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## Collateral Damage: A Guide to Criminal Appellate, Postconviction, and Habeas Corpus Litigation in Wisconsin

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# **COLLATERAL DAMAGE: A GUIDE TO CRIMINAL APPELLATE, POSTCONVICTION, AND HABEAS CORPUS LITIGATION IN WISCONSIN**

MATTHEW M. FERNHOLZ\*

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## I. INTRODUCTION

When is a criminal conviction final? Oftentimes the answer is not “when a guilty plea is entered” or when “an appellate court affirms the conviction.” Welcome to the world of habeas corpus petitions and state collateral review, where imprisoned defendants can litigate their convictions for years and sometimes even decades after the trial. This Article will focus on the part of criminal law that is rarely covered on television: specifically, what happens after a defendant is convicted and sentenced? I will attempt to flesh out the intricacies of criminal appellate, postconviction, and collateral proceedings, and in the process, hopefully provide clarification in a dense and complicated area of the law. Additionally, this Article will pay special attention to claims of ineffective assistance of counsel in these types of proceedings. I note at the outset that while at times I will discuss the federal system, my focus is primarily Wisconsin-based. The aim here is to provide a practical guide to attorneys who must navigate through the hornet’s nest that is criminal postconviction litigation.

The Article is organized as follows. Section II provides a brief background on petitions for writs of habeas corpus. Section III discusses Wisconsin Statutes section 974.06, the statute that was designed to replace habeas corpus in Wisconsin. Section IV traces the limits placed on section 974.06 claims, the revival of habeas petitions in Wisconsin, and also discusses how postconviction counsel differs from appellate counsel and why this difference is procedurally significant. Finally, Sections V and VI will discuss recent developments in this area of the law and how Wisconsin criminal procedure could be affected by a pair of recent United States Supreme Court decisions.

## II. BACKGROUND ON PETITIONS FOR WRITS OF HABEAS CORPUS

Habeas corpus, Latin for “that you have the body,”<sup>1</sup> is one of the bedrock principles of Anglo-American law.<sup>2</sup> While habeas corpus comes in a variety of forms, this Article concerns the “inquiry into illegal detention with a view to an order releasing the petitioner.”<sup>3</sup> The writ of habeas corpus “is of immemorial antiquity,” stretching all the way back to England’s Habeas Corpus Act of 1679.<sup>4</sup> A full discussion of the history of the writ in England would be both pedantic and supererogatory, but suffice it to say, “It is perhaps the most important writ known to the constitutional law of England.”<sup>5</sup>

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.”<sup>6</sup> The power of federal courts to issue the writ for federal prisoners derives from Section 14 of the Judiciary Act of 1789.<sup>7</sup> Similar to the federal system, the writ of habeas corpus is enshrined in both Wisconsin’s constitution<sup>8</sup> and its statute books.<sup>9</sup>

Despite the increasing federalization of criminal law,<sup>10</sup> most criminal cases remain in state courts.<sup>11</sup> A state prisoner who brings a habeas claim resting solely on a violation of his state constitutional or statutory rights is limited to pleading his case in state courts.<sup>12</sup> If, however, a state

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1. BLACK’S LAW DICTIONARY 825 (10th ed. 2014).

2. *Fay v. Noia*, 372 U.S. 391, 399–400 (1963).

3. *Id.* at 399 n.5. This form of habeas is known as “habeas corpus ad subjiciendum,” or “that you have the body to submit to.” BLACK’S LAW DICTIONARY 825 (10th ed. 2014).

4. Habeas Corpus Act, 1679, 31 Car. 2, c. 2. (Eng.); *Sec’y of State for Home Affairs v. O’Brien*, [1923] A.C. 603 (H.L.) 609 (appeal taken from Eng.).

5. *O’Brien*, [1923] A.C. 603 (H.L.) at 609.

6. U.S. CONST. art. I, § 9, cl. 2.

7. Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1188. See 28 U.S.C. § 2241(c)(1) (2012) for the current statutory codification of the writ.

8. WIS. CONST. art. I, § 8, cl. 4 (“The privilege of the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety requires it.”).

9. See WIS. STAT. § 782 (2013–2014).

10. See AM. BAR ASS’N TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998), available at [http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization\\_of\\_Criminal\\_Law.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf), archived at <http://perma.cc/BV6V-YSN4>; see also HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2009).

11. Gregory J. O’Meara, S.J., “*You Can’t Get There From Here?*”: *Ineffective Assistance Claims in Federal Circuit Courts After AEDPA*, 93 MARQ. L. REV. 545, 549 (2009).

12. *Id.* at 549–50.

prisoner alleges that his detention also violates his rights under the United States Constitution, the prisoner may file his case anew in federal court after he has exhausted his state appellate remedies.<sup>13</sup> To qualify for habeas corpus relief in Wisconsin, the petitioner must be “restrained of personal liberty.”<sup>14</sup> Relying on federal case law, Wisconsin courts have held that a restraint of personal liberty occurs not only when an individual “is in actual physical custody,” but also when someone is “subject to restraints not shared by the public generally.”<sup>15</sup>

Because both the United States<sup>16</sup> and Wisconsin Constitutions<sup>17</sup> provide for the right to counsel, a state prisoner in Wisconsin who alleges he received ineffective assistance of counsel may proceed with his claim in federal court if he is unsuccessful at the state level.<sup>18</sup> However, the United States Supreme Court has held that once the state court system has determined that a defendant did not receive ineffective assistance of counsel, a federal court’s review of the claim is “doubly deferential.”<sup>19</sup> “The question ‘is not whether a federal court believes the state court’s determination’ under the *Strickland*<sup>[20]</sup> standard ‘was incorrect but whether that determination was unreasonable—a substantially higher threshold.’”<sup>21</sup>

### III. BACKGROUND ON WISCONSIN STATUTES SECTION 974.06

In 1969, Wisconsin added Chapter 974 to its criminal procedure code.<sup>22</sup> Shortly after the new statute was enacted, then-assistant public defender (and future dean of Marquette University Law School)

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13. *Id.* at 550.

