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STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP378-W

STATE OF WISCONSIN ex rel.
LORENZO D. KYLES,

Petitioner,

v.

WILLIAM POLLARD, Warden,

Respondent.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS DENYING A PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF ISSUES

1. Should a petition for a writ of habeas corpus alleging that trial counsel was ineffective for failing to timely file a notice of intent to pursue postconviction relief be filed in the circuit court or the court of appeals?

The court of appeals determined such claims should be raised in the circuit court.

2. Is Petitioner Lorenzo D. Kyles' petition for a writ of habeas corpus procedurally barred because he has asked for the same relief he sought in his petition in three previous circuit court and court of appeals proceedings?

The court of appeals did not answer this question.

3. Assuming Kyles properly raised his claims in the court of appeals and it is not procedurally barred, is he entitled to an evidentiary hearing?

The court of appeals did not answer this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This court has already set this case for oral argument. As with any case this court has accepted for review, publication is warranted.

SUMMARY OF ARGUMENT

Petitioner Lorenzo D. Kyles asks this court to reverse a decision of the Wisconsin Court of Appeals denying his petition for a writ of habeas corpus that he filed pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992) (Kyles' brief at 8-30).

Kyles alleged in his petition that his retained trial counsel, Thomas J. Flanagan, denied him a direct appeal by ineffectively failing

to file a notice of intent to pursue postconviction relief and asked the court to reinstate his time for filing the notice (Kyles' *Knight* petition at 14-19). *See* Wis. Stat. § 809.30(2)(a) and (b). The court of appeals denied the petition, concluding, as it had when rejecting an earlier *Knight* petition Kyles had filed, that this claim needed to be raised in the circuit court. *See State of Wisconsin ex rel. Kyles v. Pollard*, Case No. 2012AP378-W, at 3-4 (Wis. Ct. App., Dist. I, May 9, 2012).

Kyles asserts that the court of appeals' determination was in error, arguing that a *Knight* petition is the correct remedy for a claim that trial counsel was ineffective for failing to file a notice of intent (Kyles' brief at 24-30).

He also maintains that his petition contained sufficient allegations to warrant a hearing on his claims that Flanagan was ineffective for not: (1) filing the notice of intent within the twenty-day deadline imposed by Wis. Stat. § 809.30(2)(b) after learning Kyles wished to appeal; (2) remaining "reasonably available" during the twenty-day period to allow Kyles to inform Flanagan of his desire to appeal; and (3) filing a motion for an extension of time to file the notice of intent when Kyles told Flanagan that he wished to begin an appeal after the twenty-day period expired, or telling Kyles an extension was an option (Kyles' brief at 13-20).

Kyles further argues that his petition was not procedurally barred by his previous attempts to reinstate his direct appeal (Kyles' brief at 20-24).

This court should affirm the court of appeals. Initially, it should determine that the correct procedure and forum for Kyles to raise his claims that Flanagan was ineffective for not filing the notice of intent or being available to him during the filing period was a circuit court petition for a writ of habeas corpus because any error or omission by Flanagan occurred in that court. Further, although a *Knight* petition would be the appropriate procedure for Kyles to raise his claim that Flanagan ineffectively failed to file an extension motion, this issue is not properly before this court because Kyles did not assert it in his petition for review.

This court should also conclude that Kyles' claims are procedurally barred. Regardless of whether a petition in circuit court or the court of appeals is the correct procedure to litigate Kyles' claims, he has already unsuccessfully filed habeas petitions in both courts asserting that Flanagan was ineffective for not filing the notice of intent. He should not be allowed to challenge counsel's actions another time. Further, Kyles' most recent motion contains far more specific allegations than his previous filings did, and this court should hold that his claims are barred due to his failure to present this information in his earlier attempts to have his direct appeal reinstated.

Finally, if this court concludes that Kyles properly filed his motion in the court of appeals and it is not procedurally barred, the State[1] agrees

[1] Although Warden William Pollard is the named Respondent in this proceeding, the State of Wisconsin is the real party in interest, and all future references to Respondent will be to "the State."

that he is entitled to an evidentiary hearing on his claims that Flanagan was ineffective for not timely filing the notice of intent to pursue postconviction relief and for not being reasonably available during the filing period. Kyles is not entitled to a hearing on his claim that Flanagan should have filed a motion for an extension of time to file the notice.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

A. Kyles' conviction and sentence.

In September 2002, Kyles pled guilty to one count of first-degree reckless homicide by use of a dangerous weapon (Kyles' *Knight* petition at 4). *See* Wis. Stat. §§ 940.02(1); 939.63. On November 12, 2002, the circuit court sentenced Kyles to forty years' imprisonment, consisting of thirty-two years' initial confinement and eight years' extended supervision (Kyles' *Knight* petition at 4 & Pet-Ap. A).[2]

The same day as sentencing, Kyles and Flanagan both signed a "Notice of Right to Seek Postconviction Relief" form explaining that Kyles had the right to seek postconviction relief, and in order to do so, needed to file a notice of intent to pursue postconviction relief within twenty days of sentencing (Pet-Ap. B). Kyles checked a box acknowledging "I am undecided about seeking postconviction relief and I know I need to decide

[2] All future references to Kyle's *Knight* petition appendix will be to Pet-Ap. __.

and tell my lawyer within 20 days" (Pet-Ap. B). Flanagan did not file a notice of intent.

