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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2019AP567-W

STATE OF WISCONSIN EX REL.
MILTON EUGENE WARREN,

Plaintiff-Petitioner-Petitioner,

v.

MICHAEL MEISNER,

Defendant-Respondent.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Review from an Ex Parte Denial of Petition for Writ of Habeas Corpus by the Court of Appeals, District IV

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief concerning:

(1) the conflict between ***State v. Starks***, 2013 WI 69, 349 Wis.2d 274, 833 N.W.2d 146, *reconsideration denied*, 2014 WI 91, 357 Wis.2d 142, 849 N.W.2d 724, and *reconsideration denied*, 2014 WI 109, 358 Wis.2d 307, 852 N.W.2d 746, *cert. denied*, 135 S. Ct. 1548 (2015), and decisions such as ***State ex rel. Rothering v McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), regarding the appropriate forum for raising a claim of ineffective post-conviction counsel and

(2) the appropriate remedy for those defendants harmed by the confusion resulting from ***Starks'*** apparent *sub silento* overruling of the longstanding ***Rothering*** standard.

ARGUMENT

I.

THE COURT SHOULD RETURN CLARITY AND CONSISTENCY TO POST-CONVICTION PROCEDURE BY WITHDRAWING INACCURATE AND CONFUSING LANGUAGE IN *STARKS*

This case addresses the appropriate forum in which to raise a claim of ineffectiveness of counsel based on post-conviction counsel's allegedly unreasonable failure to preserve a claim for direct appeal by raising it first in a post-conviction motion in the circuit court pursuant to Wis. Stat. (Rule) 809.30(2)(h). Prior to this Court's decision in ***Starks***, the answer was clear that such claims of post-conviction ineffectiveness must be raised in the circuit court, generally in a motion under Wis. Stat. §974.06. ***Rothering***, *supra*. ***Starks***, however, *sua sponte* suggested that answer was wrong, albeit without indicating why it believed ***Rothering*** was wrong and without even acknowledging the conflict. 2013 WI 69, ¶¶33-35, 37-38. The result has been widespread confusion among litigants and the lower courts.

Although overlooked in ***Starks***, 2013 WI 69, ¶34,[1] deficient performance may consist of errors of *omission* as well as errors of *commission*. That is, counsel's unreasonable failure to take action – whether by failing to object at trial or failing to pursue a claim

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[1] In their briefs before this court, Starks and the State refer to Starks's second appointed attorney, Robert Kagen, as his "postconviction counsel." This is not an accurate description, though, of the tasks Kagen performed. Kagen did not file any postconviction motions with the circuit court and instead pursued a direct appeal with the court of appeals. He was thus Starks's "appellate" attorney.

2013 WI 69, ¶35.

in the circuit court via a Rule 809.30 motion – is deficient performance that takes place in the circuit court.

WACDL joins Warren, the state through Warden Meisner, and the State Public Defender in urging this Court to repair the widespread confusion caused by the Court's *sua sponte* discussion in ***Starks*** which conflicts with previously settled and reasonable precedent regarding the appropriate forum for raising a claim that counsel was ineffective for failing to raise a claim in a Rule 809.30 post-conviction motion. WACDL joins those litigants in asking that the Court withdraw the language in ***Starks*** that caused that confusion and instead reaffirm the longstanding principle that claims of ineffective assistance of counsel be pursued first in the forum in which the alleged error(s), whether of commission or omission, occurred unless that particular forum is unauthorized to remedy the alleged violation.

