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IN SUPREME COURT

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Case No. 2019AP567-W

STATE OF WISCONSIN EX REL.
MILTON EUGENE WARREN,

Plaintiff-Petitioner-Petitioner,

v.

MICHAEL MEISNER,

Defendant-Respondent.

REVIEW OF A DECISION OF THE COURT OF APPEALS,
DISTRICT IV, DENYING A WRIT OF HABEAS CORPUS
AND REINSTATEMENT OF DIRECT APPEAL RIGHTS

**DEFENDANT-RESPONDENT'S BRIEF AND
SUPPLEMENTAL APPENDIX**

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ISSUES PRESENTED

1. In *State v. Starks*, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146, did this Court overrule or modify the already-existing law concerning the proper forum for a collateral challenge to prior counsel's failure to raise claims in a Wis. Stat. § (Rule) 809.30 postconviction motion?

The Court of Appeals did not address this question.

This Court should answer: No. It should hold that the general rule that a collateral postconviction claim should be first raised in the court where the alleged error would have occurred applies where the claim concerns ineffective assistance of direct appeal counsel for not first raising claims in a section 809.30 postconviction motion. This Court should withdraw any language in the *Starks* opinion that could be read to change the previously existing framework. *Starks*, 349 Wis. 2d 274, ¶¶ 4, 30–31, 34–35.

2. Did the Court of Appeals err in denying Warren's *Knight*¹ petition?

The Court of Appeals concluded that Warren's *Knight* petition was not the proper vehicle for Warren's claims.

This Court should affirm, because Warren had another adequate remedy at law: to appeal from the circuit court's February 4, 2019, order denying his section § 974.06 motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

¹ *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

INTRODUCTION

Warren seeks review of a Court of Appeals' decision denying his *Knight* petition.

Warren filed a *Knight* petition arguing ineffective assistance of counsel on direct appeal. He filed it after separately, in his underlying criminal case, filing a section 974.06 motion raising claims of ineffective assistance of counsel on direct appeal.

Warren contends that, in his underlying criminal case, the circuit court erred in applying *Starks* to reject his section 974.06 motion without addressing his claims on the merits. Now that the Court of Appeals has also denied his *Knight* petition, he argues he is left without a forum.

The State agrees with Warren that the proper forum for his section 974.06 motion—alleging ineffective assistance of counsel on direct appeal for not first raising claims in a section 809.30 motion—was the circuit court. A motion alleging ineffective assistance of postconviction counsel for failing to raise trial counsel's ineffectiveness is properly brought before the circuit court under the well-established *Knight/Rothering* framework.

But the State disagrees with Warren that this Court must “either reverse its 2013 ruling in *Starks* and reinstate the *Warren* case in the circuit court, or, affirm its ruling in the 2013 *Starks* case and reinstate the *Warren* case in the Court of Appeals.” (Warren's Br. 10.)

This Court did not overrule the *Knight/Rothering*² framework in *Starks*. The *Starks* decision was not about the propriety of the *Knight/Rothering* framework, but about

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

adoption of the “clearly stronger” standard for evaluating issues that a defendant claims should have been raised on direct appeal but were not.

That said, before beginning its analysis of the dispute in that matter, this Court made some introductory statements about the procedural posture of Starks’ claims. The defendant there alleged ineffective assistance of direct appeal counsel, for not first raising claims in a section 809.30 postconviction motion, before raising other claims before the Court of Appeals. This Court’s language in *Starks* suggested that the defendant improperly raised his collateral challenge of ineffective assistance of direct appeal counsel in the circuit court, when it should have been raised in the Court of Appeals.

Because that language suggests something different than the well-established *Knight/Rothering* framework, and as it was not essential to the matter at issue, this Court should withdraw language in that opinion that could be read to conclude that this Court meant to propose a different holding.

The circuit court’s February 4, 2019, order in Warren’s criminal case concluded that this Court did intend to overrule the *Knight/Rothering* framework in *Starks*, given the introductory language. That conclusion was erroneous.

But this Court should still affirm the Court of Appeals’ opinion denying Warren’s *Knight* petition. Warren had an adequate remedy available to him at law outside of a writ of habeas corpus: to file a notice of appeal from the circuit court’s denial of his section 974.06 motion, and raise the issue to the Court of Appeals so that it could correct the error. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 50, 326 Wis. 2d 729, 786 N.W.2d 78. Because he had a separate, adequate remedy at

law, the Court of Appeals properly concluded he was not entitled to habeas relief.

Thus, this Court should affirm the Court of Appeals' decision denying Warren's *Knight* petition.

STATEMENT OF THE CASE

This appeal began in the Court of Appeals through a *Knight* petition. The record here is therefore limited. The State therefore begins with the facts and procedural history of the underlying case, as clarified by the Court of Appeals in its decision in Warren's direct appeal.

In 2015, Warren was convicted of three drug related offenses in Rock County Circuit Court. (Pet-App. 104; R-App. 102.) The charges alleged that Warren and his associates transported heroin and marijuana through a minor courier, named "L.J." (R-App. 103.) Acting off a tip from an informant, officers found L.J. carrying a brick of heroin as he exited a bus going from Chicago to Madison. (R-App. 103.)

