No. 25-5859

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL M. NIGL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE WISCONSIN COURT OF APPEALS

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Paul M. Nigl, #280834
Kettle Moraine Correctional Institution
Post Office Box 282
Plymouth, Wisconsin 53073-0282

Pro se for Petitioner

QUESTION PRESENTED

1. Whether the Wisconsin Court of Appeals unfairly blocked Petitioner access to his *only* remaining avenue for postconviction relief?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner is Paul M. Nigl. Counsel for petitioner was Paul M. Nigl, Kettle Moraine Correctional Institution, Post Office Box 282, Plymouth, Wisconsin 53073-0282.

Respondent is the State of Wisconsin. Counsels for respondent were Jennifer L. Vandermeuse and John Blimling, Assistant Attorney Generals, Wisconsin Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857.

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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

The opinion and orders of the Wisconsin Court of Appeals appear in Appendix A to the petition and are reported at *State of Wisconsin ex rel. Paul M. Nigl v. Cheryl Eplett*, 2024AP1420-W (August 2, 2024), reconsideration denied (Aug. 12, 2024).

The order of the Wisconsin Supreme Court appears in Appendix B to the petition and is reported at *Nigl v. Eplett*, 2024AP1420-W (June 25, 2025).

JURISDICTION

The order of the Wisconsin Supreme Court denying discretionary review, and affirming the opinion and orders of the Wisconsin Court of Appeals which denied petitioner's petition for writ of habeas corpus without ordering a response, was entered on June 25, 2025. A copy of the decision denying discretionary review appears at Appendix B. Pursuant to 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed, within ninety (90) calendar days of the entry of the judgment, on or before September 22, 2025. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On May 10, 2001, Petitioner Paul M. Nigl (Nigl) was convicted by a jury in Winnebago County Circuit Court, Oshkosh, Wisconsin on two counts of homicide by intoxicated use of a vehicle and two counts of homicide by use of a vehicle with a prohibited blood alcohol content in violation of Wis. Stats. § 940.09(1)(a) and § 940.09 (1)(b). Nigl was sentenced to 100 years of imprisonment, consisting of 60 years initial confinement and 40 years extended supervision under Wisconsin's truth-in-sentencing (TIS) legislation.

A. Direct Appeal

On October 14, 2002, Nigl's privately retained attorney, Ralph J. Sczygelski (Sczygelski) (functioning as *postconviction counsel*) filed a motion for postconviction relief, pursuant to Wis. Stats. § (Rule) 809.30(2)(h) and § 974.02(1), alleging numerous claims of ineffective assistance of trial counsel. Sczygelski's postconviction motion did not allege trial counsel's ineffectiveness for the failure to communicate a plea offer. On February 5, 2003, the circuit court entered an order summarily denying the postconviction motion to vacate judgment, reverse jury verdict and/or to reduce sentence.

Sczygelski (now functioning as *appellate counsel*) filed a notice of appeal and during briefing to the Wisconsin Court of Appeals, he argued that: (1) Nigl's blood test results should have been suppressed, (2) Nigl was denied effective assistance of counsel because trial counsel failed to request an instruction on a lesser-included offense, (3) the trial court should have granted Nigl's request for a continuance, and (4) Nigl's sentence was the result of an erroneous exercise of discretion.

On March 3, 2004, the Wisconsin Court of Appeals affirmed the circuit court's order. The Wisconsin Supreme Court denied discretionary review.

B. Federal Habeas Review

On February 25, 2005, Nigl, *pro se*, filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, arguing that his state court conviction and sentence were imposed in violation of the United States Constitution. The district court denied the petition and dismissed the case. The Court of Appeals for the Seventh Circuit refused to issue a certificate of appealability.

C. Collateral Review

On January 19, 2009, Nigl, *pro se*, filed a collateral motion, pursuant to Wis. Stat. § 974.06(1), arguing that *postconviction counsel* was ineffective for not raising trial counsel's ineffectiveness for the failure to request a continuance on the day of trial after the prosecuting attorney provided Nigl's trial attorney with the results of the diagnostic blood draw the day before trial.

On February 9, 2009, the Winnebago County Circuit Court denied the motion without conducting an evidentiary hearing. On November 20, 2009, the Wisconsin Court of Appeals summarily affirmed the circuit court's denial, reconsideration denied on December 15, 2009. Again, the Wisconsin Supreme Court denied discretionary review.

D. State Habeas Review

On July 16, 2024, Nigl, *pro se*, filed a petition for writ of habeas corpus alleging his counsel on direct appeal was ineffective for failing to include in his brief to the Wisconsin Court of Appeals that trial counsel was ineffective for failing to communicate a plea offer.

On August 2, 2024, the Wisconsin Court of Appeals denied the petition concluding that the "circuit court, not the court of appeals, is the proper forum to hear Nigl's claim." **App. A2**. Nigl timely motioned for reconsideration and on August 12, 2024, the Wisconsin Court of Appeals denied reconsideration. ***Id.***

On August 26, 2024, Nigl, *pro se*, filed a petition for review to the Wisconsin Supreme Court alleging the Wisconsin Court of Appeals erred when it concluded that the circuit court, not the court of appeals, is the proper forum to hear Nigl's claim. On June 25, 2025, the Wisconsin Supreme Court, yet again, denied discretionary review. *See* **App. B.**

STATEMENT OF THE FACTS

On January 23, 2001, Nigl was involved in a head-on collision in Oshkosh, Wisconsin. As a result, two persons, Cindy Nast and Diane Jungwirth, were tragically killed. The Chevy truck Nigl was driving collided with their vehicle.

Nigl was sitting in the driver's seat when the first responding officer at the scene approached his truck. Accompanied by paramedics, the officer asked Nigl what had happened. As Nigl spoke, the officer noticed the odor of intoxicants. A second officer overheard Nigl inform the paramedics that he had consumed two beers. Nigl was then transported to Mercy Medical Center for treatment of injuries sustained in the collision. At the hospital the arresting officer requested that Nigl submit to a blood draw under Wisconsin's implied consent law. Nigl was disorientated from his injuries so he asked for an attorney. The arresting officer informed Nigl that he was not entitled to an attorney and, without Nigl's consent or a warrant, commanded hospital staff to perform a blood draw. The toxicology results revealed a blood alcohol concentration of .141 percent and the presence of cocaine and marijuana. A blood draw was also taken at that time by hospital staff for diagnostic purposes.

A. Pretrial Proceedings

On February 13, 2001, Nigl was charged with two counts of homicide by intoxicated use of a vehicle and two counts of homicide by use of vehicle with a prohibited blood alcohol content in violation of Wis. Stat. § 940.09(1)(a) and (b).

In February 2001, the prosecution, represented by Joseph F. Paulus (Paulus), requested a subpoena duces tecum to obtain Nigl's medical records from Mercy Medical Center.

On February 21, 2001, trial counsel, Mark R. Fremgen (Fremgen), filed a motion and demand for discovery. Within the discovery were the results of the implied consent blood draw.

On or about May 7, 2001, Fremgen filed a motion to dismiss refusal, chemical tests. The motion to dismiss only challenged the evidence as to the implied consent blood draw.

On May 7, 2001, after Fremgen filed the motion to dismiss refusal, chemical tests, Paulus provided him with the medical records from Mercy Medical Center containing the toxicology results of the diagnostic blood draw. Fremgen did not request a continuance after he was provided with the additional evidence.

B. Trial Proceedings

On May 8, 2001, a jury trial commenced. It was only then that Nigl learned that the prosecution intended to introduce, as inculpatory evidence, the toxicology results of the diagnostic blood draw. Nigl was completely blindsided by this development. Once Nigl learned of this, he *immediately* informed Fremgen that he wanted to plead guilty. Fremgen told Nigl it was too late for that and proceeded to trial. In consequence, the state's expert was allowed to testify that those results revealed a blood alcohol concentration of .181 percent.

