

# THE DUTY OF COMPETENCY FOR APPELLATE LAWYERS

## Post-Conviction Motions and the Criminal Appeal

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Given the scope of this topic, discussion of the appellate lawyer's duty of competency regarding post-conviction motions and criminal appeals could fill a book and a full seminar on its own. As I am not in a position either to write such a book or to present such a seminar, the following remarks will summarize important areas of concern for those representing individuals convicted of crimes in Wisconsin state courts.

### **I. Direct Appeal Procedures**

A. Applicable direct appeal procedures and deadlines are set forth in Wis. Stat. §974.02 and (Rule) 809.30.

1. All deadlines under Rule 809.30 may be extended upon motion to the Court of Appeals for cause shown under Wis. Stat. (Rule) 809.82(2).

2. With the exception of the 30-day deadline for filing a Petition for Review to the Supreme Court, the appellate deadlines for criminal cases under ch. 809 likewise may be extended for cause shown under Rule 809.92(2)

B. Unlike in federal court, state procedures provide for a post-conviction motion in the circuit court as part of the direct appeal process. Rule 809.30(2)(h).

1. While “[a]n appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised,” Wis. Stat. §974.02(2), such a motion is required to raise claims such as ineffective assistance of counsel, challenges to the sentence, or other issues requiring consideration of facts outside the circuit court record.

C. No merit or *Anders* Briefs – Procedures and deadlines in Wis. Stat. (Rule) 809.32.

1. No merit brief is the default if counsel believes appeal frivolous and client declines to dismiss appeal or proceed *pro se*.

2. Client is free to proceed *pro se* (with leave of the Court), *see State v. Thornton*, 2002 WI App 294, 259 Wis.2d 157, 656 N.W.2d 45 (listing requirements for waiver of counsel on appeal), or to have attorney close case without action (no Court action required, but attorney should document for own file).

## II. Collateral Review Procedures

A. While the direct appeal gives your client the best chance of challenging a conviction or sentence, there are a number of potential procedural mechanisms for collaterally challenging the client's conviction or sentence, either after an unsuccessful direct appeal or after the time for a direct appeal has expired and a motion to extend time for the appeal denied. *See Henak, R., When the Supreme Court Denies Review: Remedies after Direct Appeal* (Outline for 2002 SPD Conference), at my website: [www.henak.net/HLO](http://www.henak.net/HLO)

B. The most commonly used of these collateral remedies is Wis. Stat. §974.06, which allows a person in custody (i.e., incarcerated or on supervision) to challenge that custody on constitutional or jurisdictional grounds.

!. Generally §974.06 cannot be used, absent "sufficient reason," to raise issues which could have been raised on client's direct appeal or prior post-conviction motion but were not. *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994); Wis. Stat. §974.06(4). *But see Loop v. State*, 65 Wis.2d 499, 222 N.W.2d 694 (1974) ("sufficient reason" unnecessary when defendant did not file direct appeal).

C. Federal habeas corpus -- 28 U.S.C. §2254.

1. Federal habeas law is quite complex but not insurmountable.
  - a. Custody required –includes probation or parole.
  - b. Exhaustion of state remedies required. 28 U.S.C. §2254(b).
  - c. Generally must be filed within 1 year of date conviction becomes final, subject to tolling while state post-conviction motions or appeals are pending. 28 U.S.C. §2244(d).
  - d. Must be federal constitutional issue

- e. Must meet high standards for success under AEDPA; unconstitutional custody alone insufficient. This is difficult, but not impossible. *See Williams v. Taylor*, 529 U.S. 362, 391 (2000); *Washington v. Smith*, 219 F.3d 620, 628 (7<sup>th</sup> Cir. 2000) (granting habeas relief on ineffectiveness claim rejected by Wisconsin courts).

### III. Considerations for Counsel

A. Defendant has right to direct appeal and to appeal with appointed counsel if indigent. Attorney obligated to perfect appeal if client desires appeal. *United States v. Nagib*, 56 F.3d 798, 801 (7<sup>th</sup> Cir. 1995) (failure to file timely appeal when client asks for one “constitute[s] per se ineffective assistance of counsel”).

B. Attorney has obligation to consult with client regarding whether to appeal, and best practice is to do so even when client pleads guilty. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

C. If appropriate, seek bail pending appeal under Wis. Stat. §969.01(2) & (Rule) 809.31. *See State v. Salmon*, 163 Wis. 2d 369, 471 N.W.2d 286 (Ct. App. 1991).

D. Communicate with client; in person if possible.

1. Client may have factual information supporting grounds for post-conviction relief.

2. Client may have legal theories worthy of consideration.

3. Although legal theories to be raised technically are matter of appellate strategy for the attorney, the client is the one doing the time. He or she should have say in which non-frivolous claims to raise by motion or appeal.

4. Client entitled to know likelihood of success on available issues and potential costs and benefits of raising each issue. For instance,

a. withdrawing guilty plea or vacating sentence may subject client to risk of greater sentence.

b. failure to raise claim as part of direct appeal may forever bar client from raising that claim later. *See Escalona-Naranjo*, 517 N.W.2d at 164:

Section 974.06(4) was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. Rather, the defendant should raise the constitutional issues *of which he or she is aware* as part of the original postconviction proceedings.

E. Avoid waiver. If any chance issue to be raised was not preserved by proper objection, raise alternative ground of plain error, *State v. Sonnenberg*, 117 Wis.2d 159, 344 N.W.2d 95, 103-04 (1984); *see* Wis. Stat. §901.03(4), interests of justice, Wis. Stat. §§805.15(1), 752.35, & 751.06, or ineffective assistance of counsel *if appropriate*.

1. Ineffective assistance of trial counsel must be raised by motion in the circuit court and trial counsel must be called to testify concerning his or her reasons for the acts or omissions alleged to have been unreasonable. It is appellate counsel's obligation to ensure trial counsel's appearance at the post-conviction hearing. *E.g. State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

2. When considering ineffectiveness claim, always try to speak with trial counsel before filing. Refusal to discuss the case with you can be used as evidence of "consciousness of guilt" if hearing required, while disclosure of reasonable strategic basis for acts or omissions in question could render ineffectiveness claim inappropriate (assuming there is no evidence rebutting the attorney's claim) or counterproductive (if there are stronger issues and bringing the claim would require a swearing contest between the attorney and your client).

F. Prepare post-conviction motions and appeal with eye toward proceedings beyond direct appeal.

a. Post-conviction motion/direct appeal is best shot at relief.

b. Issues which are available but not raised on direct appeal may be forever barred. *Escalona-Naranjo, supra*.

c. Given limitations of federal habeas corpus to (1) federal constitutional claims (2) that the petitioner exhausted in the state system, argue the constitutional basis for claims (i.e., violation of right to confrontation and not just "hearsay"), and present them throughout the state system through the petition for review or Supreme Court briefs.

**DISCLAIMER:** This outline is not intended as an exhaustive statement of the law on the various post-conviction procedures discussed. Rather, it is only a starting point for your own research.