In 2016, Warren, by counsel, appealed his judgment of conviction. (Pet-App. 104.) Warren did not file a Wis. Stat. § (Rule) 809.30 postconviction motion. (R-App. 102.)

Instead, counsel filed a notice of appeal from the two judgments of conviction, and Warren advanced arguments to this Court. (R-App. 102.) Warren argued that the evidence at trial was insufficient to support his convictions. (R-App. 102.) He further argued that he was entitled to a new trial because the circuit court erroneously denied his motion to admit evidence about the facts of an informant's conviction for robbery. (R-App. 107.)

In a per curiam opinion dated July 20, 2017, the Court of Appeals rejected Warren's arguments and affirmed his judgments of conviction. *State v. Warren*, No. 2016AP936,

2017 WL 3084867 (Wis. Ct. App. July 20, 2017) (per curiam) (unpublished), (R-App. 101–107.)

Warren petitioned this Court for review. (Warren's Br. 2.) This Court denied the petition by order dated October 9, 2017. (Warren's Br. 2.)

On October 11, 2018, Warren filed with the circuit court a pro se motion for postconviction relief under Wis. Stat. § 974.06. (Pet-App. 104.)

Warren subsequently retained Attorney Meyeroff, who filed an amended Wis. Stat. § 974.06 motion on Warren's behalf in January 2019. (Pet-App. 104.) Warren did not include either his original or amended Wis. Stat. § 974.06 motion in his appendix to either his *Knight* petition or to his brief in this Court; the motions are not in the record before this Court.

Warren, however, does include in his appendix the circuit court's decision denying his section 974.06 motion in his criminal matter. (Pet-App. 104–07.)

Warren filed a Wis. Stat. § 974.06 motion that, according to the circuit court, argued his "appellate counsel was ineffective for not raising a claim for the ineffective assistance of trial counsel" on direct appeal via a Wis. Stat. § (Rule) 809.30 postconviction motion. (Pet-App. 105.) The circuit court also noted that "[t]he defense argues that the errors of appellate counsel are [a] sufficient reason for this court to hear the postconviction motion, despite the prior direct appeal." (Pet-App. 105.)

In an order dated February 4, 2019, the circuit court denied Warren's section 974.06 motion. (Pet-App. 104–07.) Relying on the State's arguments before it, the circuit court concluded that, under *Starks*, 349 Wis. 2d 274, ¶ 4, Warren had filed his brief in the wrong forum. (Pet-App. 106–07.)

The circuit court wrote that “[t]he Supreme Court in 2013 ruled that the attorney who did not file a postconviction motion for the ineffective assistance of trial counsel, and who did file a direct appeal, ‘was not Starks’ postconviction counsel but was rather his appellate counsel.’” (Pet-App. 106 (emphasis omitted) (citation omitted).) The circuit court opined that “[t]he Supreme Court in *Starks* overruled the Court of Appeals’ holding in *Rothering* as to when an attorney is considered appellate counsel.” (Pet-App. 106.) Online records do not reflect that Warren filed a notice of appeal from the circuit court’s denial of his section 974.06 motion.³

Thereafter, on March 21, 2019, Warren filed the *Knight* petition at issue here, with the Court of Appeals. (R-App. 108–27.) The petition alleged that counsel on direct appeal was “ineffective for failing to discover and raise” four claims. (R-App. 109.)⁴

All four claims concerned underlying claims of ineffective assistance of trial counsel—that trial counsel: failed to secure some video footage before trial, failed to secure Warren’s vehicle so it could be checked for fingerprints, failed to file a motion to suppress the warrant authorizing GPS tracking of Warren, and failed to argue that the Wisconsin courts did not have jurisdiction over Warren’s crimes because they happened in Illinois. (R-App. 115–24.) The *Knight* petition alleged that all four issues were “clearly stronger” than those counsel raised on direct appeal. (R-App. 125–27.)

In a decision dated April 8, 2019, the Court of Appeals denied Warren’s *Knight* petition without ordering a response.

³ The State obtains this fact from Wisconsin Circuit Court Case Access (WCCA), <http://wcca.wicourts.gov> (last visited Jan. 14, 2020).

⁴ Warren’s *Knight* Petition is included in the State’s supplemental appendix. (R-App. 108–27.)

(Pet-App. 102–03.) The court took issue with Warren’s assertion that he had “not sought any additional relief in this matter,” following direct appeal, as Warren did not mention the Wis. Stat. § 974.06 motion he filed in October 2018. (Pet-App. 103.)

The court reasoned that “[t]o the extent Warren seeks relief from the order denying the motion [before the circuit court], his remedy lies not by writ, but by appeal of that order.” (Pet-App. 103 (citing *State ex rel. Dressler v. Circuit Court for Racine Cty.*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991)).)

Warren filed a motion for reconsideration. (Pet-App. 101.) By order dated May 10, 2019, the Court of Appeals denied Warren’s motion. (Pet-App. 101.)

Warren petitioned this Court for review. By order dated October 15, 2019, this Court granted review.

