STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2010AP425

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAMELL E. STARKS,

Defendant-Appellant-Petitioner.

# NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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# NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR REVIEW

## ARGUMENT

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief addressing the proper interpretation of the "sufficient reason" requirement of Wis. Stat. §974.06. WACDL addresses two issues: 1) when is a sufficient reason showing required, and 2) when do errors of post-conviction or appellate counsel constitute "sufficient reason" under Wis. Stat. §974.06(4).

WACDL takes no position on the validity of Starks' underlying constitutional challenges.

## I.

## APPLICATION OF THE "SUFFICIENT REASON" REQUIREMENT OF WIS. STAT. §974.06(4)

### A. The "Sufficient Reason" Requirement Does Not Apply Absent a Prior Post-Conviction Motion or Appeal in Which the New Constitutional Claim Could Have Been Raised.

Section 974.06 of the Wisconsin Statutes provides a

procedure for post-conviction relief following either completion of a direct appeal or expiration of the time for filing such an appeal. Under §974.06, a person in custody may, after the time for direct appeal expires, move the court which imposed sentence to vacate or set aside that sentence on the grounds, *inter alia*, that it "was imposed in violation of the U.S. constitution or the constitution or laws of [Wisconsin], [or] that the court was without jurisdiction to impose such sentence...." Wis. Stat. §974.06(1).

Although "[a] sec. 974.06 motion is not a complete substitute for an appeal," "[t]his simply means that not every issue which can or should be raised on direct appeal can also be raised by this post-conviction motion." ***Loop v. State***, 65 Wis.2d 499, 502, 222 N.W.2d 694 (1974). Specifically, §974.06 is limited to jurisdictional and constitutional claims. ***Id.*** at 501. "Issues of constitutional dimension can be raised on direct appeal and can also be raised on 974.06 motion." ***Id.*** at 502.

The right to seek relief from constitutional or jurisdictional violations under §974.06(1) is not unlimited, however. Pursuant to Wis. Stat. §974.06(4),

> 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.

As this Court held in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 185, 517 N.W.2d 157 (1994), however, §974.06(4) *only* requires the showing of a sufficient reason when the issue(s) sought to be raised "could have been raised" in the previous motion. The Court explained in ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis.2d 1, 665 N.W.2d 756, that

> all claims of error that a criminal defendant can bring

> should be consolidated into one motion or appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion.

*See also* ***State v. Balliette***, 2011 WI 79, ¶36, 336 Wis.2d 358, 805 N.W.2d 334.

Accordingly, unless the defendant pursued motions or a direct appeal under Rule 809.30, a no-merit appeal under Wis. Stat. (Rule) 809.32, a prior §974.06 motion, or some other motion in which he or she could have raised the new constitutional claim, the requirement of a "sufficient reason" showing does not apply to a later §974.06 motion. *See also* ***Balliette***, 2011 WI 79, ¶36. A sentence modification motion based on an erroneous exercise of discretion under Wis. Stat. §973.19,[1] a motion to modify one's sentence based on new factors under ***Hayes v. State***, 46 Wis.2d 93, 101, 175 N.W.2d 625 (1970), after the time for a direct appeal,[2] a motion for sentence adjustment under Wis. Stat. §973.195, a separate motion for sentence credit under Wis. Stat. §973.155 not as part of a Rule 809.30 motion, and the like would *not* trigger the sufficient reason requirement for a later §974.06 motion because any new constitutional claim could not have been raised in the context of such a motion.

Similarly, a prior challenge to the effectiveness of *appellate* counsel under ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992), would not bar a subsequent §974.06 motion raising ineffectiveness of *post-conviction* counsel or other constitutional claims that could not be raised in the context of the ***Knight*** petition

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[1] Section 973.19(1)(a) "provides the mechanism for asserting an erroneous exercise of discretion based on excessiveness, undue harshness, or unconscionability," ***State v. Noll***, 2002 WI App 273, ¶10, 258 Wis.2d 573, 653 N.W.2d 895, not constitutional violations.

