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STATE OF WISCONSIN,

Plaintiff-Respondent,

- vs -

MARTELL D. ROGERS,

Defendant-Appellant-Petitioner.

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# P E T I T I O N  F O R  R E V I E W

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T A B L E O F C O N T E N T S

# TABLE OF AUTHORITIES

S T A T E O F W I S C O N S I N

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# P E T I T I O N F O R R E V I E W

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¶1 Petitioner, Martell D. Rogers, pro se and hereby petitions the Wisconsin Supreme Court for review of the above-captioned adverse decisions of the Wisconsin Court of Appeals, District II, dated April 8, 2015 and May 5, 2015, pursuant to WIS. STAT. §§ 808.10 and (Rule) 809.62 (1m) (a) (b).

## I S S U E S  P R E S E N T E D  F O R  R E V I E W

¶2 The issues presented for review asks whether adverse decisions of the Court of Appeals:

I. Erroneously dertermined that postconviction counsel did not render ineffective assistance by failing to file a postconviction motion in the circuit court after being instructed to do so.

II. Incorrectly concluded that Rogers filed a pro se petition for a writ of habeas corpus alleging ineffective assistance of postconviction counsel under State v. Knight, 168 Wis. 2d 509 (1992).

## C R I T E R I A  F O R  R E V I E W

¶3 Review should be granted because the Court of Appeals' adverse decisions presents real and significant questions of State and Federal Constitutional law, see WIS. STAT. § (Rule) 809.62 (1r) (a); demonstrating a need for the Supreme Court to consider establishing, implementing and changing policy within its authority, id. at (b); and, a decision by the Court will help develop, clarify and harmonize the law, id. at (c). These adverse decisions are both: in conflict with controlling opinions of the United States and Wisconsin Supreme Courts and other Court of Appeals' decisions, id. at (d); and, in accord with opinions of these same Courts but due to the passage of time and changing jurisprudence, these opinions are ripe for re-examination, id. at (e).

## STATEMENT OF FACTS AND OF THE CASE

### A. Nature of the case

¶4 In a 12-count criminal complaint, Rogers was accused of committing multiple armed robberies and other related offenses, as a party to a crime (R. 1). The complaint alleged Rogers, Rachel Ritacco and Gerald Halcsik went on a crime spree involving unrelated complainants, at various times, dates and locations throughout the County of Racine, between June 27, 2006 and July 31, 2006 (id).

### B. Procedural background

¶5 At preliminary hearing, Rogers was bound over for trial on counts 1 - 3, while a continuance on counts 4 - 12 were ordered, upon request of Assistant District Attorney, Jennifer Tanck-Adams (66:1-6). Rogers subsequently agreed to enter guilty pleas to counts 1 - 3 (67), but when Tanck-Adams withdrew the State from the agreement (69), Rogers requested that a preliminary hearing be held on counts 4 - 12 (70).

¶6 After preliminary proceedings reconvened, Rogers was bound over for trial on counts 1 - 5 and 7 - 12 (72:26-27). Count 6 -- involving the alleged armed robbery of Richard Therkelsen -- was dismissed when Tanck-Adams notified the circuit court that

the State "could [not] prove up" that charge (72:18-25).

¶7 After an amended information was filed excluding count 6 (3), the State Public Defender appointed successor attorney, Douglas I. Henderson (22), and Rogers again entered guilty pleas on counts 1 - 3 -- this time without any plea agreement (85:4-7). On September 1, 2010, a 2nd amended criminal complaint and information was filed recharging the dismissed count 6 (4; 5). Attorney Henderson requested to file a formal objection (86:2).

¶8 The formal objection alleged that the amended information violated WIS. STAT. § 971.29 and Whitaker v. State, 83 Wis. 2d 368 (1978) (32). The circuit court however allowed the amendment (84:24) and a 3rd amended information preceded jury trial (6; 88:3; 89). A jury returned guilty verdicts on the remaining counts (91:96-98) and the trial court sentenced Rogers to a total of 42 years -- with 25 years of initial confinement and 17 years of extended supervision (92:36-44).

