STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2012AP378-W

STATE OF WISCONSIN ex rel.
LORENZO D. KYLES,

Petitioner-Petitioner,

v.

WILLIAM POLLARD
Warden, Waupun Correctional Institution,

Respondent-Respondent.

On Review of the Order of the Wisconsin Court of Appeals, District I

BRIEF AND APPENDIX OF PETITIONER-PETITIONER

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ISSUES PRESENTED FOR REVIEW

1. Whether Lorenzo D. Kyles is entitled to a hearing on allegations that his attorney's errors in (1) unreasonably failing to file a notice of intent to pursue post-conviction relief, (2) failing to remain reasonably available to Kyles during the 20-day period for filing that notice, and (3) unreasonably failing either to advise Kyles that he could seek an extension of time for filing the notice of intent or seeking such an extension when clear that Kyles desired an appeal deprived Kyles of the effective assistance of counsel and his right to a direct appeal.

The Court of Appeals denied Kyles a hearing on his claim, holding that such claims must be raised in the circuit court rather than by a ***Knight*** Petition in the Court of Appeals.

2. What are the proper vehicle and forum for challenging counsel's unreasonable acts or omissions that result in the failure to commence post-conviction and appellate proceedings on direct appeal as of right in a criminal case.

The Court of Appeals below held that an effective assistance of counsel claim based on counsel's unreasonable failure to commence the direct appeal process must be raised in the circuit court.

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LORENZO D. KYLES,

Petitioner-Petitioner,

v.

WILLIAM POLLARD
Warden, Waupun Correctional Institution,

Respondent-Respondent.

BRIEF OF PETITIONER-PETITIONER

Lorenzo Kyles appeals from the denial of his *pro se* Petition for Writ of Habeas Corpus, filed in the Court of Appeals pursuant to ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992), challenging his attorney's unreasonable acts and omissions resulting in the failure to commence appellate proceedings by filing a notice of intent to pursue postconviction relief pursuant to Wis. Stat. (Rule) 809.30(2)(b) and/or filing a motion with the Court of Appeals to extend the time for filing that notice. The Court of Appeals summarily denied this petition without reaching his substantive claims, holding that Kyles must raise those claims in the circuit court (App. 1-4).

STATEMENT OF CASE

On September 30, 2002, Kyles entered a guilty plea to first degree reckless homicide, while armed, Wis. Stats. §§940.02(1) & 939.63(1)(a)2 and, on November 12, 2002, was sentenced to 40 years

imprisonment (Pet:3-4).[1] Kyles then met with his retained attorney, Thomas Flanagan, to discuss the sentence and Kyles' appeal rights. However, a court officer cut off their conversation before Flanagan could fully explain Kyles' appeal rights, the potential costs and benefits of an appeal, or the applicable procedures. On the Notice of Right to Seek Postconviction Relief form, Kyles therefore checked the box "I am undecided about seeking postconviction relief and I know I need to decide and tell my lawyer within 20 days" (Pet:5; Pet. App.E:1; *see* Pet. App.B). The 20-day deadline to file the notice of intent expired on December 2, 2012.

According to the petition and its appended documents, which must be taken as true for purposes of this appeal, ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433, after his sentencing hearing, Kyles took the following steps to assert his constitutional right to a Rule 809.30 direct appeal, resulting in the following court actions and decisions:

11/15/02	Kyles sent letter to Flanagan, informing him that he wanted to appeal and that he wanted him to file a notice of appeal (Pet:6; Pet. App.E:2)
11/18/02	Kyles placed a collect call to Flanagan to request appeal; however, Flanagan's office refused to accept the call (Pet:6; Pet. App.E:2; Pet. App.F: 4)
11/12 to 11/20/02	Kyles' mother called Flanagan's office and left him a message that Kyles wanted to appeal his case (Pet:5; Pet. App.D:1)
11/20/02	Kyles contacted his mother to see if she informed Flanagan that he decided to appeal; she told him she was unable to reach Flanagan and Flanagan had not

[1] References to Kyles' ***Knight*** Petition will be to "Pet:" followed by the page number. References to the appendix to the Petition will be to "Pet. App." followed by the item's letter and page number, if applicable.

	returned her call; Kyles asked his mother to keep trying to contact Flanagan because he wanted to appeal (Pet:6; Pet. App.D:1; Pet. App.E:2)
After 11/20/02	Kyles' mother called Flanagan's office "a couple of times," was unable to reach him, and left messages that Kyles wanted to appeal (Pet. App.D:1)
11/27/02	Kyles placed a collect call to Flanagan to request appeal; however, Flanagan's office refused to accept call (Pet:6-7; Pet. App.E:2; Pet. App.F:4)
12/02/02	Kyles placed a collect call to Flanagan to request appeal; however, Flanagan's office failed to answer (Pet:7; Pet. App.E:2; Pet. App.F:4)
12/5/02	Kyles wrote to his institution's records office asking for his transcripts (Pet:7; Pet. App.E:2; Pet. App.G:1-2)
1/16/03	Kyles placed collect call to Flanagan to request appeal; however, Flanagan's office refused to accept call (Pet:7; Pet. App.E:2; Pet. App.F:4)
1/17/03	Kyles placed collect call to Flanagan to request appeal; however, Flanagan's office refused to accept call (Pet:7; Pet. App.E:2; Pet. App.F:4)
1/24/03	During an in-person visit, Kyles told Flanagan he wanted to appeal; Flanagan informed him that the appellate deadlines had expired and that there were few non-frivolous issues for appeal based on his plea (Pet:7; Pet. App.E:2-3; *See* Pet. App.J:1)
5/14/03	Kyles contacted Legal Assistance for Institutionalized Person program for assistance (Pet:7; Pet. App.E:3; Pet. App.H)
9/6/03	Kyles wrote to Court of Appeals inquiring whether

Flanagan withdrew (Pet:8; Pet. App.E:3; Pet. App.I)

9/10/03 Court of Appeals informed Kyles that there had been no filings in his case (Pet:8; Pet. App.E:3; Pet. App.I)

Before 10/10/03 Kyles filed a complaint with Office of Lawyer Regulation, including an allegation that Flanagan failed to timely file notice of intent to pursue postconviction relief (Pet:8; Pet. App.E:3; *See* Pet. App.J:1)