14. WIS. STAT. § 782.01(1).

15. *State ex rel. Wohlfahrt v. Bodette*, 95 Wis. 2d 130, 133–34, 289 N.W.2d 366, 367 (Ct. App. 1980).

16. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

17. WIS. CONST. art. I, § 7 (“In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel.”); *see also* *State v. Sanchez*, 201 Wis. 2d 219, 226, 548 N.W.2d 69, 72 (1996) (holding that the federal and Wisconsin constitutional provisions guaranteeing the right to counsel “are substantially similar, and are to be interpreted identically”).

18. *See* O’Meara, *supra* note 11, at 550.

19. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

20. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that in order for a defendant to establish a claim for ineffective assistance of counsel he must show that (1) counsel’s performance was deficient, and (2) counsel’s deficiency prejudiced the defendant).

21. *Knowles*, 556 U.S. at 123 (quoting *Schiro v. Landrigan*, 550 U.S. 465, 473 (2007)).

22. Act of Nov. 25, 1969, 1969 Wis. Act. 255, § 63, 1969 Wis. Sess. Laws, 602, 667–71.

Howard Eisenberg wrote a *tour d'horizon* in the *Marquette Law Review* outlining how the added provisions would affect criminal procedure in Wisconsin.<sup>23</sup> 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 Statutes] section 974.06.”<sup>24</sup> 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.”<sup>25</sup> While both habeas and section 974.06 proceedings are civil in nature,<sup>26</sup> 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.”<sup>27</sup>

After the time for appeal or postconviction relief found in Wisconsin Statutes section 974.02 has expired, 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.<sup>28</sup>

#### IV. THE CREATION OF WISCONSIN STATUTES SECTION 974.06 AND ITS EFFECT ON HABEAS CLAIMS

##### A. *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

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23. Howard B. Eisenberg, *Post-Conviction Remedies in the 1970's*, 56 MARQ. L. REV. 69 (1972).

24. *Id.* at 78.

25. *Id.* at 79.

26. *Id.*

27. *Id.*

28. WIS. STAT. § 974.06(1) (2013–2014).

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.<sup>29</sup>

This language has been analyzed in numerous appellate court opinions, most significantly in *State v. Escalona-Naranjo*.<sup>30</sup> In that case, Barbaro Escalona-Naranjo was convicted of multiple drug charges.<sup>31</sup> 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.<sup>32</sup> The circuit court denied the motion and the court of appeals affirmed.<sup>33</sup>

With his direct appellate remedies extinguished, Escalona-Naranjo filed a Wisconsin Statutes section 974.06 motion in circuit court alleging that he received ineffective assistance of trial counsel.<sup>34</sup> 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.<sup>35</sup> The court of appeals certified the case to the 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.”<sup>36</sup>

Before the 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.<sup>37</sup> 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

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29. *Id.* § 974.06(4).

30. 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

31. 185 Wis. 2d at 173–74.

32. *Id.* at 174.

33. *Id.* at 174–75.

34. *Id.* at 175.

35. *Id.*

36. *Id.*

37. *Id.* at 180.

direct appeal.<sup>38</sup> 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.”<sup>39</sup> The court’s holding was based on the need for “finality in . . . litigation.”<sup>40</sup> 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.<sup>41</sup> Instead, all constitutional issues should be part of the original proceeding, barring a “sufficient reason” for not raising them.<sup>42</sup>

*Escalona-Naranjo*’s “sufficient reason” holding has remained the standard for section 974.06 proceedings for two decades,<sup>43</sup> although it has been refined over the years. For example, in *State v. Allen* the 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.”<sup>44</sup> 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.”<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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38. 72 Wis. 2d 740, 748, 242 N.W.2d 199, 203 (1976).

39. *Escalona-Naranjo*, 185 Wis. 2d at 181–82 (quoting language from WIS. STAT. § 974.06(4) (1991–1992)).

40. *Id.* at 185.

41. *Id.*

42. *Id.* at 185–86.

43. The supreme court reaffirmed the *Escalona-Naranjo* opinion nearly a decade later in *State v. Lo*, 2003 WI 107, 264 Wis. 2d 1, 665 N.W.2d 756, with only Chief Justice Abrahamson voting to overturn it. 2003 WI 107, ¶ 108 (Abrahamson, C.J., dissenting).

44. 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

45. *Id.*

46. *Id.* ¶ 23.

47. *Id.* ¶ 24.



*B. 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,<sup>48</sup> 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."<sup>49</sup> Habeas, however, was largely dormant in this state in the aftermath of Wisconsin Statutes section 974.06 until the supreme court revived it in *State v. Knight*.<sup>50</sup> 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."<sup>51</sup> 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,"<sup>52</sup> while the defendant averred that such a claim is properly filed as a section 974.06 motion with the circuit court.<sup>53</sup> 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.<sup>54</sup> 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."<sup>55</sup>

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48. See WIS. STAT. § 782 (2013–2014).

49. WIS. CONST. art. I, § 8, cl. 4.

50. 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

51. *Id.* at 514.

52. *Id.* at 512. *Knight* repeatedly used the phrase "the appellate court that considered the appeal," which in most cases is the court of appeals. See, e.g., *id.* at 518, 520–22. A defendant may, however, file a writ of habeas corpus with the Wisconsin Supreme Court if the alleged ineffectiveness of appellate counsel occurred at the high court rather than the court of appeals. See *State ex rel. Schmelzer v. Murphy*, 195 Wis. 2d 1, 6–7, 535 N.W.2d 459, 461 (Ct. App. 1995) (per curiam) (holding that the supreme court, not the court of appeals, should hear a petition for a writ of habeas corpus alleging that appellate counsel was ineffective in preparing a petition for review), *rev'd on other grounds*, 201 Wis. 2d 246, 548 N.W.2d 45 (1996).