¶9 Notice of intent to pursue postconviction relief was filed (46) and the State Public Defender appointed attorney Benbow Cheesman to represent Rogers on direct review, see APPENDIX 118. Rogers directed attorney Cheesman to file postconviction claims in the circuit court (59:62-68), but counsel instead filed a

a notice of appeal "rather than try to argue ineffective assistance of trial counsel . . . [because] All the trial judge would have to do is say that he'd have denied the motion anyway, so it makes no difference." (59:70, 72) (response from attorney Cheesman).

¶10 On appeal counsel raised two frivolous claims and the Court of Appeals affirmed the judgment of conviction, see State v. Rogers I, 2012 Wisc. App. LEXIS 789 (Appeal Case No. 2011AP002428CR). This Court denied review, 2013 Wisc. LEXIS 69, and on January 1, 2014, Rogers pro se moved to vacate the sentence under WIS. STAT. § 974.06 (59) on grounds that attorney Benbow rendered ineffective assistance of counsel by failing to file a postconviction motion in the circuit court after being instructed to do so (59:7-10). A teleconference hearing was held (93) and the circuit court denied the motion based on State v. Escalona-Naranjo, 185 Wis. 2d 168 (1994) (93:19). Rogers appealed, State v. Rogers II, 2015 Wisc. App. LEXIS 268 (Appeal Case No. 2014AP000850CR).

¶11 In this appeal, Rogers argued that his WIS. STAT. § 974.06 motion to vacate sentence is not barred by Escalona-Naranjo, see Defendant-Appellant "Brief", p. 9. The Court of Appeals noted 'Rogers allege[d] a

"sufficient reason" . . . , [and] assume[d] without deciding that he did not have the ability to raise argument different than those made by his postconviction counsel.' Rogers II, 2015 Wisc. App. LEXIS 268, ¶5. Thereupon, the Court of Appeals elected to "proceed to the merits to determine whether Rogers received ineffective assistance of postconviction counsel." Id.

**¶12** While the appeal was pending a decision, Rogers pro se petitioned the Court of Appeals for a writ of habeas corpus pursuant to State v. Knight, 168 Wis. 2d 509 (1992), APPENDIX 119-32. In the petition, Rogers alleged that attorney Benbow -- as appellate counsel -- rendered ineffective assistance by failing "to raise claim that trial on charge dismissed for a lack of probable cause violated due process . . . " APPENDIX 125. The petition was held in abeyance pending the decision in Rogers II, APPENDIX 133.

**¶13** In its April 8, 2015 decision, the Court of Appeals determined that Rogers' postconviction attorney did not render ineffective assistance of counsel, APPENDIX 110-17. Rogers requested reconsideration, APPENDIX 134-37, and on May 5, 2015, reconsideration and the Rogers' petition for a writ of habeas corpus was denied, APPENDICES 138; 139-41, respectively. A petition for review to this Court follows.

## A R G U M E N T

**I. The adverse decision of the Court of Appeals erroneously determined that postconviction counsel did not render ineffective assistance by failing to file a postconviction motion in the circuit court after being instructed to do so.**

¶15 The Court of Appeals' adverse decision that postconviction counsel was not ineffective rely on four independently erroneous conclusions, any one of which is sufficient to necessitate Review and an Order granting Rogers postconviction relief:

**First,** postconviction counsel did not make a strategic decision only to litigate certain issues and not others. Counsel unilaterally decided not to raise **any** postconviction claims in the circuit court.

**Second,** postconviction counsel was obligated to assert trial counsel's ineffectiveness for failure to object to trial on an information of the District Attorney.

**Third,** the failure of postconviction counsel to raise ineffective assistance of trial counsel for failure to object or properly object to trial on a refiled charge, without any preliminary finding of probable cause, is prejudicial. The District Attorney conceded there was not evidence to show probable cause on the charge.

**Finally,** evidence of judicial misconduct was so

clear as to require postconviction counsel to assert ineffective assistance of trial counsel for failure to object thereto.