10/14/03 Kyles filed a *pro se* Petition for Writ of Habeas Corpus seeking reinstatement of his direct appeal rights in the Wisconsin Court of Appeals (Pet:8; Pet. App.E:3; Pet. App.K)

1/28/04 Court of Appeals issued order dismissing Kyles' petition and indicating that this claim should be raised in the trial court by either a Wis. Stat. §974.06 motion or a writ of habeas corpus (Pet. 8-9; Pet. App.L; App. 11-12)

2/13/04 Kyles filed a *pro se* habeas petition seeking reinstatement of his direct appeal deadlines in Milwaukee County Circuit Court. The petition alleged, *inter alia* that he had written to Flanagan within the 20-day period for filing the notice of intent but that Flanagan did not respond. (Pet:8-9; Pet. App.E:3; Pet. App.M)

3/10/04 Circuit court issued order construing Kyles' petition as Wis. Stat. §974.06 motion and denying it *ex parte* on the grounds that Kyles did not attach a copy of the letter and did not specifically allege that he had asked Flanagan to file the notice of intent within the 20-day deadline. The court stated that it would reconsider its decision if Kyles could produce a copy of the letter. (Pet:9; Pet. App.N; App. 9-10)

3/19/04	Kyles filed notice of appeal (Pet:9; Pet. App.E:3)
4/26/04	Kyles filed *pro se* motion for production of transcripts in the circuit court (Pet:9; Pet. App.E:3; Pet. App.Q)
12/15/04	Court of Appeals issued decision and order affirming circuit court's habeas/§974.06 order, reasoning that Kyles had not specifically alleged that he told Flanagan that he wanted to pursue post-conviction relief (Pet:9; Pet. App.O; App. 6-8)
1/10/05	Kyles filed *pro se* petition for review regarding the circuit court's habeas/§974.06 order (Pet:9; Pet. App.E:3)
2/9/05	Petition for review denied (Pet:9; Pet. App.P)
4/5/05	Kyles filed *pro se* federal habeas petition pursuant to 28 U.S.C § 2254 in the U.S. District Court, arguing, among other things that he was denied his right to appeal his conviction (Pet:9; Pet. App.E:3; Pet. App.R:1-3)
2/12/08	U.S. Magistrate Judge denied Kyles' petition as untimely (Pet:9; Pet. App.R)
3/11/08	Kyles filed *pro se* federal appeal (Pet. 9; Pet. App.E:3; Pet. App.S:1)
3/17/08	U.S. Magistrate Judge granted *in forma pauperis* status but denied certificate of appealability. (Pet:9; Pet. App.S)
6/10/08	Seventh Circuit Court of Appeals denied Kyles' certificate of appealability (Pet:9; Pet. App.T)
10/20/08	U.S. Supreme Court denied Kyles' *pro se certiorari* petition (Pet:9; Pet. App.U)

12/3/08	Kyles filed *pro se* motion to extend deadline for filing notice of intent to pursue post conviction relief in Court of Appeals pursuant to Wis. Stat. (Rule) 809.82(2) (Pet:10; Pet. App.V)
1/16/09	Court of Appeals denied extension motion (Pet:10; Pet. App.W)
Before 9/28/10	Kyles requested that State Public Defender ("SPD") appoint counsel for him on his ***Knight*** claim (*See* Pet. App.X)
Before 9/28/10	SPD declined to appoint counsel for Kyles (*See* Pet. App.X)
9/22/10	Kyles wrote to Attorney Robert Henak requesting legal assistance (Pet. App.Y)
9/28/10	Kyles asked SPD to reconsider denial of appointed counsel (Pet. App.X)
10/4/10	Henak responded, advising that ***Knight*** Petition is appropriate procedure for raising abandonment of counsel (Pet. App.Y)
10/12/10	SPD again denied appointment of counsel (Pet. App.X)
1/16/11	Kyles wrote Legal Action of Wisconsin requesting assistance with habeas petition (Pet. App.Z)
1/25/11	Legal Action responded that it was unable to assist him (Pet. App.Z)
Prior to 3/9/11	Kyles wrote to Attorney Benbow Cheeseman seeking representation (*See* Pet. App.AA)
3/9/11	Cheeseman responded that he was unable to represent Kyles (Pet. App.AA)

2/17/12	Kyles filed this *pro se* ***Knight*** Petition in the Court of Appeals seeking reinstatement of the deadline to file a notice of intent to pursue post-conviction relief. Kyles alleged that he was denied his rights to a direct appeal and to appellate counsel when Flanagan abandoned him after the sentencing hearing. Kyles asserted that Flanagan's acts and omissions constituted ineffective assistance of counsel when: 1) he failed to file a notice of intent to pursue postconviction relief despite Kyles' letter and his mother's phone messages that he wanted to appeal; 2) failed to remain reasonably available to Kyles during the 20-day period after his sentencing hearing to consult with him about appealing when Flanagan failed to accept multiple collect calls from Kyles or respond to his letter or his mother's phone calls; and 3) after learning, only six weeks after the deadline expired, that Kyles wanted to appeal, unreasonably failed to file a motion to extend the deadline for filing a notice of intent or to advise Kyles of that option.
5/9/12	Court of Appeals issued *ex parte* opinion and decision denying the ***Knight*** Petition, again reasoning that Kyles' claims must be raised in the circuit court (App. 1-4).
5/29/12	Kyles filed motion for reconsideration in the Court of Appeals.
6/14/12	Court of Appeals issued order denying reconsideration (App. 5)

On July 16, 2012, this Court deemed the motion for reconsideration to be a timely petition for review. On December 17, 2013, this court granted the petition for review and appointed undersigned counsel to represent Kyles.

SUMMARY OF ARGUMENT

There is no dispute that a defendant is entitled to some process for raising a claim that his or her attorney's deficient performance regarding the filing of a notice of intent to pursue post-conviction relief deprived them of an appeal. *E.g.*, ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992).