53. *Knight*, 168 Wis. 2d at 514.

54. Compare *id.* at 515 n.3, with *id.* at 517 n.5.

55. *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.”<sup>56</sup> 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.”<sup>57</sup> 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.<sup>58</sup> 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.”<sup>59</sup> 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.”<sup>60</sup> For these reasons, the appellate court that hears the initial appeal is in the best position to “judge the conduct of appellate counsel.”<sup>61</sup>

The Wisconsin Supreme Court acknowledged that the “question of the appropriate forum and procedure is a close one,”<sup>62</sup> 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.”<sup>63</sup> 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.”<sup>64</sup> 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

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56. *Id.* at 518.

57. *Id.* at 517–18.

58. *Id.* at 518.

59. *Watson v. United States*, 536 A.2d 1056, 1060 (D.C. 1987), *cited in Knight*, 168 Wis. 2d at 518).

60. *United States v. Winterhalter*, 724 F.2d 109, 111 (10th Cir. 1983), *cited in Knight*, 168 Wis. 2d at 518.

61. *Knight*, 168 Wis. 2d at 518–19 (citing *Hemphill v. State*, 566 S.W.2d 200, 208 (Mo. 1978)).

62. *Id.* at 519.

63. *Id.* at 520.

64. *Id.* (quoting WIS. STAT. § 974.06(8) (2013–2014)).

appellate court's expertise and authority to decide *de novo*. The appellate court will be familiar with the case and the appellate proceedings."<sup>65</sup> 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."<sup>66</sup> 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."<sup>67</sup>

*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.<sup>68</sup> 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.<sup>69</sup>

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*.<sup>70</sup>

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65. *Id.* at 521.

66. *Id.*

67. *Id.*

68. 2008 WI App 146, ¶ 22, 314 Wis. 2d 112, 758 N.W.2d 806 (per curiam).

69. *Id.*

70. *Id.* ¶ 25.

While I agree 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,<sup>71</sup> so the process is unlikely to change.

*C. Wisconsin Statutes Section 974.06 Governs Claims of Ineffective Assistance of Postconviction Counsel*

A question that *Knight* left unanswered was, "How does a defendant properly plead ineffective assistance of *postconviction* counsel?" The court of appeals addressed this question in *State ex rel. Rothering v. McCaughtry*.<sup>72</sup> Before discussing the holding of *Rothering*, I should briefly elucidate the difference between postconviction and appellate representation.

Appellate representation consists of two functions: writing the brief and delivering oral argument.<sup>73</sup> 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."<sup>74</sup> 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."<sup>75</sup> 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 need to be filed. On the other hand, new issues such as newly discovered evidence, a

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71. 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.

72. 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) (per curiam).

73. *Id.* at 678–79 (citing *Watson v. United States*, 536 A.2d 1056, 1057 (D.C. 1987)).

74. MICHAEL S. HEFFERNAN, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 19.16 (5th ed. 2011) (citation omitted).

75. WIS. STAT. § (Rule) 809.30(2)(h) (2013–2014).

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.<sup>76</sup>

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.”<sup>77</sup>

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.<sup>78</sup> The same attorney handled both his trial and his appeal.<sup>79</sup> The court of appeals affirmed his conviction and sentence, and the supreme court denied his petition for review.<sup>80</sup> Rothering subsequently filed a habeas petition with the court of appeals, arguing his attorney was ineffective in both his trial and appellate capacities.<sup>81</sup> 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.”<sup>82</sup>

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.<sup>83</sup> Rothering’s attorney, however, never filed a postconviction motion with the trial court on these two issues.<sup>84</sup> 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.”<sup>85</sup> In other words, because Rothering’s attorney did

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76. HEFFERNAN, *supra* note 75, § 19.16.

77. *Id.*

78. State *ex. rel.* Rothering v. McCaughtry, 205 Wis. 2d 675, 676, 556 N.W.2d 136, 137 (Ct. App. 1996) (per curiam).

79. *Id.*

80. *Id.* at 676–77.

81. *Id.* at 677.

82. *Id.*

83. *See id.*

84. *See id.* at 679.

85. WIS. STAT. § (Rule) 809.30(2)(h) (2013–2014); *see also id.* § 974.02(2).

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.<sup>86</sup>

As a corollary to that conclusion, the 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.”<sup>87</sup>

*D. 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 defendants and defense attorneys should be cognizant of. After a defendant is convicted and sentenced, he has the option of (1) filing a postconviction motion with the circuit court,<sup>88</sup> (2) pursuing a direct appeal to the court of appeals,<sup>89</sup> or (3) filing a motion for sentence modification with the circuit court.<sup>90</sup> If the defendant elects to pursue postconviction relief, he has twenty days after sentencing to file his notice with the circuit court.<sup>91</sup> Filing a postconviction motion does not bar a subsequent appeal; indeed, a postconviction motion is

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86. *Rothering*, 205 Wis. 2d at 679.

87. *Id.* at 681. Neither the *Rothering* court nor any subsequent appellate court decision has clarified when a habeas petition would be a more appropriate remedy than a § 974.06 motion for a defendant alleging he received ineffective assistance of postconviction counsel.

88. WIS. STAT. § (Rule) 809.30(2)(b).

89. *Id.* § 809.30(2)(j).

90. *Id.* § 973.19.

91. *Id.* § 809.30(2)(b).

often necessary to preserve issues for appeal.<sup>92</sup> 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.”<sup>93</sup> 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.<sup>94</sup>

Of course, 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.<sup>95</sup> 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.<sup>96</sup>

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).<sup>97</sup> 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.”<sup>98</sup> 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.”<sup>99</sup> 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.<sup>100</sup> A defendant has ninety days after sentencing to move for sentence modification.<sup>101</sup>

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92. *See id.* § 809.30(2)(h).

