STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2010AP000425

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAMELL E. STARKS,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE KEVIN E. MARTENS, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

TRICIA J. BUSHNELL
Bar No. 1080889

LINDSEY E. SMITH
Bar No. 1079795

CAITLIN PLUMMER
Bar No. 1090090

MICHAEL BOSHARDY
R. WARREN BECK
JOSHUA JARRETT
Law Students

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-1002

Attorneys for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. THE PARTIES AGREE STARKS'S CHERRY MOTION DOES NOT COUNT AS A PRIOR MOTION FOR PURPOSES OF THE § 974.06(4) PROCEDURAL BAR.

A. The State is correct that Starks's untimely *Cherry* motion does not bar his subsequent § 974.06 motion.

The State asserts Starks's untimely *Cherry* motion "does not [] and should not" count as a prior motion for purposes of the procedural bar of Wis. Stat. § 974.06(4). (State's brief at 2). The Court need not reach beyond the limited question of whether an untimely *Cherry* motion—unconnected to a direct appeal under § 809.30—implicates the procedural bar of § 974.06(4). ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.").

B. Even if Starks's *Cherry* motion had been timely, it would not invoke the procedural bar precluding a subsequent § 974.06 motion.

In the event the Court decides the issue does not turn on the timeliness of the motion, it is necessary to respond to the State's argument that a timely, standalone *Cherry* motion filed under Wis. Stat. § 973.19(1)(a) would bar a subsequent § 974.06 motion. (State's brief at 5-7).

1. The State's position is contradicted by its own logic.

In conceding that an untimely § 973.19 sentence modification motion does not implicate § 974.06(4), the State reasoned that "a motion that cannot even be brought under Wis. Stat. § 974.06 necessarily cannot be a prior motion under Wis. Stat. § 974.06." (State's brief at 3). That logic applies with equal force to a timely § 973.19(1)(a) motion—

because a § 973.19 claim (here a challenge to the sentencing court's discretion) cannot be brought under § 974.06. Therefore, based on the very logic underlying the State's concession, the distinction between a timely and untimely motion makes no sense.

Certainly, whether a claim such as the one raised here is raised in a direct appeal under § 809.30 or in a standalone § 973.19(1)(a) motion is a distinction that matters. The State argues, and Starks agrees, that "if the defendant timely raises a *Cherry* claim in his direct appeal under Wis. Stat. §§ 809.30 and 974.02 . . . then the defendant would be precluded under Wis. Stat. § 974.06 and *Escalona-Naranjo* from raising any later constitutional claims, absent a 'sufficient reason' for his failure to do so. . . ." (State's brief at 4). This is consistent with the logic of both parties—that § 974.06 is implicated when the defendant has filed a motion in which constitutional issues could be raised. Starks has never argued that his direct appeal did not trigger the procedural bar—only that his *Cherry* motion did not.

2. The State's position is directly contradicted by this Court's prior rulings.

Wisconsin case law makes clear that a § 973.19 motion does not bar a subsequent motion under § 974.06. As explained in Starks's opening brief, the State's position is inconsistent with opinions of this Court which have interpreted § 974.06(4) and made clear that only direct appeals and previous § 974.06 motions implicate the procedural bar. *See, e.g.*, ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); ***State v. Lo***, 2003 WI 107, ¶¶32, 44, 264 Wis. 2d 1, 665 N.W.2d 756. The State's position is contradicted even more directly by ***Lo***, which, in reaffirming ***Escalona-Naranjo***, stated explicitly,

> [o]ur ruling would only be applicable in the situation where a criminal defendant actually filed a § 974.02 motion or pursued a direct appeal. Therefore, in *Loop v. State*, 65 Wis. 2d 499, 222 N.W.2d 694 (1974), where

> the defendant filed a § 974.06 motion challenging his conviction without having previously filed a § 974.02 motion or pursued a direct appeal, he was permitted to raise a constitutional issue not raised on direct appeal because no direct appeal had been sought. We agree with this analysis.

Lo, at ¶44 n. 11. Indisputably, by proceeding under § 973.19(1)(a), a defendant waives his right to file an appeal under § 809.30. Wis. Stat. § 973.19(5). But a defendant may also waive his right to file a direct appeal merely by his failure to exercise the right. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994). Under ***Lo***, it cannot and does not follow that he has waived the right to pursue a § 974.06 motion or that he waives all of his constitutional claims, regardless of *how* he waives his right to an appeal under § 809.30. The State's assertion to the contrary (State's brief at 7) is directly foreclosed by ***Lo***. *See also* ***Loop v. State***, 65 Wis. 2d 499, 502, 222 N.W.2d 694 (1974) ("Merely because a direct appeal was not taken does not mean that a 974.06 motion cannot be made later.").

