STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2015AP1799-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTHONY R. PICO,

Defendant-Respondent-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Waukesha County, the Honorable Michael O. Bohren, Presiding

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief in support of Anthony R. Pico to address the following two issues:

1. Whether this Court should bar circuit courts from considering expert evidence they deem helpful regarding an attorney's standard of care on an ineffective assistance of counsel claim.

2. Whether the respondent must or may cross-appeal from a circuit court's advisory opinion "denying" a request for lesser relief rendered moot by that court's grant of more inclusive relief.

WACDL takes no position regarding whether Mr. Pico ultimately is entitled to relief.

For the reasons stated below, the state's novel attempt to limit circuit court discretion to hear and consider evidence it

deems helpful has no basis in law or logic. There is nothing inherently unreliable about expert testimony on the reasonableness of counsel's actions, and both the defense and the state have resorted to such evidence in the past. The Court of Appeals' novel requirement that respondents cross-appeal from advisory opinions "denying" requests for lesser relief rendered moot by the circuit court's grant of more inclusive relief likewise lacks legal or logical support.

ARGUMENT

I.

THE CIRCUIT COURT HAS THE AUTHORITY TO PERMIT EXPERT TESTIMONY IT DEEMS HELPFUL IN A *MACHNER* HEARING

The question presented by the state is whether it is wrong, as a matter of law, for a circuit court to permit expert testimony from either the state or the defense that it deems helpful on the standard of care owed by a criminal defense attorney to his or her client. As a general principle, however, if a court believes that certain information would be helpful to deciding an issue, we should trust them on that and, absent good reason, let them have it.

Under Wisconsin law, a criminal defendant claiming ineffective assistance of counsel must "go beyond mere notification and . . . require counsel's presence at the hearing in which his conduct is challenged" and have "trial counsel . . . explain the reasons underlying his handling of a case." ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). One purpose of the hearing is to determine whether counsel acted reasonably. ***Id.*** Under those circumstances, prior counsel effectively testifies as an expert regarding what an attorney would or would not have done in his or her circumstances.

In undersigned counsel's experience over the past 30+ years of handling post-conviction cases, it is not common for either side to call an attorney expert separate from the attorney whose acts or omissions are being challenged at a ***Machner*** hearing. Independent expert testimony is not, of course, required as a matter of law when the defendant claims ineffective assistance of counsel. However, there have been times when either the state or the defense has proffered such evidence and the circuit courts have admitted it as helpful on the issue of what a reasonable criminal defense attorney would or would not have done under the circumstances facing the allegedly ineffective attorney.

Pursuant to Wis. Stat. §907.02:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

"Whether to admit proffered 'expert' testimony rests in the circuit court's discretion." ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis.2d 85, 750 N.W.2d 780 (citation omitted). Review of such decisions is deferential, with the circuit court upheld "if the decision had 'a reasonable basis,' and if the decision was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***Id.*** (citations omitted).

The state's argument that circuit courts should be barred from admitting expert attorney evidence they deem helpful is based on a faulty premise. According to the state, the court presiding over the ***Machner*** hearing "is the only 'expert' on domestic law." State's Brief at 48 (citations omitted). That may be true, but there is a substantial difference between what "the law" is and how a reasonable attorney would or would not

handle a particular situation when representing a criminal defendant.

Judges are trained to be able to decide what "the law" is, even if they lack personal experience in a particular area of law. Therefore, even a judge who never represented the state or a criminal defendant is competent to determine the applicable legal standards for ineffectiveness under ***Strickland v. Washington***, 466 U.S. 668 (1984), and its progeny.

However, any individual judge is not necessarily trained or experienced with representing a defendant against criminal charges. Not every judge spent time defending criminal cases before being elevated to the bench. Even experience as a prosecutor does not necessarily translate to understanding or appreciating the various factors a criminal defense attorney must consider or balance in a given circumstance. If a judge believes that expert testimony from the defense or the state regarding what a reasonably experienced criminal defense attorney would have done under the circumstances of a given case would be helpful, therefore, the appellate courts should not deny the judge access to that help.