93. *Id.* § 974.02(2); *see also id.* § 809.30(2)(h).

94. *Cf. State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677–78, 556 N.W.2d 136, 137–38 (Ct. App. 1996) (“Claims of ineffective trial counsel or whether grounds exist to withdraw a guilty plea cannot be reviewed on appeal absent a postconviction motion in the trial court.”).

95. *See id.* at 677–78.

96. WIS. STAT. § (Rule) 809.30(2)(j) (2013–2014).

97. *Id.* § 973.19(5).

98. HEFFERNAN, *supra* note 75, § 19.17.

99. *Id.* (citing WIS. STAT. § 973.19 Judicial Council Note, 1984 (2013–2014)).

100. *Id.*

101. 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.<sup>102</sup> Perplexingly, although a section 974.06 motion is a collateral attack upon a defendant's conviction, the statute is entitled "postconviction procedure."<sup>103</sup> A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal."<sup>104</sup> Many Wisconsin judicial opinions have thus used the phrase "postconviction motion" when referring to section 974.06 motions.<sup>105</sup> 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,<sup>106</sup> Wisconsin also recognizes a right to counsel when filing postconviction motions.<sup>107</sup> That right to counsel, though, does not extend to section 974.06 motions.<sup>108</sup> The distinction between an attorney providing postconviction as opposed to appellate representation is not merely

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102. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677–81, 556 N.W.2d 136, 137–39 (Ct. App. 1996).

103. *Cf. State v. Evans*, 2004 WI 84, ¶ 27 n.8, 273 Wis. 2d 192, 682 N.W.2d 784 ("[A] motion to *collaterally* attack a conviction under § 974.06 is commonly referred to as a *postconviction* motion." (emphasis added)).

104. BLACK'S LAW DICTIONARY 318 (10th ed. 2014) ("A petition for a writ of habeas corpus is one type of collateral attack.").

105. *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).

106. *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985).

107. *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)).

108. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 648–49, 579 N.W.2d 698, 713 (1998) ("[A Section] 974.06 proceeding is considered to be civil in nature, and authorizes a collateral attack on a defendant's conviction. Defendants do not have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . ." (citation omitted)). Note that the Wisconsin State Public Defender's Office has the discretion to appoint counsel in section 974.06 proceedings if it determines that "the case should be pursued." WIS. STAT. § 977.05(4)(j) (2013–2014). In deciding whether counsel should be appointed, the Public Defender's Office "considers a number of factors, including the likelihood of success if counsel is appointed." HEFFERNAN, *supra* note 75, § 19.24.



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.<sup>109</sup> A defendant arguing ineffective assistance of *appellate* counsel, conversely, may not seek relief under section 974.06 and must instead petition the court of appeals for a writ of habeas corpus.<sup>110</sup> 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.<sup>111</sup> 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.”<sup>112</sup>

It is often the case that the same attorney serves as both a defendant’s postconviction and appellate counsel.<sup>113</sup> However, as claims of ineffective assistance of postconviction counsel follow a different path than claims of ineffective assistance of appellate counsel, lawyers and defendants must be precise about what form of ineffectiveness they are alleging.

#### V. 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 two such issues: (1) the proper pleading standard for a defendant alleging that his appellate attorney was ineffective for failing to raise certain issues, and (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. The answers to these two questions will now be discussed in turn.

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109. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996).

110. *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992).

111. See WIS. STAT. § 974.06 (2013–2014); *Evans*, 2004 WI 84, ¶ 35.

112. *Evans*, 2004 WI 84, ¶ 35.

113. *Rothering*, 205 Wis. 2d at 678 n.4.

## A. State v. Starks

## 1. 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.<sup>114</sup> “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 . . . .”<sup>115</sup> The court of appeals affirmed his convictions and the supreme court denied his petition for review.<sup>116</sup>

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.<sup>117</sup> Here is where the imbroglio unfolded. The circuit court dismissed the motion for exceeding the Milwaukee County Circuit Court rule on page length limit.<sup>118</sup> 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”).<sup>119</sup> The circuit

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114. *State v. Starks*, 2013 WI 69, ¶ 1, 349 Wis. 2d 274, 833 N.W.2d 146.

115. *Id.* ¶ 15.

116. *Id.* ¶ 20.

117. *Id.* ¶ 21.

118. *Id.*

119. All defendants (such as Starks) convicted of a felony are required to provide a DNA sample to the state crime laboratories as mandated by Wisconsin Statutes section 973.047(1f). Prior to the passage of the 2013–2014 state budget, unless the felony was sexual assault, the circuit court had discretion in deciding whether to impose a \$250 DNA surcharge on the defendant. *See State v. Ziller*, 2011 WI App 164, ¶ 9, 338 Wis. 2d 151, 807 N.W.2d 241. In *State v. Cherry*, 2008 WI App 80, ¶ 10, 312 Wis. 2d 203, 752 N.W.2d 393, the court of appeals held that a circuit court “must do something more than stat[e] it is imposing the DNA surcharge simply because it can.” At the very least, a circuit court had to demonstrate that it went through a rational decision-making process. *See id.* ¶¶ 10–11. A motion challenging the circuit court’s discretion in imposing a DNA surcharge was known as a “*Cherry* motion.” *See Starks*, 2013 WI 69, ¶ 2. The 2013 budget act, however, rewrote the statute such that now a court *must* impose a \$250 DNA surcharge for each felony conviction and \$200 for each misdemeanor conviction. Act of June 30, 2013, 2013 Wis. Act 20, §§ 2353–55, 2013 Wis. Sess.

