voluntarily dismiss his (in name only) direct appeal in 2003; and **(5)** whether the court of appeals may use its discretionary and equitable powers to restore petitioner's postconviction and appellate rights.

In the amended habeas petition, pro hac vice counsel flagged 4 issues they wanted to pursue if petitioner's direct appeal rights were reinstated: **(1)** trial counsel was ineffective for filing a limited motion to suppress that was devoid of facts/law related to warrantless search of petitioner's cellphone in violation of petitioner's 4th Amendment rights; **(2)** trial counsel was ineffective for orally stipulating to an essential element of the charged offense - identification of suspected substance that police seized without conferring with the petitioner's thereby involuntarily waiving his personal and fundamental right to have a jury determination on element two; **(3)** petitioner's sentence was abnormally long; and **(4)** as of 2003, a key witness at trial was willing to recant her testimony against petitioner.

On May 10, 2022, the court of appeals again denied relief. (**App. 111-117**). Following the denial of his motion for reconsideration (**App. 109-110**), petitioner, pro se, filed a petition for review with the Wisconsin Supreme Court on June 7, 2022. The petition for review raised the following

grounds:**(1)** whether Attorney Reitz provided ineffective assistance of counsel by filing a Notice of Appeal without petitioner's knowledge or consent; **(2)** whether the Court of Appeals erred when it denied petitioner's, pro se, request for voluntary dismissal of his (in name only) direct appeal; **(3)** Did the COurt of Appeals violate petitioner's Right to Counsel of Choice when the court refused to dismiss an appeal in which the appellate briefs were filed by Attorney Provis, a lawyer he never, met, hired, spoken to, or even heard of; and **(4)** whether Attorney Provis provided ineffective assistance of counsel by wasting petitioner's direct appeal on unpreserved discovery claims.

Twelve months later, on June 22, 2023, the Wisconsin Supreme Court recruited counsel to represent the petitioner and order a Supplemental Petition for Review. (**App. 102-106**). On August 7, 2023, a supplemental petition for review was filed raising three issue for review: (1) whether the court of appeals lacked jurisdiction to rule on the merits of petitioner's (in name only) direct appeal upon receiving petitioner's notice of voluntarily dismissal, and whether the court's refusal to dismiss the appeal upon request deprived petitioner of his right to counsel of choice; (2) whether the Knight/Rothering procedural framework is overly complex and therefore should be simplified to allow for adequate resolution of claims of ineffective assistance of counsel; and (3) whether the supreme court should exercise its discretionary statutory or equitable powers to restore petitioner's postconviction and appellate rights or tailor another just remedy.

On September 7, 2023, the respondent filed its supplemental response.

On December 12, 2023, the Wisconsin Supreme Court denied review over **DISSENT** of two justices **ANN WALSH BRADLEY** and **REBECCA FRANK DALLETT**, J.J., dissent. (**App. 101**).

ARGUMENT FOR GRANTING THE WRIT

A. Is Machner Unconstitutional?

State v. Machner, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), held "that it 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. In such situations, then, it is the better rule, and in the client's best interests to require trial counsel to explain the reasons underlying his handling of a case."

This case presents an opportunity for this Court to resolve a conflict with controlling opinions of this Court and bring Alabama, Texas, Wisconsin, and the Eleventh Circuit, with five federal on the other side of the slit, in line with this court's precedent recognizing only an objective inquiry into the adequacy and reasonableness of counsel's performance.

Currently, in Wisconsin, any claim of ineffective assistance of counsel requires a Machner hearing. **State v. Machner**, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979)("This court is of the opinion that where a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged."); see also **State ex rel. Panama v. Hepp**, 2008 WI App 146, ¶22, 314 Wis.2d 112, 124, 758 N.W.2d 806, 812 ("Indeed, Machner requires an evidentiary hearing before granting relief on any claim of ineffective assistance of counsel."); **State v. Balliette**, 2011 WI 79, ¶31, 336 Wis.2d 358, 374, 805 N.W.2d 334, 341 (2011)(commenting that a Machner hearing "includes counsel's testimony to explain his or her handling of the case.").

Since Machner, in at least three (3) published opinions, the Wisconsin Court of Appeals has found that because trial counsel did not testify at the post conviction hearing, an ineffectiveness claim is forfeited. **State v. Mosley**, 201 Wis.2d 36, 50, 547 N.W.2d 806 (Ct. App. 1996)(defendant "waived" review of his ineffectiveness claim because he failed to call trial counsel as a witness). Without trial counsel's testimony "to explain the reasons underlying his handling of [the] case," we cannot determine if counsel's conduct was objectively unreasonable. **Machner**, 92 Wis.2d at 804. See also **State v. Curtis**, 218 Wis.2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998)(evidentiary hearing required to give trial counsel a chance to explain his or her actions). Finally, **State v. Ziebart**, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Wisconsin joins only Alabama, Texas, and the Eleventh Circuit in requiring trial counsel's testimony, with five federal circuits on the other side of the split. (In fact, the Seventh Circuit has upheld a grant of habeas relief to a Wisconsin inmate who declined to call trial counsel, despite the state's contrary rule).

