STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2009AP2422-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DAVID W. DOMKE,

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 Michael T. Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. i

ARGUMENT. 1

BASIC REASONABLENESS CONTROLS ASSESSMENT OF ATTORNEY DEFICIENCY WHEN CONTROLLING LAW IS LESS THAN CLEAR. 1

A. General Ineffective Assistance of Counsel Standards. 1

B. Application of These Standards When the Controlling Law is Less than Clear. 3

CONCLUSION. 7

RULE 809.19(8)(d) CERTIFICATION. 8

RULE 809.19(12)(f) CERTIFICATION. 8

TABLE OF AUTHORITIES

Cases

Davis v. Lambert, 388 F.3d 1052 (7th Cir. 2004). 2

Dixon v. Snyder, 266 F.3d 693 (7th Cir. 2001). 2

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990). 2

Holmes v. State, 76 Wis.2d 259,
251 N.W.2d 56 (1977). 6

Kimmelman v. Morrison, 477 U.S. 365 (1986). 2

Murray v. Carrier, 477 U.S. 478 (1986). 2

Smith v. Singletary, 170 F.3d 1051 (11th Cir. 1999). 5

State v. Allen, 2010 WI 89,
328 Wis.2d 1, 786 N.W.2d 124.. 4

State v. Felton, 110 Wis. 2d 485,
329 N.W.2d 161 (1983). 2, 3

State v. Hubert, 181 Wis. 2d 333,
510 N.W.2d 799 (Ct. App. 1993)... 3

State v. Johnson, 133 Wis.2d 207,
395 N.W.2d 176 (1986). 1

State v. Maloney, 2005 WI 74,
281 Wis.2d 595, 698 N.W.2d 583. .... 3-5, 7

State v. McMahon, 186 Wis.2d 68,
519 N.W.2d 621 (Ct. App. 1994)... 4, 7

State v. Moffett, 147 Wis.2d 343,
433 N.W.2d 572 (1989). 2, 3

State v. Thayer, 2001 WI App 51,
241 Wis.2d 417, 626 N.W.2d 811. .... 4, 7

State v. James R. Thiel, 2003 WI 111,
264 Wis.2d 571, 665 N.W.2d 305 4

Strickland v. Washington, 466 U.S. 668 (1984)................... 1-3, 5-7

United States v. Cronic, 466 U.S. 648 (1984)................................. 2

Wiggins v. Smith, 539 U.S. 510 (2003)...................................... 2, 6

Williams v. Taylor, 529 U.S. 362 (2000). 3

Constitutions, Rules, and Statutes

SCR 20:1.1. 4

SCR 20:1.3. 4

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ARGUMENT

BASIC REASONABLENESS CONTROLS ASSESSMENT OF ATTORNEY DEFICIENCY WHEN CONTROLLING LAW IS LESS THAN CLEAR

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 counsel where counsel is alleged to have acted unreasonably by missing a relevant point of law. WACDL takes no position on whether Domke has met those standards.

A. General Ineffective Assistance of Counsel Standards

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). Indeed, "judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise." ***State v. Felton***, 110 Wis.2d 485, 499, 329 N.W.2d 161 (1983) (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. Application of These Standards When the Controlling Law is Less than Clear

The state sought review in this matter primarily to "clarify the extent to which defense attorneys must acquaint themselves with the finer points of Wisconsin case law or risk having their performance deemed deficient." Petition for Review at 3. Its opening brief, however, spends little more than a page arguing that Domke's trial counsel could not reasonably be expected to have known of controlling case law from this Court. State's Brief at 21-22. The state relies on the Court of Appeals' recognition in ***State v. Hubert***, 181 Wis. 2d 333, 341, 510 N.W.2d 799 (Ct. App. 1993), that "[w]e would hold defense attorneys to an impossible burden were we to require total and complete knowledge of all aspects of reported criminal law, no matter how obscure."

WACDL has no dispute with this language from ***Hubert***. Nor can WACDL (or the state) dispute ***Hubert's*** further recognition that an "attorney's unawareness of a body of law can constitute prejudicial ineffective assistance of counsel." 181 Wis.2d at 341 n.1, *citing* ***Felton***, 110 Wis.2d at 504. "Ignorance of well-defined legal principles, of course, is nearly inexcusable." ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis.2d 595, 698 N.W.2d 583. Moreover, counsel is expected to research and correctly interpret relevant portions of the law. ***State v. James R. Thiel***, 2003 WI 111, ¶51, 264 Wis.2d 571,

665 N.W.2d 305.[1] *See also* SCR 20:1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); SCR 20:1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

The question, then, is where to draw the line in cases where the law is less than clear or "well-defined."

The Court of Appeals has taken one approach, suggesting that deficient performance should be limited to "situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***State v. McMahon***, 186 Wis.2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). In ***McMahon,*** trial counsel failed to object on the grounds that duplicitous charging deprived the defendant of jury unanimity. Counsel did not even consider the issue. The Court of Appeals concluded this failure was not unreasonable because both parties' interpretations of the applicable law were reasonable and authorities were split. 186 Wis.2d at 84-85.