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.<sup>120</sup> Starks then refiled his section 974.06 motion within the local page limit requirement.<sup>121</sup> Ultimately, the circuit court denied Starks's section 974.06 motion on the merits as "not set[ting] forth a viable claim for relief with regards to trial counsel's performance."<sup>122</sup> Starks's motion, however, should have been denied for an entirely different reason: he filed the wrong claim in the wrong court.<sup>123</sup> Because Kagen did not file any postconviction motions with the circuit court and instead pursued a direct appeal, he was Starks's appellate attorney, not his postconviction attorney.<sup>124</sup> 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.<sup>125</sup> While the district attorney's office could have sought dismissal, nothing in the record indicated that the State requested for Starks's section 974.06 motion to be dismissed on these grounds.<sup>126</sup>

When the case made its way to the court of appeals, the State (now represented by the Wisconsin Department of Justice)<sup>127</sup> argued: "Attorney Kagen was Starks's *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."<sup>128</sup> 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

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Laws 85, 637 (codified as amended at Wis. Stat. § 976.046(1r) (2013–2014)). For purposes of this Article, I will still use the term "*Cherry* motion."

120. *Starks*, 2013 WI 69, ¶ 21.

121. *Id.*

122. *Id.* ¶ 22 (alteration in original) (internal quotation marks omitted).

123. *Id.* ¶ 30.

124. *See id.* ¶ 15.

125. *Id.* ¶ 30.

126. *Id.* ¶ 38.

127. The local district attorney's office represents the State at trial and in one-judge appeals before the court of appeals, while the Department of Justice represents the State in three-judge appeals before the court of appeals and all cases before the Wisconsin Supreme Court. *See* WIS. STAT. §§ 165.25(1), 752.31(4), 978.05(5) (2013–2014).

128. Brief and Supplemental Appendix of Plaintiff-Respondent at 19, *State v. Starks*, No. 2010AP425, 2011 WL 2314951 (Wis. Ct. App. June 14, 2011), 2010 WL 4633221 at \*19.

challenge to appellate counsel's performance does not belong in the circuit court."<sup>129</sup> 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.<sup>130</sup> In any event, the court of appeals eventually held that Starks's 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.<sup>131</sup>

## 2. The Wisconsin Supreme Court's Decision

Because of the procedural errors made as the case wended its way through the appellate system,<sup>132</sup> the first question the 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.<sup>133</sup> 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

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129. *State v. Starks*, No. 2010AP425, 2011 WL 2314951, ¶ 5 n.1 (Wis. Ct. App. June 14, 2011).

130. *Cf. State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678 n.4, 556 N.W.2d 136, 138 n.4 (Ct. App. 1996) ("[W]e are not bound by the designations used in the appointment of counsel after a conviction.").

131. *Starks*, 2013 WI 69, ¶ 25.

132. Another procedural wrinkle in *Starks* was that Attorney Kagen never filed a postconviction motion with the circuit court alleging that Starks's trial attorney was ineffective. *Id.* ¶ 34. When a defendant pursues an appeal of his conviction, he may only plead arguments related to the sufficiency of the evidence or issues that were previously raised, either during the trial or in a postconviction motion. *See* WIS. STAT. § 974.02(2) (2013–2014); *Rothering*, 205 Wis. 2d at 677–78. So because Kagen qua postconviction counsel did not file a motion for a new trial based on ineffective assistance of trial counsel, Kagen in his capacity as appellate counsel could not allege that trial counsel was ineffective. However, ineffective assistance of postconviction counsel can constitute a sufficient reason to excuse the failure to raise an issue prior to a direct appeal. *State v. Allen*, 2010 WI 89, ¶ 29, 328 Wis. 2d 1, 786 N.W.2d 124. It is unclear how this issue could have been resolved, as the only way for Starks's attorney before the supreme court to present this issue would have been to argue that Attorney Kagen as appellate counsel was ineffective for failing to allege that Attorney Kagen as postconviction counsel was ineffective for failing to allege that Starks's trial counsel was ineffective. Paradoxically, it is thus arguably ineffective assistance of counsel for a postconviction attorney to *not* argue that trial counsel was ineffective, even if it is the same lawyer.

133. *Starks*, 2013 WI 69, ¶¶ 36–38.

with the court of appeals, deleting the word ‘postconviction’ and replacing it with ‘appellate.’”<sup>134</sup>

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.<sup>135</sup>

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.”<sup>136</sup> 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.”<sup>137</sup> What is more, the 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.”<sup>138</sup> 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.’”<sup>139</sup>

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.<sup>140</sup> 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.”<sup>141</sup> Meanwhile, the State argued that a defendant “must also establish why the unraised claims of ineffective assistance of trial

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134. *Id.* ¶ 39.

135. *See id.* ¶ 32.

136. *Id.* ¶ 49.

137. *Id.*

138. *Id.* ¶ 51.

139. *Id.* ¶ 52 (quoting WIS. STAT. § 974.06(1) (2013–2014)).

140. *Id.* ¶ 32.

141. *Id.* ¶ 56.

counsel were ‘clearly stronger’ than the claims that appellate counsel raised on appeal.”<sup>142</sup> The court held that the State “articulated the proper standard.”<sup>143</sup>

In examining the issue, the supreme court turned first to a decision by the Seventh Circuit Court of Appeals, 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.*<sup>144</sup>

This “clearly stronger” standard was adopted by the United States Supreme Court fourteen years later in *Smith v. Robbins*.<sup>145</sup> There, the 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.”<sup>146</sup>

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.”<sup>147</sup> As support for the “clearly stronger” pleading standard, the court cited the necessity of “finality in . . . litigation”<sup>148</sup> as well as the need to “respect the professional judgment of postconviction attorneys in separating the wheat from the chaff.”<sup>149</sup>

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142. *Id.*

143. *Id.*

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

145. 528 U.S. 259 (2000).

146. *Id.* at 288 (emphasis added).

147. *Starks*, 2013 WI 69, ¶ 60.

