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STATE OF WISCONSIN  
IN SUPREME COURT

Case No. 2019AP000567-W

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STATE OF WISCONSIN EX REL.  
MILTON EUGENE WARREN,  
Plaintiff-Petitioner-Petitioner,  
v.

MICHAEL MEISNER,  
Defendant-Respondent.

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On Review of the Court of Appeals, Dist. IV,  
Decision Dismissing Mr. Warren's Petition for Writ of  
Habeas Corpus, Filed After the Circuit Court  
Dismissed His Wis. Stat. § 974.06 Motion.

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AMICUS CURIAE BRIEF AND APPENDIX  
OF WISCONSIN STATE PUBLIC DEFENDER

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## ARGUMENT

- I. The State Public Defender urges this court to clarify and re-affirm the procedure for collateral postconviction litigation established in *State v. Knight*<sup>1</sup> and *State ex rel. Rothering v. McCaughtry*,<sup>2</sup> and to withdraw inconsistent and confusing language in *State v. Starks*.<sup>3</sup>

It had been bedrock blackletter law in Wisconsin that when alleging ineffective assistance of Wis. Stat. (Rule) § 809.30 direct appeal counsel, a claim that Rule 809.30 counsel was ineffective at the pre-appeal postconviction stage of the direct appeal is litigated via a Wis. Stat. § 974.06 postconviction motion filed in the circuit court [*Rothering*, 205 Wis. 2d at 681], and a claim that Rule 809.30 counsel was ineffective at the appellate court stage is litigated via a writ of habeas corpus filed in the appellate court that heard the appeal. *Knight*, 168 Wis. 2d at 522; *See also State v. Balliette*, 2011 WI 79, ¶¶ 32-37, 336 Wis. 2d 358, 805 N.W.2d 334. This court's decision in *State v. Starks*, however,

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

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

<sup>3</sup> *State v. Starks*, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146.

has broken this once clear procedural framework and has created a situation akin to the Schrödinger's cat mind problem in physics,<sup>4</sup> where a § 974.06 motion in the circuit court and a writ of habeas corpus in the court of appeals now are at once, each, simultaneously both the correct and incorrect vehicle and venue for pursuing collateral post-conviction ineffective assistance of counsel claims.

In *Starks* the petitioner properly filed under the *Knight/Rothering* framework a § 974.06 collateral postconviction motion arguing that his Rule 809.30 attorney was ineffective at the direct appeal postconviction stage by failing to file a § 974.02 motion alleging ineffective assistance of trial counsel, as is required by *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The *Starks* majority opinion, however, states “the attorney who represented [Starks] after his conviction did not file any postconviction motions and instead pursued a direct appeal. He thus was not Starks’s *postconviction* counsel but rather was his *appellate* counsel.” *Starks, Id.* at ¶ 4 (emphasis in original). The court then ruled Starks’ allegation of ineffective assistance of counsel (IAC) for his Rule 809.30 attorney’s failure to raise an IAC of trial counsel claim was required to be litigated via a *Knight* habeas petition in the court of appeals rather than a

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<sup>4</sup> A thought experiment attributed to Austrian physicist Erwin Schrödinger relating to an analysis of a quantum mechanics theory which implies during the course of the experiment a cat to be simultaneously both dead and alive.

*Rothering* § 974.06 motion in the circuit court. *Id.* at ¶¶ 4, 30-39.

In *Starks* this court did not expressly overrule *Rothering* or prior decisions affirming the *Knight/Rothering* framework—See, e.g. *State v. Balliette*, 336 Wis. 2d 358 at ¶¶ 32-37; Also See *State v. Starks*, 2014 WI 91, 357 Wis. 2d 142, 849 N.W.2d 724 (Prosser, J., concurring on reconsideration at ¶¶ 44, 49) (“The *Starks* opinion did not dispute the correctness of the holdings in *Knight* and *Rothering*.”)(App. 113). Nor did *Starks* overrule or modify *State v. Machner* which established more than 40 years ago that an IAC of trial counsel claim must first be litigated by Rule 809.30 counsel in a § 974.02 motion at the postconviction stage during a direct appeal before the issue can be raised in the court of appeals. *Machner*, 92 Wis. 2d 797, 804 (“We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.”).