II. THE STATE'S HEIGHTENED PLEADING STANDARD IS UNPRECEDENTED, UNNECESSARY, AND UNSETTLES ESTABLISHED LAW.

The parties agree that ***State v. Balliette***, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, sets forth the proper pleading standard for a defendant seeking an evidentiary hearing on a § 974.06 motion alleging ineffective assistance of postconviction counsel. (State's brief at 8). The State, however, misrepresents the standard ***Balliette*** sets forth (State's brief at 8-18), and instead, asks this Court to impose a heightened pleading standard in such cases. This Court should decline to do so.

A. The State's heightened standard is unsupported by *Balliette* or § 974.06.

The State contends that ***Balliette*** requires a movant claiming ineffective assistance of postconviction counsel to allege his claims are "clearly stronger" than claims postconviction counsel actually raised (State's brief at 12), while simultaneously urging this Court to adopt the "clearly stronger" pleading standard for which it purports ***Balliette*** stands. (*Id.*) These two positions are incompatible. Regardless, both arguments should be rejected by this Court.

First, this Court did not set forth a "clearly stronger" pleading standard in ***Balliette***. Indeed, the Court never uses the phrase "clearly stronger" or even the word "stronger" anywhere in its decision. Instead, it held that in order to be granted an evidentiary hearing on a claim of ineffectiveness of postconviction counsel, a movant under § 974.06 must "allege facts which, if true, would entitle him to a new trial." ***Balliette***, at ¶61. In doing so, a defendant must meet the standard set forth in ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, "that is the who, what, where, when, why and how." ***Balliette***, at ¶¶58-59 (citing ***Allen***).

Although a defendant must do more than simply identify a claim to prevail on his motion (State's brief at 15), a defendant need not meet the "clear and obvious" standard the State proposes. Instead, ***Balliette*** requires a defendant to show how his postconviction counsel's failure to raise trial counsel's ineffectiveness was deficient and why that deficiency prejudiced him. ***Balliette***, at ¶¶62-70. Thus, to establish postconviction counsel's ineffectiveness for failing to challenge the effectiveness of trial counsel, the defendant must prove his trial counsel's performance was similarly deficient and prejudicial. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (citing ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996)).

Insofar as the State asserts ***Balliette*** requires a defendant to show the claims that his postconviction counsel failed to raise are "clearly stronger" than those his counsel actually raised (State's brief at 15), the State is wrong. This Court's cases *do* make clear that postconviction motions "must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim'," but nothing more is required. ***Allen***,at ¶21 (quoting ***State v. Bentley***, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)).

To support its "clearly stronger" standard, the State cites ***Smith v. Robbins***, 528 U.S. 259, 120 S. Ct. 746 (2000), which adopted the standard in federal habeas corpus cases. (State's brief at 17). However, ***Balliette*** does not cite ***Robbins*** for the proposition that defendants are required to meet a "clearly stronger" standard as the State suggests. Rather, the case is cited for the notion that counsel is presumed effective unless shown to be otherwise by the defendant. ***Balliette***, at ¶¶27-28.

Further, the State conflates language *actually* used in ***Balliette*** with the heightened pleading standard it asks this Court to adopt. In ***Balliette***, the Court suggested that Balliette's motion neglected to show the "issues that [postconviction counsel] failed to raise are obvious and very strong." ***Id.*** at ¶69. The Court did not, as the State suggests, reject Balliette's motion because he failed to assert the claims his postconviction counsel raised were "clearly stronger." Rather, Balliette's motion failed because it did not allege sufficient facts to support his contentions or "set forth what [he] intended to prove at an evidentiary hearing, if one were granted." ***Id.***

Finally, the State also asserts that the plain language of § 974.06(4) sets forth a "comparison-of-claims" requirement, wherein a defendant's motion is barred for failure to explicitly plead that his claims were not previously litigated. (State's brief at 10-11). Under § 974.06(4), a defendant may not raise a claim "finally adjudicated" in a previous motion

absent a "sufficient reason" for why the claim was "inadequately raised" previously. However, neither the statute nor case law requires a defendant to engage in an explicit "comparison-of-claims." A defendant need not, as the State suggests, plead with particularity the fact that his claims have not been previously litigated by overtly stating that his new claims are different. That fact will be apparent from the face of the motion.