Under that established standard, errors of commission or omission by counsel prior to entry of the judgment of conviction must first be challenged in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Errors of commission or omission by counsel after sentencing but prior to filing of the notice of appeal likewise must be pursued first in the circuit court, ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), unless that court is unauthorized to remedy the alleged violation, ***State ex rel. Kyles v. Pollard***, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805 (because the circuit court cannot extend the appeal deadlines, ineffectiveness challenge to counsel's failure to initiate post-conviction proceedings by filing notice of intent in the circuit court under Wis. Stat. (Rule) 809.30(2)(b) must be raised in a habeas petition in the Court of Appeals). Errors of commission or omission by counsel between the filing of the notice of appeal

and decision on any motion for reconsideration or expiration of the time to seek reconsideration under Wis. Stat. (Rule) 809.24 must be raised first in the Court of Appeals. ***State v. Knight***, 168 Wis.2d 509, 519-21, 484 N.W.2d 540 (1992). And finally, any errors of commission or omission by counsel in this Court must be raised in a habeas petition before this Court. ***State ex rel. Schmelzer v. Murphy***, 201 Wis.2d 246, 548 N.W.2d 45 (1996) (challenge to counsel's unreasonable failure to file petition for review must be raised in Supreme Court).

Because the arguments of the other litigants adequately address this matter, WACDL will not prolong this brief by rehashing those arguments.

II.

WARREN AND OTHERS CAUGHT UP IN THE CONFUSION CAUSED BY *STARKS* ARE ENTITLED TO A REMEDY

While the litigants on this appeal agree that the Court should withdraw the language from ***Starks*** that conflicts with the principles underlying ***Machner***, ***Rothering***, ***Knight***, and ***Schmelzer***, such action only resolves the confusion for the future. It does nothing to repair the harm already caused to people like Warren who either have been denied a forum in which to raise their ineffectiveness claims or have relied upon that language and therefore failed to raise their post-conviction ineffectiveness claims in the circuit court.

While everyone appears to agree, once again, that Warren is entitled to raise his ineffectiveness claims in the proper forum, whatever that may be, there does not appear to be much agreement or in depth analysis on how to get to that result.

If the Court chooses *not* to withdraw the language in

Starks, then it is clear that the Court of Appeals here got it wrong in dismissing Warren's ***Knight*** petition since ***Starks*** said that claims such as Warren's must be raised via a ***Knight*** petition in the Court of Appeals. 2013 WI 69, ¶¶34-35, 37. If the ***Starks*** language stands, therefore, the remedy is to reverse the order dismissing Warren's ***Knight*** petition and remand to the Court of Appeals to consider the petition on the merits as it would any other properly filed ***Knight*** petition.

Although the issue of remedy is more complex if the Court agrees with the litigants and resolves the conflict and confusion by withdrawing its language in ***Starks***, established authority still provides guidance. Habeas is an equitable remedy and thus "empowers a court of equity to tailor a fair and just remedy to the given factual circumstances provided that the remedy does not itself violate the constitution." ***State ex rel. Fuentes v. Wisconsin Court of Appeals, Dist. IV***, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999); *see* ***Knight***, 168 Wis.2d at 520-21.

The "fair and just remedy" is to return defendants such as Warren to the position they would have been in but for the language in ***Starks***. After all, Warren and others like him are victims of the confusion caused by conflict between established standards and the language in ***Starks***. They did not cause any of it.

Denying Warren the appropriate forum for raising his post-conviction ineffectiveness claim simply because he relied on the Court's language in ***Starks*** and did not appeal the circuit court's Order, is constitutionally impermissible.[2] Due process

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[2] Starks, like Warren, filed a §974.06 motion challenging his prior counsel's failure to file a motion pursuant to Rule 809.30 challenging trial counsel's effectiveness. The circuit court in Warren's case reasonably deemed this Court's statement in ***Starks*** that the claim "should have been (continued...)

does not permit enforcing any kind of forfeiture or disability upon those, like Warren and his attorney, who reasonably relied upon this Court's assertion in ***Starks*** that claims such as his must be raised via a ***Knight*** petition in the Court of Appeals. *E.g.*, ***United States v. Pennsylvania Industrial Chemical Corp.***, 411 U.S. 655, 670–75 (1973) (criminal defendant may assert as a defense that the Government led him to believe that its conduct was legal); ***Cox v. Louisiana***, 379 U.S. 559 (1965) (state may not punish protestor for demonstrating "near" a courthouse where the police officials had advised the demonstrators that they could meet where they did); ***Raley v. Ohio***, 360 U.S. 423, 437–438 (1959) (due process precluded conviction of individuals for refusing to answer questions asked by a state commission which had erroneously assured them that they had a privilege under state law to refuse to answer).

