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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2010AP1391-CRNM

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFERY G. SUTTON,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Milwaukee County, the Honorable Dominic Amato Presiding

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

ARGUMENT

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief in support of Jeffery G. Sutton regarding the appropriate procedure and remedies when a post-conviction motion is denied due to a curable pleading defect.

The record here reflects a string of mistakes by virtually everyone involved. The circuit court failed to adequately advise the defendant regarding waiver of the right to a jury. Sutton's appointed post-conviction counsel failed to allege a critical fact, resulting in summary denial of Sutton's post-conviction motion. And the Court of Appeals stubbornly refused to remand the case to allow counsel to cure the technical defect and later responded to counsel's no-merit report by allowing her to withdraw despite acknowledging that Sutton had at least one non-frivolous basis for challenging his conviction.

This Court should act to prevent, or at least minimize, the occurrence of similar injustices in the future (and the financial, judicial, and emotional costs resulting from them), both by firmly rejecting the

Court of Appeals' approach in this case and by providing clear guidance regarding the summary denial of post-conviction motions.

I.

THE COURT OF APPEALS VIOLATED THE NO-MERIT PROCEDURE

The central issue as presented to this Court is an easy one. The Court of Appeals erred as a matter of law by refusing to reject the no-merit report and to reinstate Sutton's direct appeal rights so he could cure the technical pleading defect in his post-conviction motion. Especially when combined with that court's unreasonable refusal to remand so Sutton could cure the pleading defect, its actions reflect an unreasonable "gotcha" mentality rather than reasoned decision-making.

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence, Wis. Const. art. I, §21, 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. ***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 no-merit procedure is intended to protect the defendant's right to the assistance of counsel in presenting challenges to the conviction or sentence. ***Anders v. California***, 386 U.S. 738, 741-42 (1967). Neither the language nor the purpose of that procedure allows the Court of Appeals to pick and choose which non-frivolous challenges are worthy of pursuit on the direct appeal with the assistance of counsel and which are not.

"[T]he function of the [no-merit] brief is to enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court." ***McCoy v. Court of Appeals of Wisconsin, Dist. I***, 486 U.S. 429, 439 n.13 (1988). The ***Anders*** Court explained the obligations of the court

as follows once the no-merit report and any response are filed:

> [T]he court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, *if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.*

Anders, 386 U.S. at 744 (emphasis added); *see* ***State v. Allen***, 2010 WI 89, ¶18, 328 Wis.2d 1, 786 N.W.2d 124.

Having found a legal issue that is at least arguable on its merits, such that the case was not "wholly frivolous," the Court of Appeals' obligation was clear: "it must, prior to decision, afford the indigent the assistance of counsel" to raise the claim. ***Anders***, 386 U.S. at 744. *See also* ***Allen***, ¶21 (noting obligation of court to determine "'whether there are *any* potential appellate issues of arguable merit'" (quoting ***State v. Fortier***, 2006 WI App 11, ¶21, 289 Wis.2d 179, 709 N.W.2d 893) (emphasis added)).

By failing to reject the no-merit report and to remand for further proceedings on the non-frivolous issue, the Court of Appeals violated its obligations under ***Anders***. That court's suggestion that Sutton should file a *separate* motion alleging ineffectiveness of counsel rather than remand to raise it on Sutton's direct appeal also violates this state's policy against unnecessary, piecemeal litigation reflected in ***State v. Escalona-Naranjo***, 185 Wis.2d 169, 517 N.W.2d 157 (1994), and ***State ex rel. A.E. v. Green Lake County Circuit Court***, 94 Wis.2d 98, 101, 288 N.W.2d 125 (1980).

II.

GUIDANCE IS NEEDED REGARDING FAIR, EFFICIENT, AND EFFECTIVE PROCEDURES TO CURE TECHNICAL AND EASILY CURED PLEADING DEFECTS IN POST-CONVICTION MOTIONS

The real question here is not whether Sutton is entitled to reversal and remand for the opportunity to cure the technical pleading defect. He clearly is. Section I, *supra*. Rather, the question of statewide importance is how to prevent similar injustices in future post-conviction proceedings of all kinds. In other words, what remedy should be available and what procedures followed where, as here, a defendant's post-conviction motion is summarily denied based on pleading defects that could be remedied if the defendant were provided an opportunity to do so?

