Robert R. Henak
Ellen Henak
Henak Law Office, S.C.
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Framing Ineffective Assistance Claims in Wisconsin Courts

I. ***Ineffective Assistance of Counsel Claims 101.*** In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the United States Supreme Court first set forth the standard, two-pronged test for ineffective assistance of counsel, which requires that the defendant first show "that counsel's performance was deficient" and second show that "the deficient performance prejudiced the defense."

A. ***Deficient Performance*** –Need to show "that 'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson*, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986) (quoting *Strickland*, 466 U.S. at 688).

1. Courts "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." *Strickland*, 466 U.S. at 690; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

2. There is a presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S. at 690, but 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).

3. A single serious error may justify reversal, *Kimmelman*, 477 U.S. at 383; *see Murray v. Carrier*, 477 U.S. 478, 496 (1986); *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984), so there is no need to show total incompetence.

4. "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." *Kimmelman*, 477 U.S. at 384 (citing *Strickland*, 466 U.S. at 689).

5. The deficiency prong is met where counsel's error resulted from oversight 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).

6. Although the Court must not second-guess counsel's considered selection of trial tactics or the exercise of his or her professional judgment, *State v. Felton*, 110 Wis.2d 485, 329 N.W.2d 161, 169 (1983), even tactics "must stand the scrutiny of common sense." *Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984); *see Felton*, 329 N.W.2d at 169. A reviewing court thus "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than judgment." *Felton*, 329 N.W.2d at 169. *See also Washington v. Smith*, 219 F.3d 620, 629-32 (7th Cir. 2000).

7. "'[J]ust 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*, 894 F.2d at 878); *see also Kimmelman*, 477 U.S. at 386-87 (same). *But see State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-35, 246 Wis.2d 648, 630 N.W.2d 752; *State v. Koller*, 2001 WI App. 253, ¶¶8, 53, 248 Wis.2d 259, 635 N.W.2d 838.

8. Note that failure to raise a motion which would not have succeeded, is NOT deficient performance, *State v. Cummings*, 199 Wis.2d 721, 747 n.10, 546 N.W.2d 406 (1996); *see also State v. Simpson*, 185 Wis.2d 772, 519 N.W.2d 662, 666 (Ct. App. 1994), so you must prove that the motion would have been successful.

B. ***Prejudice***

1. ***Trials*** –prejudice exists when the 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Johnson*, 133 Wis.2d at 222 (quoting *Strickland*, 466 U.S. at 687).

   a. "The test is whether defense counsel's errors undermine confidence in the reliability of the results. The question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *State v. Moffett*, 147 Wis.2d 343, 357, 433 N.W.2d 572 (1989)

i. "Reasonable probability is a "'probability sufficient to undermine confidence in the outcome.'" *Id*. (quoting *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, 390-394 (2000).

ii. Not outcome based--"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*, 147 Wis.2d at 354 (quoting *Strickland*, 466 U.S. at 693).

iii. In assessing resulting harm, courts are not to act as some sort of "super-jury." *Neder v. United States*, 527 US. 1, 19 (1999). Where the defendant contested the issue affected by the error, and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. *Id*.

2. ***Pleas*** – prejudice exists when "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial," *see Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *State v. Bentley*, 201 Wis.2d 303, 312, 548 N.W.2d 50 (1996)

3. The court must consider the totality of the circumstances. *Strickland*, 466 U.S. at 695.

4. The Court must assess the cumulative effect of *all* proven errors and may not merely review the effect of each in artificial isolation. *E.g.*, *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000); *State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel).

5. "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999).

6. When evaluating prejudice, unlike when evaluating attorney performance, hindsight is permissible. *Shaw v. Wilson*, 721 F.3d 908, 918 (7th Cir. 2013) (citations omitted).

7. Assessment of prejudice must assume a rational and impartial decisionmaker, and "should not depend on the idiosyncracies of the particular decisionmaker." *Strickland*, 466 U.S. at 695.

II. ***Determining Your Issues***

A. Starting places

1. The things that do not "feel right"

2. The client's complaints about trial counsel

3. Complaints about trial counsel by client's family and friends

4. The discovery that was not used at trial

5. Trial counsel's file and his or her investigation

A. Evaluation.

1. *Trial cases*. Begin with trial counsel's theory of the case. The openings and closings are good places to look for that theory. Is the theory reasonable? If that theory is reasonable, it should become the touchstone against which trial counsel's actions at trial are judged. If not, you will have to come up with your own theory of the case to use as a touchstone.

2. *Plea cases.* Begin with the goal of representation. Did the client and trial counsel have the same goal? Did the goal change as the litigation progressed? Why? How? Assess counsel's actions against the goals of the representation.

3. *All cases*. What might you know about the "why?" Is there a reason counsel did what he did? Was the reason reasonable? What potential risks were associated with counsel doing or not doing a particular action? What potential benefits were associated with that action or lack of action? Was the defendant apprised

of the risks and benefits? Did the defendant ever express any opinions that suggest the value of the various risks and benefits to him or her?