B. Kyles' first *Knight* petition.

In October 2003, Kyles filed a *Knight* petition in the court of appeals seeking reinstatement of his direct appeal, claiming that Flanagan was ineffective for failing to file a notice of intent (Pet-Ap. K). In the petition, Kyles alleged that in November 2002 he wrote "Flanagan a letter about the Twenty days he had left to file a post-conviction relief in the Circuit Court from Milwaukee County," and that Flanagan never responded (Pet-Ap. K:2). Kyles did not attach a copy of the letter. Kyles also asserted that Flanagan did not respond to an August 2003 letter he wrote, a copy of which was included with his petition (Pet-Ap. K:2). Kyles further alleged that Flanagan "decided that pursuing appeal would be frivolous" (Pet-Ap. K:2).

The court of appeals dismissed Kyles' petition in January 2004 (Pet-Ap. L.). It construed Kyles' claim as one of ineffective assistance of postconviction counsel because no notice of intent to pursue postconviction relief had been filed (Pet-Ap. L:1). It then held that such claims needed to be raised in the circuit court pursuant to *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) (Pet-Ap. L:1-2). Kyles did not petition this court for review.

C. Kyles' circuit court habeas petition.

In February 2004, Kyles filed a habeas petition in the circuit court, arguing that Flanagan ineffectively failed to file a notice of intent (Pet-Ap. M). He again referenced the November 2002 and August 2003 letters, and asserted that Flanagan did not respond (Pet-Ap. M:1). He attached the August 2003 letter, but not the one from November 2002 (Pet-Ap. M:1).[3] Kyles also alleged that Flanagan "left his client helpless and informed him there were no merits in his case to raise on an appeal" (Pet-Ap. M:3).

The circuit court denied Kyles' petition. After noting that Kyles had indicated on the "Notice of Right to Seek Postconviction Relief" form that he was undecided about pursuing postconviction relief, the court held that Kyles had failed to "affirmatively state" that he told Flanagan to file the notice of intent (Pet-Ap. N:1-2). The court said it would reconsider its decision if Kyles could produce a copy of the November 2002 letter that he claimed he wrote to Flanagan (Pet-Ap. N:2). Kyles did not provide the court with a copy of the letter.

Kyles appealed. The court of appeals affirmed, agreeing with the circuit court's reasoning (Pet-Ap. O:2-3). This court denied Kyles' petition for review (Pet-Ap. P).

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[3] The August 2003 letter is not attached to the copies of Kyles' 2003 *Knight* petition and his 2004 circuit court habeas petition in the appendix to the copy of Kyles' current *Knight* petition that was served on the State. However, the copies of the habeas petitions in the State's files from these cases have the letter attached.

D. Kyles' federal petition for a writ of habeas corpus.

In April 2005, Kyles filed a petition for a writ of habeas corpus in the Eastern District of Wisconsin (Pet-Ap. R:1). *See* 28 U.S.C. § 2254. In the petition, Kyles argued, among other things, that he was denied his right to appeal when Flanagan did not file the notice of intent (Pet-Ap. R:2-3). The court denied Kyles' petition after concluding he filed it after the applicable statute of limitations had expired (Pet-Ap. R:4). The court also held that even if Kyles had timely filed his petition, he was not entitled to habeas relief because he could not show that he ever asked Flanagan to file the notice of intent (Pet-Ap. R:4-7).

Both the district court and the Seventh Circuit Court of Appeals denied Kyles' request to appeal the district court's decision (Pet-Ap. S; T). *See* 28 U.S.C. § 2253(c). The United States Supreme Court denied Kyles' petition for a writ of certiorari (Pet-Ap. U).

E. Kyles' motion to extend the time to file his notice of intent to pursue postconviction relief.

In December 2008, Kyles filed a motion to extend the time for him to file his notice of intent (Pet-Ap. V). *See* Wis. Stat. § 809.82(2). *See State v. Quackenbush,* 2005 WI App 2, ¶ 9, 278 Wis. 2d 611, 692 N.W.2d 340. In support, Kyles again argued that Flanagan was responsible for the notice not being filed. Kyles alleged that he wrote Flanagan a letter within the time period

"seeking counsel's assistance in filing a Notice of Intent," but said he did not have a copy of it (Pet-Ap. V:1-2). Kyles also said that he called Flanagan's office collect from prison during the time period, but that his calls either were not answered or someone "hung up during accept" (Pet-Ap. V:1). Kyles attached prison phone records he obtained in 2007 showing that he made the calls (Pet-Ap. F; V:1). In addition, Kyles alleged that he told Flanagan that he wanted to appeal when Flanagan visited him in prison in January 2003 (Pet-Ap. V:2).