**A. Postconviction counsel did not make a strategic decision only to litigate certain issues and not others. Counsel unilaterally decided not to raise any post-conviction claims in the circuit court.**

¶16 The entire premise for the Court of Appeals' adverse decision that postconviction counsel did not render ineffective assistance is based on a misapplication of the law. The adverse decision determined that "Rogers' postconviction counsel made a strategic decision only to litigate certain issues and not others." See APPENDIX 111. And, the decision held:

> Rogers did not show that his post-conviction counsel was ineffective under the **Strickland** standard for failing to raise any of these arguments, as none is [sic] "clearly stronger" than those he did raise.

APPENDIX 117, quoting State v. Starks, 349 Wis. 2d 247, ¶¶57, 60 (2013). But the problem with this is the fact that postconviction counsel ignored Rogers' request and decided not to litigate **any** issues in a motion before the circuit court.

¶17 Rogers, no doubt, argued "Postconviction counsel unilaterally decided not to file a postconviction motion . . . after being instruct to do so." See Brief, at 16 ("As proof of this assertion, Rogers proffered

attorney/client correspondence . . . "); see also APPENDIX 136. The Court of Appeals' application of the "clearly stronger" standard is, therefore, clearly misplaced.

¶18 The "clearly stronger" standard, promulgated as a pleading requirement in Starks, 349 Wis. 2d 274, ¶60 and extended in State v. Romero-Georgana, 2014 WI 83, ¶45, is founded upon principles established in Gray v. Greer, 800 F. 2d 664 (7th Cir. 1986) and, as adopted in Smith v. Robbins, 528 U.S. 259 (2000), see Starks, ¶¶57-58, 63-64. The requirement is triggered upon allegation(s) that "counsel was ineffective for failing to bring certain viable claims . . . " Romero-Georgana, ¶4; Starks, ¶60; but see Romero-Georgana, at ¶42 ("This allegation is different from an allegation that postconviction counsel did not comply with the defendant's requests or instructions after trial or that postconviction counsel failed to bring any claims at all").

¶19 Thus, where postconviction "counsel erroneously failed to file" any claims at all, "it will be easier for a defendant-appellant to satisfy the first part of the **Strickland** test, for it is only necessary for him to show that reasonably competent attorney would have found one nonfrivolous issue warranting a merits brief, rather

than showing that a particular nonfrivolous issue was clearly stronger than issues that counsel did present." Smith v. Robbins, 528 U.S. 259, 288. Here, the Court of Appeals did not find that any or all of Rogers' issues were frivolous. In fact, Rogers' issues were decided on their merit and on that basis, it must be found that Rogers has at least satisfied the first part of the **Strickland** test.

**B. Postconviction counsel was obligated to assert trial counsel's ineffectiveness for failure to object to trial on an information of the District Attorney.**

¶20 In demonstrating the second part of the **Strickland** test: prejudice, Rogers argued that trial counsel should have objected to a trial on an information of the District Attorney, because the Fifth Amendment to the United States Constitution explicitly prohibits trial on anything other than a presentment or indictment of Grand Jury, see Brief, at 22-25. The Court of Appeals' adverse decision, however, embraces the antiquated position that the Fifth Amendment's Grand Jury Clause -- unlike each of its other Clauses -- is "not by way of the Fourteenth Amendment applicable to the states and therefore d[oes] not limit the power of a state to proceed by information rather than by indictment." APPENDIX 113. Clearly, the issue Rogers put forth

does not regard whether the State could proceed by an information rather than an indictment, but whether the Constitution command -- that by whatever the document's title -- it be by return of a Grand Jury and not a District Attorney or any other entity, see Brief, at 22-25.

¶21 Citing legislative authority, the Court of Appeals concluded "the law does not require the State to use a grand jury to charge Rogers. So, his trial counsel was not ineffective for failing to raise this issue." APPENDIX 113, ¶7, citation omitted. But, it is without question that the "Constitution, and the Laws of the United States, . . . [are] the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . . " United States Constitution, Article VI, Clause 2. And, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Id., Amendment XIV.

