STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP795

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON ANTONIO ALLEN,

Defendant-Appellant-Petitioner.

ON APPEAL FROM AN ORDER DENYING A MOTION FOR POST-CONVICTION RELIEF UNDER WIS. STAT. § 974.06, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS P. MORONEY, CIRCUIT JUDGE, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review in this case, this court has determined that the case is sufficiently important to merit both oral argument and publication.

STATEMENT ON ISSUES PRESENTED

This court's order of March 18, 2009, granting defendant-appellant-petitioner's supplemental petition for review, specified that the issues to be argued before this court are those identified in Allen's supplemental petition (Pet-Ap. 10-11). His supplemental petition included the three issues this court had identified in earlier orders of June 11, 2008 (Pet-Ap. 14-15), and October 13, 2008 (Pet-Ap. 12-13). The issues before this court are fairly stated in Allen's brief, at vii.

SUPPLEMENTAL STATEMENT OF THE CASE

Allen's brief, at 1-3, presents a concise statement of the procedural history of this case. The State offers the following explanatory statements on two matters:

1. Allen's Statement of the Case, at 1, correctly notes that Allen's appointed post-conviction counsel filed a no-merit report on Allen's direct appeal on March 14, 2000.[1] Allen's description of the issues raised in counsel's no-merit report is drawn from the Wisconsin Court of Appeals' later decision on that appeal (98:2; Pet-Ap. 8). The no-merit report is not in the appeal record. Such reports are filed in the court of appeals, not the circuit court, are rarely served upon or provided to the State, and seldom if ever make their way into a circuit court record.

2. Allen's Statement of the Case, at 2, correctly notes that, more than six years after his conviction was

[1] Allen states that the no-merit report was filed in "*State v. Aaron Antonio Allen,* Appeal Nos. 04-0736-CRNM & 04-0737-CRNM." The case reference is erroneous. These were consolidated no-merit appeals from separate convictions of Allen in Racine County in 2002. Allen's no-merit direct appeal in the present case was from his conviction in 1999 in Milwaukee County; the appeal case number was 99-2218-CRNM (98:2; Pet-Ap. 7).

affirmed on direct appeal, Allen filed a *pro se* motion for post-conviction relief under Wis. Stat. § 974.06 in Milwaukee County Circuit Court (101; R-Ap. 101-17). He further notes, correctly, that the State did not file a response to the motion. The State did not file a response to the motion because it had no opportunity to do so. The motion was never served upon the State and the State was never ordered to respond to it.[2] The motion was filed with the circuit court on March 16, 2007 (101:1; R-Ap. 101). That court summarily denied the motion in an order entered five days later (102; Pet-Ap. 6).

The allegations of Allen's postconviction motion are described within the Argument section of the State's brief.

STANDARD OF REVIEW

The parties agree on the standard of review in this case. Because legal issues are presented, this court's review is *de novo*. *See State v. Lo*, 2003 WI 107, ¶ 14, 264 Wis. 2d 1, 665 N.W.2d 756, and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 175-76, 517 N.W.2d 157 (1994).

[2] The statutory procedure for § 974.06 motions provides that after the motion is filed with a circuit court, the court may summarily deny it if "the motion and the files and records of the action conclusively show that the person is entitled to no relief. . . ." Wis. Stat. § 974.06(3). If the motion is not summarily denied, the court is required to have the district attorney served with the motion and to order the prosecutor to file a response. Wis. Stat. § 974.06(3)(a).

Because the circuit court and the court of appeals decided this case exclusively on a procedural ground, the parties have never addressed the merits of Allen's § 974.06 motion claims.

ARGUMENT

THE LOWER COURTS PROPERLY DETERMINED THAT ALLEN COULD NOT PURSUE, BY MEANS OF A SEC. 974.06 MOTION FILED YEARS AFTER HIS CONVICTION WAS AFFIRMED ON A NO-MERIT DIRECT APPEAL, CLAIMS THAT HE FAILED TO ASSERT – WITHOUT A SHOWING OF SUFFICIENT REASON – ON THE DIRECT APPEAL.