While the state of Wisconsin has the prerogative to employ its own procedural rules, the right to effective assistance of counsel stems from the Sixth Amendment. See **Strickland v. Washington**, 466 U.S. at 687, 104 S.Ct. 2064 (1986). Yet, nothing in Strickland or it progeny "requires prisoners seeking to prove ineffective assistance to call the challenged counsel as a witness." **Pidgeon v. Smith**, 785 F.3d 1165, 1171 (7th Cir. 2015)(holding that prisoner was not required to call challenged counsel as a witness because counsel's testimony would not have made a difference).

If the challenged counsel's testimony would not make a difference in the process of determining ineffectiveness, then the defendant should not be required to obtain counsel's testimony. There have been, and will continue to be, as the instant case, instances where trial, postconviction, or appellate counsel's conduct is so deficient that their testimony at a hearing would be unnecessary to determine ineffectiveness. See E.g. Peterkin v. Horn, 176 F.Supp.2d 342, 376-77 (E.D. Pa. 2001), amended on reconsideration in part, 179 F.Supp.2d 518 (E.D. Pa. 2002)(finding trial counsel was "blatantly deficient" in "fail[ing] to provide notice of an alibi defense and to interview alibi and fact witnesses for the defense," and "appellate counsel's was likewise ineffective in failing to raise these claims earlier").

Furthermore,at least two justices and a former justice of this Court believe a mandate like Machner - requiring trial counsel's testimony to succeed on an ineffective-assistance claim is contrary to Strickland v. Washington; and therefore is unconstitutional. The three (3) (Sotomayor, Ginsbury, and Kagan) dissented from this Court's denial of certiorari in Reeves v. Alabama, 583 U.S. 979 (Nov. 13, 2017). From the dissent:

There can be no dispute that the imposition of a categorical rule that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim contravenes our decisions requiring an objective inquiry into the adequacy and reasonableness of counsel's performance based on the full record before the court. Even Alabama does not defend such a rule....

This Court has never, however, required that a defendant present evidence of his counsel's actions or reasoning in the form of testimony from counsel, nor has it ever rejected an ineffective-assistance claim solely because the record did not include such testimony. Rather, Strickland and its progeny establish that when a court is presented with an ineffective-assistance-of-counsel claim, it should look to the full record presented by the defendant to determine whether the defendant satisfied his burden to prove deficient performance. The absence of counsel's testimony may make it more difficult for a defendant to meet his burden, but that fact alone does not absolve a court of its duty to look at the whole record and evaluate the reasonableness of counsel's professional assistance in light of that evidence.

(Reeves, 583 U.S. at, 138 S.Ct. 22, 23)

In sum, it is uncontroversial that courts are empowered to develop the evidentiary record of ineffectiveness in the manner they see fit. It necessarily follows that, sometimes, the testimony of challenged counsel is unnecessary. The instant case, is one of those cases; Petitioner argued that his retained counsel, on his own volition, and without knowledge or consent of the Client, initiates an unauthorized direct appeal, and then outsourced the appellate representation to another lawyer not affiliated with the firm and whom made a bold decision to file a direct appeal for a clarinet who he, himself, had never spoken to and who had not retained him. The harm was compounded by the non-consented counsel filing an appellate brief which raised only unpreserved issues. The State Court of Appeals order, dated May 22, 2022, lay out the following relevant facts:

"We summarize the relevant facts from the lengthy procedural history of this case as follows: In 2003, Northern hired the Mandelman law firm (with Jeffrey Reitz as lead attorney) to represent him in seeking postconviction relief from his drug convictions. Unbeknownst to Northern, Reitz filed a notice of appeal without first filing a postconviction motion, and Mandelman then subcontracted with Timothy Provis to file an appellate brief on Northern's behalf. Provis filed a brief raising several discovery claims without ever contacting Northern. Northern sent this court a pro se request to withdraw his appeal on the grounds that he had not authorized Provis to file

it and he had other issues he wanted to raise --including filing a postconviction motion alleging ineffective assistance of trial counsel. We denied the motion on the ground that we would not entertain pro se motions from represented litigants. We then affirmed the conviction on the ground that the discovery issues Provis raised had been waived by the lack of a postconviction motion."

(See Court of Appeals decision, dated May 10, 2022 at page; see also APP at 112)

Accordingly, a decision of this Court, reaffirming and clarifying that this Court has never required that a defendant present evidence of counsel's actions or reasoning in the form of testimony directly from counsel.