On May 10, 2001, Nigl was found guilty on all four counts.

C. Postconviction Proceedings

On January 29, 2003, an evidentiary hearing (commonly referred to as a *Machner* hearing) was held. It was spontaneously discovered at the hearing through examination of trial counsel by postconviction counsel, that trial counsel failed to communicate a plea offer to Nigl. Postconviction and trial counsels had the following exchange:

[POSTCONVICTION COUNSEL]: Just to be clear: Did Mr. Paulus provide any parameters for sentencing or anything of that nature in exchange for a plea to the charges?

[TRIAL COUNSEL]: He indicated to me after the trial, had Mr. Nigl plead to the charges, he would have made a sentence recommendation. That's what the plea would have been, the reduced sentence recommendation.

[POSTCONVICTION COUNSEL]: Do you remember what that was?

[TRIAL COUNSEL]: He didn't say because we never discussed it. I never accepted any offers from him.

[POSTCONVICTION COUNSEL]: Did you communicate that to Mr. Nigl?

[TRIAL COUNSEL]: Mr. Nigl in the very beginning told me he would not plead to homicide by intoxicated use of motor vehicle, so I didn't offer that to him.

See **App. C1**.

Despite hearing the above testimony, Circuit Court Judge Bruce K. Schmidt summarily disposed of *all* the ineffective assistance of trial counsel claims that were raised, in addition to the plea offer issue that had just spontaneously came to light. His denial was as follows:

[THE COURT]: Even if the Court could find some deficiencies in what [trial counsel] did -- and I can't' -- but for the sake of argument, assuming that some could be found, I in no way can see that anything that was done or not done here in any way prejudiced Mr. Nigl in his case, so I cannot find that even one prong of the two-prong test has been met, but certainly I can't find that both prongs have been met which is required before the Court can find ineffective assistance of counsel, so, on that basis, the motion will be denied.

See **App. C2**.

REASONS FOR GRANTING THE PETITION

I. NIGL WAS DEPRIVED OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WHEN THE WISCONSIN COURT OF APPEALS UNFAIRLY BLOCKED HIS LAST OPPORTUNITY FOR POSTCONVICTION RELIEF.

A. Constitutional Background

Article I, Section Nine of the United States Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, §9, cl. 2. The power of federal courts to issue the writ for federal prisoners derives from Section 14 of the Judiciary Act of 1789. *See* **Jared A. Goldstein, *Habeas Without Rights***, 2007 Wis. L. Rev. 1165, 1188; *see also* 28 U.S.C.

§2241(c)(1). Similar to the federal system, the writ of habeas corpus is enshrined in both Wisconsin's constitution, *see* Wis. Const. Art. I, §8, cl. 4, and its statute books. *See* Wis. Stat. § 782.

B. Background on Wisconsin Statutes Section 974.06

In 1969, Wisconsin added Chapter 974 to its criminal procedure code. *See* 1969 Wis. Act 255, §63, 1969 Wis. Sess. Laws 602, 667-71. Shortly after the new chapter was enacted, then-assistant public defender (and future dean of Marquette University Law School) Howard Eisenberg wrote a *tour d'horizon* in the *Marquette Law Review* outlining how the added provisions would affect criminal procedure in Wisconsin. *See* **Howard B. Eisenberg, *Post-Conviction Remedies in the 1970's***, 56 Marq. L. Rev. 69 (1972). As Eisenberg stated, "One of the most important innovations of the 1969 revision of the criminal procedure code was the adoption of a comprehensive post-conviction remedy statute which is codified as [Wisconsin Statute] section 974.06." ***Id.*** at 78. Section 974.06 was "designed to replace habeas corpus as the primary method in which a defendant can attack his conviction after the time for [an] appeal has expired." ***Id.*** at 79. While both habeas and section 974.06 proceedings are civil in nature, ***id.***, a section 974.06 motion differs from a habeas petition in that it is not a new action but rather "simply an additional motion made in the existing criminal action." ***Id.***

After the time for appeal or postconviction relief found in Wisconsin Statutes section 974.02 has expired or been exhausted, an imprisoned defendant may bring a section 974.06 motion to vacate, set aside, or correct his sentence if he contends that (1) his sentence violates the U.S. or Wisconsin Constitutions, (2) the court imposing the sentence lacked jurisdiction, or (3) his sentence exceeded the maximum time set by law or is otherwise subject to collateral attack. *See* Wis. Stat. § 974.06(1).

C. The Creation of Wisconsin Statutes Section 974.06 and Its Effect on Habeas Claims

1. Limitations on Section 974.06 Actions

Both the legislature and the courts have placed limits on a prisoner's ability to bring motions under Wisconsin Statutes section 974.06. Section 974.06(4), which, aside from a few minor stylistic changes, has remained unchanged since 1969, provides:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

Wis. Stat. § 974.06(4).

This language has been analyzed in numerous appellate court opinions, most significantly in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994). In that case, Barbaro Escalona-Naranjo was convicted of multiple drug charges. ***Id.*** at 173-74. After he was sentenced, Escalona-Naranjo filed a motion for postconviction relief pursuant to section 974.02 with the circuit court requesting a new trial, a competency redetermination, and resentencing. ***Id.*** at 174. The circuit court denied the motion and the court of appeals affirmed. ***Id.*** at 174-75.

With his direct appellate remedies extinguished, Escalona-Naranjo filed a Wisconsin Statues section 974.06 motion in circuit court alleging that he received ineffective assistance of trial counsel. ***Id.*** at 175. The circuit court dismissed the motion, concluding that Escalona-Naranjo was simply rephrasing issues that he had already raised in his postconviction motion and in his appeal. ***Id.*** The Wisconsin Court of Appeals certified the case to the Wisconsin Supreme Court, stating that "even though Escalona-Naranjo waived certain evidentiary issues because he

did not object at trial, the [section] 974.06 motion may have raised new issues not decided on direct appeal." ***Id.***

Before the Wisconsin Supreme Court, Escalona-Naranjo argued that his failure to raise ineffective assistance of trial counsel in either his motion for a new trial or on direct appeal did not preclude him from raising the issue in his Wisconsin Statutes section 974.06 motion because his claim was based on a constitutional right. ***Id.*** at 180. Escalona-Naranjo relied on ***Bergenthal v. State***, which held that a court must always consider constitutional claims in a section 974.06 motion, even those that were forfeited on direct appeal. ***Id.***, 72 Wis.2d 740, 748, 242 N.W.2d 199, 203 (1976). The court in ***Escalona-Naranjo*** overruled ***Bergenthal***, holding that a defendant may not raise an issue in his section 974.06 motion that was finally adjudicated, waived, or forfeited, unless he can provide a "sufficient reason" for why the issue was not raised in the "original, supplemental or amended motion." ***Escalona-Naranjo***, 185 Wis.2d at 181-82 (quoting language from Wis. Stat. § 974.06(4)). The court's holding was based on the need for "finality in . . . litigation." ***Id.*** at 185. Section 974.06 does not give a defendant a license to raise some constitutional issues on direct appeal and strategically wait a few years to raise additional issues. ***Id.*** Instead, all constitutional issues should be part of the original proceeding, barring a "sufficient reason" for not raising them. ***Id.*** at 185-86.