Keeping those principles in mind, the remedy proposed by the state through Warden Meisner is nonetheless not viable. Meisner suggests that Warren move the Court of Appeals under Wis. Stat. (Rule) 809.82(2) "to retroactively extend his deadline for his Wis. Stat. § (Rule) 809.30(2)(h) notice of appeal." Meisner's Brief at 25. However, that remedy would subject Warren's *right* to a procedure for raising his ineffectiveness claim to the Court of Appeals' discretion. Moreover, granting such a request would require reopening Warren's direct appeal even though it is already completed and became final when this Court denied his petition for review.

Alternatively, if Meisner is suggesting that the Court of Appeals could extend the time for filing his notice of appeal

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[2] (...continued)
dismissed and not allowed to proceed to an appeal," 2013 WI 69, ¶35 (Warren App. 106), controlling. *See* ***State v. Lossman***, 118 Wis.2d 526, 533, 348 N.W.2d 159 (1984) (lower courts bound by Supreme Court decisions).

from the circuit court's denial of his §974.06 motion, he is wrong. Although filed under the defendant's criminal case number, Wis. Stat. §974.06(2), a §974.06 motion is considered civil in nature. Wis. Stat. §974.06(6). The appeal from a final order in such a case is governed by the rules for civil appeals, not Wis. Stat. (Rule) 809.30. *See* Wis. Stat. § 974.02(1); Wis. Stat. (Rule) 809.30(2)(L). The notice of appeal in a civil case must be filed within 90 days or less, Wis. Stat. §808.04(1), and that deadline cannot be extended by the Court of Appeals, Wis. Stat. (Rule) 809.82(2)(b).

This Court has more straight forward means of remedying the harm caused to Warren. The confusion over the appropriate forum was reasonable given the language in ***Starks***, and the state, through Meisner, does not dispute that Warren is entitled to review of his claims in the appropriate forum. *See* Meisner's Brief at 25. Accordingly, this Court has the authority under Wis. Stat. §807.07(2) to construe Warren's ***Knight*** petition filed on March 25, 2019, as a §974.06 motion and to transfer it to the circuit court. *See, e.g.*, ***State ex rel. L'Minaggio v. Gamble***, 2003 WI 82, ¶25, 263 Wis.2d 55, 667 N.W.2d 1 (construing habeas petition as petition for certiorari and remanding to circuit court); ***Amek bin-Rilla v. Israel***, 113 Wis.2d 514, 523–24, 335 N.W.2d 384 (1983) (where habeas petition challenging conditions of confinement was filed in Court of Appeals but was more appropriately addressed by circuit court, Supreme Court transferred case to circuit court).

Indeed, the Court of Appeals should have taken that action. Wis. Stat. §807.07(2) ("[I]n all cases in every court where objection to its jurisdiction is sustained the cause shall be certified to some court having jurisdiction, provided it appears that the error arose from mistake.").

Alternatively, this Court could construe Warren's ***Knight*** petition as a timely but nonconforming notice of appeal, but only

if a copy was filed in the circuit court within 90 days of the circuit court's decision on February 4, 2019. Because the notice of appeal must be filed *in the circuit court* within the 90-day deadline, Wis. Stat. (Rule) 809.10(1)(a), merely filing that document in the Court of Appeals within that time frame is not enough. Similarly, some other document filed in the circuit court within the 90 days following entry of that Order could be construed as a notice of appeal. *See, e.g.,* ***State v. Avery***, 80 Wis.2d 305, 308-09, 259 N.W.2d 63 (1977);[3] Wis. Stat. §807.07. *See generally* ***In re Commitment of Sorenson***, 2000 WI 43, 234 Wis. 2d 648, 611 N.W.2d 240 (notice of appeal filed by fax is effective and need not be accompanied by filing fee).