148. *Id.* (quoting *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163 (1994)).

149. *Id.*

The following term, the court logically extended the “clearly stronger” standard to claims of ineffective assistance of postconviction counsel.<sup>150</sup> As the court noted, the principle of finality is of such import that “not every mistake will justify relief.”<sup>151</sup>

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

1. 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.<sup>152</sup> Lorenzo Kyles pled guilty to first-degree reckless homicide by use of a dangerous weapon and was sentenced to forty years imprisonment.<sup>153</sup> When he initially met with his lawyer after sentencing, Kyles stated he was undecided about seeking postconviction or appellate relief.<sup>154</sup> A few days later, he decided he wanted to appeal.<sup>155</sup> However, Kyles was unable to get ahold of his lawyer until after the deadline to file a notice of appeal passed.<sup>156</sup>

Kyles responded by filing a pro se *Knight* petition with the court of appeals seeking reinstatement of his right to appeal.<sup>157</sup> In dismissing his petition, the court of appeals held that because Kyles’s 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.<sup>158</sup> 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

150. *State v. Romero-Georgana*, 2014 WI 83, ¶ 46, 360 Wis. 2d 522, 849 N.W.2d 668. The court did caution, however, that this standard may not apply “when counsel has valid reasons for choosing one set of arguments over another. These reasons may include the preferences, even the directives, of the defendant.” *Id.*

151. *Id.* ¶ 31.

152. 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805.

153. *Id.* ¶ 6.

154. *Id.* ¶ 7.

155. *Id.* ¶ 8.

156. *Id.* ¶¶ 8–10.

157. *Id.* ¶ 11.

158. *Id.*

window.<sup>159</sup> 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.<sup>160</sup> Imprisoned but unbowed, Kyles tried his luck one more time with a habeas petition to the court of appeals, again asking for an extension.<sup>161</sup> 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.<sup>162</sup>

## 2. The Wisconsin Supreme Court's Decision

The Wisconsin Supreme Court took Kyles's 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."<sup>163</sup> The court acknowledged that there was "no precedent directly addressing the discrete procedural issue" presented.<sup>164</sup> The state argued that under *Knight* and *Rothering*, Kyles's petition should go to the circuit court, as that was where the alleged ineffectiveness occurred.<sup>165</sup> In a unanimous opinion authored by Justice Bradley, the 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.<sup>166</sup> The 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."<sup>167</sup>

Having decided the proper forum, the 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.<sup>168</sup> The court held that, rather than bringing a

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159. *Id.* ¶ 14.

160. *Id.*

161. *Id.* ¶ 15.

162. *Id.*

163. *Id.* ¶ 16.

164. *Id.* ¶ 19.

165. *Id.* ¶ 28.

166. *Id.* ¶ 32.

167. *Id.* ¶ 38.

168. *Id.* ¶ 39.



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.”<sup>169</sup> 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.”<sup>170</sup>

Turning to the substance of his claim, the court held that Kyles alleged sufficient facts to entitle him to an evidentiary hearing.<sup>171</sup> Noting that “the deprivation of counsel during an appeal is per se prejudicial,”<sup>172</sup> 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.”<sup>173</sup> 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.<sup>174</sup>

The lesson from *Starks* and *Kyles* is that no matter how many times the Wisconsin Supreme Court plumbs the depths of this area of the law, unanswered procedural questions continue to emerge. While perhaps not the quagmire it once was, the waters of criminal appellate, postconviction, and collateral litigation remain muddled. Unfortunately for practitioners, the United States Supreme Court has just injected further uncertainty.

## VI. RECENT UNITED STATES SUPREME COURT DECISIONS

In *Douglas v. California*, released on the same day in 1963 as *Gideon v. Wainwright*,<sup>175</sup> the United States Supreme Court held that a criminal defendant has a constitutional right to counsel in his initial criminal appeal.<sup>176</sup> Twenty-two years later in *Evitts v. Lucey*, the Court extended this right to encompass the effective assistance of appellate counsel.<sup>177</sup> Shortly after the *Evitts* decision, the Court cautioned that the constitutional right to counsel does not apply to defendants who are

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169. *Id.*

170. *Id.* ¶ 44.

171. *Id.* ¶¶ 49, 59.

172. *Id.* ¶ 54.

173. *Id.* ¶ 56.

174. *Id.* ¶ 59.

175. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

176. *Douglas v. California*, 372 U.S. 353 (1963).

177. 469 U.S. 387, 396–97 (1985).

“mounting collateral attacks upon their convictions” because “the right to appointed counsel extends to the first appeal of right, and no further.”<sup>178</sup> For that reason, the Court has “rejected suggestions [to] establish a right to counsel on discretionary appeals.”<sup>179</sup> Accordingly, even when a defendant has representation in state collateral proceedings, he may not allege that he received ineffective assistance of counsel.<sup>180</sup>

Two recent opinions by the Court, however, raise questions over whether the right to effective assistance of counsel is expanding beyond the trial and first appeal, and into state collateral proceedings. These holdings, and their implications for Wisconsin law, will now be discussed.

#### A. *Martinez v. Ryan*

*Martinez* dealt with the question of “whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial.”<sup>181</sup> In *Arizona*, a convicted defendant may not raise the issue of ineffective assistance of trial counsel on direct appeal but instead can only raise the claim in a separate collateral proceeding.<sup>182</sup> Luis Martinez was convicted of two counts of sexual conduct with a minor under the age of fifteen.<sup>183</sup> A new attorney was appointed to handle Martinez’s appeal.<sup>184</sup> While the direct appeal was pending, the appointed counsel filed a motion for collateral relief with the state trial court.<sup>185</sup> No allegations of ineffective assistance of trial counsel were raised in the collateral motion, and the attorney filed a statement saying she could find no colorable claims of ineffective assistance of trial counsel.<sup>186</sup> The trial court gave Martinez a chance to respond to his attorney’s collateral motion and raise any claims he

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178. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

179. *Id.*

180. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

181. *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012).