The court of appeals denied Kyles' motion, concluding that he had not shown good cause to extend the deadline so long after it had passed (Pet-Ap. W:2). In its decision, the court referenced the circuit court's earlier finding that Kyles had failed to instruct Flanagan to file the notice of intent, and held "Kyles's assertions to the contrary cannot constitute a basis for extending his appellate deadline" (Pet-Ap. W:2).

F. Kyles' 2012 *Knight* petition.

In 2012, Kyles filed the *Knight* petition at issue in this case. In it, he asked to have his time to file a notice of intent reinstated based on Flanagan's failure to file one. Specifically, Kyles argued that Flanagan violated his "duty to remain reasonably available" during the twenty-day filing period to see if Kyles wanted to file the notice of intent (Kyles' *Knight* petition at 16-19). Flanagan violated this duty, according to Kyles, by not answering his telephone calls or responding to his November 2002 letter (Kyles' *Knight* petition at 17-19). Kyles also asserted that Flanagan should

have filed a motion for an extension of time to file a notice of intent after Kyles told him at the January 2003 meeting that he wanted to appeal (Kyles' *Knight* petition at 19).

Kyles' petition also alleged information that he had not included in his earlier motions. He explained that the reason he made the calls was to inform Flanagan he wanted to appeal (Kyles' *Knight* petition at 6-7). Kyles also asserted that he had his mother attempt to contact Flanagan during the filing period, but that he did not return her telephone calls (Kyles' *Knight* petition at 6; Pet-Ap. D). Additionally, Kyles said that when he told Flanagan he wanted to appeal in January 2003, Flanagan told him "there were few non-frivolous issues based on his guilty plea but the time limits had expired" (Kyles' *Knight* petition at 7).

Kyles also attached to his petition an October 2003 letter from Flanagan discussing an Office of Lawyer Regulation complaint Kyles had filed against him about his failure to file the notice of intent (Pet-Ap. J).[4] In it, Flanagan denied that he had ignored Kyles' request to file the notice, and asserted that Kyles had never asked him to do so. Flanagan said Kyles had asked him at a meeting in prison about a potential appeal, and Flanagan had advised Kyles that his time limits had expired and "there were few non-frivolous issues for appeal (based upon your plea)" (Pet-Ap. J). The letter also referred to a not-yet filed

[4] A review of the State's records shows that Kyles also attached this letter to his motion for an extension of time and to his federal habeas petition (Pet-Ap. R:3; V:2).

civil case on which Flanagan was representing Kyles (Pet-Ap. J).

The court of appeals denied Kyles' petition. After outlining Kyles' previous challenges to Flanagan's failure to file a notice of intent, the court concluded this claim needed to be raised in the circuit court based on the same reasoning it relied on to deny Kyles' initial *Knight* petition. *Kyles*, Case No. 2012AP378-W, at 2-4. The court of appeals denied Kyles' motion for reconsideration. *See Kyles,* Case No. 2012AP378-W (Wis. Ct. App., Dist. I, June 14, 2012).

ARGUMENT

I. THE PROPER PROCEDURE AND FORUM FOR KYLES TO RAISE HIS CLAIM IS A PETITION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT.

The court of appeals has twice denied Kyles' *Knight* petitions alleging that Flanagan was ineffective for failing to file a notice of intent on the grounds that his remedy was in the circuit court. In this court, Kyles claims this was in error, and his *Knight* petitions were the appropriate means of litigating this claim (Kyles' brief at 24-30). He also asserts that Flanagan was ineffective for not: (1) filing the notice of intent within the twenty-day deadline imposed by Wis. Stat. § 809.30(2)(b); (2) remaining "reasonably available" during the twenty-day period to allow Kyles to inform Flanagan of his desire to appeal; and (3) filing a motion for an extension of time to file the notice of intent when Kyles told Flanagan that

he wished to begin an appeal after the filing period expired, or telling Kyles this was an option (Kyles' brief at 13-20).

The court of appeals was correct that the circuit court is the proper forum for Kyles' claim, at least on the first and second grounds on which he argues Flanagan was ineffective. This is because any error by Flanagan in failing to file the notice within the twenty-day time period of Wis. Stat. § 809.30(2)(b) occurred in the circuit court and claims of ineffective assistance of counsel are almost always raised where the error allegedly occurred. Further, the proper method of raising these claims in the circuit court would be a petition for a writ of habeas corpus.

In contrast, Kyles' claim that Flanagan should have asked the court of appeals for an extension of time to file the notice of intent when Kyles told him he wanted to appeal after the filing period had expired involves action Flanagan allegedly should have taken in the court of appeals. *See* Wis. Stat. § 809.82(2). As such, a *Knight* petition would be the proper remedy for this claim. This court, however, should decline to address this specific ground for relief because Kyles did not assert it in his petition for review and it is not properly before this court.