STANDARDS OF REVIEW

The determination of the proper forum for a defendant’s claim of ineffective assistance of counsel is a question of law reviewed de novo. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 16, 354 Wis. 2d 626, 847 N.W.2d 805.

“Whether writ of habeas corpus is available to the party seeking relief is [also] a question of the law that [is] review[ed] de novo.” *State v. Pozo*, 2002 WI App 279, ¶ 6, 258 Wis. 2d 796, 654 N.W.2d 12

ARGUMENT

I. This Court should reaffirm the *Knight/Rothering* framework. This Court should withdraw any language from *Starks* suggesting otherwise.

A. Applicable legal principles

1. Procedural requirements for litigation of postconviction and appellate claims in Wisconsin

Statutory requirements for commencing a Wis. Stat. § (Rule) 809.30 appeal. “Upon conviction, a defendant has a statutory right to seek postconviction relief through a postconviction motion or an appeal.” *Kyles*, 354 Wis. 2d 626, ¶ 21. “The process begins with the filing of a notice of intent to seek postconviction relief with the circuit court.” *Id.*; see also Wis. Stat. § (Rule) 809.30(2)(b).

After a defendant provides this notice, the county clerk prepares the appellate record, including making arrangements for preparation of any necessary transcripts. Wis. Stat. § (Rule) 809.30(2)(c), (g). Thereafter, the defendant must file a notice of intent to appeal, or, a postconviction motion if one is necessary, within 60 days of “the later of the service of the transcript or circuit court case record.” Wis. Stat. § (Rule) 809.30(2)(h). If the circuit court denies the defendant’s postconviction motion, the defendant must file a notice of appeal within 20 days of the entry of the order that denied the motion. Wis. Stat. § (Rule) 809.30(2)(j).

“However, the court of appeals may, upon its own motion or a showing of good cause, extend the time for filing the notice.” *Kyles*, 354 Wis. 2d 626, ¶ 22. “The court of appeals’ ‘authority to extend the time periods of Rule 809.30 is to the exclusion of the trial court.’” *Id.* (quoting *State v. Rembert*, 99 Wis. 2d 401, 406 n.4, 299 N.W.2d 289 (Ct. App. 1980).)

Requirements that some claims be first raised in a Wis. Stat. § (Rule) 809.30 postconviction motion, before being litigated before the Court of Appeals.

No postconviction motion is necessary to preserve an issue for appeal “if the grounds are sufficiency of the evidence or issues previously raised.” Wis. Stat. § 974.02(2); *see also State v. Hayes*, 2004 WI 80, ¶ 55, 273 Wis. 2d 1, 681 N.W.2d 203.

But many other claims must first be raised in a section 809.30 postconviction motion before they may be litigated in the Court of Appeals. An allegation of ineffective assistance of trial counsel, for example, must be raised via postconviction motion before the circuit court; this puts the parties on notice of the claim of ineffectiveness and allows it to be evaluated on the merits through testimony. *State ex rel. Rothering v McCaughtry*, 205 Wis. 2d 675, 678–79, 556 N.W.2d 136 (Ct. App. 1996); *State v. Mosley*, 102 Wis. 2d 636, 657, 307 N.W.2d 200 (1981) (“A claim of inadequate trial counsel is to be raised by a hearing in a trial court, at which trial counsel can testify concerning the reasons behind actions taken.”). Trial counsel’s testimony is a prerequisite to granting any relief on an ineffective assistance of counsel claim. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Statutory requirements for commencing an appeal from the denial of a Wis. Stat. § 974.06 motion. Wisconsin Stat. § 974.06 provides an additional appellate avenue to a criminal defendant “[a]fter the time for appeal or postconviction remedy provided in s. 974.02 has expired.” Wis. Stat. § 974.06(1).

A postconviction motion under Wis. Stat. § 974.06 is “part of the original criminal action, is not a separate proceeding and may be made at any time.” Wis. Stat. § 974.06(2). However, an appeal under Wis. Stat. § 974.06 is

civil in nature and “the burden of proof shall be upon the person.” Wis. Stat. § 974.06(6).

If a criminal defendant wants to appeal a circuit court order denying a Wis. Stat. § 974.06 postconviction motion, “[a]n appeal may be taken from the order entered on the motion as from a final judgment.” Wis. Stat. § 974.06(7). Thus, a defendant who wishes to appeal from a circuit court’s order denying a Wis. Stat. § 974.06 may appeal as of right under Wis. Stat. § 808.03(1).

Assistance of counsel during postconviction and direct appeal. “A defendant is entitled to counsel while seeking relief through a postconviction motion under Wis. Stat. § 974.02 or a [Wis. Stat. § (Rule) 809.30] direct appeal.” *Kyles*, 354 Wis. 2d 626, ¶ 23.

This right to counsel on direct appeal also includes the right to effective assistance of counsel. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 604–05, 516 N.W.2d 362 (1994).