Moreover, Kyles is entitled to a hearing and decision on the merits of his ineffectiveness claim. His ***Knight*** Petition sets forth the who, what, when, where, why, and how of his attorney's abandonment of him on any of three grounds. First, Flanagan failed to file the notice of intent to pursue post-conviction relief after Kyles had notified him that he wished to appeal (both by letter and through his mother's phone messages) before expiration of the deadline for filing that notice. Second, Flanagan failed to keep himself reasonably available to consult with Kyles about the decision to appeal after their post-sentencing consultation was prematurely aborted by the court officer, and Flanagan failed to accept or timely respond to the multiple calls by Kyles and his mother during the 20-day period for filing the notice of intent. And third, even when he finally got around to meeting with his client less than two months after the notice of intent was due and after Kyles told him face-to-face of his desire to appeal, Flanagan merely advised Kyles that the time for doing so had expired, and unreasonably failed either to advise Kyles of the ability to seek an extension of time to file the notice or to in fact file a motion for such an extension.

Kyles' entitlement to a hearing on his claims is not diminished by the fact that he previously took actions, while involuntarily deprived of his right to counsel, seeking to reinstate his rights to direct appeal and the assistance of counsel. *E.g.*, ***Murray v. Carrier***, 477 U.S. 478, 488 (1986); ***Betts v. Litscher***, 241 F.3d 594, 596-97 (7th Cir. 2001).

The real issue before this Court is the question of what process must be used to challenge counsel's unreasonable acts or omissions that, as here, result in the failure to file the notice of intent to pursue

post-conviction relief that is necessary to initiate post-conviction and appellate proceedings under Wis. Stat. §974.02 and (Rule) 809.30. The court below held that Kyles must raise his claim in the circuit court under Wis. Stat. §974.06 (App. 1-4). The state acknowledges that §974.06 is *not* appropriate, but posits that a circuit court habeas petition is better than a ***Knight*** Petition in the Court of Appeals. Response to Petition for Review ("Pet. Rev. Response") at 9 n.4.

While the specific forum does not change Kyles' own entitlement to a hearing and decision on the merits of his claim, the only appropriate process and forum is a ***Knight*** Petition in the Court of Appeals. Only that Court has the authority under state law to grant the required relief of reinstating Kyles' direct appeal rights. *See* ***Knight***, 168 Wis.2d at 519-20.

ARGUMENT

I.

BECAUSE THE ALLEGATIONS OF KYLES' *KNIGHT* PETITION ESTABLISH HIS RIGHT TO THE RELIEF REQUESTED, HE IS ENTITLED TO A HEARING AND DECISION ON THE MERITS OF HIS INEFFECTIVENESS CLAIM

Although Kyles had a fundamental right to the assistance of counsel on his one direct appeal as of right, he did not receive the effective assistance of such counsel because Flanagan unreasonably abandoned him without complying with Kyles' timely requests to initiate the appeal process by filing a notice of intent to pursue post-conviction relief under Wis. Stat. (Rule) 809.30(2), without responding to the phone calls of Kyles and his mother, and without either advising Kyles of his right to seek extension of the time for filing the notice of intent or filing such an extension request when he learned, less than two months after expiration of the deadline, that Kyles had desired an appeal all along. As a consequence, Kyles lost his right to post-conviction motions and a direct appeal.

Given the basis for Kyles' claims, an evidentiary hearing is mandatory so Attorney Flanagan can explain his actions. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). Because the allegations of Kyles' ***Knight*** Petition set forth non-conclusory facts that, if true, would entitle him to relief, he is entitled to a hearing and decision on the merits of those claims. *E.g.*, ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433; *see* ***State v. Love***, 2005 WI 116, ¶26, 284 Wis.2d 111, 700 N.W.2d 62. The adequacy of a pleading is reviewed *de novo*. ***Id.***

A. Kyles Was Denied the Effective Assistance of Counsel on Appeal

1. Applicable legal standards

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence and to the effective assistance of counsel on his first appeal as of right in the state courts, ***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. *E.g.*, ***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 Supreme Court established the general standard for assessing claims of ineffective assistance of counsel in ***Strickland v. Washington***, 466 U.S. 668 (1984). That test is two-pronged. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *See, e.g.*, ***id.*** at 687. The same standard applies, with appropriate modifications, to claims of ineffective assistance of appellate counsel. ***Roe v. Flores-Ortega***, 528 U.S. 470, 477 (2000).

The deficiency prong is met where counsel's representation "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. In analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to

make the adversarial testing process work in the particular case." ***Id.*** at 690; *see* ***Kimmelman v. Morrison***, 477 U.S. 365, 384 (1986).

A defendant generally must show that counsel's deficient performance prejudiced his defense. The defendant is not required, however, to show "that counsel's deficient conduct more likely than not altered the outcome of the case." ***Strickland***, 466 U.S. at 693; *see* ***Kyles v. Whitley***, 514 U.S. 419, 434 (1995). Rather, the question on review is "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" or "reliability" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

However, actual denial of the assistance of counsel altogether is legally presumed to result in prejudice and can never be treated as harmless error. ***Penson v. Ohio,*** 488 U.S. 75, 88 (1988); ***State ex rel. Seibert v. Macht***, 2001 WI 67, ¶19, 244 Wis.2d 378, 627 N.W.2d 881, *modified on denial of reconsideration*, 2002 WI 12, 249 Wis.2d 702, 639 N.W.2d 707. Counsel's abandonment of a client's appeal, for instance, is a *per se* violation of the right to counsel. ***Flores-Ortega***, 528 U.S. at 483; ***Betts v. Litscher***, 241 F.3d 594, 597 (7th Cir. 2001). "Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy." ***Penson***, 488 U.S. at 87; *see* ***Seibert***, ¶19.

Moreover, when the right to counsel attaches, as on the direct appeal as of right from a criminal conviction, the state bears the "responsibility to ensure that petitioner was represented by . . . counsel." ***Coleman v. Thomson***, 501 U.S. 722, 754 (1991). If the state abdicates that responsibility by improperly denying counsel to a defendant by failing to take the steps necessary to provide a defendant with counsel, or because counsel has abandoned the defendant, any procedural defaults the *pro se* defendant commits properly may be "'imputed to the State.'" *See* ***id.*** (quoting ***Murray v. Carrier***, 477 U.S.

478, 488 (1986)).

The constitutionally required remedy for the denial of counsel on appeal is to restore the defendant to the position he would have occupied but for the denial. In other words, he must be granted his direct appeal as of right with the assistance of counsel, ***Betts***, 241 F.3d at 597; *see* ***Penson***, 488 U.S. at 86-88, an appeal made and judged without regard to any arguments or mistakes the defendant may have made while he lacked the assistance counsel. ***Betts***, 241 F.3d at 596, 597.