Escalona-Naranjo's "sufficient reason" holding has remained the standard for section 974.06 proceedings for more than two decades, *see* ***State v. Lo***, 2003 WI 107, 264 Wis.2d 1, 665 N.W.2d 756, although it has been refined over the years. For example, in ***State v. Allen*** the Wisconsin Supreme Court held that for a defendant filing a section 974.06 motion to successfully obtain an evidentiary hearing, a court first must "determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. . .. If the

motion raises such facts, the circuit court must hold an evidentiary hearing." ***Id.***, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433. The court qualified this test, however, by noting that if the motion presented only "conclusory allegations" or "if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.*** As to what a defendant must plead to show "sufficient material facts," the court laid down the "who, what, where, when, why, and how" test. ***Id.*** at ¶23. More specifically, a section 974.06 motion that provides "the name of the witness (who), the reason the witness is important (why, how), and facts that can be proven (what, where, when)" would meet the standard. ***Id.*** at ¶24.

2. The Revival of Habeas Corpus in Wisconsin

While Wisconsin Statutes section 974.06 was designed to replace habeas corpus in Wisconsin, the legislature has never repealed the habeas corpus statute, *see* Wis. Stat. § 782, and Wisconsin's constitution still provides that "[t]he privilege of . . . habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety requires it." *See* Wis. Const. Art. I, §8, cl. 4. Habeas, however, was largely dormant in the State of Wisconsin in the aftermath of Wisconsin Statutes section 974.06 until the Wisconsin Supreme Court revived it in ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992).

The sole question presented for determination in ***Knight*** was "the proper procedure by which a defendant may assert a claim of ineffective assistance of *appellate* counsel." ***Id.*** at 514 (emphasis added). The State argued that the claim should be filed as a petition for a writ of habeas corpus "to the appellate court that considered the appeal," ***id.*** at 512, while the defendant averred that such a claim is properly filed as a section 974.06 motion with the circuit court. ***Id.*** at 514. In deciding this matter of first impression, the Wisconsin Supreme Court noted that the

federal courts of appeals and other state supreme courts were divided on whether claims of ineffective assistance of appellate counsel should originate in the trial court or the appellate courts. ***Compare id.*** at 513 n.3 *with* ***id.*** at 517 n.5. The courts that held that such claims should be filed with the trial courts reasoned that "the trial court passes not on the appellate court's decision, but only on the conduct of the counsel who presented the appeal. Furthermore, the appellate court is not bound by the trial court's decision; the appellate court may review the trial court's decision on appeal by either party." ***Id.*** at 516-17 (citations omitted) (citing ***Page v. United States***, 884 F.2d 300, 302 (7th Cir. 1989); ***Commonwealth v. Sullivan***, 371 A.2d 468, 475 (Pa. 1977)).

By contrast, other courts have come to the opposite conclusion, determining that "the appellate court that rendered the decision in the appeal is in the best position to evaluate claims of ineffective assistance of *appellate* counsel." ***Id.*** at 518 (emphasis added). To begin with, "[t]hese courts view the postconviction remedy in the trial courts as designed to set aside a sentence only for infirmities arising during the trial proceedings." ***Id.*** at 517-18. However, a successful claim of ineffective assistance of appellate counsel, if filed initially in the trial court, would require the trial court to set aside an appellate court decision. ***Id.*** at 518. As the District of Columbia Court of Appeals noted, a trial court "should not have authority to rule on the constitutionality of an appellate proceeding." ***Watson v. United States***, 536 A.2d 1056, 1060 (D.C. 1987), cited in ***Knight***, 168 Wis.2d at 518. Or as the Tenth Circuit has held, "a district court lack[s] authority . . . to create appellate jurisdiction by directing [a] defendant to file a notice of appeal." ***United States v. Winterhalder***, 724 F.2d 109, 111 (10th Cir. 1983), cited in ***Knight***, 168 Wis.2d at 518. For these reasons, the appellate court that hears the initial appeal is in

the best position to "judge the conduct of appellate counsel." ***Knight***, 168 Wis.2d at 518-19 (citing ***Hemphill v. State***, 566 S.W.2d 200, 208 (Mo. 1978)).

The Wisconsin Supreme Court acknowledged that the "question of the appropriate forum and procedure is a close one," ***id.*** at 519, but ultimately concluded that "*to bring a claim of ineffective assistance of* ***appellate counsel****, a defendant should petition the appellate court that heard the appeal for a writ of habeas corpus.*" ***Id.*** at 520 (emphasis added). While the court recognized that Wisconsin Statutes section 974.06 "was designed to supplant habeas corpus, the legislature has expressly recognized in the statute that [section] 974.06 may on occasion prove 'inadequate or ineffective to test the legality' of a defendant's detention. In such circumstances, a petition for a writ of habeas corpus may still be appropriate." ***Id.*** (quoting Wis. Stat. § 974.06(8)). The ***Knight*** decision stressed the institutional competence that appellate courts have to decide claims of ineffective assistance of appellate counsel: "These determinations involve questions of law within the appellate court's expertise and authority to decide *de novo*. The appellate court will be familiar with the case and the appellate proceedings." ***Id.*** at 521. Should the court of appeals decide that further fact-finding is needed to adjudicate a habeas claim, it has the statutory authority under Wisconsin Statutes section 752.39 "to submit the matter to a referee or to the circuit court for inquiry into counsel's conduct, which may include the testimony of counsel and other evidence concerning appellate strategy." ***Id.*** While under this scenario a habeas petition with the court of appeals will take longer to adjudicate than would a section 974.06 motion with the circuit court, "in cases where no fact-finding is needed, the habeas corpus procedure will be faster." ***Id.***

Knight is not without its detractors. In ***State ex rel. Panama v. Hepp***, the Wisconsin Court of Appeals (in a published per curiam opinion) criticized the *Knight* court's conclusion that

the court of appeals is in the best position to assess claims of ineffective assistance of appellate counsel. ***Id.***, 2008 WI App 146, ¶22, 314 Wis.2d 112, 758 N.W.2d 806 (per curiam). The main problem with having such claims originate with the court of appeals instead of the circuit court is that additional factual findings are often required:

> [W]hile this court may deny a *Knight* petition whose allegations are insufficient on their face to warrant relief, we can never grant relief without first remanding the matter to the circuit court unless the State concedes error. Thus, nearly all potentially meritorious *Knight* petitions are subjected to a cumbersome trifurcated process in which they are first submitted to this court, then referred to the circuit court for an evidentiary hearing, and then returned to this court for a decision based upon the factual findings of the circuit court. The result is a significant delay in the very cases in which relief is most likely warranted.

Id., 2008 WI App 146, ¶22.

The court of appeals went on to note that "[c]ommon sense suggests that all claims of ineffective assistance of counsel, including appellate counsel, be initially addressed in the circuit court," but lamented that it was bound by *Knight*. ***Id.*** at ¶25.

While Nigl agrees with the ***Hepp*** court's criticism of the procedural problems caused by having ineffective assistance of appellate counsel claims originate in an appellate court rather than the trial court, it should be noted that the Wisconsin Supreme Court reaffirmed the *Knight* holding in 2004, *see* ***State v. Evans***, 2004 WI 84, ¶4, 273 Wis.2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis.2d 352, 714 N.W.2d 900, so the process is unlikely to change.

3. Wisconsin Statutes Section 974.06 Governs Claims of Ineffective Assistance of *Postconviction* Counsel, Not Claims of Ineffective Assistance of Appellate Counsel.

A question that *Knight* left unanswered was, "How does a defendant properly plead ineffective assistance of *postconviction* counsel?" The Wisconsin Court of Appeals addressed this question in ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct.