II(A) Did Attorneys Reitz and Provis Engage In Impermissible Advocacy Where Attorney Reitz Filed A Notice of Appeal Without Petitioner's Knowledge or Consent and Then Outsourced the Appellate Briefing To Attorney Reitz, Who Then Filed A Defective Appellate Brief And Thereby Constituting A Per Se Violation Of Petitioner's Sixth Amendment Rights

Under Wisconsin law, claims for ineffective assistance of appellate counsel are brought in the appellate court. **State v. Knight**, 168 Wis.2d 509, 518, 484 N.W.2d 540, 544 (1992), whereas claims for ineffective assistance of postconviction counsel are routed through the trial court, **State ex rel. Rothering v. McCaughtry**, 205 Wis.2d 675, 683, 556 N.W.2d 136, 140 (Ct. App. 1996)(extending logic of **Knight**, but further clarifying that Knight "does not foreclose the possibility that ineffective postconviction counsel ***could be a sufficient reason for permitting an additional motion for postconviction relief under 974.06***...").

In 2013, the Wisconsin Supreme Court held that ineffective assistance of counsel for failure to file a postconviction motion should be raised in a Knight petitioner filed in the Court of Appeals. See **State v. Starks**, 2013 WI 69, ¶ 4, 349 Wis.2d at 281, 833 N.W.2d at 150. But that decision was reversed in 2020, when the Wisconsin Supreme Court held that the failure to file a postconviction motion constituted ineffectiveness of **postconviction counsel**, which ostensibly occurred in the trial court. See **State ex rel. Warren v. Meisner,** 2020 WI 55, ¶ ¶ 37-46, 392 N.W.2d at, 15-18, 944 N.W.2d at 595-97.

Additionally, The decision to appeal is a fundamental right that is personal to the defendant, and only he, not his attorney, can decide whether to appeal or not. See **Fay v. Noia**, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Jones v. Barnes, 463 U.S. 745, 751 (1983)("recognized that the accused has 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); see also **State v. Neave**, 117 Wis.2d 359, 344 N.W.2d 181 citing **State v. Albright**, 96 Wis.2d 122, 291

N.W.2d 487 cert. denied 449 U.S. 957, 101 S.Ct. 367, 66 L.Ed.2d 223 (1980). In Albright, this court discussed the principles governing the waiver of constitutional rights in the course of deciding whether the defendant had waived her right to testify. The court stated that there are certain "fundamental" rights which can only be waived by the defendant personally. This category of rights includes: the decision to appeal, **Fay v. Noia**, 372 U.S. 391 [83 S.Ct. 822, 9 L.Ed.2d 837] (1963). Therefore, an attorney is obligated to consult with the Client before initiating and litigating an appeal on behalf of the Client.

Here, shortly after sentencing, Petitioner filed a Notice of Intent to Seek Postconviction Relief with the Circuit Court, the prerequisite for asserting an ineffective assistance of trial counsel claim on direct appeal. The Notice of Intent also noted that Petitioner had retained Attorney Jeffrey Reitz from the law firm of Reitz, Mandelman & Lawent ("the Firm").

A. The Petitioner had a constitutional right to appeal, the right of counsel and the right to counsel of choice upon appeal

1. Right to Appeal

Criminal defendants in Wisconsin enjoy a constitutional Right to Appeal their convictions to the state Court of Appeals, see **Wis. Const. Arts. I, § 21(1)**, 7, § 5(3), and a corresponding "statutory right to seek postconviction relief through a postconviction motion," **State ex rel. Kyles v. Pollard,** 2014 WI 38, ¶ 21, 354 Wis.2d 626, 847 N.W.2d 805; see also **WIS. STAT § 808.01(1)**(Stating that "appeal' means review in an appellate court); **WIS. STAT § 809.30(1)** ("Postconviction relief" means an appeal or a motion for postconviction relief in a criminal case); and WIS. STAT § 809.30(2)(H)("The person shall file in circuit court ... a notice of appeal or motion seeking postconviction ... relief within 60 days after the later of the service of the transcript or circuit court case record').

2. The Right to Counsel

Because defendants in Wisconsin are "entitled to counsel while seeking relief through a postconviction motion under **Wis. Stat. § 974.02** or a direct appeal," see **Kyles v. Pollard**, 2014 WI 38 , ¶ 23, 847 N.W.2d at 810 (citing State v. Evans, 2004 WI 84, ¶ 30, 273 Wis.2d 192, 682 N.W.2d 784; **State v. Peterson**, 2008 WI App 140, ¶ 11, 314 Wis.2d 192, 757 N.W.2d 834) and to the effective assistance of counsel on their first appeal as a right in state courts, Douglas v. California, 372 U.S 353 (1963), the appeal must be meaningful. see **State v. Perry,** 136 Iws.2d at 99 (recognizing defendant's right to appeal must be a "meaningful one").

The Right to Counsel is intended to help protect defendants' rights because criminal defendants cannot be expected to do so themselves. **Evitts v. Lucey**, 469 U.S. 387, (1985) ("An unrepresented appellant -- like an unrepresented defendant at trial -- is unable to protect the vital interests at stake").

Thus, it is the duty and responsibilities of the lawyer to conduct a "conscientious examination" of the record, see **State ex rel. Panama v. Hepp**, 2008 WI App 146, ¶ 14, 314 Wis.2d 112, 120, 758

N.W.2d 806, 810; and explore all avenues leading to meaningful appellate review of a conviction. It is necessary, therefore, to consider all circumstances surrounding a trial attorney's representation of a client at trial. Of course, a postconviction attorney must discuss with the defendant his or her right to appeal, including the option to file a postconviction motion in the trial court and obtaining consent of the client to initiate any appeal. (Emphasis added).