4. *All cases*. For claims of strategy to block an ineffectiveness claim, the strategy must be reasonable. *Kellogg*, 741 F.2d at 1102; *Cf. Felton*, *supra* (a decision based upon an erroneous view of the law cannot be considered a reasonable strategic decision).

5. *All cases*. Looking at other successful claims can give you ideas. *See* Teresa Norris, Summaries of Successful Ineffective Assistance of Counsel Claims Per-*Wiggins v. Smith*, http://www.capdefnet.org/hat/uploadedFiles/Public/Helpful_Cases/Ineffective_Assistance_of_Counsel/IAC%20PreWiggins%2072613.pdf

III. *Try to Speak With Prior Counsel.*

A. The Supreme Court recently has suggested that the PC motion must allege prior counsel's explanation for claimed errors or omissions. *E.g.*, *State v. Starks*, 2013 WI 69, ¶54, 349 Wis. 2d 274, 833 N.W.2d 146, 162 (noting presumption that "any decision made during the course of representation is regarded as having been made for 'tactical reasons' *in the absence of evidence to the contrary*." (emphasis added), *citing Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

B. Prepare release and get client's signature early in representation so you can get prior counsel's file and subsequently speak with him/her once you have narrowed the potential issues.

C. *Before* filing the motion, contact prior counsel *in writing* (so you have a record and something to attach to your motion), setting out in detail and without accusation those acts and omissions for which you seek an explanation. Indicate that you will follow up with a phone call and then do it.

D. Counsel may provide reasonable explanation for apparent errors - better to know facts that will kill a particular claim or create conflict in testimony before filing motion.

E. Counsel may be unable or unwilling to provide a reasonable explanation for apparent errors - can be used in motion to support allegation of deficient

performance and to rebut any newly conceived "reasons" attorney may claim at hearing

F. If prior counsel refuses to speak with you, or refuses to provide rational reason for challenged acts or omissions, you will need to include facts regarding your efforts and prior counsel's responses in the motion to explain why you do not have the attorney's explanation and argue that court should assume that alleged errors did not result from reasonable trial strategy because rational prior counsel would have provided reasonable explanation if one existed.

G. Circuit court record itself may provide prior counsel's rationale for a particular act or omission.

IV. *The Devil is in the Details–Facts, facts, and more facts.*

A. Plan for the possibility you will not get an evidentiary hearing, even if you should.

B. When a postconviction motion alleges sufficient material facts that, if true, the defendant would be entitled to relief, a circuit court must hold an evidentiary hearing. *State v. Love*, 2005 WI 116, 284 Wis.2d 111, 123, 700 N.W.2d 62. Meeting that standard requires that the motion alleges, within itself, "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Id*., ¶27. *See also State v. Balliette*, 2011 WI 79, 336 Wis.2d 358, 805 N.W.2d 334.

1. "[A] postconviction motion must contain an historical basis setting forth material facts that allows the reviewing court to meaningfully assess the defendant's claims. *Love*, 2005 WI 116, ¶27.

2. Consider reminding the court that it is not to assess the credibility of yet unseen witnesses. "The general rule is that credibility determinations are resolved by live testimony." *Id*., ¶42/

C. Most courts have some idea of the basic law. Whether you get a hearing is likely to turn on what facts you allege.

D. Know your story. If you do not tell a clear story, you may have difficulty getting a hearing.

1. Begin by listing your broader, essential facts.

    a. What did trial counsel do or fail to do? What do you know about why he or she did or did not do it?

    b. Why does what happened matter to your client? What would have been different if counsel had not failed?

2. Next list the facts that build up to these essential facts. What details support your essential, more conclusory facts?

    a. For example, how did trial counsel know about the witness he or she failed to contact? Was the name in a letter from the client or in a police report?

    b. For example, what would the missing witness have said specifically?

3. Short and simple sentences can help you see where you are going and where the holes are. Try putting your slant in your verbs, rather than in adjectives. If someone from the media could not pick up your motion and understand what is going on, you need to re-draft.

E. Think about the difference between fact and opinion in drafting your motion.

F. At this stage, do not worry about admissibility. "[A] movant need not demonstrate theories of admissibility for every factual assertion he or she seeks to introduce." *Love*, 2005 WI 116, ¶36. Whether information is admissible "is not a matter to be decided from the face of the motion papers." *Id*., ¶37.

G. Make sure you are telling a story.

H. Don't succumb to the urge to keep your options open. Take a stand.

I. *The Allen example*. In *State v. Allen*, 2004 WI 106, ¶24, 274 Wis.2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court approved the following example:

> The defendant alleges she was deprived effective assistance of counsel because her trial counsel failed to call as a witness, Bill Johnson, whose testimony would support the defendant's testimony that she was dining and going to the

movies with her boyfriend at 10:00 p.m. on the night of June 1, 2002, when Sally's Hair Salon was burglarized.