App. 1996) (per curiam). Before discussing the holding of *Rothering*, Nigl will briefly elucidate the difference between postconviction and appellate representation. Appellate representation consists of two functions: writing the brief and delivering oral argument. ***Id.*** at 678-79 (citing ***Watson v. United States***, 536 A.2d 1056, 1057 (D.C. 1987). This is distinct from postconviction representation (sometimes called "postdisposition" representation), which refers to an attorney's role in filing motions with the circuit court immediately after his client has been convicted and sentenced. Wisconsin Statute § (Rule) 809.30(2)(h) provides that "instead of, or as a prelude to, filing a notice of appeal, a person may file a motion for postconviction or postdisposition relief in the circuit court." **Michael S. Heffernan**, ***Appellate Practice and Procedure in Wisconsin***, §19.16 (5th ed. 2011) (citation omitted). A defendant "shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed" unless the basis for the appeal is the "sufficiency of the evidence" or an issue "previously raised." ***Heffernan***, *supra* note 75, § 19.16. As one treatise of Wisconsin appellate law has stated,

> [I]f appellate counsel concludes that the only issues to be raised on appeal are points that have previously been raised and rejected (for example, in a motion to dismiss; a motion for mistrial; or a request for, or objection to, a jury instruction), no postconviction or postdisposition motion needs to be filed. On the other hand, new issues such as newly discovered evidence, a challenge to the sentence, or an assertion that trial counsel was ineffective must be the subject of a postconviction or postdisposition motion before the appeal.

Heffernan, *supra* note 75, §19.16.

Filing postconviction motions with the circuit court serves two purposes. "First, it provides an opportunity to present issues to the circuit court that were not previously raised. Second, it allows the circuit court a further opportunity to consider issues that were previously raised." ***Id.***

Returning to the ***Rothering*** decision, after Aaron Rothering was convicted of seven criminal charges, he filed a direct appeal arguing his sentence was the result of an erroneous exercise of discretion. ***Id.***, 205 Wis.2d at 676. The same attorney handled both his trial and his appeal. ***Id.*** The Wisconsin Court of Appeals affirmed his conviction and sentence, and the Wisconsin Supreme Court denied his petition for review. ***Id.*** at 676-77. Rothering subsequently filed a habeas petition with the Wisconsin Court of Appeals, arguing his attorney was ineffective in both his trial and appellate capacities. ***Id.*** at 677. But because Rothering sought to invoke the court of appeals' jurisdiction under *Knight*, the court limited itself "to consideration of whether he was deprived of the effective assistance of appellate counsel." ***Id.***

Rothering faced a hurdle with his claims of ineffective assistance of appellate counsel, though. He averred that his appellate counsel should have argued that his trial counsel was ineffective (an awkward position given that it was the same attorney) and that he involuntarily entered a guilty plea. ***Id.*** Rothering's attorney, however, never filed a postconviction motion with the trial court on these two issues. ***Id.*** at 679. This was significant because, as previously mentioned, (Rule) 809.30(2)(h) mandates that a defendant "shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." Wis. Stat. § (Rule) 809.30(2)(h); *see also* Wis. Stat. § 974.02(2). In other words, because Rothering's attorney did not preserve those issues with a motion for postconviction relief, he could not raise them on appeal. As the court of appeals explained,

> What Rothering really complains of is the failure of postconviction counsel to bring a postconviction motion before the trial court to withdraw his plea and raising the issue of ineffective trial counsel. The allegedly deficient conduct is not what occurred before this court but rather what should have occurred before the trial court by a motion filed by postconviction counsel. We hold that a *Knight* petition is not the proper vehicle for seeking redress of the alleged deficiencies of postconviction counsel.

Rothering, 205 Wis.2d at 679.

As a corollary to that conclusion, the *Rothering* court held that "a claim of ineffective assistance of postconviction counsel should be raised in the trial court either by a petition for habeas corpus or a motion under [Wisconsin Statutes section] 974.06." ***Id.*** at 681.

4. The Differences Between Postconviction and Appellate Counsel are Procedurally Significant

The previous sections laid out the features of habeas corpus, Wisconsin Statutes section 974.06, postconviction proceedings, and criminal appellate representation. This section will attempt to tie them together in a coherent whole to provide a useful guidepost.

The differences between postconviction and appellate representation can be quite confusing, but the distinction is procedurally significant and one that *pro se* defendants and defense attorneys should be cognizant of. In Wisconsin, after a defendant is convicted and sentenced, he has the option of: (1) filing a postconviction motion with the circuit court, *see* Wis. Stat. § (Rule) 809.30(2)(b); (2) pursuing a direct appeal to the court of appeals, *id.* § 809.30(2)(j); or (3) filing a motion for sentence modification with the circuit court. *See* Wis. Stat. § 973.19. If the defendant elects to pursue postconviction relief, he has twenty days after sentencing to file his notice with the circuit court. *See* Wis. Stat. § 809.30(2)(b). Filing a postconviction motion does not bar a subsequent appeal; indeed, a postconviction motion is often necessary to preserve issues for appeal. *See* Wis. Stat. § 809.30(2)(h). For instance, a defendant "is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised." Wis. Stat. 974.02(2); *see also* 809.30(2)(h). In other words, when a defendant pursues an appeal of his conviction, he may raise only arguments related to the sufficiency of the evidence or issues that were previously raised, either during the trial or in a postconviction motion with the circuit court. *Cf.* ***Rothering***, 205

Wis.2d at 677-78 ("claims of ineffective trial counsel . . . cannot be reviewed on appeal absent a postconviction motion in the trial court.").

In Wisconsin, if a defendant elects to pursue a direct appeal without filing any postconviction motions with the circuit court, he can no longer file a postconviction motion under Rule 809.30(2)(b), as an appeal transfers jurisdiction from the circuit court to the court of appeals. ***Id.*** at 677-78. If a defendant elects not to pursue postconviction relief, he has twenty days from entry of the sentence or final adjudication to file his notice of appeal with the circuit court. *See* Wis. Stat. § (Rule) 809.30(2)(j).

While a defendant may file a postconviction motion and *then* pursue a direct appeal, a motion for sentence modification precludes him from filing a direct appeal or a subsequent postconviction motion under Rule 809.30(2). *See* Wis. Stat. § 973.19(5). Sentence modification is thus a separate avenue of relief and "not simply another piece of postconviction ammunition to be used in a never-ending assault on the conviction." ***Heffernan***, *supra* note 75, § 19.17. The sentence-modification statute, which was created via supreme court order, is "aimed primarily at guilty-plea cases in which the only issue after sentencing normally will be whether the sentence was excessive." ***Id.*** (citing Wis. Stat. § 973.19 Judicial Council Note, 1984 (2013-2014)). Because it "eliminate[s] a number of steps from the postconviction procedure," opting for the sentence modification route is designed to be a "money-saver" for convicted defendants. ***Id.*** A defendant has ninety days after sentencing to move for sentence modification. *See* Wis. Stat. § 973.19(1)(a).

After a defendant's postconviction and appellate remedies have expired, he may file a Wisconsin Statutes section 974.06 motion with the circuit court. *See* ***Rothering***, 205 Wis.2d 677-81. Perplexingly, although a section 974.06 motion is a collateral attack upon a defendant's

conviction, the statute is entitled "postconviction procedure." *Cf.* ***Evans***, 2004 WI 84, ¶27 n.8 ("a motion to *collaterally* attack a conviction under § 974.06 is commonly referred to as a *postconviction* motion." (emphasis added)). A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal." ***Black's Law Dictionary*** **318** (10th ed 2014) ("A petition for a writ of habeas corpus is one type of collateral attack."). Many Wisconsin judicial opinions have thus used the phrase "postconviction motion" when referring to section 974.06 motions. *See e.g.,* ***State v. Lo,*** 2003 WI 107, ¶¶33, 44, 264 Wis.2d 1, 665 N.W.2d 756; ***State v. Braun***, 185 Wis.2d 152, 157, 159, 162, 516 N.W.2d 740, 742, 744 (1994); ***State v. Crockett***, 2001 WI App 235, ¶1, 248 Wis.2d 120, 635 N.W.2d 673; ***State v. Tolefree***, 209 Wis.2d 421, 425, 563 N.W.2d 175, 177 (Ct. App. 1997). To avoid confusion with postconviction motions under Rule 809.30, it would be more accurate and indeed salutary to refer to section 974.06 motions as "collateral motions" or simply "section 974.06 motions."