Finally, functions of Wisconsin's appellate criminal procedure makes a distinction between the term "postconviction counsel" and "appellate counsel" even though one attorney is responsible for preparing and filing either a **Rule 809.30(2)(h) / WIS. STAT § 974.02** motion in the trial court of a direct appeal or both.

B. Petitioner's Retained Counsel Takes Petitioner's Money And Then Abandons Him

Attorney Reitz did not pursue any postconviction relief, but instead sat on the case for over six months, thereby waiving Petitioner's postconviction options related to any claim of ineffective assistance of trial counsel claim. Further, without consulting with Petitioner, and without Petitioner's consent or awareness, Attorney Reitz, on his own volition, initiated a direct appeal on behalf of Petitioner.

Throughout most of the calendar year 2003, Petitioner tried, and failed to have any meaningful participation in developing the legal strategy that was ultimately dictated by Attorney Reitz. For example, in June 2003, after the opening brief had already been filed with the state Court of Appeals, Attorney Reitz sent a copy of the brief to Petitioner. Thereafter, the Petitioner wrote to Attorney Reitz asking why the brief did not address certain legal issues that Petitioner anticipated to be part of his appeal.

C. A Stranger Helms Petitioner's Direct Appeal without Petitioner's Knowledge or Consent.

Unbeknownst to Petitioner, Attorney Reitz had subcontracted the appellate briefing to Attorney Tim Provis -- an attorney who was not affiliated with the Reitz Firm, and whom Petitioner did not know and had never even spoken to -- without first notifying Petitioner or obtaining his consent. **See APP 162.** ("Finally, looking at the cover of the Appellate brief, I noticed that an attorney's name (Tim Provis) out of Madison, Wisconsin is printed under Attorney Mandelman's name, who is he? And what does he have to do with my appeal [?]"). Petitioner then wrote additional letters to Attorney Reitz seeking answers to his questions, but he did not receive any timely response.

When the Reply Brief in Petitioner's appeal came due in August 2003, Attorney Provis again drafted and filed it without ever discussing its contents with Petitioner prior to its submission.

See APP 161 (Aug 26, 2003 letter from Attorney Provis to Petitioner stating he "did not receive [Petitioner's correspondence] in time to respond to [Petitioner's] requests before the reply brief was due on August 21, 2003.")

Indeed, the first time that Petitioner personally spoke with Attorney Provis was by phone in September 2003, after the direct appeal had been fully briefed. Not surprisingly, the brief filed by Provis failed to raise any issue that were preserved for appeal, and was summarily dismissed by the state Court of Appeal on the grounds that the discovery issues raised by Provis were not preserved for appellate review. **See APP 147-53**. To that end, Petitioner was not actually represented by counsel because he never hired Attorney Provis. Petitioner hired the Reitz law firm and they hired Attorney Provis without Petitioner's permission.

It is objectively unreasonable for an attorney to file a Notice of Appeal without first discussing the merits of all potential issues. Once the attorney has identified all of the issues presented by the case, counsel must discuss with his or her client the merits, risks, and benefit of pursuing each of the identified issues. While the final decision as to which issue(s) can and should be raised is for the attorney, many issues involve risks to the Client and the Client's decision regarding the issues should be controlling on the lawyer.

It is also objectively unreasonable for an attorney to file an appellate brief in the Court of Appeals without first determining whether the Client's claims require a postconviction motion to properly preserve the issue(s) for appeal. There is no strategic basis for failing to file the appropriate postconviction motion. A defendant suffers prejudice at the hands of a lawyer who fails to properly preserve claims for appeal.

In **Roe v. Flores-Ortega**, 528 U.S. 470, 475, 478, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), after reviewing testimony from an evidentiary hearing, this Court concluded that "the record from the hearing was deficient," and the court remanded for further proceeding. Id. at 487 (explaining, "[w]here defendant neither instructs counsel to file appeal nor asks that appeal not be taken, question whether counsel has performed deficiently by not filing notice of appeal is best answered by first asking whether counsel in fact consulted with defendant about appeal; if counsel consulted with defendant, counsel performed in professionally unreasonable manner only by failing to follow defendant's express instructions with respect to appeal, but if counsel did not consult with defendant, court must determine whether counsel's failure to consult with defendant itself was deficient performance." Id.

The Roe court went on to say "[w]e employ the term "consult" to convey a specific meaning-advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a

professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. See supra, at 1034 and this page. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?" Id. at 478.

This Court should grant Petitioner relief (remand to state court of appeal with instructions) because Petitioner was denied his right to effective assistance of counsel through his postconviction and appellate process. "A defendant is entitled to counsel while seeking relief through a postconviction motion under s. 974.02 Wis. Stat. or a direct appeal." State ex rel. **Kyles v. Pollard**, 2014 WI 38, ¶23, 354 Wis.2d 626, 636, 847 N.W.2d 805, 810. That right "includes the guarantee of effective assistance of counsel." **State ex rel. Flores v. State**, 183 Wis.2d 587, 605, 516 N.W.2d 362, 367 (1994).