This court in *Knight* ruled the place where the error was alleged to have occurred carries the day—i.e. an error at the appellate court stage of a Rule 809.30 direct appeal is appropriately litigated via a writ of habeas corpus filed in the court of appeals, rather than via a § 974.06 motion, which is a circuit court proceeding where errors alleged to have occurred in that court at the pre-appeal postconviction stage of a direct appeal are appropriately litigated. *Knight*, 168 Wis. 2d at 519-20. The rationale was based upon a “pragmatic

assessment” articulated “from the standpoint of institutional capability.” *Starks, Id.* at ¶ 37; *Knight, Id.* at 518. The court of appeals in *Rothering* extended the *Knight* rationale, establishing IAC of Rule 809.30 counsel at the postconviction stage must be litigated via a § 974.06 motion in the circuit court. *Rothering*, 205 Wis. 2d at 681

Mr. Starks’ Rule 809.30 attorney did not raise any issues at the postconviction stage of the direct appeal, but instead filed a notice of appeal and raised in the court of appeals issues preserved at trial. Yet, while Starks’ collateral postconviction claim was that his Rule 809.30 attorney was ineffective at the postconviction stage for not raising IAC of trial counsel, this court concluded Starks was really raising an IAC claim against his direct appeal counsel at the appeal stage, even though under *Knight*, *Rothering*, *Machner* and Wis. Stat. § 809.30(2)(h), an IAC of trial counsel claim must be litigated in the circuit court via a postconviction motion before the issue can be raised in the court of appeals.

This court in *Starks* described collateral postconviction law or procedure as “complex” and “dense” [*Id.* at ¶ 31]; but it is more a matter of confusing language than complexity. Unlike in other jurisdictions where trial, appellate and collateral postconviction counsel have singular definitions, and where no role exists for appellate counsel in the circuit court, a direct appeal in a Wisconsin criminal case begins in the circuit court. Rule 809.30 direct



appeal counsel, as “postconviction counsel,” must first evaluate the case while the record is still in the circuit court. Wis. Stat. §§ 809.30(2)(g) & (h). “Postconviction counsel” then either litigates a Rule 809.30 postconviction motion, or files a notice of appeal, after which the attorney becomes “appellate counsel” in the *Knight/Rothering/Machner* procedural framework. *Starks*, however, connotes a binary framework where one is either postconviction counsel or appellate counsel, as though they are different attorneys, not recognizing that the terms just describe different stages of direct appeal litigation which, except in unusual circumstances, are litigated by the same attorney. *Id.* at ¶¶ 4, 34-37.

*Starks* states that there is no “postconviction counsel” unless a Rule 809.30 postconviction motion is filed. *Id.* at ¶¶ 4, 34. *Starks* ignores, as noted above, that Rule 809.30 appeals all begin at the postconviction stage, with the record in the circuit court, and with postconviction counsel having 60 days from the date of service of transcripts to evaluate the case to identify arguable issues which, with two exceptions, must be litigated in the circuit court via a postconviction motion. See Wis. Stat. § 809.30(2)(h) (“The person shall file a motion for postconviction relief...unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.”). An ineffective assistance of trial counsel claim is by definition an issue *not* “previously raised,” and therefore must always be litigated first at the postconviction stage before being appealed.

It is not possible to reconcile *Starks* with procedure established in *Knight*, *Rothering*, and *Machner*, and by Rule 809.30(2)(h). Mr. Starks' Rule 809.30 appellate attorney could not have been ineffective for not raising an IAC of trial counsel claim in the court of appeals because *Knight/Rothering/Machner* and Rule 809.30(2)(h), require that issue to be litigated in the circuit court by Rule 809.30 "postconviction counsel" at the postconviction stage before it can be raised and litigated by Rule 809.30 "appellate counsel" in the court of appeals. Thus contrary to the analysis and ruling in *Starks*, Mr. Starks properly filed his claim as a § 974.06 motion in the circuit court under the controlling law at the time he filed his motion.