2. This Court’s decision in *Knight*

“Traditionally, the rule has been that claims of ineffective assistance of counsel premised on errors occurring before the circuit court should be pursued in the circuit court and claims of ineffective assistance of counsel premised on errors occurring before the appellate court should be pursued in the court of appeals.” *Kyles*, 354 Wis. 2d 626, ¶ 25. Thus, a defendant alleging ineffective assistance of appellate counsel on appeal brings his or her claims under “petition for a writ of habeas corpus to the appellate court that considered the appeal,” more commonly known as a *Knight* petition. *State v. Knight*, 168 Wis. 2d 509, 512, 484 N.W.2d 540.

In *Knight*, the defendant alleged his appellate counsel was ineffective for failing to raise certain arguments in the court of appeals. 168 Wis. 2d at 513. This Court determined

that the appellate court that heard the appeal, and not the circuit court, “is a more appropriate and better suited forum than is the circuit court to determine whether appellate counsel’s performance was deficient and prejudiced the defendant’s appeal.” *Knight*, 168 Wis. 2d at 521. As it explained, these “determinations involve questions of law within the appellate court’s expertise and authority to decide *de novo*. The appellate court will be familiar with the case and the appellate proceedings.” *Id.*

In subsequent decisions, this Court has continued to uphold the *Knight* framework. *State v. Balliette*, 2011 WI 79, ¶ 32, 336 Wis. 2d 358, 805 N.W.2d 334; *Kyles*, 354 Wis. 2d 626, ¶¶ 44–45.

3. The Court of Appeals’ decision in *Rothering*

Conversely, a defendant alleging ineffective assistance of *postconviction* counsel brings his or her claims under a *Rothering* petition before the circuit court. *Rothering*, 205 Wis. 2d at 678–79. Again, the Court of Appeals holding accorded with the general rule that an allegation of ineffective assistance of counsel should be raised in the court where the error occurred. *Kyles*, 354 Wis. 2d 626, ¶ 25.

In *Rothering*, the ineffective assistance of counsel claim was premised on postconviction counsel’s failure to bring a postconviction motion before the circuit court, to withdraw the defendant’s plea on grounds of ineffective assistance of trial counsel. *Rothering*, 205 Wis. 2d at 677. As the Court of Appeals reasoned, “The allegedly deficient conduct is not what occurred before [the court of appeals] but rather what should have occurred before the trial court.” *Id.* at 679. Further, the Court of Appeals explained that it “does not have any familiarity with the claims of ineffective trial counsel and

whether the plea should be withdrawn as they were never raised in this court.” *Id.* at 679–80.

As a result, “a claim of ineffective assistance of postconviction counsel should be raised in the trial court either by a petition for habeas corpus or a motion under § 974.06, Stats.” *Rothering*, 205 Wis. 2d at 681 (footnote omitted).

Like *Knight*, this Court has continued to uphold the process established in *Rothering* in recent decisions. *Balliette*, 336 Wis. 2d 358, ¶ 32; *Kyles*, 354 Wis. 2d 626, ¶¶ 25, 27.

4. Narrow exceptions to the *Knight/Rothering* framework, prior to *Starks*

Before *Starks*, there were two notable exceptions to the above framework, which presumes that a claim of ineffective assistance should be filed in the forum in which the alleged ineffectiveness occurred.

First, courts have drawn an exception where counsel fails to pursue any postconviction or appellate claims. In *State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 565 N.W.2d 805 (Ct. App. 1997), *overruled on other grounds by State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, 387 Wis. 2d 50, 928 N.W.2d 480, the defendant alleged ineffective assistance of appellate counsel on direct appeal for failing to pursue an appeal or file a no-merit report. *Smalley*, 211 Wis. 2d at 798–99. Because this failure effectively deprived the defendant of his direct appeal rights, the Court of Appeals reasoned that, “[c]ounsel’s failure to commence an appeal . . . regardless of whether such an appeal had to be preceded by a postconviction motion, can be challenged by a *Knight* petition in this court because counsel’s inaction in this court is at issue.” *Id.* (footnote omitted).

Indeed, the Court of Appeals similarly held that, where the allegation of ineffectiveness on direct appeal is that counsel failed to take an appeal without first properly informing the defendant of this decision, a defendant's claim is properly brought before the Court of Appeals via *Knight* petition. *State ex rel. Ford v. Holm*, 2004 WI App 22, ¶ 9, 269 Wis. 2d 810, 676 N.W.2d 500; *State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶ 4, 288 Wis. 2d 707, 709 N.W.2d 515.

Second, relatedly, this Court has drawn an exception where counsel fails to file a notice of intent to pursue postconviction relief: in *Kyles*, this Court held that where the allegation of ineffective assistance of counsel concerns the failure to file a notice of intent to pursue postconviction relief with the circuit court under Wis. Stat. § (Rule) 809.30(2)(b), such a claim should be brought before the Court of Appeals, even though the notice of intent is filed with the circuit court. *Kyles*, 354 Wis. 2d 626, ¶ 38.