In the instant case, Petitioner had zero input into the decision whether to file the Notice of Appeal because Attorney filed no post-trial motions, nor discuss any potential appellate claims because there had been a serious "breakdown" in communications with Attorney Reitz and Attorney Reitz subcontracted the appellate representation to Attorney Provis without the Client's permission, and because neither attorney communicated with Petitioner concerning the direct appeal.

Petitioner has never been permitted to litigate: (1) a motion to suppress the results of the illegal search of his cell phone that yielded the core evidence used against him at trial; (2) his claims of ineffective-assistance of trial counsel for, among other things, not filing the appropriate motion to suppress cell phone derivative evidence and for counsel's stipulating to an essential element of the crime without conferring with Petitioner; and (3) ineffective assistance of postconviction and appellate counsel for forfeiting Petitioner's postconviction rights, outsourcing his appeal, and filing a defective appellate brief raising only unpreserve claims, all against Petitioner's knowledge and consent.

II(B) Did Waiver of Petitioner's Postconviction Options, A Failed Appeal, And the Denial of His Efforts At Subsequent Relief Deprive Petitioner Due Process

Attorneys Reitz and Provis were deficient in failing to communicate or consult with Petitioner during direct appeal process. Specifically, Attorney Reitz ignored the postconviction process entirely and Provis moved forward with an appeal of waived issues. Each attorney's deficiencies prejudiced Petitioner's appellate rights at the time, and handicapped Petitioner indefinitely by depriving him of evidence that could only have been obtained at a postconviction evidentiary hearing.

Had Reitz and Provis not ignored the postconviction process, Petitioner could have raised ineffective assistance of trial counsel claims in postconviction filing as required by law and earned

a Machner hearing. See State v. Machner, 92 Wis.2d 979, 803, 285 N.W.2d 905, 908 (Ct. App. 1979). Of course, in Wisconsin, "[a] Machner hearing is a prerequisite for consideration of an ineffective assistance claim." **State v. Sholar**, 2018 WI 53, ¶50, 381 Wis.2d 560, 593, 912 N.W.2d 89, 105.

At a Machner hearing (something that has alluded petition for more than 20 years), Petitioner's trial counsel could have been questioned about her stipulating to an essential element - that all substances recovered by the police during their investigation were cocaine (Element #2), without consulting Petitioner about conceding this element of the charged offense, or having the trial judge conduct a colloquy with petitioner regarding the same. See Wis. Stat. 972.02 ("(1) Except as otherwise provided in this chapter, criminal cases shall be tried by a jury selected as prescribed in s. 805.08, unless the defendant waives a jury in writing or by statement in open court or under s. 967.08(2), on the record, with the approval of the court and the consent of the state."); **State v. Livingston**, 159 Wis.2d 561, 569, 464 N.W.2d 839, 843 (1992)(holding that a defendant must personally, and on the record, consent to waiver of jury trial right). In **Denson**, the Wisconsin supreme court determined that, the remedy of a new trial remains the appropriate remedy for a defendant who did not, on the record, personally and affirmatively waive his or right to a jury trial is consistent with an express statutory mandate. **State v. Denson**, 2011 WI 70, ¶¶ 68-71, 335 Wis.2d 681, 709-10, 799 N.W.2d 831, 845-46 (citing **State v. Livingston**, 159 Wis.2d at 573, 464 N.W.2d 839).

A personal colloquy with a defendant applies to waiver of jury trial on all the elements of the crime or only some of them. State v. Warbelton, 2009 WI 6, ¶59, 315 Wis.2d 253, 278, 759 N.W.2d at 570; see also State v. Villareal, 153 Wis.2d 323, 332, 450 N.W.2d 519 (1989).

Were such a hearing held today on this record, Reitz would be questioned about his failure to pursue postconviction relief, and subcontracting the appeal to Attorney Provis, without conferring with Petitioner. If Provis were questioned at a Machner hearing, he would be asked why he believed four days was sufficient time to read the entire record, draft an appellate brief, why he raised only unpreserved issues, and why he failed to communicate with Petitioner prior to filing the brief. Altogether, a Machner hearing would have provided the courts, with facts relevant to Petitioner's postconviction claims and failed direct appeal.

Tough the record is limited and may need amplification, it contains sufficient information to support a finding that both Attorney Reitz and Attorney Provis were per se ineffective. Attorney Reitz unilateral decision to ignore Petitioner's well documented desire to pursue postconviction relief. Recall the Court of Appeals' May 10, 2022 decision:

"We summarize the relevant facts from the lengthy procedural history of this case as follows: In 2003, Northern hired the Mandelman law firm (with Jeffrey Reitz as lead attorney) to represent him in seeking postconviction relief from his drug convictions. Unbeknownst to Northern, Reitz filed a notice of appeal without first filing a postconviction motion, and Mandelman then

subcontracted with Timothy Provis to file an appellate brief on Northern's behalf. Provis filed a brief raising several discovery claims without ever contacting Northern. Northern sent this court a pro se request to withdraw his appeal on the grounds that he had not authorized Provis to file it and he had other issues he wanted to raise --including filing a postconviction motion alleging ineffective assistance of trial counsel. We denied the motion on the ground that we would not entertain pro se motions from represented litigants. We then affirmed the conviction on the ground that the discovery issues Provis raised had been waived by the lack of a postconviction motion."