The subject of consideration in this case is the application of *Escalona-Naranjo*, 185 Wis. 2d 168, to a motion for collateral postconviction relief under Wis. Stat. § 974.06 brought after – in this case, more than six years after – the defendant's conviction was affirmed on a no-merit direct appeal under Wis. Stat. § (Rule) 809.32. The circuit court and court of appeals concluded that Allen's § 974.06 motion claims were barred under *Escalona-Naranjo* and *State v. Tillman*, 2005 WI App 71, ¶¶ 19-20, 281 Wis. 2d 157, 696 N.W.2d 574, because he failed to demonstrate a sufficient reason for his failure to assert the claims in the course of the earlier no-merit proceedings, where he did not avail himself of the opportunity to raise them in a response to his attorney's no-merit report.

Allen contends that the application of the *Escalona-Naranjo* rule in the no-merit context imposes an unfair, illogical, and unconstitutional burden upon a defendant's seeking of relief from a criminal conviction. The State maintains that the application of the well-established rule in this case was lawful, fair, and logical. Because of the legally insufficient allegations of Allen's § 974.06 motion, he fell far short of asserting – much less demonstrating the ability to prove – the existence of any sufficient reason for his failure to raise his § 974.06 motion claims in his no-merit direct appeal years earlier.

A. Allen raises no challenge to the constitutional sufficiency of Wisconsin's statutory no-merit appeal procedure.

It is important at the outset to recognize that Allen does not challenge the constitutional sufficiency of Wisconsin's no-merit appeal procedure, either as it existed at the time of his no-merit appeal, Wis. Stat. § (Rule) 809.32 (1997-98), or in its subsequently amended and current form, Wis. Stat. § (Rule) 809.32 (2007-08). Nor does he argue that the requirements of the rule were not followed in his no-merit direct appeal in 1999 and 2000. He acknowledges that his appointed postconviction counsel filed a no-merit report in March of 2000, that he did not submit a response to the no-merit report – as the rule provided him the opportunity to do – and that he did not file a petition for review of the court of appeals' decision affirming his conviction. (Brief and Appendix of Defendant-Appellant-Petitioner at 1-2.)

Allen recognizes that the constitutionality of Wisconsin's no-merit procedure was upheld in *McCoy v. Court of Appeals*, 486 U.S. 429 (1988). (Brief and Appendix of Defendant-Appellant-Petitioner at 25.) The Wisconsin no-merit procedure fully complies with — indeed, goes beyond — the requirements of *Anders v. California*, 386 U.S. 738 (1967). *See generally McCoy v. Court of Appeals.* In *Anders*, the supreme court wrote:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and *time allowed him to raise any points that he chooses;* the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Anders, 386 U.S. at 744 (emphasis added).

Under Wis. Stat. § (Rule) 809.32(1), as it existed at the time of Allen's direct appeal, and now under § (Rule) 809.32(1)(e), a defendant receives a copy of the no-merit report and has thirty days to respond. The current rule provides that the court clerk is to send a copy of the response to the attorney who filed the no-merit report. Neither § (Rule) 809.32 nor any published Wisconsin state court interpretation of Wisconsin's no-merit procedure restricts the issues a defendant can raise in response to a no-merit report. *Cf. State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994) ("The No Merit report option gives the criminal defendant the option to compel counsel to document why counsel is of the opinion that the appeal would have no merit. The defendant may then respond and the Court of Appeals will determine whether there is any merit to the appeal."); *Tillman*, 281 Wis. 2d 157, ¶¶ 16-17 (describing Wisconsin's no-merit procedure and noting that "the defendant has the opportunity to respond to the no merit report and raise additional issues"). If anything, any such restriction would flout the supreme court's declaration in *Anders* that the response provides a defendant with the opportunity "to raise any points that he chooses."