Both of these exceptions to the general *Knight/Rothering* framework make sense, given the remedy for the error in these circumstances—reinstatement of the 809.30 deadlines. As this Court reasoned in *Kyles*, because the remedy for the failure to file a notice of intent to pursue postconviction relief is an extension of the section 809.30 statutory deadline to file the notice, and only the Court of Appeals is empowered to extend the section 809.30 deadlines, a claim of ineffective assistance of counsel for failing to file a notice of intent should be raised via *Knight* petition before the Court of Appeals. *Kyles*, 354 Wis. 2d 626, ¶ 45. Similarly, in *Smalley*, the remedy was the reinstatement of Smalley's appellate rights. *Smalley*, 211 Wis. 2d at 797.

5. This Court's decision in *Starks* and the subsequent motions for reconsideration

In 2013, this Court issued its decision in *Starks*, 349 Wis. 2d 274. *Starks* concerned the adoption of the “clearly stronger” standard for “criminal defendants alleging in a habeas petition that they received ineffective assistance of appellate counsel due to counsel’s failure to raise certain issues.” *Id.* ¶ 60.

That is, in order to satisfy the deficiency prong of *Strickland*'s⁵ test for ineffective assistance, a defendant who had a counseled direct appeal and alleges that counsel was deficient for not raising a particular claim during that direct appeal must show that the issue counsel did not raise was “clearly stronger” than the issue counsel did raise. *Id.*

Before beginning its analysis of the “clearly stronger” standard, this Court observed that there was a “procedural problem” in *Starks*'s case. *Starks*, 349 Wis. 2d 274, ¶ 4. This Court explained that *Starks*'s Wis. Stat. § 974.06 motion “alleged ineffective assistance of *postconviction* counsel.” *Id.*⁶ “However, the attorney who represented [*Starks*] after his conviction did not file any *postconviction* motions and instead pursued a direct appeal.” *Id.* Citing *Knight*, this Court then stated that “[t]his is significant because claims of ineffective assistance of appellate counsel must be filed in the form of a petition for a writ of habeas corpus with the court of appeals.” *Id.* This Court noted that “[h]e was thus not *Starks*'s *postconviction* counsel but was rather his *appellate* counsel.” *Id.*

⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁶ Neither the State nor the defense contended that *Starks*' motion was filed in the wrong forum.

This Court continued onto explain that it would nevertheless review the claims before it: because this “erroneous filing deprived the circuit court of competency rather than jurisdiction, our review of [Starks’] case is appropriate.” *Starks*, 349 Wis. 2d 274, ¶ 4. It then went on and decided the “clearly stronger” question at issue.

Later in the *Starks* opinion, this Court held that, “Starks improperly cast his claim of ineffective assistance of appellate counsel as a claim of ineffective assistance of postconviction counsel.” *Starks*, 349 Wis. 2d 274, ¶30. “Because a claim of ineffective assistance of appellate counsel must be filed as a petition for a writ of habeas corpus with the court of appeals, Starks’s decision to file a Wis. Stat. § 974.06 motion with the circuit court was procedurally incorrect.” *Id.* This Court reasoned that, because Starks’s appointed counsel “did not file any postconviction motions with the circuit court and instead pursued a direct appeal with the court of appeals[, appointed counsel] was thus Starks’s ‘appellate’ attorney.” *Id.* ¶ 34. Thus, this Court concluded that “[a]s Starks filed his claim with the circuit court, it should have been dismissed and not allowed to proceed on appeal.” *Id.* ¶ 35.

The language in these paragraphs of this Court’s *Starks* decision led both the State and the defense to file motions for reconsideration. *State v. Starks*, 2014 WI 91, 357 Wis. 2d 142, 849 N.W.2d 724. The State’s motion for reconsideration sought to “modify all paragraphs discussing the role of [direct appeal counsel] and clarify the proper forum for Starks to bring his claims.” *Starks*, 357 Wis. 2d at 147.

The State noted, “As in *Rothering*, what Starks really complained of was not his counsel’s performance on appeal (*i.e.*, the briefs and oral argument); but rather, his counsel’s performance during the postconviction proceedings (*i.e.*, his

counsel's failure to file a postconviction motion), or what should have occurred in the circuit court." *Id.* at 148.

The State reasoned that Starks properly raised his claims via a *Rothering* petition "because his counsel failed to file a postconviction motion in the circuit court preserving Starks' current *Machner* claims for appeal." *Starks*, 357 Wis. 2d at 149. As it explained, "[T]he real relief Starks sought was not a new appeal, but a new trial, based on postconviction counsel's alleged ineffectiveness for failure to raise claims of trial counsel's alleged ineffectiveness." *Id.* Thus, under *Rothering*, the "appropriate forum for [Starks'] claims was the circuit court—thereby keeping the relevant decision-making with the appropriate fact-finder and linking the remedy closely to the scope of the alleged constitutional violation." *Id.*

The State's motion concluded that "[t]his court's discussion about forum in *Starks* directly conflicts with *Rothering's* holding, and implicitly conflicts with *Knight's* rationale. Accordingly, the State seeks to clarify whether this court is overruling *Rothering* and/or modifying *Knight.*" *Starks*, 357 Wis. 2d at 150.