In ***State v. Thayer,*** 2001 WI App 51, ¶14, 241 Wis.2d 417, 626 N.W.2d 811, the Court of Appeals extended the rationale of ***McMahon***, holding flatly that "counsel is not required to argue a point of law that is unclear." ***Id.*** at ¶14.

In ***Maloney***, ¶¶23-30, this Court appears to have adopted the holdings in ***McMahon*** and ***Thayer***.

WACDL respectfully submits that, regardless of the results in those cases, the particular language used to express their holdings far exceeds the rationale supporting it. Reasonableness of counsel's actions must be assessed based on the specific facts of a given case, not on general assertions that may have no connection to whether a

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[1] In fact, this Court has held that ignorance of applicable general legal standards is not acceptable even from a *pro se* defendant. *See* ***State v. Allen***, 2010 WI 89, §91, 328 Wis.2d 1, 786 N.W.2d 124. No lesser standard reasonably can be applied to trained legal counsel.

specific attorney's actions were objectively reasonable. WACDL accordingly asks that the Court use this opportunity to clarify and limit that language to situations where it is actually supported.

There can be no dispute that, "because the law is not an exact science and may shift over time, the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized." ***Maloney***, ¶23 (citations and internal markings omitted). It does not follow, however, that "counsel is not required to argue a point of law that is unclear."

The central question on matters of deficient performance is whether the challenged action or inaction "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. Thus, reasonableness is the key, with the unsettled nature of substantive law relevant only to the extent that it reflects on the reasonableness of counsel's actions or inaction.

The unsettled nature of the law no doubt should defeat a claim that counsel acted unreasonably by not knowing the precise scope of the law or by not accurately anticipating future changes in it. *E.g.*, ***Smith v. Singletary,*** 170 F.3d 1051, 1054 (11th Cir. 1999).

However, the unsettled nature of substantive or procedural law does not inherently absolve counsel of any deficiency. Counsel does not act reasonably by ignoring an issue that may spell the difference between conviction or acquittal or between reversal or affirmance of a conviction or sentence.

Sometimes, for instance, it is the nature of the law as being unsettled that itself renders counsel's actions unreasonable. Thus, if counsel advises his or her client that the law is X, when in fact the law is unsettled on that point, deficiency regarding this erroneous advice turns on the reasonableness of counsel's determination about the nature of the law.

Likewise, if counsel knows, or reasonably should know, that the law is unsettled on a point that is important to the defendant's case, that attorney acts unreasonably by failing to preserve the issue

for review (assuming there are no reasonable strategic bases for failing to do so). Just as reasonable counsel would not ignore evidence supporting a client's cause just because the ultimate facts are unsettled or in dispute, such counsel cannot merely ignore known legal arguments that may support the defense merely because the law is unsettled. After all, a reasonable attorney would know that a proper objection is necessary to preserve the issue for appellate review. *E.g.*, ***Holmes v. State***, 76 Wis.2d 259, 271, 251 N.W.2d 56 (1977). The law on forfeiture is well-settled.

The unsettled nature of the law also does not render reasonable counsel's inadvertent failure to raise a claim or objection he or she intended to raise, or that attorney's failure to raise an intended claim or objection at the right time or in the proper manner.

Nor can the unsettled nature of the law excuse counsel's failure to conduct a reasonable investigation of the law. Under ***Strickland***, defense counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-91. If counsel fails to research a legal issue, 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.

The one situation where counsel's failure to object or to raise a legal argument that most often would not support an ineffectiveness claim is where the law is settled against a position that would help the attorney's client. Even then, however, an attorney acts unreasonably by failing to raise challenges to established law that the attorney knows or should know exists (again, absent reasonable countervailing strategy concerns).

For instance, if the attorney knows or should know that a particular decision has been the subject of much controversy or debate, such that a reasonable attorney would challenge the existing

law or at least investigate whether such challenges exist, even the failure to raise a challenge to currently settled law can form a valid basis for an ineffectiveness claim. Of course, to win such a claim, the bad law will have to be reversed. However, that is an issue of resulting prejudice rather than deficient performance.

The language in ***Maloney***, ***McMahon***, and ***Thayer***, therefore, addresses the wrong issue. The relevant question is not whether the law is unsettled, or even whether it is against the defendant's position. Rather, the question under ***Strickland*** is whether counsel's challenged actions or omissions were reasonable under all the circumstances. Applying that standard, there are in fact many circumstances in which the effective assistance of counsel demands objectively reasonable counsel to act to protect his or her client's rights despite the unsettled nature of the law.

CONCLUSION

For these reasons, WACDL asks that the Court clarify and limit the "unsettled law" language in ***Maloney***, ***McMahon***, and ***Thayer*** to conform to the deficiency standards of ***Strickland***.

Dated at Milwaukee, Wisconsin, April 21, 2011.

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 2,011 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 21st day of April, 2011, 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.

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Domke. Amicus Brief.wpd