182. *Id.* at 1313.

183. *Id.*

184. *Id.* at 1314.

185. *Id.* *Arizona* refers to their collateral proceedings as “postconviction” proceedings, but I will use the term “collateral” to avoid the confusion I have described throughout this Article.

186. *Id.*

thought his lawyer overlooked.<sup>187</sup> Martinez did not respond and the trial court dismissed the collateral motion.<sup>188</sup> On direct appeal, the Arizona Court of Appeals affirmed his conviction and the state supreme court denied review.<sup>189</sup>

Over a year later, Martinez (now represented by a new attorney) filed a second collateral motion with the Arizona trial court, this time alleging ineffective assistance of trial counsel.<sup>190</sup> The trial court denied his motion, holding that Martinez was required to raise this issue in his first collateral motion.<sup>191</sup> The court of appeals agreed and the Arizona Supreme Court again denied his petition for review.<sup>192</sup>

His state remedies having evaporated, Martinez turned to the federal system for succor, filing a petition for a writ of habeas corpus with the district court, once again alleging ineffective assistance of trial counsel.<sup>193</sup> Martinez acknowledged that he procedurally defaulted<sup>194</sup> on this claim by not raising it in his original collateral motion, but argued he had a legitimate excuse: his first collateral review attorney was ineffective.<sup>195</sup> The district court denied the petition and the Ninth Circuit affirmed.<sup>196</sup>

The Supreme Court granted certiorari and proceeded to carve out a tiny exception to the rule that there is no right to counsel in state collateral proceedings.<sup>197</sup> When a state (such as Arizona) provides that claims of ineffective assistance of trial counsel can only be raised in collateral proceedings and not in a direct appeal, a defendant's failure to raise such a claim in the initial collateral proceedings "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. The "procedural-default doctrine" holds that "a federal court lacks jurisdiction to review the merits of a habeas corpus petition if a state court has refused to review the complaint because the petitioner failed to follow reasonable state-court procedures." BLACK'S LAW DICTIONARY 1397 (10th ed. 2014).

195. *Martinez*, 132 S. Ct. at 1314–15.

196. *Id.* at 1315.

197. *See id.* at 1320.

no counsel or counsel in that proceeding was ineffective.”<sup>198</sup> Justice Kennedy’s opinion was littered with qualifiers, such as the warning that the Court’s holding “does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State’s appellate courts.”<sup>199</sup> In addition, the *Martinez* holding “does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.”<sup>200</sup>

Justice Scalia — joined by Justice Thomas — wrote a biting dissent.<sup>201</sup> Justice Scalia accused the Court of reaching its result for “equitable” reasons and effectively inventing “a new constitutional right to collateral-review counsel.”<sup>202</sup> He also warned that the holding was not limited to ineffective-assistance-of-trial counsel claims (as the majority insisted) and would soon apply to other situations where state collateral proceedings provided the first opportunity to raise certain issues, such as “claims of ‘newly discovered’ prosecutorial misconduct, . . . claims based on ‘newly discovered’ exculpatory evidence or ‘newly discovered’ impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel.”<sup>203</sup> As Justice Scalia rhetorically asked,

Is there any relevant difference between cases in which the State says that certain claims can only be brought on collateral review and cases in which those claims *by their nature* can only be brought on collateral review, since they do not manifest themselves until the appellate process is complete?<sup>204</sup>

#### B. Trevino v. Thaler

The door leading to the constitutional right to collateral counsel that *Martinez* pried open was kicked in a little more the following term in *Trevino v. Thaler*.<sup>205</sup> A Texas jury convicted Carlos Trevino of capital

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198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1321–27 (Scalia, J., dissenting). To be sure, it is perhaps redundant to refer to a Scalia dissent as “biting.”

202. *Id.* at 1321.

203. *Id.*

204. *Id.* at 1322 n.1.

205. 133 S. Ct. 1911 (2013).

murder and the judge sentenced him to death.<sup>206</sup> A new attorney was appointed to handle Trevino's direct appeal.<sup>207</sup> In accordance with Texas's criminal procedural rules, a second new attorney was appointed to seek state collateral relief while the direct appeal was pending.<sup>208</sup> Each of Trevino's attorneys raised claims of ineffective assistance of trial counsel; however, appellate counsel "did not claim that Trevino's trial counsel had been constitutionally ineffective during the penalty phase of the trial court proceedings," while the attorney handling the collateral motion "did not include a claim that trial counsel's ineffectiveness consisted in part of a failure adequately to investigate and to present mitigating circumstances during the penalty phase of Trevino's trial."<sup>209</sup> His convictions were eventually affirmed in both the direct appeal and the collateral review.<sup>210</sup>

Trevino then moved for habeas relief in federal district court.<sup>211</sup> Yet another new attorney was appointed, who at this point raised an argument that Trevino's appellate and collateral attorneys failed to make: "Trevino had not received constitutionally effective counsel during the penalty phase of his trial in part because of trial counsel's failure to adequately investigate and present mitigating circumstances during the penalty phase."<sup>212</sup> The district court denied Trevino's habeas petition, holding that he defaulted on his ineffective-assistance-of-trial-counsel claim because he did not raise it in his state collateral proceedings.<sup>213</sup> The Fifth Circuit affirmed.<sup>214</sup>

Justice Breyer, writing for the Court, began by reciting the facts and holding of *Martinez*, then noted one critical factual distinction between the criminal appellate procedures of Arizona and Texas: "Unlike Arizona, Texas does not expressly *require* the defendant to raise a claim of ineffective assistance of trial counsel in an initial *collateral review* proceeding. Rather Texas law on its face appears to permit (but not

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206. *Id.* at 1915.

