STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2009AP472

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DAVID J. BALLIETTE,

Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Winnebago County, the Honorable Karen L. Seifert, Presiding

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ARGUMENT

THE STATE'S DESIRED CHANGE IN PLEADING REQUIREMENTS IS UNSUPPORTED AND UNSUPPORTABLE

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief to address the applicable standards for evaluating claims of ineffective assistance of post-conviction counsel. WACDL takes no position regarding whether Mr. Balliette's motion satisfies the requirements for a hearing.

Contrary to the focus of the state's argument, the issue on this appeal is not whether conclusory or incomplete allegations are sufficient to support a claim of post-conviction ineffectiveness. WACDL and the parties agree that they are not. *See, e.g.*, ***State v. Love***, 2005 WI 116, ¶27, 284 Wis.2d 111, 700 N.W.2d 62 ("postconviction motion must contain an historical basis setting forth material facts that allows the reviewing court to meaningfully assess the defendant's claims." (citation omitted)). Rather, the dispute centers on what must be alleged to satisfy that requirement for a

post-conviction/appellate ineffectiveness claim.

The state's argument rests on two fundamental errors. First, it erroneously limits post-conviction ineffectiveness to circumstances where prior counsel raised weaker issues instead of one or more issues that were both stronger and obvious. State's Brief at 8. Second, it seeks to impose a novel pleading requirement that is neither consistent with existing law (or its own proposed legal standard) nor practical in the real world. *Id.* at 12-24.

A. Ineffective Assistance of Counsel Standards

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence, Wis. Const. art. I, §21, and to the effective assistance of counsel on his first appeal as of right, ***Douglas v. California***, 372 U.S. 353 (1963); ***Evitts v. Lucey***, 469 U.S. 387 (1985). The right to counsel is intended to help protect a defendant's rights because he cannot be expected to do so himself. ***Evitts***, 469 U.S. at 396 ("An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake").

The two-pronged standard for assessing the effectiveness of trial counsel is well-established. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984). The first, deficiency prong is met where counsel's representation "'fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 395 N.W.2d 176, 181 (1986), *quoting* ***Strickland***, 466 U.S. at 688. This prong is met when counsel's errors resulted from oversight or inattention rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Kimmelman v. Morrison***, 477 U.S. 365, 385 (1986); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).

The defendant need not show total incompetence of counsel; a single unreasonable error is sufficient. ***Kimmelman***, 477 U.S. at 383; *see* ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel . . . may in a particular

case be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial." ***Murray v. Carrier***, 477 U.S. 478, 496 (1986) (citation omitted).

Although the Court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," ***Strickland***, 466 U.S. at 690, the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." ***Kimmelman***, 477 U.S. at 384, *citing* ***Strickland***, 466 U.S. at 688-89. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*., *citing* ***Strickland***, 466 U.S. at 689. Moreover, "'just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.'" ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004), *quoting* ***Harris v. Reed*****,** 894 F.2d 871, 878 (7th Cir. 1990). *See also* ***Kimmelman***, 477 U.S. at 386-87 (same).

The second prong requires resulting prejudice. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 433 N.W.2d at 576, *quoting* ***Strickland***, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability" of a different result but for counsel's deficient performance. ***Moffett***, 433 N.W.2d at 577 (citation omitted). "Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id*., *quoting* ***Strickland***, 466 U.S. at 694. In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland***, 466 U.S. at 695. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362, 393-94 (2000).

B. Ineffective Assistance of Post-Conviction/Appellate Counsel

Although post-conviction or appellate counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, *see* ***Smith v. Robbins***, 528 U.S. 259, 287-88 (2000), counsel's decisions in choosing among issues cannot be isolated from review. *E.g.*, *id.*; ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986). The same ***Strickland*** standard for ineffectiveness applies to assess the constitutional effectiveness of post-conviction or appellate counsel. ***Smith***, 528 U.S. at 285-86, 287-88; *see* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369. The defendant raising such a claim must show both that post-conviction or appellate counsel acted unreasonably and a reasonable probability that he or she would have prevailed on appeal but for counsel's unreasonable behavior. ***Smith***, 528 U.S. at 285-86, 287-88.

The Seventh Circuit has recognized one way to show deficient performance:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (citations omitted). *See also* ***Smith***, 528 U.S. at 288.

This makes sense. Reasonable post-conviction/appellate counsel normally would raise the strongest issues available, *see* ***Jones***, 463 U.S. at 751-54, not forego them for weaker issues. *See* ***Gray***, 800 F.2d at 646. When the issue is obvious, moreover, the court can rest assured that a reasonable attorney would not overlook it.

The state suggests that ineffectiveness of post-conviction/appellate counsel is limited to such circumstances. State's Brief at 8. Although not directly relevant here, the state is wrong.

As the Supreme Court noted in ***Smith***, 528 U.S. at 285, the question is whether counsel acted unreasonably. Failing to raise an obvious and stronger issue is not the only way that post-conviction/appellate counsel can act unreasonably. *Id.* at 288 ("'*Generally*, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome'" (emphasis added)), *quoting* ***Gray***, 800 F.2d at 646.

