STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2010AP425-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAMELL E. STARKS,

Defendant-Appellant-Petitioner.

STARKS' MOTION FOR RECONSIDERATION

Tramell E. Starks, by counsel, moves this Court pursuant to Wis. Stat. (Rules) 809.14 & 809.64 for an order striking paragraphs 4, 27, 30, 33-40, and that portion of paragraph 31 asserting that Starks filed his ineffective assistance of post-conviction counsel claim in the wrong court. Starks requests that the Court withdraw its opinion and order briefing regarding whether ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996) (ineffectiveness claims challenging failure to file post-conviction motion must be raised in circuit court under Wis. Stat. §974.06), should be overruled.

This Court's decision that Starks' challenge to the failure to file a post-

conviction motion alleged an error of "appellate counsel" rather than "post-conviction counsel" directly conflicts with the holding and rationale of ***Rothering*** which has guided litigants and the courts for 17 years. *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"), *cert. denied*, 132 S. Ct. 825 (2011).

By overlooking the conflict with ***Rothering***, the Court failed to address the rationale and policy reasons underlying that decision and unknowingly and unintentionally upset the settled expectations of litigants (including *pro se* defendants who file most collateral attacks), attorneys, and the lower courts concerning the proper forum for raising post-conviction ineffectiveness claims.

Starks does not dispute ***Rothering's*** distinction between post-conviction and appellate counsel. Rather, the confusion arises from this Court's choice to denominate counsel's failure to file a post-conviction motion in the circuit court an error of "appellate counsel." ***Starks***, ¶¶4, 30, 34-40.

Wisconsin courts have identified the proper forum for ineffectiveness claims to be that in which counsel's errors, of commission *or omission*, are

alleged to have occurred. Thus, counsel's failure to file a petition for review with this Court must be addressed by habeas petition to this Court. ***State ex rel. Schmelzer v. Murphy***, 201 Wis.2d 246, 255-56, 548 N.W.2d 45 (1996). Similarly, counsel's failure to file a no-merit report, merits brief, or motion to extend Wis. Stat. (Rule) 809.30 deadlines in the Court of Appeals is ineffectiveness of appellate counsel that must be addressed by habeas petition in that court. ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992); *see e.g.*, ***State v. Evans***, 2004 WI 84, ¶ 32, 273 Wis.2d 192, 682 N.W.2d 784; ***State ex rel. Smalley v. Morgan***, 211 Wis.2d 795, 565 N.W.2d 805 (Ct. App. 1997).[1]

Although overlooked here, ***Rothering*** applied a similar common sense standard, holding that counsel's unreasonable failure to file a post-conviction motion in the circuit court challenging the effectiveness of trial counsel is an error of "post-conviction counsel" that must be raised under Wis. Stat. §974.06 rather than in the Court of Appeals. That Court's rationale, again overlooked by the Court here, is that "[c]laims of ineffective trial counsel ... cannot be reviewed on appeal absent a postconviction motion in the trial court." ***Balliette***, 2011 WI 79, ¶29, quoting ***Rothering***, 205 Wis.2d at 677–78.

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[1] A different holding in ***Smalley*** was overruled on other grounds in ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900.

Accordingly counsel's failure to raise a trial ineffectiveness claim for the first time on appeal cannot be ineffectiveness of appellate counsel because appellate counsel does not act unreasonably in failing to raise an unpreserved claim. Rather, the ineffectiveness is of *postconviction* counsel for failing to raise and preserve the claim in a postconviction motion in the circuit court. ***Rothering***, 205 Wis.2d at 677-79.

Absent clarification, the result will be confusion and litigation. Overruling 17 years of established practice necessarily causes uncertainty and interferes with settled expectations. The resulting confusion is heightened when, as here, the reversal happens with no acknowledgment of the radical changes, with no explanation for why the change is necessary, and with minimal explanation of the scope of the changes. Adding that most of those impacted are *pro se* inmates with rudimentary understanding of law and procedure, and the change is a recipe for confusion, litigation, and injustice. Given the confusion resulting from ***Starks***, for instance, cautious litigants raising post-conviction ineffectiveness claims will be forced to file duplicate motions in the circuit court and the Court of Appeals to guaranty the proper forum.

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Starks also seeks reconsideration of the Court's assessment of his

substantive claims, ***Starks***, ¶¶66-73, because that assessment conflicts with controlling and apparently overlooked legal standards.

First, a separately charged witness' sworn allegations are not inherently "unreliable." ***Starks***, ¶67. The state regularly relies on such evidence to meet its burden of proof beyond a reasonable doubt at trial and the defendant is not even required to present affidavits in support of a post-conviction motion. *E.g.*, ***State v. Brown***, 2006 WI 100, ¶62, 293 Wis.2d 594, 716 N.W.2d 906.

Second, contrary to the Court's assertion, ***Starks***, ¶¶68-69, judicial determinations are *not* controlling when they result from ineffective assistance of counsel or the defendant satisfies the due process requirements for newly discovered evidence.

Third, contrary to the Court's holding, ***Starks***, ¶70, it is well-established that supporting documentary proof is *not* required to get a hearing. ***Brown***, 2006 WI 100, ¶62. A specific factual allegation - such as that specific phone records would show that the state's witnesses did not speak with Starks - are not rationally rendered "conclusory" merely because Starks did not attach the phone records corroborating that claim. *E.g.*, ***State v. Love***, 2005 WI 116, 284 Wis.2d 111, 700 N.W.2d 62.

Finally, while counsel may be assumed to have acted for tactical reasons where the defendant relies solely on the trial record without calling the

attorney to testify, ***Yarborough v. Gentry***, 540 U.S. 1, 8 (2003) (per curiam), the Court's apparent approval of such an assumption to deny a ***Machner*** hearing absent proof that trial counsel's failure was due to something other than reasoned tactics effectively creates an "attorney's allowing counsel to avoid a finding of ineffectiveness merely by refusing to speak with the defendant or his postconviction counsel.

Because the Court's analysis of Starks' substantive claims also overlooks and conflicts with controlling legal standards, it likewise will cause unnecessary confusion, litigation, and injustice. Reconsideration of that analysis accordingly is appropriate as well.

Dated at Milwaukee, Wisconsin, July 30, 2013.

Respectfully submitted,

TRAMELL STARKS,
Defendant-Appellant-Petitioner

HENAK LAW OFFICE, S.C.

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CERTIFICATION

This motion conforms to the requirements contained in Wis. Stat. (Rules) 809.24, 809.63, and 809.64 for a motion for reconsideration produced with a proportional serif font. The length of this motion is 1,070 words.

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Robert R. Henak

Reconsideration Motion.wpd