B. Wisconsin's collateral post-conviction remedy, Wis. Stat. § 974.06.

Wisconsin's collateral postconviction remedy statute, Wis. Stat. § 974.06, is designed to provide a postconviction relief procedure for the assertion of constitutional or jurisdictional claims after the expiration of time for the customary postconviction motion and direct appeal provided in Wis. Stat. §§ 974.02 and (Rule) 809.30. Wis. Stat. § 974.06(1). In *Bergenthal v. State*, 72 Wis. 2d 740, 748, 242 N.W.2d 1999 (1976), this court interpreted § 974.06 to permit a defendant to challenge a conviction on constitutional grounds by collateral motion under the statute even though the challenge could have been raised on the defendant's prior direct appeal.

Escalona-Naranjo overruled *Bergenthal* holding that under § 974.06(4), a ground for relief that was not raised in a prior postconviction motion or direct appeal could not be asserted in a later § 974.06 motion "unless the court ascertains that a 'sufficient reason' exists for either the failure to allege or to adequately raise the issue" previously. *Escalona-Naranjo*, 185 Wis. 2d at 181-82.

Escalona-Naranjo stands for the proposition that "due process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error[.]" *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). *Escalona-Naranjo* made clear that convicted defendants are not entirely free to pursue a succession of postconviction remedies:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185.

"This rule is designed to ensure finality in prisoner litigation[.]" *State v. Evans*, 2004 WI 84, ¶ 33, 273 Wis. 2d 192, 682 N.W.2d 784, *overruled on other grounds*, *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶ 22-29, 290 Wis. 2d 352, 714 N.W.2d 900. But finality is not the single or exclusive purpose served by the rule. As this court recognized in *Lo*, 264 Wis. 2d 1, ¶¶ 44-46, multiple and successive attacks on the same conviction or sentence not only undermine the goal of finality of litigation; they also clog the judicial system and waste judicial resources to the detriment of other litigators.

> Consequently, we reaffirm our holding in *Escalona* that all claims of error that a criminal defendant can bring should be consolidated into one

> motion *or* appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion. *Escalona*, 185 Wis. 2d 168.
>
> *Escalona* declared that "we need finality in our litigation." *Id.* at 185. This statement comports with concerns expressed by the National Conference of Commissioners on Uniform State Laws in 1966. The Prefatory Note to the 1966 Uniform Act states:
>
> > If a person has been unconstitutionally imprisoned while the numerous state remedies are pursued for from two to ten years, the situation is abhorrent to our sense of justice. On the other hand, if the greatest number of applications for post-conviction relief are groundless, the wear and tear on the judicial machinery resulting from years of litigation in thousands of cases becomes a matter of serious import to courts and judges. The element of expense is not to be ignored.
>
> 11A U.L.A. 270.
>
> It is apparent that the Commissioners' concerns with expense and "years of litigation" reflect a goal of finality in the criminal appeals process. **This finality is inherently related to the purpose of vindicating justice via a simplified and adequate postconviction remedy**. Our construction of § 974.06(4) furthers these mutually related concerns without compromising fairness. *Escalona* was correct in asserting that the purpose of the UPCPA was "to compel a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental, or amended motion, thereby cutting off successive frivolous motions." *Escalona*, 185 Wis. 2d at 177.

Lo, 264 Wis. 2d 1, ¶¶ 44-46 (footnote omitted; emphasis added).

The defendant-appellant-petitioner in *Lo* unabashedly sought to overrule *Escalona-Naranjo*. *Lo*,

264 Wis. 2d 1, ¶ 2. This court described the defendant's objective in blunt terms:

> Lo devoted most of his argument to the proposition that *Escalona* was wrongly decided and should be overruled. His mission was not to attempt to find the best way to implement *Escalona.* His mission was to bury the case.