2. Applicable facts

Kyles specifically alleged in his ***Knight*** Petition that, following the sentencing hearing, he consulted with Flanagan for three to five minutes in a court side-room, and reviewed the written explanation of sentence form (Pet:5; Pet. App.E:1-2). Although he was forced to indicate that he was undecided on the notice of post-conviction rights form after the bailiff shooed them out of the conference room shortly after sentencing on November 12, 2002, and before Flanagan could fully advise him (Pet. App.E:1-2; *see* Pet. App.B), he asked his mother the same day to call and tell Flanagan that he wished to appeal (Pet:5-6; Pet. App.E:2). His mother called and, although unable to speak with Flanagan directly, left him a message that Kyles wanted to appeal (Pet:6; Pet. App.D:1). On November 15, 2002, Kyles sent Flanagan a letter, again informing him that he decided to appeal but did not retain a copy of that letter (Pet:6; Pet. App.E:2). "[T]he mailing of a letter creates a presumption that the letter was delivered and received." ***State ex rel. Flores v. State***, 183 Wis.2d 587, 612, 516 N.W.2d 362 (1994) (citations omitted).

Kyles attempted to follow up on the letter with collect phone calls on November 18 and 27, 2002, and December 2, 2002 (Pet:6-7; Pet. App.E:2; Pet. App.F:4; App. 13). Each time, however, Kyles' call was not accepted (*Id.*). Among the items attached to his Petition, Kyles attached institution phone logs showing collect calls to Flanagan's

office on these dates, with the first two indicating that someone in Flanagan's office refused to accept the call after answering the call and the third not being answered at all (Pet. App.F:4; App. 13).

On November 20, 2002, Kyles spoke with his mother about whether she informed Flanagan that he wanted to appeal and learned that she had been unable to reach Flanagan directly. He therefore asked her to try to contact Flanagan again because he wanted to appeal. (Pet:6; Pet. App.D:1; Pet. App.E:2). Despite leaving several messages for Flanagan, Kyles' mother never heard from him (Pet. App.D:1).

Kyles again placed collect calls to Flanagan's office on January 16 and January 17, 2002. Each time, however, Kyles' call was not accepted because someone in Flanagan's office refused to accept the call. (Pet:7; Pet. App.E:2; *see* Pet. App.F:4).

On January 24, 2003, Flanagan finally met with Kyles in prison (Pet:7; Pet. App.E:2). During this visit, Kyles told Flanagan that he wanted to appeal and asked Flanagan if he had grounds to appeal (Pet:7; Pet. App.E:2-3). Flanagan told him that his appellate time limits had expired and that there were few non-frivolous issues based on his guilty plea and then Flanagan changed the subject (Pet:7; Pet. App.E:3). Kyles attached an October 23, 2003 letter from Flanagan which indicated that at this prison meeting, Kyles discussed a potential appeal and Flanagan informed him that the time limits had expired and that there were few non-frivolous issues for an appeal based on his plea (Pet. App.J:1).

3. Attorney Flanagan's performance was deficient

Kyles' mother retained Attorney Flanagan to represent Kyles in the trial court (Pet. App.D:1). As alleged in Kyles' ***Knight*** Petition, and thus true for purposes of this proceeding, Flanagan's handling of Kyles' case following the sentencing was deficient in at least three

ways.[2]

a. Flanagan's failure to initiate the appeal when requested by Kyles is deficient performance

To initiate a criminal appeal, the defendant must file a notice of intent to pursue post-conviction relief within 20 days of the sentencing. Wis. Stat. (Rule) 809.30(2)(b). According to the non-conclusory factual allegations of Kyles' ***Knight*** Petition, he specifically asked Flanagan to file the notice of intent, once by letter and a number of times by phone messages from his mother, all within the 20-day period for filing the notice. Yet, Flanagan failed to file it.

Where, as here, counsel knows that his client wishes to appeal yet fails to perfect that appeal, that failure "constitute[s] per se ineffective assistance of counsel." ***United States v. Nagib***, 56 F.3d 798, 801 (7th Cir. 1995). The failure to comply with such a request is inherently unreasonable and thus constitutes deficient performance. *Id.*

See also ***Flores-Ortega***, 528 U.S. at 477:

> We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. [Citations omitted]. This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

This is not a situation in which counsel reasonably evaluated the

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[2] Trial counsel's obligations do not end with the sentencing. *See, e.g.*, Wis. Stat. (Rule) 809.30(2)(a) ("Counsel representing the person at sentencing . . . shall continue representation by filing a [notice of intent] if the person desires to pursue postconviction . . . relief unless counsel is discharged by the person or allowed to withdraw by the circuit court before the notice must be filed"); *see* ***Flores-Ortega***, 528 U.S. at 483.

record and, after full consultation with his client, was directed to close the case without filing an appeal. *Compare* ***State ex rel. Ford v. Holm***, 2004 WI App 22, 269 Wis.2d 810, 676 N.W.2d 500. Kyles insisted on an appeal and never consented to closing the case.

b. Flanagan's failure to remain reasonably available to Kyles during the 20-day period for the notice of intent was deficient performance

Even if Flanagan somehow did not receive Kyles' letter and his mother's phone messages directing him to file the notice of intent, he still acted unreasonably by failing to remain reasonably available to his client during the 20-day period for filing the notice of intent. Despite knowing that he had insufficient time to fully discuss with Kyles the potential risks and benefits of seeking a "second opinion" by new counsel by filing a notice of intent immediately after the sentencing, and despite knowing that Kyles therefore was undecided about whether filing an appeal would be in his best interests, Flanagan declined Kyles' multiple phone calls and failed to respond to the phone messages left by Kyles' mother during the 20-day period for filing the notice.

This Court long ago recognized the continuing obligation of trial counsel to consult with the defendant after sentencing and to assist the defendant until a final, knowing decision is reached regarding whether to appeal:

> [I]t is apparent that the duties of trial counsel should not cease until the decision is made by the defendant and his counsel whether to appeal immediately or undertake any post-conviction motions that may be desirable. It is the obligation of trial counsel to continue his representation of the defendant during this stage of the proceedings and assist the defendant in making a reasonable decision. He has the duty to explain in detail to the defendant the relative advantages or disadvantages of any projected appeal or post-conviction motions. The decision, of course, must be the defendant's own.