(SEE APP 112).

And instead filed Petitioner's Notice of Appeals was unreasonable and prejudiced Petitioner's opportunity for any meaningful relief. That harm was compounded by Attorney Provis' bold decision to file a direct appeal for a client who he had never spoken to and who had not retained him. This amounted to a grossly unethical deprivation of Petitioner's right to effective counsel guaranteed by the Sixth Amendment. Petitioner remained bound to the aforementioned errors nearly 23 years later.

The errors of the past, however, can still be undone. Petitioner respectfully moves this Court to reexamine the actions and failures to act of Reitz, Provis and the Wisconsin Court of Appeals.

III. The Wisconsin Court of Appeals Deprived Petitioner Counsel of his Choice, Where Petitioner, in His Notice for Voluntary Dismissal Explained, With Specificality, That his Retained Counsel Had Subcontracted Out Petitioner's Appellate Representation To A Different Attorney Without Knowledge or Consent of Petitioner. But the Court refused to Dismiss the Direct Appeal Upon Petitioner's Request Via Notice of Dismissal

On June 17, 2002, Petitioner was sentenced to 30 years of confinement and 10 years of extended supervision on Count 1 and 20 years of confinement and 10 years of extended supervision on Count 3, to be served concurrentiy.

Three days later, Petitioner filed a Notice of Intent to Seek Postconviction Relief with the Circuit Court, noting that he had retained attorney Jeffrey Reitz from the law firm of Reitz, Mandelman, & Lawent LLC ("the Firm") to handle his postconviction and appellate representation. APP XXX. Among other claims, Petitioner planned to raise an ineffective assistance of trial counsel claim in the Circuit Court. Petitioner believed that many aspects of his trial needed to be reviewed by an appellate court, including issues related to the search of his cell phone (i.e. answering incoming calls) by law enforcement without a warrant and trial counsel stipulating to an element of the crime without neither trial counsel nor the trial court judge conferring with regarding the stipulation to determine whether he had agreed with the stipulation.

From that point onward, however, the Firm effectively abandoned Petitioner. Despite his repeated efforts to contact the Firm, Petitioner did not have a single conversation with his attorney for the remainder of the 2002 calendar year.

On January 22, 2003, unbeknownst to Petitioner and contrary to his wishes to first seek postconviction relief in the Circuit Court, Attorney Reitz relinquished Petitioner's postconviction rights and the opportunity for an evidentiary hearing on his ineffective assistance of trial counsel claims. Specifically, Attorney Reitz failed to file any motion for postconviction relief and instead filed a Notice of Appeal with the state Court of Appeals.

C. A Stranger Files An Appellate Brief On Behalf of Petitioner Northern

On April 22, 2003, unbeknownst to Petitioner and without his consent, conflicted attorney Provis filed an appellate brief raising only unpreserved discovery claims. Petitioner was unaware that the Firm subcontracted appellate briefing to Provis, an attorney unaffiliated with the Firm. Petitioner was never consulted on the substance of the appellate brief, nor did he receive a copy of the brief until six weeks after its filing. Several months later, Petitioner learned that Attorney Provis only had roughly four (4) days before the appellate brief was due to review the entirety of the case file and write a brief.

Between June and October 2003, Petitioner repeatedly tried to obtain answers from Reitz regarding his appellate strategy and sought some control over his own case.

On October 1, 2003, after months without any control over his own case, Petitioner wrote to Attorney Reitz directing him to dismiss the appeal. **See APP 160.** In another letter dated a few days later, Petitioner reiterated to Attorney Reitz that he wanted Attorney Reita to dismiss the pending appeal, which was permitted by Wisconsin statute 809.18, in order to raise other issues that had not yet been litigated in the Circuit Court in the postconviction context. Attorney Retiz did not timely respond to any of Petitioner's written correspondence.