It is certainly within this court's authority to re-determine or recast rules for litigating ineffective assistance of Rule 809.30 direct appeal counsel claims at the collateral postconviction stage of a case. *See Knight*, 168 Wis. 2d 509, 519 ("We do not believe that the legislature enacted sec. 974.06 to remedy alleged defects in a perfected and completed appellate review."). But the rationale for the well-established *Knight/Rothering/Machner* procedure is sound, has worked reasonably well for 40 years, and should be reaffirmed. Leaving the contrary language from *Starks* in place will at minimum cause continued confusion, as it has in Mr. Warren's case with the circuit court judge believing *Starks* reversed *Rothering*. Leaving the *Starks* language in place will result in wasteful litigation as prudent litigants under conflicting laws would have to simultaneously

file a circuit court § 974.06 motion and a writ of habeas corpus in the court of appeals when alleging IAC of direct appeal counsel for failure to raise an IAC of trial counsel claim, and hope that each court does not rule the pleading to have been filed in the wrong court, as occurred here.

If this court rules that *Starks* did not create new appellate procedure, and reaffirms the procedure established in *Knight*, *Rothering* and *Machner*, the SPD urges the court to consider alternatively articulating the standard with a focus not on the “who” (i.e. “postconviction counsel” vs. “appellate counsel”), but rather on “when” or “where” the alleged IAC error occurred. That is, the court should hold that Rule 809.30 direct appeal counsel’s alleged errors of commission or omission occurring before notice of appeal is filed are litigated via § 974.06 in the circuit court, and alleged errors occurring after notice of appeal is filed are litigated via writ of habeas corpus in the appellate court where the error occurred.

Since all Rule 809.30 direct appeal issues can be litigated in the circuit court via a § 974.02 direct appeal postconviction motion (i.e. there are no original jurisdiction court of appeals Rule 809.30 direct appeal issues, except those related to blown deadlines),<sup>5</sup> and all issues except sufficiency of

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<sup>5</sup> Because circuit courts lack authority to enlarge or reinstate appeal deadlines, all such actions must be litigated in the appropriate appellate court either by writ of habeas corpus

evidence and those fully preserved must be raised in a § 974.02 postconviction motion, most IAC of Rule 809.30 direct appeal counsel issues will be litigated via § 974.06. Even IAC of Rule 809.30 counsel regarding preserved issues or sufficiency of evidence raised by Rule 809.30 counsel directly in the court of appeals would be challenged via § 974.06 if the alleged IAC error is failure to present evidence or argument that should have been raised in a § 974.02 motion at the direct appeal postconviction stage.

Regarding IAC of Rule 809.30 “appellate counsel,” since the “two principal manifestations of appellate representation [are] (a) the brief and (b) oral argument” [*Rothering*, 205 Wis. 2d at 678-79], habeas litigation in the court of appeals would generally be limited only to alleged errors in briefing (e.g. failure to develop an argument, failure to cite key supporting cases, forfeiture of issues by failing to file a reply brief etc.), errors at oral argument (e.g. making an improper concession), or errors relating to blown deadlines or appellate procedure.

Adopting a pre-notice of appeal/post-notice of appeal framework to delineate the line between circuit court § 974.06 and appellate court habeas litigation in IAC collateral postconviction proceedings would not change the substance of the *Knight/*

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[See *State ex rel. Kyles v. Pollard*, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805; *State ex rel. Schmelzer v. Murphy*, 201 Wis. 2d 246, 548, N.W.2d 45 (1996)], or motion. *State v. Quackenbush*, 2005 WI App 2, 278 Wis. 2d 611, 692 N.W.2d 340; *aff’d. in Kyles, Id.* at ¶ 44 n. 12.

*Rothering/Machner* rule, but may help clear up confusion stemming from a Rule 809.30 direct appeal attorney being both “postconviction counsel” and “appellate counsel.”

The court is also urged to address language in *Starks* on two other points. In *Starks* at ¶ 29 the court states “Lastly, we address the merits of Starks’s Sixth Amendment ineffective assistance of appellate counsel claim, i.e. his habeas claim.” The right to counsel for direct appeal derives from the due process and equal protection clauses in the 14<sup>th</sup> Amendment, not the 6<sup>th</sup> Amendment. See *Douglas v. California*, 372 U.S. 353, 356-58 (1963); and *Martinez v. Court of Appeals of California, Fourth Appellate Dist.*, 528 U.S. 152, 160 (2000)(“...none of our many cases safeguarding the rights of an indigent appellant has placed any reliance on...the Sixth Amendment.”). The distinction was of no consequence in *Starks*, and nor in the case at bar, but it matters in other contexts and so should be clarified.