Where the difference between postconviction motions, direct appeals, and section 974.06 motions is most significant is in the right to counsel context. While it is firmly established that the right to counsel goes beyond the trial and through a defendant's first appeal, *see* ***Evitts v. Lucey***, 469 U.S. 387, 396-96 (1985), Wisconsin also recognizes a right to counsel when filing postconviction motions. *See* ***Evans***, 2004 WI 84, ¶27 ("A criminal defendant has a right to postconviction relief that encompasses both bringing a postconviction motion and an appeal. The circuit court judge must inform the defendant at sentencing of these rights and the right to the assistance of the [State Public Defender] if he is indigent." (citations omitted)). That right to counsel, though, does not extend to section 974.06 motions. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis.2d 615, 648-49, 579 N.W.2d 698 (1998) ("Defendants do not have a constitutional right to counsel when mounting collateral attacks upon their conviction"). The

distinction between an attorney providing postconviction as opposed to appellate representation is not merely academic and has significant procedural implications for a defendant arguing he received ineffective assistance of counsel. A claim of ineffective assistance of *postconviction* counsel must be filed with the circuit court, either as a section 974.06 motion or as a petition for a writ of habeas corpus. *See* ***Rothering***, 205 Wis.2d at 681. A defendant arguing ineffective assistance of *appellate* counsel, conversely, may not seek relief under section 974.06 and instead, must petition the court of appeals for a writ of habeas corpus. *See* ***Knight***, 168 Wis.2d at 520. A defendant is limited to one section 974.06 motion with the circuit court and one habeas petition with the court of appeals unless he can provide a "sufficient reason" as to why he did not raise a particular issue. *See* Wis. Stat. § 974.06; *see also* ***Evans***, 2004 WI 84, ¶35. Yet "unlike [section] 974.06 motions, a habeas petition under *Knight* is subject to the doctrine of laches because a petition for habeas corpus seeks an equitable remedy." ***Id.*** at ¶35.

It is often the case that the same attorney serves as both a defendant's postconviction and appellate counsel. *See* ***Rothering***, 205 Wis.2d at 678 n.4. However, as claims of ineffective assistance of *postconviction counsel* follow a different path than claims of ineffective assistance of *appellate counsel*, lawyers and *pro se* defendants must be precise about what form of ineffectiveness they are alleging.

D. Recent Developments in Wisconsin

Despite the significant amount of litigation engendered by criminal convictions, new (and seemingly foundational) questions continue to emerge in the areas of criminal appellate, postconviction, and collateral litigation. Recently, the Wisconsin Supreme Court grappled with three such issues: (1) the proper pleading standard for a defendant alleging that his *appellate* attorney was ineffective for failing to raise certain issues, (2) whether a claim that *postconviction*

counsel was ineffective for failing to file a notice of intent to pursue postconviction relief belongs in the circuit court or the court of appeals; and, (3) the proper forum to adjudicate a claim that defendant's *postconviction counsel* was ineffective for failing to assert an ineffective assistance of trial counsel claim. The answers to these three questions will now be discussed in turn.

1. *State v. Starks*

a. Background

A case from the Wisconsin Supreme Court's 2012-2013 term revealed the procedural morass that can ensue when careful attention is not paid to the fine distinctions between *postconviction* and *appellate* counsel. Tramell Starks was convicted by a jury of reckless homicide and being a felon-in-possession of a firearm as a result of Starks shooting Lee Weddle to death. *See* ***State v. Starks***, 2013 WI 69, ¶1, 349 Wis.2d 274, 833 N.W.2d 146. "Following his convictions, the Public Defender's Office appointed a new attorney, Robert Kagen, to represent Starks in his postconviction matters. Kagen did not file any postconviction motions with the circuit court and instead pursued a direct appeal at the court of appeals . . .." ***Id.*** at ¶15. The court of appeals affirmed his convictions and the supreme court denied his petition for review. ***Id.*** at ¶20.

With his postconviction and appellate remedies drained, Starks filed a pro se Wisconsin Statutes section 974.06 motion with the circuit court, alleging that he received ineffective assistance of *postconviction counsel* because Attorney Kagen failed to raise numerous claims of ineffective assistance of trial counsel. ***Id.*** at ¶21. Here is where the imbroglio unfolded. The circuit court dismissed the motion for exceeding the Milwaukee County Circuit Court rule on page length limit. ***Id.*** Two days later, Starks filed a motion with the circuit court to vacate his

assessed DNA surcharge pursuant to ***State v. Cherry*** (henceforth "*Cherry* motion"). *See* ***Starks***, 2013 WI 69, ¶2. The circuit court denied the *Cherry* motion, reasoning that it was a motion to modify a sentence and hence had to be brought within ninety days after sentencing. ***Id.*** at ¶21. *Starks* then refiled his section 974.06 motion within the local page limit requirement. ***Id.*** Ultimately, the circuit court denied Starks' section 974.06 motion on the merits as "not set[ting] forth a viable claim for relief with regards to trial counsel's performance." ***Id.*** at ¶22 (alteration in original) (internal quotation marks omitted). Starks' motion, however, should have been denied for an entirely different reason: he filed the wrong claim in the wrong court. ***Id.*** at ¶30. Because Kagen did not file any postconviction motions with the circuit court and instead pursued a direct appeal, he was Starks' *appellate attorney*, not his postconviction attorney. ***Id.*** at ¶15. Thus, Starks's only remedy was to file a petition for a writ of habeas corpus in the court of appeals; section 974.06 was inapplicable. ***Id.*** at ¶30. While the district attorney's office could have sought dismissal, nothing in the record indicated that the State requested Starks section 974.06 motion to be dismissed on these grounds. ***Id.*** at ¶38.

When the case made its way to the Wisconsin Court of Appeals, the State (now represented by the Wisconsin Department of Justice) argued: "Attorney Kagen was Starks' *appellate* counsel, and thus, to the extent that Starks is arguing that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel, Starks has brought these claims in the wrong forum." ***State v. Starks***, No. 2010AP425, 2011 WL 2314951, (Wis. Ct. App. June 14, 2011), 2010 WL 4633221 at *19. The court of appeals did not dismiss the case, reasoning, "Starks and the circuit court both make references to appellate counsel, possibly because the same attorney who handled the appeal would have been appointed to pursue any postconviction relief. However, as the State correctly points out, a challenge to appellate

counsel's performance does not belong in the circuit court." ***Id.*** at ¶5 n.1. This logic had it exactly backwards: the forum a defendant files in does not determine the nature of his claim; rather, the nature of his claim determines the forum he should file in. *Cf.* ***Rothering***, 205 Wis.2d at 678 n.4 ("we are not bound by the designations used in the appointment of counsel after a conviction."). In any event, the court of appeals eventually held that Starks' section 974.06 motion was procedurally barred by *Escalona-Naranjo* because Starks could have raised his ineffective assistance of counsel claims in his *Cherry* motions and failed to do so. *See* ***Starks***, 2013 WI 69, ¶25.

b. The Wisconsin Supreme Court's Decision

Because of the procedural errors made as the case winded its way through the appellate system, the first question the Wisconsin Supreme Court had to answer in *Starks* was whether it had jurisdiction to decide the case. In an opinion by Justice Gableman, the court held that, because the procedural mistake spoke to the circuit court's *competency* rather than its *jurisdiction*, the State forfeited its opportunity to seek dismissal, as it did not raise the issue before the circuit court. *See* ***Starks***, 2013 WI 69, ¶¶36-38. Moreover, the court stated, "We are also mindful of prudential concerns and the interests of judicial economy. If we were to dismiss this case for want of jurisdiction, presumably Starks would simply refile his current claim with the court of appeals, deleting the word 'postconviction' and replacing it with 'appellate.'" ***Id.*** at ¶39.