Technical pleading defects do not necessarily reflect the absence of a valid underlying claim. ***Taylor v. Matteson***, 86 Wis. 113, 56 N.W. 829, 831-32 (1893); *see* ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, ¶36, 263 Wis.2d 83, 664 N.W.2d 596. There is no dispute here, for instance, that the defect requiring denial of Sutton's post-conviction motion was easily curable. Post-conviction counsel knew that Sutton claimed unawareness of his right to a unanimous verdict at the time of the jury waiver, but she neglected to specifically allege that unawareness in the motion.

The dismissal of civil claims or criminal charges for pleading defects does not bar the filing of a new complaint later. *See* Wis. Stat. §971.31(6) (authorizing holding of criminal defendant pending filing of substitute for dismissed complaint); ***Taylor***, *supra* (dismissal of civil complaint for failure to state claim does not bar later complaint properly alleging claim). A criminal defendant denied relief based on perceived pleading defects, however, cannot merely file a new motion sometime later. *See* Wis. Stat. §974.06(4) (successive post-conviction motions barred absent "sufficient reason").

The question then is what to do when a post-conviction motion is denied due to a curable pleading defect. Do we follow the Court of Appeals' lead in this case, essentially turning pleading in post-conviction matters into a game of judicial "gotcha?" Or, do we follow basic principles of fairness and due process and provide a fair, efficient, and effective means for curing the perceived defect if possible?

The answer is obvious. The Court's function is "'to do justice between the parties,'" ***Larry v. Harris***, 2008 WI 81, ¶23, 311 Wis.2d 326, 752 N.W.2d 279 (citation omitted), not to grant one party a windfall based on a curable technicality. The concept of harmless error is not a one-way street. *See also* ***Wisconsin Pub. Serv. Corp. v. Krist***, 104 Wis.2d 381, 395, 311 N.W.2d 624 (1981) ("[T]he law prefers, whenever reasonably possible, to afford litigants their day in court").

The question of what procedure should be followed in cases such as this likewise is apparent by reference to established, though sometimes overlooked, legal principles. This Court's reinvigoration and enforcement of the following established principles would help.

First, although apparently not an issue in Sutton's case, the Court should remind the lower courts of the requirement that post-conviction motions be construed liberally in favor of the defendant. ***Zuehl v. State***, 69 Wis.2d 355, 359, 230 N.W.2d 673 (1975). The motion must raise sufficient facts, which, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996). However, in evaluating the motion, the courts should give it the same common-sense reading given to criminal complaints. *See* ***State v. Adams***, 152 Wis.2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989) (criminal complaint "to be evaluated in a common sense rather than a hypertechnical manner"). That is, the factual allegations of the motion and all reasonable inferences must be read most favorably to the defendant. *Cf.* ***State v. Grimm***, 2006 WI App 242, ¶15, 258 Wis.2d 166, 653 N.W.2d 284 (sufficiency of criminal complaint based on reasonable inferences favoring state, not contrary reasonable inferences).

The requirement of a liberal, rather than crabbed, reading of the

post-conviction motion is especially important when the motion is *pro se*. ***State v. Love***, 2005 WI 116, ¶29 n.10, 284 Wis.2d 111, 700 N.W.2d 62 (*pro se* post-conviction motions construed liberally); ***bin-Rilla v. Israel***, 113 Wis.2d 514, 520-21, 335 N.W.2d 384 (1983). The courts should be looking to protect the defendant's rights, not for hyper-technical means to deny them.