[2] This Court overruled ***Hayes*** on other grounds in ***State v. Taylor***, 60 Wis.2d 506, 523, 210 N.W.2d 873 (1973).

because they were not preserved for the direct appeal.

The state concedes much of this but nonetheless claims that a §973.19(1)(a) motion would constitute a waiver of any subsequent claims, thus requiring "sufficient reason" to raise such a claim. State's Brief at 5-7. The state is wrong because §973.19(5) by its terms does not waive substantive *claims*; it waives the right to a particular *procedure*, in this case a direct appeal under Rule 809.30:

> (5) By filing a motion under sub.(1)(a) the defendant waives his or her right to file an appeal or postconviction motion under s.809.30(2).

Wis. Stat. §973.19(5). The same waiver arises when the defendant fails to file a direct appeal under Rule 809.30. Yet, this Court has made clear that such a failure does *not* trigger the sufficient reason requirement under §974.06(4). ***Balliette***, 2011 WI 79, ¶36.

### B. The Defendant's Inability to Raise His or Her Constitutional Claim in the Prior Proceeding Constitutes Sufficient Reason Under §974.06(4)

An alternative route to the same result is to recognize that, if the defendant could not legally raise the constitutional issue in the prior proceeding, then he or she necessarily has sufficient reason for not having raised it there. A defendant cannot be punished for failing to do something he or she could not legally do.

## II.

## PLEADING INEFFECTIVE ASSISTANCE OF POST-CONVICTION OR APPELLATE COUNSEL AS "SUFFICIENT REASON" REQUIRES NOTHING MORE, NOR LESS, THAN PLEADING THE SUBSTANTIVE INEFFECTIVENESS CLAIM

Section 974.06(4) does not define "sufficient reason," nor has this Court. While delineating the full scope of circumstances constituting "sufficient reason" is not before the Court, ineffective assistance of post-conviction or appellate counsel *can* satisfy that requirement in a particular case. *E.g.*, ***Balliette***, 2011 WI 79, ¶37; ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556

N.W.2d 136 (Ct. App. 1996). *Accord* ***Murray v. Carrier***, 477 U.S. 478 (1986) (ineffective assistance of appellate counsel meets stricter federal "cause and prejudice" standard permitting federal habeas review despite procedural default in state court).

Although the state's brief is far from clear, it does not appear to dispute that pleading ineffectiveness of post-conviction or appellate counsel as "sufficient reason" under §974.06(4) requires nothing more than an adequate allegation of the substantive ineffectiveness claim. That, of course, was the tack pursued by this Court in ***Balliette***, 2011 WI 79, ¶¶62-64. Any substantive claim omitted from or inadequately presented in a prior motion or appeal due to the ineffectiveness of post-conviction counsel necessarily would support an independent claim of ineffective post-conviction or appellate counsel. Moreover, post-conviction or appellate counsel's inability to challenge his or her own ineffectiveness on the direct appeal constitutes sufficient reason under §974.06(4). ***State v. Hensley***, 221 Wis.2d 473, 585 N.W.2d 683 (Ct. App. 1998).

The state's argument, however, erroneously limits post-conviction ineffectiveness to circumstances where prior counsel raised weaker issues instead of one or more issues that were both stronger and obvious. State's Brief at 12-29. While that is one way to show deficient performance by post-conviction or appellate counsel, it is not the only way to show it. Accepting the state's novel attempt to limit post-conviction ineffectiveness claims in this manner would conflict with both controlling federal authority and common sense.

### A. Ineffective Assistance of Counsel Standards

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence, Wis. Const. art. I, §21, and to the effective assistance of counsel on his first appeal as of right, ***Douglas v. California***, 372 U.S. 353 (1963); ***Evitts v. Lucey***, 469 U.S. 387 (1985). The right to counsel is intended to help protect a defendant's rights because he cannot be expected to do so himself. ***Evitts***, 469 U.S. at 396 ("An unrepresented appellant--like an

unrepresented defendant at trial--is unable to protect the vital interests at stake").