On October 17, 2003, after waiting more than two weeks without any response from Attorney Reitz, Petitioner filed a pro se motion with the state Court of Appeals seeking to voluntarily dismiss his appeal because, among other reasons, the appeal was initiated without his consent, retained counsel had not been communicating with him, Provis raised unpreserved discovery issues, and his retain attorneys (Reitz and the Firm) were not responding to his requests for information. **APP 157.** Five days later, on October 22, 2003, the state Court of Appeals issued a terse written order denying Petitioner's notice of voluntarily dismissal, reasoning that Petitioner was "statutorily barred from proceeding pro se during the pendency of an appeal in which he is represented by counsel." **APP 156** (the "October 22, 2003 Order"). The Court of Appeals did not cite any authority for this conclusion. Nothing in the law or inherent to the nature of appellate practices would justify blockading fundamental decisions that have uniformly been held to be in the province of the criminal defendant. See **The Defense Function Standards 4 - 5.2, 4 - 8.2; Criminal Appeals Standards 21-1.1 (1980); see also Model Code of Professional Responsibilities EC 7-7 (1979).**

The next day, on October 23, 2003, Attorney Reitz responded to Petitioner's (now rejected) request to voluntarily dismiss his appeal, stating that he "[did] not believe that this would be in your best interest and would request that you contact us immediately to discuss this matter." **APP 155**

Roughly two weeks later, on November 4, 2003, the Court of Appeals issued an opinion and order rejecting the arguments raised by Attorney Provis on appeal and affirming Petitioner's conviction. **APP 147-53**. On December 3, 2003, and without Petitioner's consent, Attorney Reitz filed a Petition for Review with the Supreme Court of Wisconsin. That petition was subsequently denied on March 23, 2004. **APP 145**

D. Petitioner was Deprived of His Right to Counsel of His Choice When a Stranger Filed a Brief in His Name and the Court of Appeals did not permit Petitioner to Withdraw His Appeal.

When a defendant is denied his counsel on appeal, it is a violation of his 6h Amendment Rights and he need not show ineffectiveness of counsel or prejudice. **United States v. Gonzalez-Lopez**, 548 U.S. 140, 148 (2006). "Denial of the right to counsel on appeal, **including the right to counsel of choice,** is a structural error that can never be harmless." **Cottenham v. Jamrog**, 248 F. App'x 625, 634, 2007 WL 2382359, at 9 (6th Cir. 2007). "Deprivation of the right 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 US. at 148.

A defendant's Sixth Amendment right is implicated when he informs the court that he is not represented by his chosen counsel. See Id. When a defendant is not given notice that counsel is withdrawing or has changed, this constitutes a denial of counsel of choice. See Cottenham, 248 F. App'x at 635.

Petitioner was denied his counsel of his choice when Reitz handed off the case to Provis without Petitioner's consent and the State Court of Appeals denied Petitioner's request to dismiss his appeal. Nearly identically, in **Cottenham**, the defendant hired an attorney for his appeal and later learned a different attorney represented him, without his consent. See **Id at 636**. The defendant attempted to dismiss appellate counsel; eventually, the trial court appointed new counsel, but not with enough time for new counsel to file an appeal. See Id. The court held that this constituted denial of counsel of choice and remanded the case with instructions to grant a conditional writ of habeas corpus and allow defendant opportunity to file a notice of appeal. See Id.

In the instant case, Petitioner had no opportunity to contest the substitution of Provis as counsel and could only move to withdraw his appeal. The State Court of Appeals could have allowed Petitioner to withdraw and assess the situation with his counsel. There was no reason for the Court of Appeals to deny Petitioner's request to withdraw in order to properly substitute counsel. In a trial court, when a defendant requests to substitute counsel, the court must balance the

defendant's right to counsel of his or her choice with the court's interest in an expeditious trial. See **Gonzalez-Lopez**, 548 U.S. at 152; **State v. McDowell**, 2004 WI 70, ¶ 66, 272 Wis.2d 488, 681 N.W.2d 500; **State v. Kazee,** 146 Wis.2d 366, 371, 432 N.W.2d 93 (1988); **State v. Lomax,** 146 Wis.2d 356, 359, 432 N.W.2d 89 (1988).

Here, there was, of course, no threat to an expeditious trial and the state Court of Appeals had not yet ruled on Petitioner's appeal. There were no true threats to efficiency in granting Petitioner's motion to withdraw his direct appeal. Instead, the court's denial of the motion forced Petitioner to rely on the representation of counsel he did not know or choose, constituting a denial of his right to appellate counsel of choice.

This denial alone is sufficient to merit relief without demonstrating deficiency or prejudice, but those factors exist in spades.

Given Petitioner's Notice of Voluntary Dismissal, the Court of Appeals Did Not Have Jurisdiction To Issue An Opinion On the Merits Of Petitioner's Direct Appeal, and Therefore Violated Petitioner's Due Process Rights.

This case presents the novel legal issue of the Court of Appeals issuing an opinion and order deciding the merits of an appeal over which it no longer had jurisdiction. Though § 809.18 and State v. Lee make plain that the right to voluntarily dismiss an appeal lies with the appellant -- and is not conditioned on any approval by a court, the respondent, or anyone else.

Up until now, the Wisconsin Supreme Court has strongly suggested that a notice of voluntary dismissal strips the Court of Appeals of jurisdiction over a case. In **Jones**, the Wisconsin Supreme Court held:

"[State v.] Lee mandates that Jones' notice of voluntary dismissal, filed in this case, the day before the court of appeals issued its opinion in this matter, must be given effect.... We conclude the court of appeals' decision dated December 11, 2001 must be withdrawn even though the panel of the appellate court deciding that appeal might not have been aware on that date of Jones' notice of voluntary dismissal."