The State acknowledges that "[t]he question of the appropriate forum and procedure is a close one." *Knight*, 168 Wis. 2d at 519. Persuasive arguments both for and against the parties' positions exist. Nonetheless, the State believes its position is correct and asks this court to adopt it.

A. Trial counsel is responsible for filing a notice of intent and claims of a violation of this duty belong in the circuit court.

The court of appeals' conclusion that Kyles needed to raise his claim in circuit court was correct because Kyles was alleging that his trial counsel was ineffective and such claims are always raised in circuit court.

The filing of a notice of intent to pursue postconviction relief within twenty days of sentencing is the first step a defendant takes in pursuing the postconviction and appellate process. *See* Wis. Stat. §§ 809.30(2)(a) and (b); *Quackenbush*, 278 Wis. 2d 611, ¶ 2. The notice is filed only in circuit court. *See* Wis. Stat. § 809.30(2)(b).

Statutes impose the duty to file the notice on trial counsel. Wisconsin Stat. § 809.30(2)(a) requires counsel representing the defendant at sentencing to continue representing the defendant by filing the notice if the defendant wishes to pursue postconviction relief, unless the defendant discharges counsel or the court allows counsel to withdraw before the notice must be filed. Similarly, Wis. Stat. § 973.18(5) states "[i]f the defendant desires to pursue postconviction relief, the defendant's trial counsel shall file the notice required by s. 809.30 (2) (b)."

Further, claims that trial counsel was ineffective are always raised in the first instance in the circuit court. *See, e.g., State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App.

1998) (postconviction evidentiary hearing in circuit court at which trial counsel testifies is a necessary prerequisite to raising claim of ineffective assistance of trial counsel on appeal; where defendant did not file postconviction motion in circuit court alleging trial counsel was ineffective, he could not raise claim on appeal).

That a claim that trial counsel was ineffective for failing to file a notice of intent should be raised in the circuit court is consistent with Wisconsin's general rule that claims of ineffective assistance of counsel are raised in the court where counsel was ineffective. When a defendant alleges appellate counsel was ineffective, the remedy is a habeas petition in the court of appeals. *See Knight*, 168 Wis. 2d at 520. But when the same attorney is ineffective in his or her postconviction role, the defendant files in the circuit court. *Rothering*, 205 Wis. 2d at 681. And, if that attorney fails to file a timely petition for review, the defendant seeks relief from this court. *See State ex rel. Schmelzer v. Murphy*, 201 Wis. 2d 246, 255-56, 548 N.W.2d 45 (1996).

Consistent with this principle, the court of appeals in *Quackenbush* criticized the argument that a *Knight* petition was the proper way to assert a claim that trial counsel was ineffective for failing to file a notice of intent. *Quackenbush*, 278 Wis. 2d 611, ¶¶ 16-22. In that case, trial counsel for two defendants filed motions for extensions of time in the court of appeals to file notices of intent to pursue postconviction relief after the filing period had expired. *Id*. ¶ 4. *See* Wis. Stat. § 809.82(2). Both motions asserted that the missed deadlines were the result of counsels' own errors. *Quackenbush*, 278 Wis. 2d 611, ¶ 4.

In response, the State argued that *State v. Evans*, 2004 WI 84, 273 Wis. 2d 192, 682 N.W.2d 784, *criticized on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29, 290 Wis. 2d 352, 714 N.W.2d 900, required counsel to file *Knight* petitions rather than extension motions when additional time to file a notice of intent is sought because of counsel's ineffectiveness. *Quackenbush*, 278 Wis. 2d 611, ¶¶ 5-7. The court of appeals disagreed, holding that under the facts of the case, an extension motion was the proper remedy. *Id.* ¶¶ 8-22.

In its decision, the court suggested that in some cases, habeas petitions and not extension motions might be the appropriate remedy. *See id.* ¶¶ 18, 21. It questioned whether in such cases the habeas petition should be filed in circuit court or the court of appeals. *Id.* ¶ 18. It criticized the State's suggestion that a *Knight* petition was the available remedy because

> the attorney whose effectiveness is in question would have never appeared before us, and any deficient performance would thus have occurred in the circuit court, which might therefore be better positioned to initially assess counsel's effectiveness.

Id. ¶ 18.

The court did not resolve which court was appropriate, however, noting that guidance on the issue would be "forthcoming in due time." *Id.* ¶ 21.

This case gives this court the opportunity to provide that guidance. This case is not like *Quackenbush*. Trial counsel is not seeking a brief,

retroactive extension of time based on counsel's own error in missing the deadline. Instead, a *pro se* defendant is asserting that his trial counsel was ineffective for failing to file a notice of intent. If this was deficient performance, it happened in the circuit court. As such, any claim relating to Flanagan's failure must be filed in that court.