The court then settled into the two issues presented: (1) whether a *Cherry* motion counts as a prior motion under Wisconsin Statutes section 974.06(4) and *Escalona-Naranjo*, and (2) what the proper pleading standard is for a defendant alleging that he received ineffective assistance of appellate counsel because his attorney did not raise certain arguments. ***Id.*** at ¶32.

On the first question, the court held that "a *Cherry* motion, or any sentence modification motion, plainly does not waive a defendant's right to bring a [Wisconsin Statutes section] 974.06 motion at a later date." ***Id.*** at ¶49. The court's analysis was driven by its interpretation of the criminal appellate and postconviction statutes, which provide that: "(1) a defendant who moves to modify his sentence pursuant to [Wisconsin Statutes section] 973.19(1)(a) renounces his right to a direct appeal and postconviction relief, and (2) [Wisconsin Statutes section] 974.06 motion is expressly *not* one of those forms of relief." ***Id.*** What is more, the state supreme court found it "implausible that a defendant would have to relinquish his statutorily-protected right to challenge his sentence in order to protect his future right to challenge the constitutionality of his conviction in state court." ***Id.*** at ¶51. Finally, while "a *Cherry* motion must be made before a criminal conviction becomes final," a section 974.06 motion "can be made only after 'the time for appeal or postconviction remedy provided in [Wisconsin Statutes section 974.02] has expired.'" ***Id.*** at ¶52 (quoting Wis. Stat. § 974.06(1)).

The second question presented was the proper pleading standard an appellate court should apply when a defendant alleges he received ineffective assistance of appellate counsel because his attorney failed to raise certain arguments. ***Id.*** at ¶32. Starks contended that all a defendant in such a position must do to demonstrate ineffectiveness "is to show that appellate counsel's performance was deficient and that it prejudiced him." ***Id.*** at ¶56. Meanwhile, the State argued that a defendant "must also establish why the unraised claims of ineffective assistance of trial counsel were 'clearly stronger' than the claims that appellate counsel raised on appeal." ***Id.*** The court held that the State "articulated the proper standard." ***Id.***

In examining the issue, the Wisconsin Supreme Court turned first to a decision by the Court of Appeals for the Seventh Circuit, which held,

> When a claim of ineffective assistance of [appellate] counsel is based on failure to raise viable issues, the [trial] court must examine the trial record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. *Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.*

Id. at ¶57 (alteration in original) (quoting ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986)).

This "clearly stronger" standard was adopted by this Court fourteen years later in ***Smith v. Robbins***, 528 U.S. 259 (2000). There, this Court held that when a defendant alleges that his appellate counsel was deficient for not raising a particular claim, "it [will be] difficult to demonstrate that counsel was incompetent" because the defendant must show that "a particular nonfrivolous issue was *clearly stronger* than issues that counsel did present." ***Id.*** at 288 (emphasis added).

The Wisconsin Supreme Court in ***Starks*** also adopted the "'clearly stronger' pleading standard for the deficiency prong of the *Strickland* test in Wisconsin for criminal defendants alleging in a [*Knight*] habeas petition that they received ineffective assistance of appellate counsel due to counsel's failure to raise certain issues." ***Id.***, 2013 WI 69, ¶60. As support for the "clearly stronger" pleading standard, the court cited the necessity of "finality in . . . litigation" ***id.*** (quoting ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 185, 517 N.W.2d 157 (1994)), as well as the need to "respect the professional judgment of postconviction attorneys in separating the wheat from the chaff." ***Id.***

The following term, the Wisconsin Supreme Court logically extended the "clearly stronger" standard to claims of ineffective assistance of postconviction counsel. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶46, 360 Wis.2d 522, 849 N.W.2d 668. As the court noted, the principle of finality is of such import that "not every mistake will justify relief." ***Id.*** at ¶31.

2. *State ex rel. Kyles v. Pollard*

a. Background

During the 2013-2014 term, the Wisconsin Supreme Court in ***State ex rel. Kyles v. Pollard*** addressed the question of the proper forum to adjudicate a claim that a defendant's *postconviction counsel* was ineffective for failing to timely file a notice of intent to pursue postconviction relief. ***Id.***, 2014 WI 38, 354 Wis.2d 626, 847 N.W.2d 805. Lorenzo Kyles pled guilty to first-degree reckless homicide by use of a dangerous weapon and was sentenced to forty years imprisonment. ***Id.*** at ¶6. When he initially met with his lawyer after sentencing, Kyles stated he was undecided about seeking postconviction or appellate relief. ***Id.*** at ¶7. A few days later, he decided he wanted to appeal. ***Id.*** at ¶8. However, Kyles was unable to get ahold of his lawyer until after the deadline to file a notice of appeal passed. ***Id.*** at ¶¶8-10

Kyles responded by filing a pro se habeas petition to the Wisconsin Court of Appeals seeking reinstatement of his right to appeal. ***Id.*** at ¶11. In dismissing his petition, the court of appeals held that because Kyles' attorney had never filed a notice of intent to seek relief, Kyles was actually denied effective assistance of postconviction counsel and hence had to seek relief in the circuit court. ***Id.*** After his attempts at relief in the circuit court and in federal court proved unsuccessful, Kyles filed a pro se motion with the court of appeals seeking to extend the time for him to file a notice of intent to seek relief on the grounds that he simply could not get in touch with his lawyer during the twenty-day statutory window. ***Id.*** at ¶14. The court of appeals denied the motion, concluding that Kyles had failed to show good cause for extending the deadline, as Kyles had previously failed to demonstrate to the circuit court that he actually told his attorney to file a notice of appeal. ***Id.*** Imprisoned but unbowed, Kyles tried his luck one more time with a habeas petition to the court of appeals, again asking for an extension. ***Id.*** at ¶15. Once again, the

court of appeals denied his request on the basis that Kyles was trying to bring an ineffective assistance of postconviction counsel claim, which properly belonged in the circuit court. ***Id.***

b. The Wisconsin Supreme Court's Decision

The Wisconsin Supreme Court took Kyles' petition for review "to determine the appropriate forum and vehicle for relief for a defendant who asserts that the ineffectiveness of counsel resulted in a notice of intent to pursue postconviction relief not being filed." ***Id.*** at ¶16. The court acknowledged that there was "no precedent directly addressing the discrete procedural issue" presented. ***Id.*** at ¶19. The State argued that under ***Knight*** and ***Rothering***, Kyles' petition should go to the circuit court, as that was where the alleged ineffectiveness occurred. ***Id.*** at ¶28. In a unanimous opinion authored by Justice Bradley, the Wisconsin Supreme Court held that, because only the court of appeals could extend the twenty-day deadline to seek postconviction relief, Kyles was correct in seeking an extension from the court of appeals rather than the circuit court. ***Id.*** at ¶32. The state supreme court stated, "[W]e determine that the court of appeals is the proper forum for claims of ineffectiveness premised on counsel's failure to file a notice of intent." ***Id.*** at ¶38.