¶22 Moreover, every attorney, prosecutor, and Judge in the State of Wisconsin are bound by oath or affirmation to support the Constitution of the

United States, see SCR 40.15; WIS. STAT. §19.10; Wisconsin Constitution, Article IV, §28; United States Constitution, Article VI, Clause 3. And, it is professional misconduct for any lawyer who violates the attorney's oath, see SCR 20:8.4 (g), upon which, having "engaged in insurrection or rebellion," may be removed from office, United States Constitution, Amendment XIV, §3.

¶23 So, because the United States Constitution is the supreme Law of the Land, commanding that no person shall be held to answer for an infamous (felony) crime, unless on a presentment of indictment of a Grand Jury, and other reason stated herewith, Rogers' postconviction counsel's failure to assert ineffective assistance of trial counsel for failure to object or properly object to trial on an information of the District Attorney is professional misconduct which prejudiced his case. The Fifth Amendment immunized Rogers from being tried on an information of the District Attorney, and is a "fundamental" and "substantial" guarantee, see Miller v. United States, 471 U.S. 130 (1985), "which cannot be taken away with or without court amendment." Stirone v. United States, 361 U.S. 212, 218-19 (1960). Therefore, had Rogers' trial attorney made an objection based upon these

constitutional principles, there exist a reasonable probability that the trial court would have fulfilled its oath to support Rogers' Fifth Amendment guarantee not to be held to answer for felonious crimes on an information of the District Attorney.

**C. The failure of postconviction counsel to raise ineffective assistance of trial counsel for failure to object or properly object to trial on a refiled charge, without any preliminary finding of probable cause, is prejudicial. The District Attorney conceded there was not evidence to show probable cause on the charge.**

¶24 Rogers argued postconviction counsel was ineffective for failure to challenge trial counsel's ineffectiveness for failing to object or properly object to trial on a charge that was dismissed for lack of probable cause and later recharged without a second preliminary examination, see Brief, at 26-29. The Court of Appeals determined postconviction counsel was not ineffective "because trial counsel's failure to object would not have prejudiced his defense . . . , the assistant district attorney . . . still had sufficient, unused evidence to charge Rogers." APPENDIX 114, ¶9, paraphrased.

¶25 The Court agreed with Rogers that when the District Attorney has new or unused evidence, a second complaint can be filed, and the circuit court must "hold a second preliminary examination." APPENDIX, id.,

citing WIS. STAT. § 970.04; State v. Brown, 96 Wis. 2d 258, 265-66 (1980). But in rendering its finding that the Assistant District Attorney **"still had sufficient, unused evidence** to charge Rogers[,]" the Court overlooked its own acknowledgement that "the assistant district attorney said **she did not have enough evidence** to show probable cause on this charge." APPENDIX 114, ¶¶8-9, emphasis added. And, if the assistant district attorney did have "sufficient, unused evidence to charge Rogers," nothing in the Court's decision, or arguments of Plaintiff-Respondent renders any reason justifying bypass of the statutory required procedure.

**¶26** Moreover, the circuit court record is devoid of proof that sufficient, unused evidence" was ever available prior to the start of trial. Plaintiff-Respondent argued that the trial testimony of Rachel "Ritacco and [Gerald] Halcsik" was proof of unused evidence it could have presented at a second preliminary hearing, see Response at 14. Yet, Halcsik's testimony as to the time the alleged robbery took place was so patently incredible and inconsistent, the State did not even attempt to present him at the first preliminary hearing (90:111-24). And, Ritacco was unwilling to provide potentially incriminating testimony up until the State agreed to give her "use immunity for the

purpose of her testimony" day three of Rogers' trial, see (72:1, 10-11; 90:48-50).

¶27 Thus, postconviction counsel's failure to raise this claim is manifest deficient performance because trial counsel's failure to object based on WIS. STAT. § 970.04 is "deficient as a matter of law," compare State v. Thiel, 264 Wis. 2d 571, ¶ 51 (2003). There is a reasonable probability that absent trial counsel's deficiency, a second preliminary examination would have been held with Halcsik's testimony patently unbelievable and the unavailability of Ritacco's incriminatory revelations.