B. *Smalley* and *Santana* do not show that Kyles' claim should have been filed in the court of appeals.

Kyles acknowledges Wisconsin's general rule that claims of ineffective assistance of counsel are raised in the court where counsel is alleged to have been ineffective, but contends that the exception to this rule established in *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 565 N.W.2d 805 (Ct. App. 1997), *abrogated on other grounds by Coleman*, 290 Wis. 2d 352, and *State ex rel. Santana v. Endicott*, 2006 WI App 13, 288 Wis. 2d 707, 709 N.W.2d 515 should control (Kyles' brief at 25-27). This court should reject this argument.

Smalley and *Santana* establish a slight exception to the general rule that ineffective assistance claims are raised in the court where counsel's actions occurred. *Smalley* held that a *Knight* petition is the appropriate remedy when appointed postconviction/appellate counsel fails to file a no-merit report under Wis. Stat. § 809.32 or an appeal under § 809.30, regardless of whether a postconviction motion in the circuit court would have been required. *Smalley*, 211 Wis. 2d at 798-99. *Santana* followed *Smalley's* holding, concluding that even where a defendant specifically alleges that his counsel failed to file a

postconviction motion, his remedy is a *Knight* petition. *Santana*, 288 Wis. 2d 707, ¶ 4. The court also rejected the State's suggestion that *Smalley* prescribed an optional procedure, and a defendant could seek relief in the circuit court. *Id.* ¶ 5.

Both cases are distinguishable because neither involved retained trial counsel's failure to file a notice of intent to pursue postconviction relief. In both cases, the notice of intent was filed. *See Santana*, 288 Wis. 2d 707, ¶ 2; *Smalley*, 211 Wis. 2d at 796 (noting that state public defender appointed counsel for Smalley, something that does not occur under Wis. Stat. § 809.30 until notice of intent is filed, *see* Wis. Stat. § 809.30(2)(b)-(e)). Instead, *Smalley* and *Santana* address the proper remedy when, after the notice of intent is filed and appellate counsel is appointed, that attorney fails to take the next step in the process by filing a notice of appeal or postconviction motion. *See* Wis. Stat. § 809.30(2)(h).

The rule of *Smalley* and *Santana* makes sense in relation to the error sought to be remedied in those cases. The error is by appointed appellate counsel and in some cases, involves a failure to file a notice of appeal in the court of appeals. *See Smalley*, 211 Wis. 2d at 798-99 (*Knight* petition is appropriate because counsel's inaction in the court of appeals is at issue). While it is true that this rule also applies when counsel would have had to have filed a postconviction motion, filing in the court of appeals still is logical in those situations because the issue is whether appellate counsel's inaction deprived the defendant of his right to appeal.

Kyles contends that *Smalley* and *Santana* should control here, arguing that because the deadlines in Wis. Stat. § 809.30 are controlled by the court of appeals, a *Knight* petition is appropriate (Kyles' brief at 26-27). He also maintains that judicial economy will be served by requiring *Knight* petitions, noting that two of his claims involve Flanagan's inaction in the circuit court while another argues he erred in the court of appeals (Kyles' brief at 26-27). Filing all of these claims in one proceedings, Kyles' argues, would be more efficient (Kyles' brief at 26-27).

Again, under the facts of *Smalley* and *Santana*, requiring a *Knight* petition makes sense. In both of those cases, the appellate process had begun. Any remedy would likely have to be issued by the court of appeals through an extension of the time limits in Wis. Stat. § 809.30. In contrast, as argued below, the trial court can provide a remedy if trial counsel completely fails to initiate the appellate process under § 809.30. Further, as will also be argued later in this brief, Kyles' claims of Flanagan's inaction in the court of appeals are not properly before this court and were insufficient to warrant a hearing. Thus, this court need not address Kyles' judicial economy argument.

C. A petition for a writ of habeas corpus is the appropriate circuit court remedy for claims like Kyles'.

Additionally, this court should conclude that a petition for a writ of habeas corpus is the correct procedural mechanism for a defendant to pursue a claim that counsel was ineffective for failing to file

a notice of intent. Kyles agrees that a habeas petition is appropriate, but disputes where it should be filed (Kyles' brief at 24-25, 28).

When it denied Kyles' 2003 *Knight* petition, the court of appeals held that he should raise his claim in either a habeas petition or a Wis. Stat. § 974.06 motion in the circuit court (Pet-Ap. L:2). The court reaffirmed this decision when it denied Kyles' most recent petition. *Kyles*, 2012AP378-W, at 2-3.

A habeas petition, not a Wis. Stat. § 974.06 motion, is the appropriate remedy. A § 974.06 motion challenges a defendant's conviction and sentence. *See* Wis. Stat. § 974.06(1). Kyles' claim does not do this, and instead, alleges that his trial counsel was ineffective for failing to commence the appellate process. Kyles thus could not obtain the relief he is seeking by filing a § 974.06 motion and habeas is the appropriate remedy. *See also* Wis. Stat. § 974.06(8) (a circuit court may not entertain a habeas petition if the defendant failed to pursue a § 974.06 motion or the court has denied such a motion, unless it appears a § 974.06 motion is inadequate to test the legality of the defendant's detention).