Having decided the proper forum, the Wisconsin Supreme Court then moved to determining the appropriate procedure for a claim of ineffectiveness based on the failure of an attorney to file a notice of intent to pursue postconviction relief. ***Id.*** at ¶39. The court held that, rather than bringing a motion to enlarge time at the court of appeals under Wisconsin Statutes section 809.82(2), "in most circumstances a habeas petition is the appropriate procedure to follow." ***Id.*** This is so because "the complex legal issues involved and fact-intensive inquiry required by most ineffective assistance of counsel claims in the court of appeals requires the more thorough analysis provided by a *Knight* petition." ***Id.*** at ¶44.

Turning to the substance of his claim, the state supreme court held that Kyles alleged sufficient facts to entitle him to an evidentiary hearing. ***Id.*** at ¶¶49, 59. Noting that "the deprivation of counsel during an appeal is per se prejudicial," ***id.*** at ¶54, the court held it would be "incongruous to state that a defendant was denied the right to counsel and then preclude the defendant from raising a claim because of errors made due to the absence of counsel." ***Id.*** at ¶56. Kyles's petition was thus remanded to the court of appeals to either appoint a referee or refer to the circuit court for an evidentiary hearing. ***Id.*** at ¶59.

3. *State ex rel. Warren v. Meisner*

a. Background

During the 2019-2020 term, the Wisconsin Supreme Court in ***State ex rel. Warren v. Meisner*** addressed the question of the proper forum to adjudicate a claim that defendant's *postconviction counsel* was ineffective for failing to assert an ineffective assistance of trial counsel claim. ***Id.***, 2020 WI 55, 392 Wis.2d 1, 944 N.W.2d 588. Milton Eugene Warren was convicted after a jury trial of three drug related offenses—possession with intent to deliver more than 50 grams of heroin, possession of THC as a second or subsequent offense, and contributing to the delinquency of a minor. ***Id.*** at ¶7. Following his conviction, and with the assistance of counsel, Warren appealed his judgment of conviction. ***Id.*** Warren, like *Starks* and *Rothering*, pursued a direct appeal *without* first filing in the circuit court a motion for postconviction relief pursuant to Wis. Stat. § (Rule) 809.30. ***Id.***

Rather than pursuing a remedy in the circuit court through a motion for postconviction relief, Warren filed a notice of appeal from his judgments of conviction, proceeding directly to the court of appeals. ***Id.*** at ¶8. He raised two issues before the court of appeals. First, he challenged the sufficiency of the evidence to support his convictions. Second, he asserted that the

circuit court erred by excluding evidence related to prior bad acts that Warren wished to use to impeach a witness. ***Id.*** The Wisconsin Court of Appeals rejected these arguments and affirmed Warren's judgments of conviction. ***State v. Warren***, No. 2016AP936-CR, unpublished slip op., 2017 WL 3084867 (Wis. Ct. App. July 20, 2017) (per curiam). Warren petitioned for review in the Wisconsin Supreme Court, which was denied. ***Id.*** at ¶9.

Subsequently, Warren filed a postconviction motion in the circuit court pursuant to Wis. Stat. § 974.06. ***Id.*** at ¶10. Although neither the original nor an amended postconviction motion was in the record, the circuit court characterized the arguments made as a contention "that Warren's *appellate counsel* was ineffective for not raising a claim for the ineffective assistance of trial counsel." ***Id.*** (emphasis added).

The circuit court denied Warren's Wis. Stat. § 974.06 postconviction motion. ***Id.*** at ¶11. It premised its determination on ***Starks***, observing that "[i]n the case at bar, the procedural posture is nearly identical to that in ***Starks***." ***Id.*** The relevant distinction that arises from ***Starks***, according to the circuit court, is that between "appellate counsel" and "postconviction counsel." Because the circuit court opined that "[t]his is a case that involves a claim for the ineffective assistance of an *appellate* attorney, as that appellation is determined [in ***Starks***,]" it concluded that Warren's claim should be brought in the first instance in the court of appeals. ***Id.*** (emphasis added).

Following the denial of this postconviction motion in the circuit court, Warren filed a petition for writ of habeas corpus, commonly referred to as a *Knight* petition, in the Wisconsin Court of Appeals. ***Id.*** at ¶12. Again, Warren alleged that his counsel on direct appeal "performed deficiently by failing to raise trial counsel's ineffectiveness." ***State ex rel. Warren v. Meisner***, No. 2019AP567-W, unpublished order at 2 (Wis. Ct. App. Apr. 8, 2019).

The Wisconsin Court of Appeals denied Warren's habeas petition without ordering a response. ***Id.*** at ¶13. Observing that "Warren's writ petition makes no mention of the postconviction motion proceedings that followed his direct appeal," it determined that "[t]o the extent Warren seeks relief from the order denying the motion, his remedy lies not by writ, but by appeal of that order. A petition for supervisory writ is not a substitute for an appeal." ***Id.*** (citing ***State ex rel. Dressler v. Cir. Ct. for Racine Cty.***, 163 Wis.2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991)). Warren moved for reconsideration, which the court of appeals denied, and, again, he subsequently petitioned for review in the Wisconsin Supreme Court. ***Id.***

b. The Wisconsin Supreme Court's Decision

The Wisconsin Supreme Court took Warren's petition for review "to determine the appropriate forum when a defendant asserts ineffective assistance of counsel for errors that take place after conviction by the failure to raise the ineffectiveness of trial counsel." ***Id.*** at ¶14.

The Wisconsin Supreme Court has previously stated that the traditional rule "has been that claims of ineffective assistance of counsel premised on errors occurring before the circuit court should be pursued in the circuit court and claims of ineffective assistance of counsel premised on errors occurring before the appellate court should be pursued in the court of appeals." ***Kyles***, 2014 WI 38, ¶25 (citing ***State v. Balliette***, 2011 WI 79, ¶32, 336 Wis.2d 358, 805 N.W.2d 334). ***Id.*** at ¶16. As demonstrated above, this framework began its development in the seminal case of ***Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992). ***Id.***

In analyzing whether Warren had properly filed his motion in the circuit court, the circuit court observed the dissonance between the ***Knight/Rothering*** framework and ***Starks***: "Whereas the ***Rothering*** court found that an appellate attorney who fails to file a postconviction motion is nonetheless postconviction counsel—at least as to the decision to not file the postconviction

motion—the ***Starks*** court found just the opposite." ***Id.*** at ¶28. Following its reading of ***Starks***, the circuit court thus determined that "[t]he Supreme Court in ***Starks*** overruled the Court of Appeals' holding in ***Rothering*** as to when an attorney is considered appellate counsel" and accordingly concluded that Warren's claim was filed in the wrong forum. ***Id.***

As a starting point, there was much agreement between the parties. Neither party sought to alter the longstanding ***Knight/Rothering*** framework or questions its continued vitality. ***Id.*** at ¶31. The parties also agreed that the circuit court is the proper forum for Warren's claim. ***Id.*** The state supreme court agreed with the parties on both of these points. Significantly, the state supreme court reaffirmed that the ***Knight/Rothering*** framework remains the correct methodology for determining the appropriate forum for a criminal defendant to file a claim relating to the alleged ineffectiveness of counsel after conviction. ***Id.*** at ¶¶32. The court further elaborated that the inquiry should be focused on "where" the alleged ineffectiveness occurred. ***Id.*** at ¶36.