The ***Gray*** balancing test

> does not effectively operate in all cases in which appellate counsel's performance is claimed to be deficient because of a failure to assert an error on appeal. Situations may arise when every error enumerated by appellate counsel on appeal presented a strong, nonfrivolous issue but counsel's performance was nonetheless deficient because counsel's tactical decision not to enumerate one rejected error "was an unreasonable one which only an incompetent attorney would adopt."

Shorter v. Waters, 571 S.E.2d 373, 376 (Ga. 2002) (citation omitted); ***Carpenter v. State***, 128 S.E.3d 879, 888 (Tenn. 2004) (same); *see e.g.,* ***Mapes v. Coyle***, 171 F.3d 408, 427-28 (6th Cir. 1999). For instance, counsel may raise two strong issues but, by unreasonably failing to raise a third, leave critical state evidence unchallenged, resulting in a finding of harmless error.

Under ***Strickland***, moreover, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 466 U.S. at 690-91. If counsel's choice of issues is based on a failure to fully investigate, or to obtain and review the court record, trial counsel's file, or discovery, the deficiency determination turns on whether the failure to investigate was itself unreasonable, not on whether that attorney would have chosen to raise the issues discovered by such an investigation. ***Wiggins***, 539 U.S. at 522-523. The failure to complete a reasonable investigation makes a fully informed strategic decision impossible. *Id*. at 527-528.

Likewise, the failure to raise an issue is unreasonable if it was due to oversight rather than an intentional, reasoned strategy, *id.* at 534, or if counsel intended to raise it but simply forgot to do so. Counsel also acts unreasonably, regardless of the relative strength of the issues, if the claims raised on the appeal are contrary to the defendant's stated goals, as when the defendant only wants to attack the sentence but counsel forgoes such issues for others challenging only the conviction. Post-conviction/appellate counsel also acts unreasonably if he or she in fact identified an issue (regardless of whether it was "obvious") but failed to raise it because he or she unreasonably believed other issues were stronger.

Even if post-conviction/appellate counsel properly identifies an issue, he or she may act unreasonably and provide deficient performance by inadequately raising it. For instance, counsel may fail to conduct the investigation or research reasonably necessary to support the claim or fail to present necessary evidence or an adequate argument to support it. *Cf.* Wis. Stat. §974.06(4) (defendant may raise previously adjudicated claim upon showing of sufficient reason why it was "inadequately raised" in the prior proceedings).

C. The Pleading Requirements for a Post-Conviction Ineffectiveness Claim

The core of the state's argument is its attempt to impose a novel new pleading requirement for claims of ineffective post-conviction/appellate counsel. The state seeks to require defendants not only to allege the facts supporting their claims, but also to allege what their prior attorneys may say at a ***Machner*** hearing. State's Brief at 12-23, *see* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). The state's desire to change established law by requiring hyper-technical allegations of facts that are either irrelevant to the claim or relevant only to a possible defense to the claim by the state has no basis in law or logic.

Although many of the alternative means of showing deficient performance by post-conviction/appellate counsel noted above may

require additional factual allegations beyond the identification of, and provision of a factual basis for, valid claims not raised by post-conviction counsel, the same is not true where, as here, deficient performance is based on prior counsel's failure to raise claims that were both obvious and stronger than those he did raise.

As explained in ***Gray***, the source of that standard,

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

800 F.2d at 646; *see id.* at 647. This review is based on examination of the record, "guided by defendant's careful presentation of those issues which allegedly should have been raised on appeal." *Id.*

Gray made clear that neither allegation nor proof of prior counsel's actual reasons is required, nor generally even relevant, to such a claim:

> Given the nature of petitioner's claims, it is difficult to envision the evidence or testimony which petitioner would present at such a hearing. When a claim of ineffective assistance of counsel is based on failure to raise issues on appeal, we note it is the exceptional case that could not be resolved on an examination of the record alone.

Gray, 800 F.2d at 647.

This Court's decision in ***Love***, *supra*, is consistent with that analysis. There, the defendant identified specific errors of trial counsel and alleged that post-conviction counsel was ineffective for failing to raise those claims. ***Love***, ¶¶22, 31. The Court assessed the adequacy of the factual allegations of the underlying claims under ***State v. Allen (John)***, 2004 WI 106, 274 Wis.2d 568, 682 N.W.2d

433, the same standards the state relies upon here, never suggesting that Love had to allege anything more than the fact that prior counsel failed to raise them. ***Love***, ¶¶27-42, 56.

Moreover, nothing in the more recent decision in ***State v. Allen (Aaron)***, 2010 WI 89, ___ Wis.2d ___, 786 N.W.2d 124, changes the pleading requirements. As discussed in Balliette's Brief at 20-23, the language from ***Allen*** relied upon by the state addresses Allen's failure to allege how counsel's actions prevented Allen himself from responding to the no-merit report, not counsel's reasons for failing to include Allen's issues in that report. ***Allen (Aaron)***, ¶87 (addressing Allen's failure to allege why prior counsel's actions prevented Allen from responding to no-merit report). The Court rejected Allen's post-conviction ineffectiveness claim on the grounds that the new issues he sought to raise lacked merit. *Id.* ¶¶76-79, 86.