Also, although permissible under certain circumstances, *see* ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, 263 Wis.2d 83, 664 N.W.2d 596, *sua sponte* dismissal may deprive parties of their due process right to be heard "'at a meaningful time and in a meaningful manner,'" ***Goldberg v. Kelly***, 397 U.S. 254, 267 (1970) (citations omitted); ***Schatz***, *supra*; *cf.* ***Lankford v. Idaho***, 500 U.S. 110, 120 (1991) (invalidating a death penalty on due process grounds because "the silent judge was the only person in the courtroom who knew that the real issue that they [counsel] should have been debating was the choice between life and death"). This Court accordingly has "urge[d] the courts to exercise caution when determining an issue *sua sponte* without the assistance of supplemental briefs and to ask for briefs unless the matter is quite clear." ***Bartus v. DH & SS***, 176 Wis.2d 1063, 1073, 501 N.W.2d 419, 424 (1993).

Second, when the court deems the post-conviction motion facially insufficient, even when read liberally, it must allow a timely amendment of the pleading to cure the perceived defect. The statutes direct that leave to amend one's pleadings "shall be freely given at any stage of the action when justice so requires." Wis. Stat. §802.09(1).[1] Such amendment thus should be allowed absent prejudice to the opposing party. ***Wiegel v. Sentry Indemnity Company***, 94 Wis.2d 172, 184, 287 N.W.2d 796 (1980). Accordingly,

> refusal to allow an amendment would be an erroneous

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[1] With limited exceptions, "the rules of . . . practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction." Wis. Stat. §972.11(1). Also, although "part of the original criminal action," Wis. Stat. §974.06(2), proceedings on a motion under Wis. Stat. §974.06 "shall be considered civil in nature," Wis. Stat. §974.06(6).

> exercise of discretion: (1) when justice requires an amendment of the pleadings, *or* (2) when it appears that an omission is material and that such omission or failure is through mistake, inadvertence, surprise, or excusable neglect.

Schatz, 2003 WI 80, ¶34 (citing ***Wiegel***, 94 Wis.2d at 184-85) (Emphasis in original). *See also* ***Foman v. Davis***, 371 U.S. 178, 182 (1962) (applying parallel requirements of Fed. R. Civ. P. 15(a)):

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Notice and an opportunity to amend the post-conviction motion can be accomplished in a number of different ways. If the court ordered briefing on the motion and the state identified an alleged pleading defect, the defendant is on notice of it and is in a position to proffer an amended motion to cure the defect.

If the court seeks to deny the motion *sua sponte*, it should provide notice to the defendant, specifying the perceived defect and indicating that it will enter an order denying the motion unless the defendant cures the defect with an amended pleading by a specified date. *Cf.* ***Jackson v. LIRC***, 2006 WI App 97, ¶30, 293 Wis.2d 332, 715 N.W.2d 654 (statutorily imposed requirement). Alternatively, the court could include in its order denying the motion language directing that it will reconsider and vacate the denial if the defendant cures the defect by a specified date.

Notice of the opportunity to cure the pleading defect by filing an amended motion should be required whenever denial is based on the alleged insufficiency of the pleadings rather than on the merits of the claim. Such notice is necessary to insure that the defendant's right to cure and to his day in court are not lost through ignorance, especially when the defendant is proceeding without counsel.

In ***Castro v. United States***, 540 U.S. 375, 382-84 (2003), for

instance, the Supreme Court mandated prior notice to a *pro se* litigant and an opportunity to object, amend, or withdraw a post-conviction motion before the district court recharacterizes it as a federal habeas petition under 28 U.S.C. §2255. The Court did so pursuant to its supervisory powers to insure that the *pro se* litigant is warned that, as a consequence of the recharacterization, he or she may lose the right to pursue any future challenges to the conviction. Such warnings and an opportunity to amend, if appropriate, thus protect the defendant's right to challenge his conviction from being lost through ignorance.

Even if the court's order does not expressly provide for an opportunity to cure the perceived pleading defect, the defendant can cure it by filing an amended pleading and timely request for reconsideration. *See, e.g.*, ***Metro. Greyhound Mgmt. Corp v. Wis. Racing Bd.***, 157 Wis.2d 678, 698, 460 N.W.2d 802 (Ct. App. 1990) (noting importance of reconsideration in potentially obviating the necessity of an appeal, sparing the litigants unnecessary expense, and promoting judicial economy).