2002 WI 63, ¶ ¶ 7-8, 252 Wis.2d at 595-96, 645 N.W.2d at 611-12; See also **In re Silverman's Est.**, 124 Wis. 459, 102 N.W. 891, 892 (1905)("There can be no doubt that, in the absence, at least, of statutory provisions to the contrary, the dismissal of an appeal removes the case from the appellate court, and places the parties in the same condition as they were before the appeal was taken.").

The Wisconsin Court of Appeals has gone a step further and expressly stated that § 809.18 speaks to the appellate jurisdiction of the court of appeals, in contrast to the scope of its original and supervisory jurisdiction. **In Int. of Peter B.**, 184 Wis.2d 57, 68, 516 N.W.2d 746, 751 (Ct. App. 1994).

Here, in 2003, the Wisconsin Court of Appeals should have granted the petitioner's October 17, 2003, motion to dismiss his (in name only) direct appeal. (**App. 157**). Instead, the Court of Appeals arbitrarily denied the petitioner's October 17th Notice of dismissal out of hand. (**App. 156**).

Under **Wis. Stat. § 809.18(1)**, "[a]n appellant may dismiss a filed appeal by filing a notice of dismissal in the court{.]" The **1978 Judicial Council Notes to § 809.18** further explain "[a]n appeal may be dismissed by the appellant at any time prior to a court's decision on the appeal without approval of the court or the respondent." The Wisconsin Supreme Court has interpreted § 809.18 as essentially providing for a one-way command to the Court of Appeals by an appellant:

"{T]he court of appeals must dismiss an appeal when an appellant files a notice of voluntary dismissal pursuant to Wis. Stat. § (Rule) 809.18 before the court of appeals issue a decision on the appeal. Upon dismissal of an appeal, the appellant is returned to the same position occupied before the appeal was initiated."

State v. Lee, 197 Wis.2d 959, 972, 542 N.W.2d 143, 148 (1997).

This is because "[t]he language of [§ 809.18] clearly places the decision of voluntary dismissal with the appellant; it makes no reference to the Court of Appeals' authority to reject or deny a notice of voluntary dismissal." Id., 197 Wis.2d at 964, 542 N.W.2d at 144.

Put another way, "consent of neither the court nor the parties is required when an appellant voluntarily chooses to dismiss an appeal before the court of appeals issues a decision." 197 Wis.2d at 967, 542 N.W.2d at 146.

This outcome is required not just by the statutory text but also by considerations of "fairness of the appellee" and "judicial economy," both of which "outweighs any public interest in continuing an appeal which an appellant wishes to dismiss." Id., 197 Wis.2d at 969, 542 N.W.2d at 146-47; see also **Anheuser v. W. Lawn Cemetery Co.**, 230 Wis. 262, 282 N.W. 577, 578 (1938) ("Mrs. Anheuser notified her attorneys in due season that she desired to have her appeal dismissed. We are of the opinion that she is entitled to discontinue.").

Since 1978, appellants have had a statutory right to voluntarily dismiss their own direct appeal by "filing a notice of dismissal in the court or, if the appeal is not yet filed, in the circuit court." Wis. Stat. 809.18; See id. (Quoting 1978 Judicial Council Note)(("An appeal may be dismissed by the appellant at any time prior to a court decision on the appeal without approval of the court or the respondent." (Emphasis added)).

Since **State v. Lee**, an appellant's right to voluntarily dismiss their direct appeal has been affirmed time and again by the Wisconsin Supreme Court. See, e.g., **State ex rel. Hass** v. **McReynolds**, 2002 WI 43, ¶ 8, 252 Wis.2d 133, 138-39, 643 N.W.2d 771, 774 (2002)(citing Lee, 197 Wis.2d at 972, 542 N.W.2d at 148 (concluding Court of Appeals was "required to honor Hass's request to withdraw the appeal." because it "had not yet issued an opinion in the appeal").

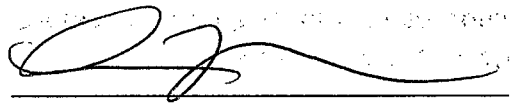
Keeping these principles in mind, the Court of Appeals should have dismissed petitioner's (in name only) direct appeal. Petitioner filed his request for voluntary dismissal on October 17, 2003, (**App. 157**), over three weeks before the Court of Appeals rendered its decision rejecting the appeal on the merits on November 4, 2003. (**App. 147-53**). Indeed, the Wisconsin Supreme Court held that a Notice of Voluntary Dismissal filed just one day before the issuance of a decision by the court of appeals is sufficient to require prompt dismissal of the appeal. See **Jones**, 2002 WI 53, ¶ 8, 252 Wis.2d at 596, 645 N.W.2d at 612.

CONCLUSION

Mr. Northern asks this Court to accept a certiorari review of his appeal no. 2020AP1811-W in order to reaffirm that there is meaningful appellate review of ineffective-assistance claims and judicially-inflicted harms.

Date this 20th day of February, 2024

Respectfully submitted,



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