The two-pronged standard for assessing the effectiveness of trial counsel is well-established. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984). The first, deficiency prong is met where counsel's representation "'fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 395 N.W.2d 176, 181 (1986), *quoting* ***Strickland***, 466 U.S. at 688. This prong is met when, for instance, counsel's errors resulted from oversight or inattention rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Kimmelman v. Morrison***, 477 U.S. 365, 385 (1986); ***State v. Moffett***, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).[3]

The defendant need not show total incompetence of counsel; a single unreasonable error is sufficient. ***Kimmelman***, 477 U.S. at 383; *see* ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial." ***Murray v. Carrier***, 477 U.S. 478, 496 (1986) (citation omitted).

Although the Court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," ***Strickland***, 466 U.S. at 690, the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." ***Kimmelman***, 477 U.S. at 384, *citing* ***Strickland***, 466 U.S. at 688-89. No additional deference is required or permitted.

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*., *citing* ***Strickland***, 466

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[3] *Compare* ***Murray v. Carrier***, 477 U.S. 478, 486-87 (1986) (given concerns for comity, attorney oversight not falling to level of ineffectiveness cannot excuse procedural default in federal habeas proceeding).

U.S. at 689. Moreover, "'just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.'" ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004), *quoting* ***Harris v. Reed,*** 894 F.2d 871, 878 (7th Cir. 1990). *See also* ***Kimmelman***, 477 U.S. at 386-87 (same).

The second prong requires resulting prejudice. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 433 N.W.2d at 576, *quoting* ***Strickland***, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability" of a different result but for counsel's deficient performance. ***Moffett***, 433 N.W.2d at 577 (citation omitted). "Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id*., *quoting* ***Strickland***, 466 U.S. at 694. In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland***, 466 U.S. at 695. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" or "reliability" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362, 393-94 (2000).

### B. Ineffective Assistance of Post-Conviction/Appellate Counsel

Although post-conviction or appellate counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, *see* ***Smith v. Robbins***, 528 U.S. 259, 287-88 (2000), counsel's decisions in choosing among issues cannot be isolated from review. *E.g.*, *id.*; ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986). The same ***Strickland*** standard for ineffectiveness applies to assess the constitutional effectiveness of post-conviction or appellate counsel. ***Smith***, 528 U.S. at 285-86, 287-88; *see* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369. The defendant raising such a claim must show both that post-conviction or appellate counsel acted unreasonably and a reasonable probability that he or she would have

prevailed on appeal but for counsel's unreasonable behavior. ***Smith***, 528 U.S. at 285-86, 287-88.

The Seventh Circuit has recognized one way to show deficient performance:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient.

***Mason v. Hanks***, 97 F.3d 887, 893 (7th Cir. 1996) (citations omitted). *See also* ***Smith***, 528 U.S. at 288. This Court similarly has noted that deficient performance exists where, for instance, unraised issues "are obvious and very strong," and "the failure to raise them cannot be explained or justified." ***Balliette***, 2011 WI 79, ¶69.

This makes sense. Reasonable post-conviction/appellate counsel normally would raise the strongest issues available, *see* ***Jones v. Barnes***, 463 U.S. 745, 751-54 (1983), not forego them for weaker issues. *See* ***Gray***, 800 F.2d at 646. When the issue is obvious, moreover, the court can rest assured that a reasonable attorney would not overlook it.

As the Supreme Court noted in ***Smith***, 528 U.S. at 285, however, the question remains whether counsel acted unreasonably. Failing to raise an obvious and stronger issue is not the only way that post-conviction/appellate counsel can act unreasonably. ***Id.*** at 288 ("'*Generally*, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome'" (emphasis added)), *quoting* ***Gray***, 800 F.2d at 646.