Counsel for Starks also filed a motion for reconsideration, in part advancing the same position as the State—that the language in paragraph four of the *Starks* decision created "confusion . . . from this Court's choice to denominate counsel's failure to file a post-conviction motion in the circuit court [as] an error of 'appellate counsel.'" *Starks*, 357 Wis. 2d at 154. As counsel reasoned, the "failure to raise a trial ineffectiveness claim for the first time on appeal cannot be ineffectiveness of appellate counsel because appellate counsel does not act unreasonably in failing to raise an unpreserved claim. Rather, the ineffectiveness is of *postconviction* counsel for failing to raise and preserve the

claim in a postconviction motion in the circuit court.” *Id.* at 156.

This Court denied both motions for reconsideration. *Starks*, 357 Wis. 2d at 143.

Then-Chief Justice Abrahamson wrote a concurrence, in which she concluded that “[t]he *Starks* opinion needs modification. I am concerned that . . . the reader may not fully understand the nature of the errors in the *Starks* majority opinion and the needed corrections.” *Starks*, 357 Wis. 2d 142, ¶ 6 (Abrahamson, C.J., concurring).

Justice Prosser also wrote a concurrence, joined by Justice Ann Walsh Bradley.⁷ *Starks*, 357 Wis. 2d 142, ¶¶ 9, 51. Most significantly, Justice Prosser wrote, “The *Starks* opinion did not dispute the correctness of the quoted holdings in *Knight* and *Rothering*.” *Starks*, 357 Wis. 2d 142, ¶ 44.

Justice Prosser noted that “[t]he motions for reconsideration contend instead that this court mischaracterized the stage of the proceeding in which the alleged ineffective assistance took place.” *Id.* Justice Prosser wrote that the parties’ reconsideration motions appeared to be “supported by this court’s decision in *Balliette*.” *Starks*, 357 Wis. 2d 142, ¶ 44.

Justice Prosser stated that the law continues to be that “[w]hen . . . conduct alleged to be ineffective is postconviction counsel’s failure to highlight some deficiency of trial counsel in a § 974.02 motion before the trial court, the defendant’s remedy lies with the circuit court under either Wis. Stat.

⁷ Warren’s Brief discusses Justice Prosser’s opinion as the “concurring opinion” in *Starks*. (Warren’s Br. 8.) In actuality, Warren is citing Justice Prosser’s concurrence to the denial of the parties’ motions for reconsideration, not the *Starks* opinion itself. *See State v. Starks*, 2014 WI 91, ¶ 9, 357 Wis. 2d 142, 849 N.W.2d 724.

§ 974.06 or a petition for habeas corpus.” *Starks*, 357 Wis. 2d 142, ¶ 44 (quoting *Balliette*, 336 Wis. 2d 358, ¶ 32).

Finally, Justice Prosser observed that:

[N]o one on the court disputes the basic correctness of the holdings in *Knight* and *Rothering* as to where to file a petition for a writ of habeas corpus challenging the effectiveness of appellate counsel or a § 974.06 motion challenging the effectiveness of postconviction counsel, for not challenging, or deficiently challenging, the alleged ineffective assistance of trial counsel.

Starks, 357 Wis. 2d 142, ¶ 49.

Justices Prosser and A.W. Bradley therefore concurred in the Court’s denial of the parties’ motions for reconsideration, but suggested that the Court should “withdraw any language from the *Starks* opinion that suggests otherwise.” *Starks*, 357 Wis. 2d 142, ¶ 49.

B. The *Knight/Rothering* framework reasonably divides allegations of ineffective assistance of counsel on direct appeal.

The *Knight/Rothering* framework reflects a sound, principled division of labor between the Court of Appeals and circuit courts. It tasks each court with evaluating counsel’s challenged action or inaction that did or should have occurred before it. It also takes into account the institutional abilities and responsibilities of each court.

In *Rothering*, for example, the defendant contended that his counsel on direct appeal should have raised a challenge to the propriety of his guilty plea. *Rothering*, 205 Wis. 2d at 677.

This type of claim required not only an evaluation of trial counsel’s reasoning (or lack thereof) in seeking plea withdrawal, but also of postconviction counsel’s reasoning for

not raising the issue prior to litigating before the Court of Appeals. Thus, as the *Rothering* court reasoned, “The allegedly deficient conduct is not what occurred before [the court of appeals] but rather what should have occurred before the trial court.” *Rothering*, 205 Wis. 2d at 679.

Conversely, an allegation of ineffective assistance of appellate counsel involves an assessment of the two principal manifestations of appellate counsel: the brief and oral argument, both of which occur before the Court of Appeals. *Rothering*, 205 Wis. 2d at 678–79. A full and fair assessment of appellate counsel’s performance is therefore better suited to the Court of Appeals that “heard the initial appeal and may be the best judge [of] the conduct of appellate counsel.” *Knight*, 168 Wis. 2d at 518–19. In addition, the determination of appellate counsel’s performance and its impact on the defendant’s appeal “involve questions of law within the appellate court’s expertise and authority to decide *de novo*.” *Knight*, 168 Wis. 2d at 521.