Whitmore v. State, 56 Wis. 2d 706, 719, 203 N.W.2d 56, 63 (1973).[3] These obligations now are codified in Wis. Stat. (Rule) 809.30(2)(a) & §973.18. *See also* Susan R. Monkmeyer, The Decision to Appeal a Criminal Conviction: Bridging the Gap Between the Obligations of Trial and Appellate Counsel, 1986 Wis. L. Rev. 399, 418 (1986) ("Trial counsel should be required to maintain contact with the defendant until a decision [whether to appeal] is made").

The United States Supreme Court imposed similar obligations as a matter of attorney effectiveness in ***Roe v. Flores–Ortega***,528 U.S. 470 (2000). ***Flores–Ortega*** held that counsel is deficient if he fails to consult with the petitioner about an appeal "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 480.

This continuing obligation of counsel to represent and guide the defendant following sentencing includes an obligation to remain reasonably available to the defendant for such consultation and so counsel is available to act on the defendant's decision to appeal. *E.g.*, ***Herrera-Corral v. United States***, 498 F.3d 470 (7th Cir. 2007) (finding ineffective assistance of counsel on this ground).

In ***Herrera-Corral***, Herrera-Corral's attorney interpreted his despondency at the time of sentencing as an indication that he did not wish to appeal his plea and 10-year sentence. Herrera-Corral attempted to tell his attorney to file the notice of appeal within the statutory 10-day period but found that the attorney had blocked calls from prison. Herrera-Corral then asked his wife to call. Although she left several messages, the attorney did not return her calls until after the 10-day

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[3] *See also* ***Baker v. Kaiser***, 929 F.2d 1495, 1498-99 (10th Cir.1991) ("the right to counsel applies to the period between the conclusion of trial proceedings and the date by which a defendant must perfect an appeal " "in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated.'" (citation omitted).

deadline for filing the notice of appeal. 498 F.3d at 472.

While noting the Supreme Court's recognition that "'a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently,'" 498 F.3d at 473, quoting ***Flores-Ortega***, 528 U.S. at 477, the Seventh Circuit also noted that "neither the Supreme Court nor this court has ever held that a defendant who initially indicates that he does not wish to appeal cannot reasonably expect counsel's assistance if the defendant has a change of heart before the window to file an appeal closes." ***Id.*** "[T]he decision whether to appeal is not final until the time to perfect an appeal has expired." ***Id.*** at 474 (citation omitted).

> Between entry of judgment and the close of the appeal window, counsel must not be allowed to withdraw precisely because a client who initially decides not to appeal might change his mind, and-as we have seen in this case-the consequences of the lawyer simply walking off can be too high.

Id.

Of course, the constitutional requirement that counsel remain reasonably available during the time for initiating the appeal does not mean that "the attorney must adjust his or her schedule in anticipation of the client's decision to appeal." ***Id.***

> Rather, we simply hold that when a criminal defendant has made reasonable efforts to contact his lawyer about an appeal during the ten-day period, his lawyer must made a reasonable effort to reach the client before the time for filing a notice of appeal expires.

Id.

Noting that Herrera-Corral could not directly contact his attorney because calls from the prison were blocked (as documented by prison records), and that the attorney failed to return the calls from Herrera-Corral's wife, the Court held that "the attorney was not merely unavailable; his failure to return some phone calls and his blocking of

others were affirmative steps to prevent his client from reaching him during this crucial time frame." ***Id.*** at 474-75.

The allegations of Kyles' ***Knight*** Petition closely track the circumstances found to constitute abandonment in ***Herrera-Corral***. As documented in the prison phone records and Kyles' sworn allegations (Pet. App.E; Pet. App.F:4; App. 13), he attempted three calls to Flanagan's office during the 20-day period following sentencing to advise him of his decision to appeal. Two, on November 18 and 27, 2002, resulted in the Flanagan's office hanging up during the process of accepting the call and one, on December 2, 2002, was not answered at all (Pet. App.F:4). At least for the two calls on November 18 and 27, therefore, the person answering the call would have known that it was coming from a prison and likely would have known who it was from before declining to accept the charges.[4]

Also, as in ***Herrera-Corral***, Flanagan would have known that Kyles' mother had left messages for him during the 20-day period for filing the notice of intent, yet he failed to return those calls (*See* Pet. App.D).

The one significant difference between Herrera-Corral's case and Kyles' makes Kyles' entitlement to relief even stronger. Flanagan knew that Kyles never indicated that he did not wish to appeal. Rather, their discussion of the potential costs and benefits of an appeal was cut short, with Kyles left undecided. Remaining available to one's client is especially critical under such circumstances.

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[4] Although not in the record, undersigned counsel's experience with collect calls from Wisconsin prison inmates is that, after the recipient answers the phone, a recording indicates the identity of the caller and that the call is from a state prison. The recipient then is given the option of accepting the call or declining it.

c. Flanagan's failure to seek an extension of the time for filing a notice of intent, or to advise Kyles of that option, was deficient performance

Flanagan finally met with Kyles and discussed his desire for an appeal on January 24, 2003, less than 60 days after expiration of the time for filing a notice of intent under Rule 809.30(2)(b). Kyles expressly told Flanagan of his desire to appeal, but Flanagan responded that the "time limits had expired and there were few non-frivolous issues for appeal based on [Kyles'] guilty plea." Flanagan then changed the subject. (Pet. App.E:2-3; Pet. App.J:1).

A reasonable attorney in Flanagan's situation would not have simply dismissed Kyles' desire for an appeal with reference to the expired deadline for filing the notice of intent so soon after expiration of the deadline. A reasonable attorney would have known that the time lines in Rule 809.30(2) may be extended for good cause upon motion to the Court of Appeals, even after the time for doing the act has expired. Wis. Stat. (Rule) 809.82(2). *See* ***State v. Harris***, 149 Wis.2d 943, 440 N.W.2d 364 (1989); ***State v. Quackenbush***, 2005 WI App 2, 278 Wis.2d 611, 692 N.W.2d 340 (noting Court of Appeals' policy of extending time for notice of intent for good cause is "long established"). Especially given that Kyles had missed the deadline for filing the notice of intent by less than 60 days, it is virtually certain that the Court of Appeals would have granted such an extension in his case. ***Id.*** *See also* ***State v. Evans***, 2004 WI 84, ¶38, 273 Wis.2d 192, 682 N.W.2d 784 (Court of Appeals "has a generally lenient policy about granting extensions that will enable a criminal defendant to prosecute and appeal" (citations and internal marking omitted)).[5]

Whatever in fact happened earlier, Flanagan then knew of his client's desire for an appeal. His failure to advise Kyles that a

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[5] This Court abrogated another of ***Evans'*** holdings on other grounds in ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900.

procedure was available with a high likelihood of success for reinstating his direct appeal rights and instead leaving Kyles to believe erroneously that nothing could be done about the appeal thus was patently unreasonable. Kyles wanted an appeal, and a reasonable attorney in Flanagan's position would have known that it remained possible to overcome the untimely filing of the notice of intent. His failure to advise Kyles of that fact accordingly was deficient performance. *Cf.* ***Flores-Ortega***, *supra* (failure to properly advise client of availability of appeal is deficient performance). There is no possible reasonable strategy furthered by misleading one's client on the availability of an appeal.