The ***Gray*** balancing test

> does not effectively operate in all cases in which appellate counsel's performance is claimed to be deficient because of a failure to assert an error on appeal. Situations may arise when every error enumerated by appellate counsel on appeal presented a strong, nonfrivolous issue but counsel's performance was nonetheless deficient because counsel's tactical

> decision not to enumerate one rejected error "was an unreasonable one which only an incompetent attorney would adopt."

***Shorter v. Waters***, 571 S.E.2d 373, 376 (Ga. 2002) (citation omitted); ***Carpenter v. State***, 128 S.W.3d 879, 888 (Tenn. 2004) (same); *see e.g.*, ***Mapes v. Coyle***, 171 F.3d 408, 427-28 (6th Cir. 1999). For instance, counsel may raise two strong issues but, by unreasonably failing to raise a third, leave critical state evidence unchallenged, resulting in a finding of harmless error.

Under ***Strickland***, moreover, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 466 U.S. at 690-91. If counsel chooses issues based on a less than a full investigation, without obtaining and reviewing all of the court record, trial counsel's file, or discovery, the deficiency determination turns on whether the failure to investigate was itself unreasonable, not on whether that attorney would have chosen to raise the issues discovered by such an investigation. ***Wiggins***, 539 U.S. at 522-523. The failure to complete a reasonable investigation makes a fully informed strategic decision impossible. ***Id.*** at 527-528.

Likewise, the failure to raise an issue is unreasonable if it was due to oversight rather than an intentional, reasoned strategy, ***id.*** at 534, or if counsel intended to raise it but simply forgot to do so. Counsel also acts unreasonably, regardless of the relative strength of the issues, if the claims raised on the appeal are contrary to the defendant's stated goals, as when the defendant only wants to attack the sentence but counsel forgoes such issues for others challenging only the conviction. Post-conviction/appellate counsel also acts unreasonably if he or she in fact identified an issue (regardless of whether it was "obvious") but failed to raise it because he or she unreasonably believed other issues were stronger.

Even if post-conviction/appellate counsel properly identifies an issue, he or she may act unreasonably and provide deficient performance by inadequately raising it. For instance, counsel may fail to conduct the investigation or research reasonably necessary to

support the claim or fail to present necessary evidence or an adequate argument to support it. *Cf.* Wis. Stat. §974.06(4) (defendant may raise previously adjudicated claim upon showing of sufficient reason why it was "inadequately raised" in the prior proceedings).

Accordingly, although post-conviction/appellate counsel's failure to raise an obvious and strong issue may constitute deficient performance in a given case, neither controlling authority nor common sense suggests that it is the *only* way to establish deficient performance. The question, as with any assessment of counsel's performance, remains one of reasonableness under the circumstances. ***Smith***, 528 U.S. at 285-86, 287-88; ***Strickland***, 466 U.S. at 688. Even ignoring, as does the state, State's Brief at 21-29, the fact that the ***Strickland*** standard already reflects any relevant concerns for finality, 466 U.S. at 693-94,[4] this Court cannot limit the defendant's federal constitutional rights to the effective assistance of counsel as a matter of policy. ***State v. Ward***, 2000 WI 3, ¶ 39, 231 Wis.2d 723, 604 N.W.2d 517 (decisions of the United States Supreme Court are controlling precedent on questions of federal law).

## CONCLUSION

For these reasons, WACDL asks that the Court reject both the Court of Appeals' misapplication of the "sufficient reason" requirement of §974.06(4) and the state's novel new limitation on the defendant's right to the effective assistance of post-conviction/appellate counsel.

Dated at Milwaukee, Wisconsin, November 30, 2012.

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[4] Indeed, the ***Strickland*** Court notes that finality concerns actually are *weaker* in an ineffectiveness claim. 466 U.S. at 694 ("An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker").

Respectfully submitted,

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**RULE 809.19(8)(d) CERTIFICATION**

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,995 words.

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Robert R. Henak

**RULE 809.19(12)(f) CERTIFICATION**

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Robert R. Henak

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