These considerations explain why claims such as those set forth in Warren’s *Knight* petition belong before the circuit court. They involve an as-yet non-existent assessment of trial counsel’s performance, as well as an as-yet non-existent of postconviction counsel’s performance in *not* raising claims. (R-App. 115–24.)

Under the reasoning in *Rothering* and *Knight*, those claims are best suited at the circuit court level, where “the allegedly deficient conduct occurred.” *Rothering*, 205 Wis. 2d at 680. To raise a claim of ineffective assistance of trial counsel, postconviction counsel would have to file a motion in the *circuit* court. Preserving claims of ineffective assistance of trial counsel in circuit court first ensures that “the underlying issues com[ing] before [the court of appeals] in their proper appellate context.” *Id.* “This approach keeps the relevant decisionmaking with the appropriate fact finder.” *Id.*

Thus, the *Knight/Rothering* framework is not only well-established law, it also provides a workable, commonsense test to determine what court is the best forum to assess a defendant's claims on the merits because of the different institutional capabilities of circuit courts and of the Court of Appeals.

C. It does not appear this Court meant to overrule the *Knight/Rothering* framework in *Starks*. Either way, this Court should remove any language from *Starks* that conflicts with that framework and reaffirm the *Knight/Rothering* framework.

Though this Court did say that it was “hold[ing]” that *Starks* improperly labeled his claim as ineffective assistance of postconviction counsel, *Starks*, 349 Wis. 2d 274, ¶ 30, this Court went on to address the merits of *Starks*' claims, adopting the “clearly stronger” pleading standard “for criminal defendants alleging in a habeas petition that they received ineffective assistance of appellate counsel due to counsel's failure to raise certain issues.” *Id.*, ¶ 60. Thus, the discussion of the procedural posture of *Starks*' case was non-essential to that broader holding. See e.g., *State v. Romero-Georgana*, 2014 WI 83, ¶ 45, 360 Wis. 2d 522, 849 N.W.2d 668 (discussing the continuing viability of the “clearly stronger” standard for evaluating deficient performance claims of appellate counsel).

Moreover, if this Court intended to overrule this established and workable approach, it did not explicitly say so in *Starks*. And it likely would have said so.

For example, earlier this term in *State v. Roberson*, 2019 WI 102, ¶ 3, 389 Wis. 2d 190, 935 N.W.2d 190, this Court overruled its prior decision in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. The *Roberson* opinion painstakingly examined the foundations of *Dubose* and the

law upon which it was based, before making clear, “stare decisis is not offended by overturning *Dubose*, and we now do so.” *Roberson*, 389 Wis. 2d 190, ¶ 65. Indeed, this Court generally “follows the doctrine of stare decisis scrupulously because of [its] abiding respect for the rule of law.” *Johnson Controls, Inc. v. Emp’rs Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257.

No such examination of the law and clear statement of intent can be found in *Starks*. Notably, this Court cited both *Knight* and *Rothering* in discussing the proper forum for the claims in *Starks*. *Starks*, 349 Wis. 2d 274, ¶ 35.

Thus, it does not appear that this Court intended to overrule or modify the *Rothering/Knight* framework therein. This Court should conclude that it did not intend to overrule *Rothering/Knight* in *Starks*. Justice Prosser’s concurrence denying the motions for reconsideration specifically stated that, at least in his view, this Court was not intending to overrule the *Knight/Rothering* framework. *Starks*, 357 Wis. 2d 142, ¶ 44 (“The *Starks* opinion did not dispute the correctness of the quoted holdings in *Knight and Rothering*.”).

But—as this case demonstrates—the language in *Starks* has caused confusion. To avoid any confusion moving forward, this Court should therefore withdraw any language from the *Starks* opinion that could be read to overrule or modify the *Knight/Rothering* framework. *Starks*, 349 Wis. 2d 274, ¶¶ 4, 30–31, 34–35.

Notably, withdrawing the identified language from the *Starks* opinion would *not* affect the broader holding of the opinion regarding this Court’s adoption of the “clearly stronger” standard for evaluating a claim of deficient performance by appellate counsel for failing to raise an issue identified by a criminal defendant. This Court’s adoption of that standard did *not* depend on whether *Starks*’ appointed

counsel was postconviction or appellate counsel; indeed, the showing a petitioner must make is the same in either case. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 46 (“We think this ‘clearly stronger’ standard is equally appropriate in evaluating the alleged deficiency in an attorney’s performance as postconviction counsel when postconviction counsel is accused of ineffective assistance on account of his failure to raise certain material issues before the circuit court.”).

D. The Rock County circuit court was the proper forum for Warren’s claims.

In this individual case, the proper forum for Warren’s claims under the existing *Knight/Rothering* framework is the Rock County Circuit Court.

Warren’s claims, as he defines them, allege the ineffective assistance of trial counsel for failing to raise four substantive issues during his direct appeal. (R-App. 115–24.) An allegation of ineffective assistance of trial counsel must be raised via postconviction motion before the circuit court to put the parties on notice of the claim of ineffectiveness and to allow it to be evaluated on the merits. *Rothering*, 205 Wis. 2d at 678–79; *Mosley*, 102 Wis. 2d at 657.