Although the presiding judge is just as much *the* expert on "the law" in civil malpractice cases as he or she is on an ineffectiveness claim, this Court has recognized the distinction between impermissible expert testimony on "the law" and permissible testimony regarding an attorney's standard of care. Indeed, expert testimony is deemed appropriate in attorney malpractice cases (despite the presiding judge's position as expert on "the law"), although it is not required where breach of the standard of care is obvious:

> Expert testimony is generally necessary in legal malpractice cases to establish the parameters of acceptable professional conduct, given the underlying

> fact situation. Expert testimony is not required in cases where the breach is so obvious that it may be determined by the court as a matter of law or where the standard of care is within the ordinary knowledge and experience of the jurors.

Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 112, 362 N.W.2d 118 (1985) (footnote omitted).

Again, *generally* the circuit court may be in a position to determine what a reasonable criminal defense attorney would do or not do under the circumstances at issue on an ineffectiveness claim without expert testimony. But, "generally" is not "always," and when a circuit court believes that expert testimony from either the state or the defense would be helpful on that point, there is no reason to deny the court that help. *See also* Wis. Stat. §901.02 (Rules of evidence to be construed, *inter alia*, "to the end that truth may be ascertained and proceedings justly determined").

II.

WHERE THE STATE APPEALS A CIRCUIT COURT'S ORDER VACATING A DEFENDANT'S CONVICTION AND SENTENCE, NO CROSS-APPEAL IS NECESSARY TO CHALLENGE THE SENTENCE ON ALTERNATIVE GROUNDS

Contrary to the underlying premise of the state's argument, State's Brief at 51-53, a defendant who wins a new trial in the circuit court need not file a cross-appeal in order to raise alternative arguments supporting that part of the judgment below that vacated his or her sentence. Indeed, it is at best questionable that a cross-appeal is permissible under those circumstances.

The state concedes that, because Pico had no complaint with the outcome in the circuit court – a new trial, combined with vacation of his conviction and sentence – someone in his

position had nothing to appeal. State's Brief at 52. It nonetheless argues that someone in Pico's position must file a cross-appeal in order to preserve even part of what he already won in the circuit court. *Id.* at 51-53. The state is wrong.

When a circuit court grants a defendant a new trial, it of necessity vacates the judgment of conviction and the original sentence. The circuit court here did so expressly (R73; A-44 ("The Court orders a new trial and vacates the sentence previously imposed on February 25,2013.")).

It is well settled that a respondent on appeal is not limited to supporting a lower court's final judgment on the precise grounds deemed controlling by that court. Rather, "a respondent may raise an issue in his briefs without filing a cross-appeal 'when all that is sought is the raising of an error which, if corrected, would sustain the judgment...'" ***Auric v. Cont'l Cas. Co.***, 111 Wis. 2d 507, 516, 331 N.W.2d 325 (1983), quoting ***State v. Alles***, 106 Wis.2d 368, 390, 316 N.W.2d 378 (1982). As the Court explained in ***Alles***,

> The reason for this is the accepted appellate court rationale that a respondent's judgment or verdict will not be overturned where the record reveals the trial court's decision was right, although for the wrong reason. An appellate court, consistent with that percept [sic], has the power, once an appealable order is within its jurisdiction, to examine all rulings to determine whether they are erroneous and, if corrected, whether they would sustain the judgment or order which was in fact entered.

Alles, 106 Wis.2d at 391.

Only where the respondent seeks to change or modify the order or judgment below is a cross-appeal necessary. *See, e.g.*, Wis. Stat. (Rule) 809.10(2)(b):

> (b) *Cross-appeal.* A respondent who seeks a modification

> of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal . . .. A cross-appellant has the same rights and obligations as an appellant under this chapter.

Accordingly, the law is well-settled that Pico was entitled to support all or part of the order below with alternative arguments, even including arguments that the circuit court had rejected. *E.g.*, ***In Interest of Jamie L.***, 172 Wis.2d 218, 232-33, 493 N.W.2d 56 (1992) (citations omitted).

It matters not that the arguments in question support only that part of the circuit court's order that vacated Pico's sentence. Pico does not seek to reduce the relief granted him by the circuit court. It is the state that wants that. Rather, Pico seeks to uphold at least a portion of the relief the circuit court's granted him, and seeks to do so, if necessary, on alternative grounds.

While not directly applicable, the rules governing cross-petitions for review to this Court provide helpful guidance. *See* Wis. Stat. (Rule) 809.62. First, paralleling Rule 809.10(2)(b) regarding cross-appeals, those rules provide that only "[a] party who seeks to reverse, vacate, or modify an adverse decision of the court of appeals" need file a petition for cross-review. Wis. Stat. (Rule) 809.62(3m)(a).