4. Flanagan's unreasonable actions prejudiced Kyles

Kyles sought to appeal but was unable to do so because (1) Flanagan failed to comply with his requests to initiate the appeal, (2) Flanagan was not reasonably available to hear and act on that desire, and (3) Flanagan unreasonably failed to advise Kyles of the procedure for seeking an extension of time for initiating the appeal upon being told face-to-face of Kyles' desire to appeal. "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." ***Flores-Ortega***, 528 U.S. at 484; ***Herrera-Corral***, 498 F.3d at 475.

Because Flanagan's unreasonable acts and omissions denied Kyles any appeal at all, Kyles need not show that an appeal would have been successful. *E.g.*, ***Penson***, *supra*.

B. Because He was Abandoned by Counsel and Unconstitutionally Left to Fend for Himself, Kyles has Not Procedurally Defaulted His Claim

The state argued in its response to Kyles' Petition for Review that Kyles is procedurally barred from raising his substantive claims because, while left to fend for himself after Attorney Flanagan

unconstitutionally abandoned him, he made certain procedural errors and failed to allege all of the facts establishing his right to relief in the earlier proceedings. Pet. Response at 17-19. The state is wrong.

The state's position *might* have made sense if Kyles had not been denied his constitutional right to counsel and a direct appeal. *If* Kyles' right to counsel had been honored and the attorney had made the same mistakes, then *perhaps* Kyles would be barred from raising any new substantive claims or any new arguments in support of a previously decided substantive claim absent a showing of "sufficient reason." *See* ***Evans***, 2004 WI 84, ¶35 (successive ***Knight*** petitions barred absent sufficient reason why new issues not raised in first petition); ***State v. Witkowski***, 163 Wis.2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); Wis. Stat. §974.06(4) (§974.06 relief barred absent sufficient reason why issues were inadequately raised or new issues were not raised in prior motion or appeal); *but see* ***State v. Howard***, 211 Wis.2d 269, ¶¶37-38, 564 N.W.2d 753 (1997) (sufficient reason where defendant did not previously know legal basis for claim).[6]

However, the state overlooks the fatal defect in its argument: A court cannot legitimately use the procedural missteps of a defendant who is involuntarily denied the right to counsel to block relief because "one principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit." ***Betts***, 241 F.3d at 596. *Cf.* ***Page v. Frank***, 343 F.3d 901, 909 (7th Cir. 2003) ("It would be incongruous to maintain that Mr. Page has a Sixth Amendment right to counsel on direct appeal, but then to accept the proposition that he can waive such right by simply failing to assert it in his pro se response challenging his counsel's *Anders* motion").

Kyles, who reads on only a sixth grade level and was denied his right to the assistance of counsel, was left to fend for himself with only

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[6] This Court overruled a different portion of ***Howard*** on other grounds in ***State v. Gordon***, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

the aid of whatever "jailhouse lawyers" he could find (Pet. 17; Pet. App.E:3, ¶19). The vast difference in quality among the various motions and petitions drafted by the various jailhouse lawyers on Kyles' behalf reflects their vastly differing abilities. *Compare* the specificity of the current ***Knight*** Petition (Pet.) with the prior motions and petitions (Pet. Apps. K, M, Q, & W). An attorney, for instance, likely would have known to include the specific factual allegations of the current ***Knight*** Petition rather than the vague and conclusory assertions of Kyles' original ***Knight*** Petition and circuit court habeas petition.

The central purpose of the right to counsel on appeal is the recognition that individuals untrained in the law cannot be expected to know the substantive and procedural rules necessary properly to assert and protect their legal rights:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that--like a trial--is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake.

Evitts, 469 U.S. at 396. *See also* ***Penson***, 488 U.S. at 85 ("The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over").

Moreover, the United States Supreme Court has recognized that any delay or default resulting from the state's improper failure to provide counsel or from counsel's abandonment of the client must be "'imputed to the State.'" ***Coleman v. Thompson***, 501 U.S. at 754 (quoting ***Murray***, 477 U.S. at 488). Under ***Coleman v. Thompson***,

"[w]here a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that [collateral] review entails." 501 U.S. at 754. In other words, the state which is responsible for depriving the defendant of his right to counsel rationally cannot be permitted to benefit from its misconduct when any delay or forfeiture is attributable to that denial.

Kyles was constitutionally entitled to the assistance of counsel in initiating his appeal and his procedural missteps while involuntarily unrepresented by counsel in his efforts to enforce that right therefore cannot constitutionally be held against him. ***Betts*** is directly on point:

> Betts was constitutionally entitled to the assistance of counsel on direct appeal, but the state of Wisconsin gave him the runaround. It allowed counsel to withdraw unilaterally, then used the ensuing procedural shortcomings to block all avenues of relief. Yet one principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit. *The Constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel.*

241 F.3d at 598 (emphasis added).

Even if Kyles had been represented by counsel, the dismissal of his initial ***Knight*** Petition was without prejudice to his raising his claims in what the Court of Appeals deemed the appropriate court (Pet. App.L). The circuit court's denial of his habeas petition expressly stated that the court would reconsider that denial if Kyles presented additional information (Pet. App.N). That decision thus likewise was without prejudice and also is consistent with Wisconsin authority that a finding that a pleading fails to state a claim does not bar a subsequent action containing adequate allegations. *See* ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, ¶36, 263 Wis. 2d 83, 664 N.W.2d 596

("Generally, when a dismissal for failure to state a claim does not specify whether it is with or without prejudice and the defects in the dismissed complaint can be cured by a subsequent complaint, the dismissal should not be treated as a bar to the filing of the subsequent complaint" (citation omitted)).