Having determined that the proper forum for Warren's claim is the circuit court, the Wisconsin Supreme Court turned to the proper remedy. ***Id.*** at ¶47. In fashioning a remedy, the Wisconsin Supreme Court sought to fulfill three goals. ***Id.*** at ¶48. First, the state supreme court concluded that Warren's claim must be heard on the merits. ***Id.***

Second, the state supreme court must respect the fact that it is the court of appeals' decision they are reviewing and not the circuit courts. ***Id.*** at ¶49. Although the circuit court's decision is essential to the supreme court's analysis, that decision was not before it—this is a writ case, separate and distinct from Warren's criminal case. *See* ***State ex rel. Fuentes v. Wis. Ct. App. Dist. IV***, 225 Wis.2d 446, 450, 593 N.W.2d 48 (1999) ("Although a habeas corpus petition normally arises out of criminal proceedings, it is a separate civil action founded upon principles of equity."). ***Id.***

Third, state supreme court made it clear that Warren's initial Wis. Stat. § 974.06 motion was properly filed. ***Id.*** at ¶50. This is important in relation to Warren's rights to federal habeas review. Indeed, a "properly filed" postconviction motion tolls the one-year limitations period for a federal habeas petition: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2); *see also* ***State ex rel. Colemean v. McCaughtry***, 2006 WI 49, ¶24 n.5, 290 Wis.2d 352, 714 N.W.2d 900.

Keeping in mind these three goals, the Wisconsin Supreme Court remanded the case to the court of appeals with directions to remand to the circuit court for Rock County, Wisconsin to construe the habeas petition as a Wis. Stat. § 974.06 postconviction motion. *See* ***Warren***, at ¶51. The Wisconsin Supreme Court then withdrew paragraphs ¶4, ¶¶30-31, and ¶¶34-35 in ***State v. Starks***, 2013 WI 69, 349 Wis.2d 274, 833 N.W.2d 146, that would contradict the court's conclusion in ***Warren***. ***Id.*** at ¶52.

E. The Wisconsin Court of Appeals Decision Denying Petitioner's Last Opportunity for Postconviction Relief as of Right Was Unreasonably Wrong.

In applying Wisconsin law as established above, it is obvious that the Wisconsin Court of Appeals unfairly blocked Nigl's last opportunity for postconviction relief as of right.

Nigl's last opportunity for postconviction relief as of right was a petition for writ of habeas corpus (commonly referred to as a *Knight* petition). The habeas petition alleged that Nigl's counsel on direct appeal was constitutionally ineffective for failing to include, in his brief to the Wisconsin Court of Appeals, the argument that trial counsel was ineffective for failing to communicate a plea offer.

The Wisconsin Court of Appeals denied Nigl's habeas petition without ordering a response. *See* **App. A1**. Ostensibly alleging that Nigl's "filings do not show that the [plea offer] claim was ever raised by postconviction counsel or specifically rejected by the circuit court at the [2003 *Machner*] hearing," *see* **App. A2 fn.2**, the court of appeals determined that "if error occurred, it occurred in the circuit court by postconviction counsel's failure to raise the additional claim of ineffective assistance against trial counsel." ***Id.*** at A2. Such a determination is not just wrong, but it is unreasonably wrong in light of the evidence presented to the Wisconsin Court of Appeals. *See* **Affidavit of Paul M. Nigl**, ¶¶63 and 68, Exhibits 49 and 50; *see also* **App. C1-2.**

If this Court were to grant certiorari review, the lower court record will demonstrably show that the claim of ineffective assistance of trial counsel for the failure to communicate a plea offer was raised by postconviction counsel through a spontaneous discussion between postconviction counsel and trial counsel and was disposed of when the circuit court summarily rejected *all* of the ineffective assistance of counsel claims raised at the 2003 *Machner* hearing; thus, preserving the issue for appeal. *See* **App. C1-2** and *compare* ***State v. Agnello***, 226 Wis.2d 164, ¶10, 593 N.W.2d 427 (1999) ("in order to maintain an objection on appeal, the objector must articulate the specific grounds for the objection") (citing ***State v. Caban***, 210 Wis.2d 597, 606, 563 N.W.2d 501 (1997) (in determining whether an issue was previously raised before the trial court, the state supreme court looked to both the written motion and to the suppression hearing); *see also* ***State v. Marks,*** 194 Wis.2d 79, 88, 533 N.W.2d 730 (1995) ("[w]here the grounds of the objection are obvious, the specific ground of objection is not important.").

Other state courts of last resort considering ineffective assistance of counsel claims have concluded that objections appearing obliquely at a hearing are sufficient to preserve an issue for appeal. *See e.g.* ***State v. Stallings***, 658 N.W.2d 106, 108 (Iowa Sup. Ct. 2003).

Having shown that petitioner properly preserved his claim of ineffective assistance of trial counsel for appeal, this Court should next consider the proper forum to hear Nigl's claim of ineffective assistance of *appellate* counsel.

1. The Wisconsin Court of Appeals, Not the Circuit Court, is the Proper Forum to Hear Petitioner's Claim of Ineffective Assistance of *Appellate* Counsel.

In order to determine if Petitioner's petition for writ of habeas corpus was properly filed to the Wisconsin Court of Appeals versus the circuit court depends on which court the error occurred in. *See* ***Warren***, 2020 WI 55, ¶36 (to determine the proper forum for claims of ineffective assistance of counsel resulting from alleged errors that take place after conviction, the inquiry should be focused on "where" the alleged ineffectiveness occurred). On certiorari review, petitioner will argue that the allegedly deficient conduct is not what occurred before the circuit court but rather what should have occurred before the court of appeals by including a powerful claim of ineffective assistance of trial counsel in Nigl's brief-in-chief by appellate counsel.

Significantly, it is axiomatic that *postconviction* counsel could not be held ineffective for failing to include an issue in a postconviction motion that he was completely unaware of. Moreover, it is black-letter Wisconsin law that a matter once litigated may not be relitigated in a subsequent postconviction proceeding. *See* ***State v. Witkowski***, 163 Wis.2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); *see also* ***Peterson v. State***, 54 Wis.2d 370, 381, 195 Wis.2d 837 (1972) (a § 974.06 motion "must not be used to raise issues disposed of by a previous appeal."). Here, the plea offer issue was already disposed of at the 2003 *Machner* hearing. Therefore, the *only* forum available for petitioner to raise trial counsel's failure to communicate a plea offer was to the Wisconsin Court of Appeals alleging that *appellate counsel* was ineffective for failing to include trial counsel's ineffectiveness in his brief on direct appeal. Such a claim is properly

raised via a writ of habeas corpus to the court that heard the original appeal. *See* ***Knight***, 168 Wis.2d at 520. Accordingly, this Court should grant certiorari review.

Beyond what has been stated above, if this Court grants certiorari review, Petitioner will also argue that his petition for writ of habeas corpus, filed to the Wisconsin Court of Appeals, shows that he followed Wisconsin's procedural rules to the letter. More specifically, petitioner will argue that his habeas petition adequately alleged the "clearly stronger" pleading standard, *see* ***Starks***, 2013 WI 69, ¶56; *see also* ***Smith v. Robbins***, 528 U.S. 259 (2000), and that it set forth the five "w's" and the one "h" test in order to obtain an evidentiary hearing in Wisconsin. *See* ***Allen***, 2004 WI 106, ¶23.

Finally, Petitioner will argue on certiorari review that his case is clearly distinguishable from ***Rothering, Starks,*** and ***Warren***. This is so because, prior to pursuing a direct appeal to the Wisconsin Court of Appeals, petitioner's postconviction counsel filed a postconviction motion in the circuit court pursuant to Wis. Stat. § (Rule) 809.30, whereas counsel's for ***Rothering, Starks,*** and ***Warren*** did not.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated this 25 day of August, 2025.

Respectfully submitted,

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