

SUPERVISORY WRITS IN STATE CRIMINAL CASES

ROBERT R. HENAK
Henak Law Office, S.C.
316 N. Milwaukee St., #535
Milwaukee, WI 53202
414-283-9300
henaklaw@sbcglobal.net

- I. For Authority and General Standards for Supervisory Writs in Wisconsin's appellate courts:
 - A. Colleen Ball's outline
 - B. Wis. Const. Art. VII, §5(3)
 - C. Wis. Stat. § 752.01
 - C. Wis. Stat. (Rule) 809.51
 - D. Heffernan, et al., *Appellate Practice and Procedure in Wisconsin*

- II. Common Law Habeas Corpus
 - A. Habeas Petition in Court of Appeals
 - 1. Used to challenge ineffectiveness of appellate counsel when alleged errors or omissions took place in Court of Appeals
 - a. failure to raise or to properly brief issue preserved in circuit court. *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992). *Compare State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App.1996) (distinguishing between claimed ineffectiveness of appellate counsel, that must be raised in the Court of Appeals under *Knight*, and claimed ineffectiveness of post-conviction counsel, that must be raised in the circuit court under Wis. Stat. §974.06)
 - b. failure to file appeal or No Merit brief, *State ex rel. Santana v. Endicott*, 2006 WI App 13, 288 Wis.2d 707, 709 N.W.2d 515; *State ex rel. Smalley v. Morgan*, 211 Wis.2d 795, 565 N.W.2d 805 (Ct. App. 1997)
 - c. where request for extension of time for pursuing direct appeal or related deadlines under Wis. Stat. (Rule) 809.30(2) is error of counsel, proper procedure is habeas in Court of Appeals

under *Knight* rather than Motion to Extend time under Wis. Stat. (Rule) 809.82(2). *State v. Evans*, 2004 WI 84, 273 Wis.2d 192, 682 N.W.2d 784

2. Habeas is an “equitable remedy.” *E.g.*, *Evans*, ¶¶40, 54; *see Knight*, 168 Wis.2d 519-21. Does this mean habeas relief may be based on other than constitutional ineffectiveness grounds????
3. Habeas remedies
 - a. “[h]abeas corpus is an equitable doctrine that would allow the court of appeals to tailor a remedy for the specific facts of each case.” *Evans*, ¶¶40, 54; *see Knight*, 168 Wis.2d 519-21
 - b. If errors resulted in denial of an appeal, remedy is a new appeal.
 - c. If errors resulted in the failure to raise or adequately argue a specific issue on the appeal, remedy is whatever remedy would have been appropriate had that issue been properly raised (i.e., new trial, resentencing, etc.)

B. Habeas Petition in Supreme Court

1. Used to challenge errors in Supreme Court and ineffectiveness of appellate counsel when alleged errors or omissions took place in Supreme Court, e.g., failure to file timely petition for review. *See generally State ex rel. Nichols v. Litscher*, 2001 WI 119, 247 Wis.2d 1013, 635 N.W.2d 292; *Schmelzer v. Murphy*, 201 Wis.2d 246, 548 N.W.2d 45 (1996). Likely also would cover other attorney errors in Supreme Court, such as failure to raise or to properly brief issue preserved below, failure to file brief, etc.
2. Also appropriate where Court of Appeals inadvertently mailed decision to defendant's former counsel, so that defendant did not learn of affirmance until after period to petition for review in Supreme Court had expired. *State ex Rel. Jose Dejesus Fuentes, V. Wisconsin Court of Appeals, District IV*, 225 Wis.2d 446, 593 N.W.2d 48 (1999).

C. Habeas Procedure

1. *See generally* Wis. Stat. (Rule) 809.51

2. Considered a new action, not continuation of previous action.
3. File petition in applicable court. A supporting brief may also be filed, but generally results in unnecessary duplication.
4. Combined length of petition and brief:
 - a. **00 00000 00 00000000000 0000 0000 0000000
00000000**
 - b. 8,000 words if proportional serif font used (e.g., Times New Roman)
 - c. Statement must be attached identifying whether the petition is produced with a monospaced font or with a proportional serif font. If proportional serif font used, must set forth word count. Wis. Stat. (Rule) 809.51(4).
 - d. Identification of Parties:
 - i. Petitioner: “State ex rel. Party Name”
 - ii. Respondent: Warden (if petitioner incarcerated) or Secretary of Department of Corrections (if petitioner on supervision)
 - e. Contents of petition:
 - i. Statutory requirements, Wis. Stat. (Rule) 809.51(1)(a)-(d). The petition shall contain:
 - (a) A statement of the issues presented by the controversy;
 - (b) A statement of the facts necessary to an understanding of the issues (and “identify[ing] precisely what counsel did or failed to do,” *Santana*, ¶9);
 - (c) The relief sought; and
 - (d) The reasons why the court should take jurisdiction.
 - ii. Address fully both the legal arguments supporting your ineffectiveness claim and those regarding any possible defenses to relief, such as waiver or laches. *See*