¶28 Hence, postconviction counsel's manifest deficient performance was prejudicial because counsel waived initial postconviction review in the circuit court, in dereliction of Rogers' specific instructions to assert ineffective assistance of trial counsel, see ante ¶9. Therefore, it is indeed reasonably probable that absent postconviction counsel's objectively unprofessional performance, Rogers would have shown that trial counsel's performance was deficient -- as a matter of law -- in allowing an illegal trial on a charge for which probable cause had not been found, warranting a reversal on that conviction.

**D. Evidence of judicial misconduct was so clear as to require postconviction counsel to assert ineffective assistance of trial counsel for failure to object thereto.**

**¶29** Two grounds were argued showing judicial misconduct occurred at trial:

1. Vouching for a State witness' credibility in the presence of the jury; and

2. Allowing the State's knowing introduction of perjured testimony.

See Brief, at 30. The Court of Appeals held that there was "no evidence of judicial bias . . . " APPENDIX 116, ¶¶10-11. The circuit court record, however, clearly belie the Court's holding. For that reason, trial counsel's failure to object circumvented Rogers' Sixth Amendment right to a fair trial before an impartial tribunal and the effective of assistance of counsel and, postconviction counsel's failure to assert trial counsel's ineffectiveness deprived Rogers Due Process postconviction relief.

**1. Vouching for a State witness' credibility in the presence of the jury.**

**¶30** The Court of Appeals' adverse decision aptly acknowledges 'Rogers argues judicial bias arising from thr [trial Judge's] statement, "I'm sure he tells the truth in his answers."' APPENDIX 116, ¶10, footnote omitted. Yet, the decision could "not see any bias in the court's statement" because "[c]learly, looking at

it in context, the court wanted to reinforce in the child witness the need to tell the truth, . . . " APPENDIX , id. But even if that is so, the residual effect of the trial court's statement, in toto, is that Rogers' jury heard the Judge say he was sure that the witness "tells the truth in his answers."

¶31 In other words, "[t]he circuit court's commentary essentially constituted unsworn testimony against the defendant, and reached a [factual] conclusion that should otherwise rest solely within the province of the jury." State v. Jorgensen, 310 Wis. 2d 138, ¶36 (2008). The child witness was in fact also an alleged victim (7), accusing Rogers of being guilty of certain crimes (89:126-35). Thus, even the appearance of partially is indeed problematic. See State v. Gudgeon, 295 Wis. 2d 189, ¶26 (Ct. App. 2006).

¶32 So, the only context in which to resolve the matter must be, instead, based on what a reasonable person would conclude from hearing the trial Judge's statement, "not what a reasonable trial judge, a reasonable appellate judge, or even a reasonable legal practitioner would conclude." Gudgeon, id. The trial Judge used strong language, id. **"I'm sure** he tells the truth in his answers." "I'm sure" signified personal

knowledge and confidence by the court; that the jury could indeed believe the testimony of the witness. And, the point should not have been reached where it even appeared to the jury that the judge believes Rogers is guilty; "this impression, once conveyed, deprive[d]" Rogers the fair trial to which he was entitled. United States v. Filani, 74 F. 3d 378, 385 (2nd Cir. 1996); see Franklin v. McCaughtry, 398 F. 3d 955, 962 (7th Cir. 2005) ("The problem arises when the judge has prejudiced the facts . . . ").

**2. Allowing the State's knowing introduction of perjured testimony.**

¶33 Here, Rogers argued that the trial court's colloquy with Rachel Ritacco and the State -- moments prior to her testifying -- clearly shows the Judge, prosecutor, and trial attorney were aware or should have known that Ritacco's denial of receiving "any kind of consideration" for her trial testimony was false, see Brief, at 32; see also (90:82-83). Yet, the Court of Appeals determined Rogers wrongly equates the State's grant of use immunity to a reduction in charges." APPENDIX 116, ¶11. Rogers calculated no such equation.

¶34 What is evident, however, is that the Court of Appeals compounded the three direct examination questions the State asked Ritacco, into a solitary

question, to which she answered "no." See APPENDIX 116, ¶11 ("During the direct examination of the accomplice, the district attorney asked her if she had received any consideration for her testimony in the form of a reduction in sentence or charges"). But, the true composition of the direct examination occurred as follows:

THE STATE: Okay. Are you receiving any kind of consideration for testifying today?