A respondent like Pico who seeks to uphold a portion of the circuit court outcome in his favor on alternative grounds (as a fall-back position to affirming the entire order) does not seek to "reverse, vacate, or modify" the circuit court's order. The rule on petitions for review expressly provides two circumstances in which a petition for cross-review is *not* required:

> 1. A petition for cross-review is not necessary to enable an opposing party to defend the court of appeals' ultimate result or outcome based on any ground, whether or not that ground was ruled upon by the

> lower courts, as long as the supreme court's acceptance of that ground would not change the result or outcome below.
>
> 2. A petition for cross-review is not necessary to enable an opposing party to assert grounds that establish the party's right to a result that is less favorable to it than the result or outcome rendered by the court of appeals but more favorable to it than the result or outcome that might be awarded to the petitioner.

Wis. Stat. (Rule) 809.62(3m)(b).

Pico's sentencing challenges fall squarely within subpar. 2. Accordingly, there would have been no need for a petition for cross-review to raise those claims here had the court of appeals upheld his right to a new trial, and the same policy reasons underlying Rule 809.62(3m) equally mitigate against requiring a litigant who wins all they ask for in the circuit court to file a cross-appeal to defend all or part of that win.

Rule 809.62 also demonstrates that a cross-appeal would not only be unnecessary in Pico's case, but inappropriate since he was not harmed by the circuit court's final order vacating his sentence and granting him a new trial. The rule makes clear that a party may petition for review only from an "adverse decision," which it defines as

> a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review.

Wis. Stat. (Rule) 809.62(1g)(a). Moreover, "'[a]dverse decision' does not include a party's disagreement with the court of appeals' language or rationale in granting a party's requested relief." *Id.* 809.62(1g)(a); *see* ***State v. Castillo***, 213 Wis. 2d 488, 570 N.W.2d 44 (1997); ***Neely v. State***, 89 Wis.2d 755, 757-58, 279 N.W.2d 255 (1979).

The provisions for filing a notice of appeal do not contain

a similarly express "adverse decision" requirement. *See* Wis. Stat. §808.03; Wis. Stat. (Rules) 809.01, 809.10. However, the requirement is implicit in the common understanding of an "appeal" as "[a] proceeding undertaken to reverse a decision by bringing it to a higher authority." Black's Law Dictionary at 36 (Pocket Ed. 1996); *see* Wis. Stat. (Rule) 809.10(4) (all prior orders and rulings "adverse" to appellant are reviewable on appeal).

See also ***State v. Terry***, 2000 WI App 250, ¶11, 239 Wis. 2d 519, 620 N.W.2d 217:

> First, we note that because the ALJ ultimately decided to revoke Terry's parole on three counts, DOC had no valid interest in pursuing an appeal of the decision on the first count. DOC was only interested in revoking Terry's parole; it was not interested in proving Terry guilty of a crime. Once the ALJ revoked Terry's parole based on three of the four alleged violations, DOC had obtained the desired result and had no further reason to appeal the decision. Moreover, because the ALJ's decision was not adverse to DOC, it is questionable whether DOC could have appealed the decision had it so desired. Generally, a party that prevails on the ultimate issue may not seek further review of the underlying rationale for the decision. See State v. Castillo, 213 Wis.2d 488, 491–92, 570 N.W.2d 44 (1997); Neely v. State, 89 Wis.2d 755, 758, 279 N.W.2d 255 (1979). Therefore, because DOC ultimately prevailed in its efforts to revoke Terry's parole, it was arguably precluded from seeking further review of the decision based on the ALJ's rejection of one of the four alleged violations.

The state's suggestion that a respondent such as Pico who won everything he asked for in the circuit court must nonetheless file a notice of cross-appeal in order to make necessary arguments preserving that win is not supported by law or logic. *See also* ***Neely***, *supra* (although relying on statutory grounds, Court identifies policy arguments for rejecting state's petition for review challenging court of appeals' rationale, but

not its result).

CONCLUSION

For these reasons, WACDL asks that the Court reject the state's novel new restrictions on circuit court discretion and its equally novel attempt to rewrite the appellate rules.

Dated at Milwaukee, Wisconsin, January 22, 2018.

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 2,543 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.

_____

Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 22nd day of January, 2018, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak

Pico Amicus Brief.wpd