207. *Id.*

208. *Id.*

209. *Id.* (emphasis omitted).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 1916. Again, although the *Trevino* opinion used "collateral" and "postconviction" interchangeably, I will exclusively use "collateral" to avoid any confusion with Wisconsin's postconviction proceedings.

214. *Id.*

require) the defendant to raise the claim on *direct appeal*.”<sup>215</sup> Whether *Martinez*’s limited exception to the rule that there is no right to counsel in state collateral proceedings would apply to the facts of *Trevino* depended on whether the difference between Texas’s and Arizona’s systems “matter[ed].”<sup>216</sup>

In holding that *Martinez* applied and Trevino was thus forgiven for not raising his ineffective-assistance-of-trial-counsel claim on direct appeal, the Court zeroed in on two key facts: (1) the rules of Texas criminal procedure make it “‘virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim’ on direct review,”<sup>217</sup> and (2) it would be “significant[ly] unfair[]” not to apply *Martinez* because “Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review.”<sup>218</sup> Without getting into the minutiae of Texas criminal appellate procedure, the reason it is “virtually impossible” to raise ineffective assistance of trial counsel in a direct appeal is because of sharp filing deadlines and because collateral review litigation proceeds concurrently with a defendant’s direct appeal.<sup>219</sup> Ergo, the differences between Arizona’s and Texas’s systems for raising ineffective assistance of trial counsel amounted to “a distinction without a difference.”<sup>220</sup> The Court ended with a cryptic caveat: “[W]e do not (any more than we did in *Martinez*) seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for States to decide.”<sup>221</sup>

While Justices Scalia and Thomas dissented for the same reasons as they did in *Martinez*,<sup>222</sup> they were joined in dissent this time by Chief Justice Roberts and Justice Alito.<sup>223</sup> Writing for himself and Justice Alito, the Chief Justice decried that the Court was already crossing over

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215. *Id.* at 1918.

216. *Id.*

217. *Id.* (alteration in original) (quoting *Robinson v. State*, 16 S.W.3d 808, 811 (Tex. Crim. App. 2000)).

218. *Id.* at 1919.

219. *See generally id.* at 1918–20.

220. *Id.* at 1921.

221. *Id.*

222. *See id.* at 1924 (Scalia, J., dissenting).

223. *Id.* at 1921 (Roberts, C.J., dissenting).

the “crisp limit” it laid down in *Martinez*.<sup>224</sup> Additionally, he observed that the “questions raised” by the majority’s decision “are as endless as will be the state-by-state litigation it takes to work them out.”<sup>225</sup> Indeed, in reading Chief Justice Roberts’s dissent, one gets the sense that he and Justice Alito felt hoodwinked by Justice Kennedy’s promise in *Martinez* that “[t]he holding in [that] case does not concern attorney errors in other kinds of proceedings,”<sup>226</sup> and that if they had to do it over, they probably would not have joined the *Martinez* opinion.

C. *Martinez’s and Trevino’s Implications for  
Wisconsin Criminal Procedure*

There are two ways one can read the *Martinez* and *Trevino* decisions. The first is that these cases are to be construed narrowly and only apply to states like Arizona and Texas that do not afford a defendant a “meaningful opportunity” to raise ineffective assistance of trial counsel claims on direct appeal. Under this view, those decisions would not touch a hair upon the head of Wisconsin’s criminal litigation system, as Wisconsin Statutes section 974.06(4) and *Escalona-Naranjo* preclude a defendant from saving issues for a collateral section 974.06 motion that could have been raised in a postconviction motion or on direct appeal.<sup>227</sup>

Another interpretation—and one consistent with the admonitions in Justice Scalia’s *Martinez* dissent—is that a defendant has a right to counsel in collateral proceedings anytime he raises a constitutional claim that could not have been raised on direct appeal. This would apply, most significantly, to claims of ineffective assistance of appellate counsel. Because ineffective assistance of appellate counsel, by definition, cannot reveal itself until the appellate process is complete, a defendant’s first opportunity to raise such a claim would be in his petition for a writ of habeas corpus with the court of appeals. If *Martinez* and *Trevino* are read broadly, and if the right to effective appellate counsel is considered as sacred as the right to effective trial counsel, then one could deduce that criminal defendants in Wisconsin have a right to counsel when filing *Knight* petitions.

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224. *Id.* at 1923.

225. *Id.*

226. *Id.* at 1922–23 (quoting *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012)).

227. See WIS. STAT. § 974.06(8) (2013–2014); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 517 N.W.2d 157, 162 (1994).

Under *Martinez* and *Trevino*, it would seem that an enterprising felon looking to attack his appellate lawyer's competency could raise the following incontrovertible syllogism: (1) I have a right to a lawyer on appeal, just as I did at trial; (2) I have a right to an effective lawyer on appeal; (3) my appellate lawyer was ineffective; (4) now is the first time I can challenge my appellate lawyer's effectiveness; (5) I am constitutionally entitled to a lawyer in my *Knight* petition. Q.E.D. Leaving aside my reservations about *Martinez* and *Trevino*, I think that the fairest reading of those cases is that criminal defendants in Wisconsin are now constitutionally entitled to a lawyer when filing a habeas petition for ineffective assistance of appellate counsel.

#### VII. CONCLUSION

The goal of this Article was to be instructive rather than theoretical. It is my hope to have clarified some of the fine distinctions between appellate counsel, postconviction counsel, petitions for writs of habeas corpus, and collateral proceedings under Wisconsin Statutes section 974.06. While the differences may seem contrived or overly formalistic, there are significant consequences to defendants and their lawyers who confuse the subjects, particularly when raising ineffective-assistance-of-counsel claims. As Dean Eisenberg warned defense attorneys practicing in this area of law over forty years ago, "It is the duty of counsel to make certain that the remedy fits the crime."<sup>228</sup> Just so today.

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228. Eisenberg, *supra* note 23, at 86.