RITACCO: No.

THE STATE: A reduction in sentence?

RITACCO: No.

THE STATE: Or reduction in charges?

RITACCO: No.

(90:82-83).

¶35 There can be no question Ritacco's denial response to the first question here is false. The circuit court record is indisputably clear. And no legal alchemy can transmute such wholly unequivocal testimony into a refutation of Rogers' specific recitation of this event, see Haynes v. Washington, 373 U.S. 503, 510 (1963). The Court of Appeals' adverse decision on this point is simply not a reasonable estimation of the facts.

¶36 That said, it is clear that trial counsel's failure to object is deficient because it was incumbent upon counsel to be prepared to put the State's case to the adversarial testing process, Strickland, 466 U.S. 668, 692-93. This was not the case since counsel failed to challenge the veracity of the State's key witness with clear and unequivocal evidence that the witness had in fact received use immunity in exchange for her testimony, and that she flat-out lied about it under oath. Thus counsel's deficient performance is here inexplicable and resulted in prejudice to Rogers' case.

¶37 Ritacco testified Rogers committed the armed robbery of Richard Therkelsen, within the time frame alleged by the State. Mr. Therkelsen did not identify Rogers as the perpetrator. Gerald Halcsik claimed Rogers committed the armed robbery so far outside the time frame alleged by the State, rendering his testimony on the matter patently unreliable. The credibility of Ritacco's testimony connecting Rogers to this crime was the only evidence with which the State had to rely.

¶38 Therefore, it was critical to Rogers's defense to expose to the jury the undeniable fact that Ritacco lied about not receiving the consideration of use immunity in exchange for her testimony. Exposure of this fact not only would have revealed that Ritacco did

have a reason to implicate Rogers, it would have also demonstrated she was willing to lie about it under oath and that the State was complicit in allowing the false testimony to go uncorrected. See Giglio v. United States, 405 U.S. 130 (1972) (failure to disclose promise of leniency violates due process); Napue v. Illinois, 360 U.S. 264, 269 (1959) (knowing use of perjured testimony violates due process); White v. Ragen, 324 U.S. 760 (1945); Mooney v. Holohan, 294 U.S. 103, 112 (1935); United States v. Thomas, 987 F. 2d 1298 (7th Cir. 1993). With the State and its key witness's credibility effectively in question, and no other reliable witness connecting Rogers to the Therkelsen armed robbery, there exist sufficient reasonable doubt as to Rogers' guilt.

**¶39** And with respect to the trial Judge's clear vouching for the credibility of the child witness in the presence of the jury, trial counsel's failure to object is equally inexplicable and prejudicial. First, the United States Supreme Court has made clear that both actual bias and the **appearance of bias** violate due process principles, see Bracy v. Gramley, 520 U.S. 899, 905 (1997); Aetna Life Insurance Company v. Lavoie, 475 U.S. 813 (1986); Ward v. Monroeville, 409 U.S. 57 (1972); In re Murchison, 349 U.S. 133 (1955); Tumey v.

Ohio, 273 U.S. 510 (1927). Second, where there has been such a structural error as judicial bias, prejudice is automatic. Franklin, 398 F. 3d 955, 961, citing Edwards v. Balisok, 520 U.S. 641, 647 (1997); Bracy v. Schomig, 286 F. 3d 406, 411 (7th Cir. 2002); Cartalino v. Washington, 122 F. 3d 8, 9-10 (7th Cir. 1997).

**¶40** At any rate, postconviction counsel's objectively deficient failure to challenge these or any other postconviction issues in the circuit court, despite Rogers' instruction that he do so, deprived Rogers of the entire process, to which prejudice is presumed. See Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000); compare State ex rel. Seibart v. Macht, 244 Wis. 2d 378, ¶19 (2001); State v. Quackenbush, 278 Wis. 2d 611, ¶¶15, 17 (Ct. App. 2005).