B. The State's heightened "clearly stronger" pleading standard places a meaningless burden on defendants.

As the State acknowledges, requiring a defendant to allege specific facts is "not synonymous to requiring proof of the claim in the pleadings." (State's brief at 22). Indeed, defendants are not required to definitively prove their claims prior to an evidentiary hearing. ***Balliette***, at ¶61. Defendants are instead required to plead sufficient material facts to avoid mere conclusory allegations. ***Bentley***, at 313.

Further, the precise meaning and requirements of the State's heightened pleading standard are elusive. It appears the State would have a defendant who alleges ineffective assistance of postconviction counsel utilize a particular formula in drafting his § 974.06 motion or else be barred from an evidentiary hearing—regardless of the merits of his claim. (State's brief at 12-26). Thus, if a defendant's pleadings show his underlying claims are meritorious and warrant an evidentiary hearing, he may still be barred simply for failing to articulate that his new claims are "clearly stronger" than the claims raised by his postconviction counsel. Such a requirement is superfluous and unnecessarily burdensome.

The State also asserts that it is not unduly burdensome for a defendant to conduct an investigation into his attorney's rationale for failing to bring certain claims by interviewing or corresponding with the attorney. (State's brief at 21-26).

Under the State's theory, however, a defendant—even an incarcerated pro se defendant—must perform the equivalent of an evidentiary hearing, and subsequently lay out the fruits of that hearing in his pleadings. The proper place to develop counsel's reasons is an evidentiary hearing. This is made clear by the State's acknowledgment that a defendant may not be able to make actual contact with his former attorney. (State's brief at 24).

Moreover, while the State is eager to add more requirements for a defendant, it fails to suggest how a defendant should go about meeting these burdens within the requirements of local page-limit rules. In this case, for example, Starks initial § 974.06 motion was dismissed for not complying with the local rule on page limits without any additional requirements. (122.)

C. *Martinez v. Ryan* supports a merit-based standard for defendants in Starks's procedural posture.

The State's factual reading of ***Martinez*** is correct (State's brief at 19-20), but that does not change its application to Starks's claims. Contrary to the State's assertion (*id.* at 20), the United States Supreme Court's recent ruling in ***Martinez v. Ryan***, __ U.S. __, 132 S. Ct. 1309 (2012), does support a merits-based standard for defendants in Starks's procedural position. In ***Martinez***, the Supreme Court held that ineffective assistance of counsel at initial-review collateral proceedings—like postconviction pleadings on direct review—may establish cause to overcome a defendant's procedural default in raising a claim of ineffective assistance of trial counsel. ***Id.*** at 1320. Because Starks's § 974.06 motion was his first opportunity to challenge the effectiveness of his initial-review counsel for failing to raise the ineffectiveness of his trial counsel, the ***Martinez*** standard does apply to Starks's procedural posture.

The State accurately notes that the holding in ***Martinez*** is limited to inadequate assistance of counsel at initial-review collateral proceedings. (State's brief at 20). Martinez's case arose in Arizona—a state that only permits defendants to raise ineffective assistance of trial counsel for the first time during an "initial-review" collateral proceeding. ***Martinez***, at 1314. This differs from Wisconsin, where a defendant may raise ineffective assistance of trial counsel on direct appeal.

Unlike ***Martinez***, Starks could have raised ineffective assistance of trial counsel on direct appeal. However, the first time he could raise ineffective assistance of postconviction counsel for failing to raise trial counsel's ineffectiveness was in his present § 974.06 motion. In other words, this is Starks's first opportunity to challenge his appointed postconviction counsel's effectiveness. Thus, ***Martinez's*** merit-based review is applicable to Starks's current procedural posture.

III. STARKS SUFFICIENTLY PLEADED HIS § 974.06 MOTION AND IS ENTITLED TO AN EVIDENTIARY HEARING.

The State maintains that Starks's motion is barred because he failed to set forth a "sufficient reason" why his current claims were not filed on his direct appeal. (State's brief at 30). This is untrue, however, because Starks offers his postconviction counsel's ineffectiveness as his "sufficient reason" for failing to challenge his trial counsel's effectiveness. (125:A-APP105). Further, Starks's "sufficient reason" is adequately pleaded under ***Balliette*** to warrant an evidentiary hearing because his motion alleges facts which, if proven, demonstrate trial counsel's ineffectiveness. Thus, Stark's postconviction counsel was ineffective for failing to raise trial counsel's ineffectiveness. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (1996).