Nor does the fact that a defendant must call prior counsel to testify at the ***Machner*** hearing support the state's new pleading requirement. In ***Machner***, the Court of Appeals expanded upon this Court's requirement in ***State v. Simmons***, 57 Wis.2d 285, 297, 203 N.W.2d 887 (1973), that a defendant challenging the effectiveness of prior counsel must provide that counsel an opportunity to respond. Under ***Machner***, mere notice to prior counsel is insufficient. Rather, "it is a prerequisite to a claim of ineffective representation of appeal to preserve the testimony of trial counsel." 92 Wis.2d at 804.

Machner only required prior counsel's *testimony* at the motion hearing; it did not suggest that the defendant must allege the anticipated testimony in the post-conviction motion. Nor does ***Machner*** suggest that the attorney's testimony is an element of the ineffectiveness claim. Rather, requiring the attorney's testimony is a procedural mechanism to facilitate defense *against* such a claim. Such a mechanism is necessary because attorney-client confidentiality bars prior counsel from disclosing his or her rationale to the state or the court prior to such a hearing. S.C.R. §20:1.6; *see* ABA Formal Opinion 10-456 (July 14, 2010), available at http://www.abanet.org/cpr/10-456%289-20-10%29.pdf. Indeed, the

state's proposed new pleading requirement could and should be viewed as an attempt to circumvent the requirements of SCR §20:1.6 by requiring the defendant to disclose that which prior counsel is barred from disclosing until the hearing. *See id.*

As discussed in Balliette's Brief at 21-22, the state also ignores other practical difficulties with its new pleading requirement. Especially for a *pro se* defendant, as most are who file under §974.06, it is often extremely difficult, if not impossible, to obtain a response from prior counsel regarding a potential ineffectiveness claim, let alone an affidavit explaining his or her reasoning. Undersigned counsel likely has handled as many ineffectiveness claims over the past 23 years as anyone in the state, and has a well-earned reputation for dealing fairly with prior counsel. Yet, there are still attorneys who refuse to discuss such matters with him prior to the ***Machner*** hearing. How then can the state, or this Court, assume that prior counsel necessarily would provide their reasons to an unrepresented prior client?

The state's desired pleading requirement thus would provide a method of self-immunization for ineffective counsel. To avoid having to testify at a ***Machner*** hearing, and potentially being found ineffective, all such counsel need do is refuse to communicate with their prior client or new counsel regarding their reasons, if any, for the challenged conduct or failure. By denying their former clients the information necessary to meet the state's new pleading requirement, they could prevent any independent review of their actions.

Adopting the state's proposal also would open up even more Wisconsin convictions to federal habeas review and reversal. Because identification of prior counsel's rationale is not an element of the federal ineffectiveness claim, *e.g.*, ***Gray***, *supra*, state denials based on the state's new pleading requirement would exempt Wisconsin defendants from compliance with the more restrictive federal habeas requirements under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA").

Liegakos v. Cooke, 106 F.3d 1381, 1385 (7th Cir. 1997) (state procedural denials reviewed *de novo* under AEDPA). Even if viewed as a denial on the merits, the fact that the state's new pleading requirement is contrary to controlling authority would remove the deference for state court decisions otherwise provided under AEDPA. ***Panetti v. Quarterman***, ___ U.S. ___, 127 S.Ct. 2842, 2858-59 (2007); *see* 28 U.S.C. §2254(d) (habeas relief appropriate where state resolution of claim is contrary to or unreasonable application of controlling Supreme Court precedent).

Finally, since most §974.06 motions are filed *pro se*, the unnecessary and hypertechnical new pleading requirements championed by the state also conflict with the principle that *pro se* pleadings are to be construed liberally to protect the litigant's rights. ***Haines v. Kerner***, 404 U.S. 519, 520 (1972); ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶29 n.11, 234 Wis.2d 626, 610 N.W.2d 821 ("we 'follow a liberal policy in judging the sufficiency of pro se complaints filed by unlettered and indigent prisoners'" (citation omitted)).

Moreover, respect for the criminal justice system is undermined where the same type of hypertechnical errors condoned when committed by a prosecutor, *e.g.*, ***State v. Smaxwell***, 2000 WI App 112, ¶5, 235 Wis.2d 230, 612 N.W.2d 756 (sufficiency of complaint turns on "'minimal adequacy, not in a hypertechnical but in a common sense evaluation'" (citation omitted)), are deemed fatal when committed by a *pro se* defendant seeking relief from an unjust conviction. *See* ***Anderson-El***, 2000 WI 40, ¶26 (respect for penal system enhanced where inmates see prison authorities abide by the rules; "It would be hypocritical for the prison system to force inmates to 'obey the rules' when the officers in charge do not").

CONCLUSION

For these reasons, WACDL asks that the Court reject the state's novel new pleading requirement for post-conviction/appellate ineffectiveness claims.

Dated at Milwaukee, Wisconsin, November 16, 2010.

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 3,000 words.

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 16th day of November, 2010, 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

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