During Warren’s direct appeal, no postconviction motion was filed and no postconviction proceedings were held. (R-App. 101–02 (stating that Warren appealed only from judgments of conviction).) No postconviction motion was necessary to the claims counsel *did* raise, because the issues Warren raised on appeal (a challenge to the sufficiency of the evidence and an evidentiary ruling regarding the informant’s criminal history) had already been preserved before the circuit court and did not require additional proceedings to raise on appeal. Wis. Stat. § 974.02(2).

The procedural posture of Warren’s case is therefore similar to the petitioner’s in *Rothering*. In that case, the issue

raised on Rothering's direct appeal was that the circuit court erroneously exercised its sentencing discretion. *Rothering*, 205 Wis. 2d at 676. Raising that issue on direct appeal did not necessarily require a postconviction motion first to preserve it. *Rothering*, 205 Wis. 2d at 676; *State v. Gallion*, 2004 WI 42, ¶ 7, 270 Wis. 2d 535, 678 N.W.2d 197 (noting that Gallion only appealed from a judgment of conviction in raising his erroneous exercise of sentencing discretion claim).⁸ Thus, in order to preserve Rothering's claim of ineffective assistance of trial counsel for not seeking plea withdrawal so that it could be raised on appeal, Rothering had to first file a postconviction motion with the circuit court. *Rothering*, 205 Wis. 2d at 677–78.

The same is true of the claims in Warren's *Knight* petition. (R-App. 115–24.) Warren's claims, as he describes them, involve allegations of ineffective assistance of trial counsel: for failing to obtain some discovery, failing to challenge the circuit court's decisions regarding the issuance of a GPS tracker on Warren's car, and failing to raise a jurisdictional challenge. (R-App. 115–24.)

Because adequately raising and preserving issues of ineffective assistance of trial counsel requires a postconviction motion before being raised on appeal, it appears that claims set forth in Warren's *Knight* petition were properly brought before the circuit court as a *Rothering* petition. See *Machner*, 92 Wis. 2d at 804; *Mosley*, 102 Wis. 2d at 657.

⁸ This type of sentencing claim is distinct from other sentencing claims that do require a postconviction motion, such as when a defendant alleges the existence of a "new factor" that could warrant sentence modification. See e.g., *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828 (stating that a circuit court may modify a defendant's sentence based on a showing of a "new factor.").

II. Nonetheless, this Court should affirm the Court of Appeals' denial of Warren's *Knight* petition, because Warren had another adequate remedy at law.

A. Applicable legal principles

A writ of habeas corpus “is an equitable remedy that protects a person’s right to personal liberty by freeing him or her from illegal confinement.” *Pozo*, 258 Wis. 2d 796, ¶ 8.

Because the writ grants extraordinary relief, it “is available only where specific factual circumstances are present.” *State ex rel. Fuentes v. Wis. Court of Appeals, Dist. IV*, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999).

To be granted relief, a petitioner must show: “(1) restraint of his or her liberty, (2) [the] restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction and (3) *no other adequate remedy available at law*.” *Pozo*, 258 Wis. 2d 796, ¶ 8 (emphasis added). “Unless these criteria are met, the writ of habeas corpus will not be available to a petitioner.” *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶ 12, 252 Wis. 2d 133, 643 N.W.2d 771.

B. The Court of Appeals correctly determined that Warren could have appealed from the circuit court’s decision denying his section 974.06 motion.

Warren is correct that there should be a forum in which to hear his complaints. (Warren’s Br. 10.) However, a prerequisite to granting a *Knight* petition is a showing that a petitioner has “no other adequate remedy available at law.” *Pozo*, 258 Wis. 2d 796, ¶ 8. Because Warren’s complaints regarding trial counsel’s alleged ineffectiveness were brought via a habeas petition, Warren had to show, among other things, that there was “no other adequate remedy available at law.” *Id.*

The Court of Appeals correctly concluded that Warren was not entitled to habeas relief because he had an adequate remedy at law: to appeal the circuit court's February 4, 2019, order, in which the court concluded that Warren's section 974.06 claims were advanced in the wrong forum. (Pet-App. 103.)

Indeed, Warren could, if he so chose, attempt to seek permission from the Court of Appeals to retroactively extend his deadline for his Wis. Stat. § (Rule) 809.30(2)(h) notice of appeal under Wis. Stat. § (Rule) 809.82(2). As this Court has noted, the Court of Appeals generally has a lenient policy toward granting extensions to allow a defendant to take an appeal. *State v. Evans*, 2004 WI 84, ¶ 30, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 38, 290 Wis. 2d 352, 714 N.W.2d 900.

CONCLUSION

This Court should affirm the Court of Appeals' April 8, 2019 order denying Warren's *Knight* petition.

Dated this 23rd day of January 2010.

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 6,641 words.

Dated this 23rd day of January 2020.

ROBERT G. PROBST
Assistant Attorney General

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

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 23rd day of January 2020.

ROBERT G. PROBST
Assistant Attorney General

Supplemental Appendix
State of Wisconsin ex rel. Milton Eugene Warren
v. Michael Meisner
Case No. 2019AP567-W

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SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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