While this Court thus has the authority to provide Warren with an immediate remedy, it also should avoid further confusion and litigation by clarifying that dismissal or denial of a §974.06 post-conviction ineffectiveness claim based upon the questioned language in ***Starks*** does *not* bar a new motion raising that claim under Wis. Stat. §974.06(4).

When such a motion has been dismissed entirely for lack of jurisdiction or competency, that motion is a nullity. It is not an "original, supplemental or amended motion" within the meaning of §974.06(4). By analogy to federal habeas law under 28 U.S.C. §§2254 and 2255, "[a] dismissal for want of jurisdiction wipes out the petition, and so its refiling in the proper district is not a second or subsequent petition." ***Phillips v. Seiter***, 173 F.3d 609, 610 (7th Cir. 1999). The United States Supreme Court's acknowledgment under similar circumstances regarding federal habeas applies equally here: "To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural

[3] This Court abrogated a different holding in ***Avery*** on different grounds in ***State v. Montgomery***, 148 Wis.2d 593, 436 N.W.2d 303 (1989).

reasons would bar the prisoner from ever obtaining federal habeas review." ***Stewart v. Martinez-Villareal***, 523 U.S. 637, 645 (1998) (citations omitted). *See also* ***Starks***, 2013 WI 69, ¶¶33-53 (nonconstitutional motion to modify sentence to delete DNA surcharge is not "first motion" under §974.06(4)).

A different analysis is necessary where only some but not all claims in a prior §974.06 motion were dismissed for lack of jurisdiction or competency based on the ***Starks*** language at issue here. For example, a defendant may raise both a confrontation claim and an ineffective post-conviction counsel claim. If the court dismissed the ineffectiveness claim for lack of competency based on ***Starks*** but ruled on the merits of the confrontation claim, that would count as an "original . . . motion" even though the defendant was denied a decision specifically on his ineffectiveness claim.

While the failure to raise a claim in an "original, supplemental or amended motion" generally would bar raising that claim later, Wis. Stat. §974.06(4), that same provision provides the answer. Specifically, the defendant is entitled to raise a new constitutional claim in a subsequent §974.06 motion upon a showing of "sufficient reason" why the claim was not raised in the earlier motion. *Id.* Accordingly, once the Court corrects the language in ***Starks*** to conform it to the procedures in ***Rothering*** and ***Knight***, defendants who were denied review of their post-conviction ineffectiveness claims based on that prior language would have "sufficient reason" to raise those claims now. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 182 n.11, 517 N.W.2d 157 (1994) ("Since the effect of subsequent law was not foreseen at the time of the appeal, a "sufficient reason" existed as to why certain issues were not raised in the earlier motion").

Likewise, where a defendant omitted a claim of ineffectiveness of post-conviction counsel from a first §974.06

motion based on the language in ***Starks*** requiring that such claims be dismissed, that defendant would have "sufficient reason" to raise that claim in a second §974.06 motion. ***Escalona-Naranjo*** 185 Wis.2d at 182 n.11.

CONCLUSION

WACDL therefore asks that the Court either overrule the "competency" analysis in ***Starks*** or withdraw the language from that decision that conflicts with the ***Machner/Rothering/Knight/Schmelzer*** line of cases. WACDL further asks that the Court clarify that defendants who have been harmed by the confusion caused by that language in ***Starks*** are entitled to a remedy as set forth in this Nonparty Brief.

Dated at Milwaukee, Wisconsin, February 19, 2020.

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 2,633 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 19th day of February, 2020, I caused 10 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak

Warren WACDL Amicus Brief (1).wpd