D. The circuit court can provide a remedy for claims that trial counsel was ineffective for failing to file a notice of intent by vacating and reentering the judgment of conviction.

Kyles argues that a *Knight* petition is the appropriate vehicle to raise his claim because the circuit court cannot grant him the remedy he seeks (Kyles' brief at 26, 28-30). Specifically, he contends that because only the court of appeals can extend the deadlines in Wis. Stat. § 809.30, he needs to file a *Knight* petition to get the time extension he needs to file a new notice of intent (Kyles' brief at 28-30).

Admittedly, the court of appeals' authority to extend the time periods in Wis. Stat. § 809.30 is to the exclusion of the circuit court. *See* Wis. Stat. § 809.82(2); *State v. Rembert*, 99 Wis. 2d 401, 406 n.4, 299 N.W.2d 289 (Ct. App. 1980). Further, as Kyles argues, *Smalley* and *Santana* based their holdings on the court of appeals' control of the time limits in § 809.30 (Kyles' brief at 26). *See Smalley*, 211 Wis. 2d at 799; *Santana*, 288 Wis. 2d 707, ¶ 4. Thus, the circuit court could not grant Kyles an extension of time to file his notice of intent.

The circuit court could nonetheless provide Kyles with a remedy by exercising its inherent power to vacate and reinstate his judgment of conviction if he proved Flanagan was ineffective. *See State v. Brockett*, 2002 WI App 115, ¶ 14, 254 Wis. 2d 817, 647 N.W.2d 357 (circuit court has

inherent authority under Wis. Stat. § 807.03 to vacate or modify an order) (citing *State v. Castillo*, 205 Wis. 2d 599, 606, 556 N.W.2d 425 (Ct. App. 1996)). Further, a common law petition for a writ of habeas corpus is an equitable proceeding allowing the court hearing it to tailor a remedy for a constitutional violation to the particular facts. *See State ex rel. Pharm v. Bartow*, 2005 WI App 215, ¶ 12 n.6, 287 Wis. 2d 663, 706 N.W.2d 693 (citations omitted).

Kyles argues that Wisconsin has "long rejected the practice of extending appellate deadlines by setting aside one judgment and entering a new one" (Kyles' brief at 29). While it is true that Wisconsin does not allow a circuit court to vacate and reenter a judgment simply to allow an appeal after the deadline has elapsed, this court has recognized that it may be appropriate to do so for other reasons. *See Edland v. Wisconsin Physicians Service Ins. Corp.*, 210 Wis. 2d 638, 648, 563 N.W.2d 519 (1997). Here, assuming that Kyles could prove Flanagan ineffectively failed to file the notice of intent, it would be appropriate for the court to reinstate his judgment of conviction, which would give him twenty days to file a notice of intent. *Id.* at 646 ("vacating an order and entering another will invariably start anew the time period for appeal").

Kyles argues that the exceptions to the prohibition against reinstating a judgment to allow an appeal fall under Wis. Stat. § 806.07, which is not applicable to criminal proceedings (Kyles' brief at 29 (citing *State v. Henley*, 2010 WI 97, ¶¶ 67-71, 328 Wis. 2d 544, 787 N.W.2d 350)). Habeas corpus is a civil proceeding, *State ex rel. Hager v. Marten*, 226 Wis. 2d 687, 692,

594 N.W.2d 791 (1999), and as noted, an equitable one that allows a court to craft a remedy appropriate to the particular facts. Further, while *Edland* relied on § 806.07 to hold that reinstating an order to allow an appeal is sometimes permissible, this does not mean that the court does not possess the authority to do so from other sources, such as Wis. Stat. § 807.03 or its equitable power to craft a remedy in a habeas corpus proceeding.

E. While one of Kyles' claims that Flanagan was ineffective is appropriate for a *Knight* petition, that claim is not properly before this court.

In addition to arguing that Flanagan was ineffective for not filing the notice of intent when told to and not remaining reasonably available during the filing period, Kyles also contends that Flanagan should have filed a motion for an extension of time when Kyles told him at the January 2003 meeting in prison that he wanted to appeal (Kyles' brief at 19-20). He also argues Flanagan should have at least told him that an extension was possible (Kyles' brief at 19-20).

Kyles asserts that this ineffective assistance claim belongs in a *Knight* petition because it involves Flanagan's failure to take action in the court of appeals (Kyles' brief at 27). The State agrees, but urges this court not to address this issue because Kyles did not raise it in his petition for review.

A defendant may not raise issues in this court that were not also presented in the petition for review. *See* Wis. Stat. § 809.62(6). The issues before this court are the issues in the petition. *See State v. Sprosty*, 227 Wis. 2d 316, 323 n.4, 595 N.W.2d 692 (1999); *State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991).