The SPD also urges the court to adopt Justice Prosser’s point in concurrence regarding *Starks* at ¶ 41 where the court states: “A defendant may file a § 974.06 motion only after he has ‘exhausted his direct remedies[,] which consist of a motion for new trial and [an] appeal.’ *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972).” The quoted passage is from a 1972 decision that was superseded by language enacted in 1977 amending § 974.06 to read “After the time for appeal or postconviction remedy provided in s. 974.02 has

expired...” a § 974.06 motion may be filed. *Starks*, 357 Wis. 2d 142, Prosser, J., concurring on reconsideration at ¶ 28). (App. 111). The ¶ 41 language implies § 974.06 litigation is available only after a person has taken a direct appeal. The amended statute makes clear § 974.06 is available to anyone after the *time* for direct appeal has expired.

**II. Mr. Warren must be allowed to litigate and receive a ruling on the merits of the § 974.06 motion he properly filed in the circuit court.**

Mr. Warren properly filed a § 974.06 motion in the circuit court pursuant to procedure established by *Knight/Rothering/Machner*. The circuit court declined to rule on the merits, essentially barred the court door and declared the filing a nullity, and ruled that pursuant to *Starks* Mr. Warren must litigate his claims via writ of habeas corpus in the court of appeals. When Warren attempted to do just that, the court of appeals similarly barred the court door, declaring that the issues needed to be litigated via § 974.06 and that Warren was now out of luck because he should have appealed the circuit court’s ruling rejecting his § 974.06 filing. The Attorney General argues the court of appeals was correct. Both are wrong.

As established above, *Starks* has rendered collateral postconviction procedure irreconcilably conflicted. As it stands case law declares both a § 974.06 motion in the circuit court and writ of

habeas corpus in the court of appeals to each be the singular exclusive avenue for Mr. Warren to litigate his IAC of Rule 809.30 counsel and trial counsel issues. Mr. Warren tried both, with the lower courts each pointing a finger at each other in rejecting the filings, leaving Warren in the cold without resolution of his substantive claims.

The court of appeals ruling Mr. Warren's avenue to pursue his claims was to have appealed the circuit court's order dismissing his § 974.06 motion was error. It conflicts with *Starks*, where this court ruled "As Starks filed his claim with the circuit court, it should have been dismissed *and not allowed to proceed to an appeal*." *Starks*, 349 Wis. 2d 274, ¶ 35 (emphasis added). And, as the *Starks* court noted in "the interests of judicial economy" when it decided to reach the merits of Starks' supposedly incorrectly litigated issues, if it "were to dismiss this case for want of jurisdiction, presumably Starks would simply refile his current claim in the court of appeals, deleting the word 'postconviction' and replacing it with 'appellate.'" This court should clarify that Mr. Warren may do the same—re-file his § 974.06 motion or writ in whichever court this court determines to be the correct court for litigating an IAC of Rule 809.30 direct appeal counsel claim for failure to litigate IAC of trial counsel.

## CONCLUSION

The State Public Defender asks that the court re-affirm the procedural framework established in

*Knight, Rothering, and Machner*, and withdraw inconsistent language in *Starks*. The court is urged to rule that except when moving to reinstate lapsed appeal deadlines, alleging ineffective assistance of Rule 809.30 direct appeal counsel for failing to litigate or to properly litigate an issue at the postconviction stage of a Rule 809.30 direct appeal is properly litigated via a Wis. Stat. § 974.06 motion in the circuit court. The court should further rule that challenging Rule 809.30 counsel's failure to litigate or to properly litigate issues at the appeal stage of a Rule 809.30 direct appeal after notice of appeal was filed is properly raised via a writ of habeas corpus filed in the appellate court where the alleged error occurred. The court is also urged to clarify misleading language in *Starks* referencing appellate counsel and the 6<sup>th</sup> Amendment, and § 974.06 only being available after direct appeal rights are exhausted.

Dated this 5<sup>th</sup> day of February, 2020.

Respectfully submitted,

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,851 words.

### **CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 5<sup>th</sup> day of February, 2020.

Signed:

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JOSEPH N. EHMANN  
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### **CERTIFICATION AS TO APPENDIX**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5<sup>th</sup> day of February, 2020.

Signed:

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