Starks's opening brief adequately rebuts the State's contention that Starks failed to show his trial counsel's

performance was deficient and prejudicial to the defense, entitling him to an evidentiary hearing. (Starks's brief at 29-36). However, several of the State's assertions demand attention.

First, the State asserts that Starks does not meet his ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052 (1984), burden by failing to show trial counsel's performance was both deficient and prejudicial. (State's brief at 29-40). In doing so, the State dismisses each claim individually as not having a prejudicial effect on the outcome of the trial. (*Id.*). The State's approach is incorrect. In determining whether an ineffective assistance of counsel claim satisfies ***Strickland's*** prejudice prong, the reviewing court should assess the cumulative effect of all the claims taken together. ***State v. Thiel***, 2003 WI 111, ¶60, 264 Wis. 2d 571, 665 N.W.2d 305.

As shown in Starks's opening brief, each claim individually satisfies ***Strickland's*** dual deficient performance and prejudicial effect prongs. (Starks's brief at 29-36). Starks's trial attorney's performance was deficient for failing to call four witnesses—Mario Mills, Dion Anderson, Mary McCallum, and Stanley Daniels—who each would have offered testimony significantly undermining the State's key witnesses, Trenton Gray and Wayne Rogers. (*Id.*). Even if counsel's failure to call each of these witnesses individually did not have an overall prejudicial effect on the outcome, taken together these deficiencies certainly did. For example, Mario Mills would have presented an alternative shooter, Wayne Rogers, which would clearly have undermined Rogers's own testimony—as well as that of Gray, who claimed Starks was the shooter. (125:A-APP119; A-APP190). Mills's testimony, combined with the testimony of Anderson, McCallum, and Daniels, would have seriously undermined the credibility of the State's primary witnesses. Considered in the aggregate—as ineffective assistance of counsel claims should be—Starks's motion shows his trial counsel's

deficient performance had a prejudicial effect on the outcome of his trial.

Next, the State asserts that some of the issues Starks raises in his current § 974.06 motion have already been finally adjudicated. (State's brief at 34, 37). Specifically, the State contends that the Dion Anderson and Willie "Junebug" Gill claims were previously litigated. The State is incorrect as to both.

The issue finally adjudicated related to Anderson was whether the circuit court should have granted Starks's motion for a mistrial because Gray and Rogers violated the court's sequestration order. (State's brief at 34). However, Anderson was never called to testify as to the substance of the conversation between Gray and Rogers, which he witnessed in the transport van from prison to court. (125:A-APP181). Therefore, this issue has never been litigated.

The issue Starks raises related to Willie "Junebug" Gill has also not been finally adjudicated. As the State points out, Starks's attorney unsuccessfully moved for a mistrial on the bases that the prosecution should have disclosed "Junebug's" identity sooner. (State's brief at 38). The court denied the motion because the defense had equal access to information that could have revealed Gill's identity. (*Id.*). Starks is not attempting to re-litigate the mistrial issue here. Rather, Starks alleges his trial counsel was ineffective for failing to fully investigate "Junebug's" identity.

Finally, the State maintains that trial counsel was not ineffective because he actually did challenge the testimony of the State's witnesses during his closing arguments. (State's brief at 32, 36). Although trial counsel proposed the possibility, "given the physical evidence in the case," that an alternative shooter was responsible for the crime, (*id.* at 32), he was still ineffective for failing to call witnesses to testify to that as fact. Indeed, witness testimony has far more impact on

the jury than an attorney's seemingly unsupported assertions during closing argument.

* * *

For all these reasons, this Court should reject the State's heightened standard and remand this case for an evidentiary hearing.

Dated this 6th day of December, 2012.

Respectfully submitted,

TRICIA J. BUSHNELL
Bar No. 1080889

CAITLIN PLUMMER
Bar No. 1090090

LINDSEY E. SMITH
Bar No. 1079795

MICHAEL BOSHARDY
R. WARREN BECK
JOSHUA JARRETT
Law Students

Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

Attorneys for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,999 words.

Tricia J. Bushnell

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Tricia J. Bushnell