While Kyles asserted that Flanagan was ineffective for the same three reasons he alleges in this court in his *Knight* petition, he did not do so in his petition for review (Kyles's *Knight* petition at 16-19). Instead, in his petition to this court, Kyles focused on Flanagan's alleged failure to remain reasonably available during the time to file a notice of intent (Kyles' petition for review at 14-18). His petition also properly raised the issue that Flanagan should have filed the notice of intent once he learned, either from Kyles' November 2002 letter or Kyles' mother, that he wanted to appeal (Kyles' petition for review at 14-18). But nowhere in the petition is there any suggestion that Flanagan should have filed an extension motion or told Kyles that it was a possibility. This issue is not before this court, and it should decline to address it.

II. KYLES' *KNIGHT* PETITION IS PROCEDURALLY BARRED BY HIS PREVIOUS ATTEMPTS TO HAVE HIS DIRECT APPEAL REINSTATED.

This court should resolve whether the circuit court or the court of appeals is the proper forum for a defendant's habeas petition alleging that trial counsel was ineffective for failing to file a

notice of intent to pursue postconviction relief. The court's decision will provide guidance to litigants and the courts, and resolve an important procedural issue.

This court should not, however, reach the merits of Kyles' particular claim because it is procedurally barred by his previous attempts to litigate it. Regardless of whether Kyles' should have filed a *Knight* petition or a circuit court habeas petition, Kyles has already pursued both remedies, and is barred from raising his ineffective assistance claim again.

If the State and the court of appeals are correct that the circuit court is the forum for Kyles to raise his claim, then he has already availed himself of his remedy. Kyles filed a habeas petition in the circuit court and lost (Pet-Ap. M; N). He appealed to the court of appeals, which affirmed (Pet-Ap. O). This court denied his petition for review (Pet-Ap. P). A matter raised in a prior proceeding "may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Further, if Kyles is correct that a *Knight* petition is his remedy, then his current petition is barred because he has also already pursued one. A defendant may not file a second *Knight* petition without providing an adequate explanation why all issues were not raised in the first. *State ex rel. Schmidt v. Cooke*, 180 Wis. 2d 187, 189-90, 509 N.W.2d 96 (Ct. App. 1993).

Kyles' claim should also be considered barred because he did not petition this court for review when the court of appeals denied his 2003 *Knight* petition. Kyles believes that the court of appeals is wrong now and was wrong then to tell him to litigate his claim in the circuit court. Kyles could have and should have made this argument in a petition for review from the court of appeals' decision on his 2003 petition. *Smalley*, which essentially provides the basis for Kyles' claim that the court of appeals was wrong, was decided in 1997, so this argument was available to him when the court of appeals denied his 2003 petition. Kyles' failure to seek review in this court in his earlier case should bar his current claims.

This court should also conclude that Kyles' current petition is procedurally barred because it alleges additional facts and is far more developed than his previous filings. For example, Kyles' original *Knight* petition and his circuit court habeas petition rely primarily on the November 2002 letter Kyles claims he sent to Flanagan. Neither of these petitions alleges that Kyles specifically asked Flanagan in the letter to file the notice, something he now claims he did (Kyles' *Knight* petition at 6; Pet-Ap. K:2; M:1).

Further, Kyles did not previously allege that he made numerous telephone calls to Flanagan from prison, as he did in his most recent *Knight* petition and his 2008 extension motion (Kyles' *Knight* petition at 6-7; Pet-Ap. V:1). He also did not assert that he had his mother try to contact Flanagan, something he mentioned for the first time in this case (Kyles' *Knight* petition at 6). Finally, Kyles' earlier filings alleged that Flanagan told him his case had no merit, while his

current petition claims that Flanagan said there were "few non-frivolous issues based on his guilty plea" (Kyles' *Knight* petition at 7; Pet-Ap. K:2; M:3). Regardless of whether Kyles had to file in the circuit court or the court of appeals, he needed to allege all of the facts supporting his claim in his first petition in those courts. His current petition raises the claim he raised previously, and the additional facts he alleges are nothing more than an artful rephrasing of that issue. *Witkowski*, 163 Wis. 2d at 990.

Kyles argues that his claim is not barred because Flanagan abandoned him (Kyles' brief at 20-23). He contends that the State's arguments might make sense had Kyles not been denied his right to counsel or a direct appeal, and maintains that the State cannot rely on his procedural missteps to bar his relitigation of this claim (Kyles' brief at 21).

This court should reject this argument. To say that Kyles' underlying claim that Flanagan abandoned him by not filing a notice of intent is not procedurally barred because Flanagan abandoned him is a circular argument. Further, there would be no reason for Kyles to be seeking reinstatement of his direct appeal had he had one with counsel. Finally, under Kyles' reasoning, because Flanagan did not file a notice of intent, he could continue to file an endless stream of requests to reinstate his appeal until he succeeds, regardless of his past attempts to litigate this claim.

Kyles also contends his claim is not barred because he was forced to rely on the assistance of other inmates to prepare his filings (Kyles' brief at

21-22).[5] Kyles never indicated until his most recent *Knight* petition that other inmates helped him with his filings (Kyles' *Knight* petition at 7-10; Pet-Ap. K; M; V). And it appears that he never asserted that another inmate helped with his current *Knight* petition until he asked this court for review (Kyles' petition for review at 11).