For all of these reasons, therefore, the state's procedural default theory is neither constitutional nor supported by the facts.

II.

A *KNIGHT* PETITION IN THE COURT OF APPEALS IS THE PROPER PROCEDURE FOR REMEDYING THE FORFEITURE OF ONE'S DIRECT APPEAL RIGHTS DUE TO THE INEFFECTIVENESS OF COUNSEL

The exact process for raising his ineffective assistance claim is not decisive in Kyles' case since he is constitutionally entitled to pursue now whatever process this Court deems appropriate without regard to his prior efforts while unconstitutionally left unrepresented by counsel. *E.g.*, ***Betts***, *supra*. *See* Section I,B, *supra*. However, the proper process for raising claims that counsel's ineffectiveness deprived the defendant of an appeal is a ***Knight*** Petition in the Court of Appeals, not a §974.06 motion or a habeas petition in the circuit court. Although this exact issue has not previously been decided in a published opinion, both the language and rationale applied in similar cases and good judicial policy dictate that result when counsel's unreasonable acts or omissions result in the failure to commence an appeal by filing a notice of intent to pursue post-conviction relief.

Wisconsin authority regarding the proper forum and process for raising ineffective assistance of counsel claims establish a number of general but not always consistent principles. First, as the state concedes, Pet. Rev. Response at 9, n.4, Wis. Stat. §974.06 is directed at correcting errors in the proceedings that resulted in the conviction and sentence, *not* procedural errors in the appellate process. *See* ***Knight***, 168 Wis.2d at 519.

There are additional policy reasons why §974.06 is not the appropriate process for challenging counsel's unreasonable failure to commence post-conviction proceedings. Because the defendant must raise *all* available claims in the first §974.06 motion or risk procedurally defaulting them, *see, e.g.*, ***State v. Kletzien***, 2011 WI App 22, 331 Wis.2d 640, 794 N.W.2d 920 (motion for post-conviction discovery under §974.06 intended to provide basis for subsequent substantive motion nonetheless held to bar subsequent §974.06 motion under Wis. Stat. §974.06(4)), he or she would be forced to raise any substantive challenges to the conviction or sentence in the same motion challenging the loss of his or her right to the assistance of counsel in presenting those claims. As suggested in ***Evans***, 2004 WI 84, ¶59 n.21, and ***State ex rel. Santana v. Endicott***, 2006 WI App 13, ¶¶7-8, 288 Wis.2d 707, 709 N.W.2d 515, the most efficient means of addressing abandonment claims is to first address whether the defendant is entitled to reinstatement of the direct appeal with counsel before raising substantive claims.

Second, ineffective assistance claims *generally* are to be raised in the court where counsel's allegedly deficient acts or omissions took place. Thus, challenges to counsel's actions through pretrial proceedings, trial or plea, and sentencing must be raised first in the circuit court. *See, e.g.*, ***State v. Curtis***, 218 Wis.2d 550, 553-54, 582 N.W.2d 409 (Ct. App. 1998). Post-conviction counsel's failures by act or omission prior to filing the notice of appeal and raising claims in the Court of Appeals generally are raised in the circuit court under Wis. Stat. §974.06. *E.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996); *see* ***State v. Balliette***, 2011 WI 79, ¶32, 336 Wis.2d 358, 805 N.W.2d 334 ("When, however, the 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. §974.06 or a petition for habeas corpus" (citation omitted)). *Contra* ***State v. Starks***, 2013 WI 69, ¶¶33-37, 349 Wis.2d 274, 833 N.W.2d 146 (unreasonable failure to first raise unpreserved

issues in post-conviction motion in the circuit court prior to pursuing appeal to court of appeals deemed ineffectiveness of appellate counsel rather than post-conviction counsel), *reconsid. pending*. The effectiveness of counsel's acts or omissions before the Court of Appeals are reviewed by habeas petition in that court, ***Knight***, 168 Wis.2d at 520, and alleged failures before the Supreme Court are reviewed by habeas petition before this Court, ***State ex rel. Schmelzer v. Murphy***, 201 Wis.3d 246, 255-56, 548 N.W.2d 45 (1996) (***Schmelzer II***).

These general principles do not, however, answer the question here because it is not always easy to determine which court is the locus of the deficient performance. For instance, although overlooked below, the Court of Appeals repeatedly has held that a ***Knight*** Petition in that Court is the proper vehicle for attacking counsel's failure to commence an appeal governed by Wis. Stat. (Rules) 809.30 or 809.32, "whether or not the appeal had to be preceded by a postconviction motion, . . . because counsel's inaction in [that] court is at issue." ***State ex rel. Smalley v. Morgan***, 211 Wis.2d 795, 798-99, 565 N.W.2d 805 (Ct. App. 1997) (footnote omitted)[7]; *see* ***Santana***, 2006 WI App 13, ¶4; ***State ex rel. Ford v. Holm***, 2004 WI App 22, ¶9 n.4, 269 Wis.2d 810, 676 N.W.2d 500 ("Although the allegation of ineffective assistance of counsel in this case involves the alleged actions or omissions of counsel prior to the filing of an appeal, it is nonetheless properly raised by way of a ***Knight*** petition in this court" (citing ***Smalley***, *supra*)).

None of these cases involved counsel's failure to file a notice of intent. As the Court of Appeals explained in ***Smalley***, however, counsel's failure to commence an appeal constituted inaction in that court because "the deadlines contained in RULE 809.30 are subject to the control of [that] court" and "[i]t is most likely that the RULE 809.30 deadlines will have expired before a defendant complains to this court that counsel abandoned him or her." 211 Wis.2d at 807-08.

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[7] This Court abrogated another of ***Smalley's*** holdings on other grounds in ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900.

In ***Evans***, 2004 WI 84, ¶39, n.14, this Court cited ***Smalley*** with approval and held that a challenge to post-conviction/appellate counsel's failure to pursue a post-conviction motion and appeal must be raised in a ***Knight*** Petition rather than by an extension motion under Wis. Stat. (Rule) 809.82(2). *Cf.* ***Quackenbush***, 2005 WI App 2 (holding that "trial counsel['s]" unreasonable failure to file notice of intent may justify motion to extend rather than ***Knight*** Petition despite ***Evans***).