Santana, ¶9.

f. Dicta in *Santana*, ¶10 states that the requirements of *statutory* habeas corpus contained in Wis. Stat. §782.04 also apply to *common law* habeas corpus proceedings under *Knight*. The issue was not briefed in *Santana* and, for the reasons stated in my attached letter to the Publications Committee, *Santana's dicta* is erroneous.

i. The requirements of §782.02:

Such petition **must be verified** and must state in substance:

(1) That the person in whose behalf the writ is applied for is restrained of personal liberty, the person by whom imprisoned and the place where, naming both parties, if their names are known, or describing them if they are not.

(2) That such person is not imprisoned by virtue of any judgment, order or execution specified in § 782.02.

(3) The cause or pretense of such imprisonment according to the best of petitioner's knowledge and belief.

(4) If the imprisonment is by virtue of any order or process a copy thereof must be annexed, or it must be averred that, by reason of such prisoner being removed or concealed a demand of such copy could not be made or that such demand was made and a fee of \$1 therefor tendered to the person having such prisoner in custody, and that such copy was refused.

(5) In what the illegality of the imprisonment consists.

ii. The requirements of §782.02(1), (3), and (5) make sense and presumably already would fall within the requirements of Rule 809.51.

iii. The requirement that the petition allege that the person is not imprisoned by a judgment specified in §782.02,

however, is impossible in a habeas petition alleging ineffectiveness of appellate counsel. Section 782.02 provides that “[n]o person shall be entitled to prosecute such a writ who shall have been committed or detained by the virtue of the final judgment or order of any competent tribunal of . . . criminal jurisdiction.”

- iv. *Santana’s* requirement of verification (i.e., swearing to the contents of the petition under oath and before a notary) is redundant to the requirements in Wis. Stat. §§802.05(1) (requiring that all pleadings be signed) and (2) (the signing and presentation of a pleading constitutes a certification, subject to sanction, that the pleading is factually accurate, warranted by existing law or nonfrivolous argument, and not presented for an improper purpose)
 - v. Although erroneous and *dicta*, it is **highly recommended** that counsel nonetheless comply with the additional requirements imposed by *Santana* to the extent possible pending reversal by the Supreme Court.
- 5. Number of copies:
 - a. Court of Appeals: original and four copies
 - b. Supreme Court: original and eight copies
 - 6. Filing fee: currently \$195
 - 7. Court may refer case to referee or circuit court where fact-finding required. *Evans*, ¶¶40, 52; *Knight*, 168 Wis.2d 521
 - 8. Limitations on Habeas Relief
 - a. “[A] defendant may file only one habeas petition under *Knight* unless that defendant can adequately explain why all issues relating to the representation of appellate counsel were not raised in the first petition.” *State ex rel. Schmidt v. Cooke*, 180 Wis.2d 187, 190, 509 N.W.2d 96 (Ct. App.1993); see *Evans*, ¶35.
 - b. No statutory deadline, but laches applies. *State ex rel.*

Coleman v. McCaughtry, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900; *Evans*, ¶49.

- i. Application of laches to ineffectiveness claim is questionable on constitutional grounds. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991) (obligation is on state to insure that defendant's right to counsel, so that any delay resulting from the denial of that right is attributable to the state)

III. Other Supervisory Writs

Supervisory writs may be used in criminal cases, just as in civil cases, to either order a lower court to perform a mandatory duty (mandamus) or to prohibit a lower court from taking action it has no legal authority to perform (prohibition). Thus, a supervisory writ may be appropriate to require the Circuit Court or the Court of Appeals to issue a decision following an unreasonable delay (although such a writ cannot require a particular result absent a mandatory duty to reach that result).

The Court of Appeals, moreover, has jurisdiction to issue supervisory writs over a judge presiding over a "John Doe" proceeding, even though the judge is not acting as a "court." *In re John Doe Proceeding*, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260