Third, in contrast to the Court of Appeals actions to prevent Sutton from curing the pleading defect in this case, that court should be directed to use its discretionary powers to *encourage* the curing of such defects to permit resolution of the defendant's claims on their merits. ***Krist***, 104 Wis.2d at 395 ("[T]he law prefers, whenever reasonably possible, to afford litigants their day in court").

For instance, the Court of Appeals has discretion to extend deadlines under Wis. Stat. (Rules) 809.30 and 809.32 for the various steps of a direct appeal or no-merit appeal. Wis. Stat. (Rules) 809.14 & 809.82(2). *E.g.*, ***State v. Evans***, 2004 WI 84, ¶28, 273 Wis.2d 192, 682 N.W.2d 784.[2] Upon the defendant's motion, therefore, that court should extend the time for decision by the circuit court or for filing the notice of appeal to facilitate reconsideration and curing the perceived defect with an amended pleading.

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[2] This Court abrogated a different holding in ***Evans*** on other grounds in ***Coleman v. McCaughtry***, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900.

Even after the notice of appeal is filed, thereby depriving the circuit court of the power to grant amendment of the motion, Wis. Stat. §§808.075(2) & (3), the Court of Appeals retains the authority to facilitate the correction of perceived pleading defects by granting a proper motion to remand for that purpose under Wis. Stat. §§808.075(5) & (6).[3] *See* ***State v. Redmond***, 203 Wis.2d 13, 21, 552 N.W.2d 115 (Ct. App. 1996) (Once defendant chooses to dismiss appointed counsel and proceed *pro se* on appeal, "if he wants to assert additional grounds for relief that have not been addressed through the original postconviction motion, he can petition this court to remand to the trial court for consideration of those specific issues" (citing §808.075(5)). *See also* ***State v. Luebeck***, 2006 WI App 87, ¶6 n.2, 292 Wis.2d 748, 715 N.W.2d 639 (noting prior remand at state's request under §808.075(5) to grant state opportunity to provide additional evidence in response to suppression motion).

Consistent with the legal preference for affording litigants their day in court, ***Krist***, 104 Wis.2d at 395, and the statutory recognition that they should be freely allowed to cure pleading defects to insure that result, Wis. Stat. §802.09(1), the same standards for review of circuit orders denying amendment of pleadings should apply to appellate actions having the same effect. Thus, because the Court of Appeals' orders denying remand acted to prevent the amendment of Sutton's motion to cure the technical pleading defect, that court erroneously exercised its discretion. The pleading omission was material and resulted from mistake or inadvertence, such that allowing amendment of the pleading was required as a matter of justice. *See* ***Schatz***, 2003 WI 80, ¶34 (denial of amendment erroneous exercise of discretion under these circumstances); ***Wiegel***, 94 Wis.2d at 184-85 (same).

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[3] Although Wis. Stat. §808.075(1) provides that the circuit court may grant relief under Wis. Stat. §806.07 (relief from judgment or order) despite the pending appeal, relief under that provision may not be available to criminal defendants. ***State v. Henley***, 2010 WI 97, ¶¶67-71, 328 Wis.2d 544, 787 N.W.2d 350 (§806.07 does not provide procedure for challenging criminal judgment).

CONCLUSION

For these reasons, WACDL respectfully asks that the Court reverse the Court of Appeals' decision and remand this matter to the circuit court with leave to amend Sutton's motion to correct the pleading defect.

WACDL further asks that the Court reinvigorate the established legal standards noted here regarding the liberal reading of post-conviction motions, the opportunity and notice of such opportunity to amend post-conviction pleadings to cure perceived defects, and the Court of Appeals' obligation to encourage rather than discourage litigants receiving their day in court on the merits of their claims.

Dated at Milwaukee, Wisconsin, December 7, 2011.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Wis. Stat. (Rule) 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 3,000 words.

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Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

____

Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 7th day of December, 2011, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robert R. Henak

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