A "location of the error" analysis accordingly does not support the Court of Appeals' holding here.

However, the facts of this case further demonstrate the difficulty of the "locus of ineffectiveness" theory for setting the forum for Kyles' ineffectiveness claims in the circuit court. If not for ***Evans*** and the ***Smalley*** line of cases, Flanagan's failures to file the notice of intent when requested by Kyles or to keep himself reasonably available to Kyles, *see* Section I,A,3,a & b, *supra*, hypothetically could be construed as having taken place in the circuit court. However, the locus of Flanagan's unreasonable failure either to advise Kyles regarding the option of a motion to extend the time for filing a notice of intent with the Court of Appeals or to file such a motion with that Court, *see* Section I,A,3,c, *supra*, is squarely in the Court of Appeals.

Thus, overruling ***Evans*** and the ***Smalley*** line of cases in order to place challenges to the unreasonable failure to file a notice of intent in the circuit court would require splitting the ineffectiveness claims of those such as Kyles between the circuit court (for the unreasonable failure to file the notice or to be available to the client during the time for filing it) and the Court of Appeals (for the unreasonable failure to advise the client regarding a motion to extend the time for filing the notice of intent or to file such a motion). Judicial economy here thus corresponds with prior authority and common sense to place all challenges to the failure to commence a criminal appeal in the Court of Appeals.

A third general principle guiding choice of forum and procedure determinations is whether the particular forum is able to provide the appropriate remedy. In ***Knight***, for instance, this Court focused primarily on the limitations of §974.06 in concluding that claims of ineffective appellate counsel must be raised by habeas in the Court of Appeals:

> More fundamentally, the limited remedies available under sec. 974.06 support our conclusion that the legislature did not intent that section to govern challenges to the proceedings of appellate courts. Section 974.06(1) permits a district court only "to vacate, set aside or correct the sentence." While a circuit court may indirectly remedy the consequences of ineffective assistance of appellate counsel through vacating and reinstating a sentence in order to allow a fresh appeal, we do not believe that the legislature intended the circuit court to utilize sec. 974.06 in this oblique manner.

168 Wis.2d at 519 (footnote omitted).

Knight thus establishes, as the state concedes, Pet. Rev. Response at 9, n.4, that habeas rather than §974.06 is the appropriate procedure here. The question remains, however, whether the appropriate *forum* is the circuit court or the Court of Appeals.

The available remedy again dictates the Court of Appeals as the appropriate forum where, as here, counsel's deficient performance prevented commencement of an appeal. The constitutionally required remedy for that violation is reinstatement of Kyles' direct appeal rights. *E.g.*, ***Penson***, 488 U.S. at 86-88. The Court of Appeal can provide that remedy. *E.g.*, ***Evans***, *supra*. Whether by §974.06 or common law habeas corpus, the circuit court cannot.

Hypothetically, the circuit court might accomplish reinstatement of Kyles' direct appeal rights in either of two ways: vacating and reinstating his conviction and sentence, thus triggering a new 20-day period for filing the notice of intent, or simply extending the time for filing that notice. However, the circuit court does not have the

authority to do either.

In ***Knight***, this Court refused to interpret §974.06 as authorizing the circuit court to vacate and reinstate a sentence to allow a fresh appeal because it did "not believe that the legislature intended the circuit courts to utilize sec. 974.06 in this oblique manner." 168 Wis.2d at 519 (footnote omitted). While interpretation of a statutory remedy does not necessarily control interpretation of a common law remedy like habeas corpus, the Court of Appeals found this Court's rationale in ***Knight*** equally compelling to circuit court habeas corpus given that §974.06 is the "statutory equivalent" of circuit court habeas corpus. ***Santana***, 2006 WI App 13, ¶5.

Moreover, Wisconsin law has long rejected the practice of extending appellate deadlines by setting aside one judgement and entering a new one. *E.g.*, ***State ex rel. Schmelzer v. Murphy***, 195 Wis.2d 1, 8-9, 535 N.W.2d 459 (Ct. App. 1995) (and authorities cited) (***Schmelzer I***). The few exceptions to this general rule apply in strictly limited circumstances justifying relief under Wis. Stat. §806.07. *E.g.*, ***Edland v. Wisconsin Physicians Service Ins. Corp.***, 210 Wis.2d 638, 563 N.W.2d 519 (1997) (affirming vacate and reinstate order where circuit court failed to notify parties of final order). Section 806.07, however, does not apply in criminal cases. ***State v. Henley***, 2010 WI 97, ¶¶67-71, 328 Wis.2d 544, 787 N.W.2d 350.

Also, the practice of vacating and reinstating a sentence to permit an appeal essentially involves the circuit court directing the Court of Appeals to accept an appeal. However, a lower court has no authority to compel action by a higher court. *See* ***State ex rel. Fuentes v. Wisconsin Court of Appeals, Dist. VI***, 225 Wis.2d 446, ¶14, 593 N.W.2d 48 (1999); ***Schmelzer I***, 195 Wis.2d at 9.

While the Court of Appeals has the authority to extend the deadline for filing a notice of intent or other deadlines under Rule 809.30, Wis. Stat. (Rules) 809.01(4) & 809.82(2), the circuit court has no such authority. *E.g.*, ***State v. Rembert***, 99 Wis.2d 401, 406 n.4, 299

N.W.2d 289 (Ct. App. 1980) (Court of Appeals' authority to extend time periods under Rule 809.30 is to the exclusion of the circuit court).

* * *

None of the general principles guiding determination of the appropriate forum and process for raising ineffectiveness claims supports the Court of Appeals' designation of the circuit court as the forum for challenging Flanagan's unreasonable failure to commence the post-conviction proceedings in this matter. To the contrary, each of them supports a ***Knight*** Petition in the Court of Appeals as the proper forum and process.

CONCLUSION

For these reasons, the Court should reverse the Court of Appeals' Order denying Kyles' ***Knight*** petition and remand to that Court with directions that it order a hearing on Kyles' abandonment claims. Should the Court not grant such relief, it should declare Kyles' right to have his abandonment claim heard in the circuit court.

Dated at Milwaukee, Wisconsin, January 16, 2014.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,068 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 January, 2014, I caused 22 copies of the Brief and Appendix of Lorenzo D. Kyles to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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