**II. The adverse decision of the Court of Appeals incorrectly concluded that Rogers filed a pro se petition for a writ of habeas corpus alleging ineffective assistance of postconviction counsel under State v. Knight Wis. 2d 509 (1992).**

**¶41** As noted above, see ante at **¶12**, Rogers **pro se** petitioned the Court of Appeals for a writ of habeas corpus. Because the appeal in State v. Rogers II, was before the Court and invovled a claim relative to the issue for habeas review, the petition was stayed pending a decision in the appeal, ante id., APPENDIX 133. After a decision had been issued, APPENDIX 110-17, the Court of Appeals denied Rogers **pro se** petition for a writ

of habeas corpus on the ground that "Rogers was not prejudiced by postconviction counsel's failure to raise" ineffective assistance of trial counsel, APPENDIX 140. The Court's denial is clearly and fundamentally inconsistent with law and fact.

¶42 **First,** Rogers claimed appellate counsel was ineffective for failure to raise -- on appeal -- claim that the trial on a refiled charge without probable cause violated due process, APPENDIX 120. Nowhere in the petition for a writ of habeas corpus does Rogers allege ineffective assistance of postconviction counsel. The confusion could very well come from the fact that postconviction and appellate counsel are one in the same, and that the claim in the petition is related in fact to a claim raised in Rogers II. So, it is clear that the first fundamental flaw involves a clear misinterpretation of the issued raised for habeas relief.

¶43 **Second,** if Rogers habeas claim was ineffective assistance of postconviction counsel, based on trial counsel's ineffectiveness, the Court of Appeals was not the proper forum to decide the issue, see State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 679 (Ct. App. 1996). A claim that trial counsel was ineffective not preserved by raising it in a postconviction motion in the circuit court is deemed waived, Rothering, at 678, citing

State v. Waites, 158 Wis. 2d 376, 392-93 (1990).

¶44 **Third,** because Rogers' petition for a writ of habeas corpus clearly alleged "appellate counsel" was ineffective and sought reinstatement of his direct appeal, see APPENDIX 119, 131, this Court has determined that "[a] habeas corpus proceeding will permit an appellate court determining a claim of ineffective assistance of appellate counsel to link the remedy closely to the scope of the constitutional violation." Knight, 168 Wis. 2d 509, 520. Thus, Rogers' petition correctly alleges ineffective assistance of appellate counsel in the proper forum, Knight, id.

¶45 **Finally,** the claim in Rogers' petition for a writ of habeas corpus is factually related to a claim raised in Rogers II, compare APPENDIX 119-32 and Brief, at 26-29. But the claims differ not only in the attorney error complained of: postconviction counsel for failure to raise ineffective assistance of trial counsel; appellate counsel for failure to raise issue preserved for appellate review, they also differ in that the habeas challenges appellate counsel's failure to raise claim of improper amendment of the information and in Rogers II it was argued that postconviction counsel rendered ineffective assistance for failure to challenge trial counsel's ineffectiveness for failure to object

to trial on a charge without probable cause. The remedy for each are as distinct as the claims themselves.

¶46 Clearly, ineffective assistance of trial counsel results reversal of a conviction. Ineffective assistance of appellate counsel warrants reinstatement of the direct appeal. And clearly, Rogers' claim decided on appeal can not reasonably be interpreted as the same claim raised in the habeas corpus petition.

## C O N C L U S I O N

For these reason, the petition for review should be granted.

June 1, 2015

Respectfully submitted,

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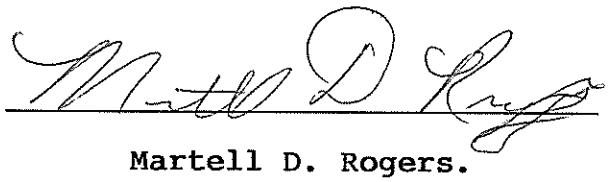
**PRO SE.**

C E R T I F I C A T I O N  O F  M A I L I N G

I certify that this Petition for Review and Appendix was deposited in the United States mail for delivery to the Clerk of the Wisconsin Supreme Court by first-class mail, on the date below. I further certify that the Petition and Appendix was correctly addressed and postage was pre-paid.

June 1, 2015



**Martell D. Rogers.**