In any event, a defendant's *pro se* status does not allow him to make the same claim in multiple rounds of litigation. *Pro se* defendants are subject to the same rules as counsel and must comply with the relevant procedural and substantive law. *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Most collateral challenges to criminal convictions are filed by *pro se* prisoners. Excusing them from well-established procedural bars would permit endless litigation and allow this exception to swallow the rule.

Finally, Kyles argues that his claim is not barred because the court of appeals and the circuit court dismissed his previous habeas petitions without prejudice (Kyles' brief at 23-24). This is incorrect. The court of appeals dismissed Kyles' 2003 *Knight* petition because he filed it in the wrong court. This is a dismissal with prejudice. While it is true that the court of appeals' order informed Kyles to file his challenge in the circuit

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[5] Kyles also seeks to excuse his repeated filings because he reads at a sixth-grade level (Kyles' brief at 21-22). The citations Kyles provides do not mention his reading ability (Kyles' brief at 22, citing Kyles' *Knight* petition at 17; Pet-Ap. E:3). Further, there does not appear to be anything in the record that would substantiate Kyles' assertion.

court, it did not contemplate that he would be free to file another *Knight* petition in the future.

Kyles is also wrong about the circuit court's order. Although the court indicated it would entertain a motion for reconsideration if Kyles could produce his November 2002 letter to Flanagan, Kyles did not take advantage of this opportunity and decided to appeal instead (Kyles' brief at 23; Kyles' *Knight* petition Pet-Ap. N:2; O). It makes no sense to say that Kyles' ignored opportunity to prove his claim in circuit court somehow gives him another chance to raise it years later.

III. KYLES' PETITION IS SUFFICIENT TO WARRANT AN EVIDENTIARY HEARING ON TWO OF HIS THREE INEFFECTIVE ASSISTANCE CLAIMS.

Finally, should this court determine that a *Knight* petition is the proper remedy for Kyles' claims and that it is not procedurally barred, the State agrees with Kyles that he is entitled to an evidentiary hearing on his claims that Flanagan failed to file the notice of intent when asked to and was not reasonably available during the filing period. Kyles' petition alleges sufficient facts, which, if true, would show he is entitled to relief on these claims (Kyles' brief at 14-18). *See State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

The State disagrees that Kyles is entitled to relief on his claim that Flanagan had a duty to file a motion for an extension of time to file the notice

of intent once Kyles informed him in January 2003 that he wanted to appeal or that Flanagan should have told him an extension was a possibility (Kyles' brief at 19). Even assuming that Kyles told Flanagan this at their meeting, he should not get a hearing on this claim.

Initially, as argued, this claim is not properly before this court because Kyles did not raise it in his petition for review. This court should thus decline to order a hearing on this issue.

Further, Kyles' allegations in support of this claim in his petition were insufficient to show that Flanagan had a duty to file an extension motion or discuss one with Kyles, or that Flanagan violated that duty. Kyles merely asserted that Flanagan should have known to ask for an extension, but never explained why that was so (Kyles' *Knight* petition at 19). Kyles did not establish why it should have been obvious to Flanagan that an extension motion was available to cure the missed deadline. Without these allegations, no hearing is warranted.

Kyles notes in his brief to this court that the court of appeals has a generally lenient policy about granting extensions to defendants to prosecute an appeal (Kyles' brief at 19 (citing *Evans*, 273 Wis. 2d 192, ¶ 38)). It is also true, as *Evans* and Kyles note, that motions for extensions of time are granted after the deadline has expired and Wis. Stat. 809.82(2) specifically permits this (Kyles' brief at 19). *Evans*, 273 Wis. 2d 192, ¶ 38. This would have been discoverable by Flanagan in 2003. *See State v. Harris*, 149 Wis. 2d 943, 945-47, 440 N.W.2d 364 (1989) (stating that deadline

for filing notice of intent can be extended by court of appeals after it has expired). But none of this was alleged in Kyles' *Knight* petition.

Further, Kyles' petition failed to establish that a motion for an extension of time would have succeeded. A showing of good cause is required to obtain an extension. Wis. Stat. § 809.82(2). Neither Kyles' petition nor his brief on appeal specifically explains what this good cause would have been (Kyles' *Knight* petition at 19; Kyles' brief at 19). It is not enough to say that the court of appeals' policy was lenient or long established. Section 809.82(2) requires a showing of good cause for an extension, and Kyles has never said what this was given the facts of his case. This court should deny him a hearing on this claim.

CONCLUSION

Upon the foregoing, the State respectfully requests that this court affirm the decision of the court of appeals. If this court determines that Kyles' claims are not procedurally barred and were filed in the correct court, the State agrees that Kyles is entitled to a hearing on the first two

of his three ineffective assistance of counsel claims.

Dated this 10th day of February, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,398 words.

Dated this 10th day of February, 2014.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated this 10th day of February, 2014.

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