The defendant told trial counsel that her neighbor, Bill Johnson, entered a restaurant around 7:00 p.m. while the defendant and her boyfriend were dining, and that on the way to be seated, Mr. Johnson stopped at defendant's table and talked with the couple. The defendant told trial counsel that following dinner she and her boyfriend saw Mr. Johnson at the movie theater while they waited in line to buy tickets for a 9:15 p.m. movie. The defendant informed her trial counsel that three movies were scheduled to start between 9:00 p.m. and 9:15 p.m., the time during which the defendant and her boyfriend were in the theater lobby and saw Mr. Johnson. The defendant further alleges that she gave trial counsel her receipt from the restaurant.

This failure to call Mr. Johnson as a witness was deficient and prejudicial to the defendant as there is a reasonable probability that she would not have been convicted of stealing hair products from Sally's Hair Salon had Mr. Johnson testified.

1. The essential, more conclusory facts in this example (Note that you may not need all of these in your own case):

   a. Defendant was accused of stealing from Sally’s Hair Salon

   b. Trial counsel failed to call Bill Johnson as a witness at trial

   c. Bill Johnson’s testimony would have supported the defendant’s alibi

   d. Defendant informed trial counsel of the existence of Bill Johnson

   e. Defendant informed trial counsel of what Bill Johnson would say.

2. The “building block” facts:

   a. The theft from Sally’s Hair Salon occurred at 10:00 p.m. on June 1, 2002

   b. Johnson saw the defendant and her boyfriend at a restaurant at 7:00 p.m. that day and spoke with them.

c. Defendant later saw Johnson at the movie theater as they were waiting in line to buy tickets for a 9:15 movie

d. Defendant told trial counsel three movies were scheduled to start between 9:00 and 9:15

e. Defendant gave trial counsel a receipt from the restaurant

3. Other "building block" facts that could be included

a. The name of the restaurant

b. The name of the theater

c. The names of the movies that were playing and the movie that the defendant claimed to have seen

d. (if Bill Johnson spoke to an investigator) when Bill Johnson spoke to an investigator and any additional details he provided.

e. (if Bill Johnson spoke to an investigator) whether trial counsel tried to contact Johnson

f. How the defendant knows Bill Johnson

V. ***Support–Documents, Exhibits, Transcripts, Stipulations, and Sometimes Affidavits***

A. Supported facts are more persuasive than facts which you simply allege. When support of a fact is readily available, make sure the judge knows it. *E.g.*, testimony in a transcript, an exhibit from trial, a pleading in the record. Attach the relevant part to your motion (especially if it is short or not otherwise in the record) so the judge does not have to look for it.

1. Remember that, if you are denied a hearing, your motion attachment may be the only way that the documents are in the record!

B. There is no requirement that counsel attach affidavits or supporting documents which contain admissible information. Hearsay is acceptable for this purpose. *See State v.*

Howell, 2006 WI App 182, ¶45 n.14, 296 Wis.2d 380, 722 N.W.2d 567, *rev'd on other grounds*, 2007 WI 75, 301 Wis.2d 734 N.W.2d 48 (holding that allegations of motion, including counsel's hearsay allegations, were adequate to require an evidentiary hearing); *see also State v. Hampton*, 2002 WI App 293, 259 Wis.2d 455, 655 N.W.2d 131 (Ct. App. 2002) (reversing and remanding for hearing on post-conviction motion despite dissents comment that necessary factual allegations were contained on ly in counsel's hearsay affidavit), *aff'd* 2004 WI 107, 274 Wis.2d 379, 683 N.W.2d 14.

1. The one exception to this is in a *Knight* Petition challenging the effectiveness of appellate counsel. The Court of Appeals has held that such petitions must be "verified," *State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶¶10-11, 288 Wis.2d 707, 709 N.W.2d 515. Also, although long-settled Wisconsin law authorizes verifications in part based on information and belief, *e.g.*, *Morley v. Guild*, 13 Wis. 576 (1861), the Court of Appeals recently has begun rejecting hearsay verifications.

C. **A defendant need not submit a sworn affidavit to the court.** *State v. Brown***,** 2006 WI 100, ¶62, 293 Wis.2d 594, 716 N.W.2d 906; *see also State v. Basley***,** 2006 WI App 253, ¶10, n.5, 298 Wis.2d 232, 726 N.W.2d 671("As we noted in *Howell*, the lack of an affidavit from Basley setting forth his assertions as averments does not render Basely's motion infirm.").

1. As a general rule, your defendant is in better shape if he needs to testify if you submit an affidavit that indicates, based upon your interactions with him, what you anticipate that he will say. (In other words, you may want to submit an "offer of proof.")

2. Again, *Santana* requires verification of *Knight* Petitions, and recent unpublished orders suggest that the Court of Appeals will reject "information and belief" verifications.

D. Make sure that your motion explains how your supporting documents matter or demonstrate what really happened. Do not just attach documents and expect the court to fill in for you.

V. The Easy Part–Make Sure Your Motion Explicitly Requests an Evidentiary Hearing and Complies with Any Local Rules.

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