Lo, 264 Wis. 2d 1, ¶ 53. The mission failed. This court declined to overrule *Escalona-Naranjo*, restating its belief that it "represents the correct interpretation of Wis. Stat. § 974.06," *Lo*, 264 Wis. 2d 1, ¶ 4, and "reaffirm[ing] our holding in *Escalona* that all claims of error that a criminal defendant can bring should be consolidated into one motion *or* appeal, and claims that could have been raised on direct appeal . . . are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal . . . ." *Lo*, 264 Wis. 2d 1, ¶ 44.

Most significantly for present purposes, *Lo* clearly reaffirmed this court's view that § 974.06 was intended to require a prisoner to raise all available challenges to a conviction in a single motion or appeal and that this view was "consistent with the purpose" of the 1966 Uniform Post-Conviction Procedure Act. *Lo*, 264 Wis. 2d 1, ¶ 19. That purpose was to reduce state prisoners' resort to federal habeas corpus by encouraging states to create all-encompassing postconviction remedies on which federal constitutional claims could be addressed in the state courts and, in further part, to "requir[e] a defendant to present all of his or her claim(s) for attack on a conviction or sentence in his or her initial postconviction proceeding, unless there exists a sufficient reason why the claims(s) were not raised in the initial proceeding." *Lo,* 264 Wis. 2d 1, ¶ 20.

It is now less than seven years since *Lo* reaffirmed *Escalona-Naranjo.* "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed," *Lamb's*

Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J.) (concurring opinion), another defendant now comes forth to stalk and attempt to "bury" *Escalona-Naranjo* once again. Allen's weapon is an argument derived from his view of the origins of Wis. Stat. § 974.06(4) that has no greater strength than the interpretive argument rejected in *Lo*. This court should reject this new challenge and conclude once again – for the third time – that § 974.06(4) requires that, in the absence of sufficient reason, a defendant may not resort to a § 974.06 motion to assert claims that the defendant failed to assert in a prior postconviction motion or direct appeal.

The *Escalona-Naranjo* requirement is simple in purpose and function. It mandates that all available challenges to a conviction or sentence should be brought in the defendant's direct appeal or an original postconviction motion. It is a general rule barring successive postconviction litigation – whether the successive attack is labeled a § 974.06 motion, a habeas petition or a sentence modification motion.

Allen describes the application of *Escalona-Naranjo* by the circuit court and court of appeals in his case as advancing a policy of "finality uber alles." (Brief and Appendix of Defendant-Appellant-Petitioner at 4.) This is not only rhetorical excess. It also misstates the holdings of *Escalona-Naranjo* and its progeny. Under *Escalona-Naranjo*, a defendant is not irrevocably foreclosed from pursuing relief from a conviction under Wis. Stat. § 974.06 after an unsuccessful postconviction motion or direct appeal. Instead, where a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or direct appeal, the claim is procedurally barred *unless* the defendant can show a sufficient reason for failing to previously raise it. *Escalona-Naranjo*, 185 Wis. 2d at 185; *accord*, *State v. Casteel,* 2001 WI App 188, ¶¶ 17-18, 247 Wis. 2d 451, 634 N.W.2d 338.

Allen recognizes, of course, that several decisions from the Wisconsin Court of Appeals have created a body of law on what constitutes a "sufficient reason" permitting a defendant to raise a claim in a § 974.06 motion that was not raised in a prior motion or appeal. *E.g., State v. Edmunds*, 2008 WI App 33, ¶¶ 10-12, 308 Wis. 2d 374, 746 N.W.2d 590 (while nature of defense arguments was same as in prior postconviction motion, evidence asserted in second postconviction motion was new; second motion not barred); *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) ("It may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.");[3] *State v. Hensley*, 221 Wis. 2d 473, 476, 585 N.W.2d 683 (Ct. App. 1998) (where the same attorney served as trial and postconviction/appellate counsel, attorney's inability to assert his own ineffectiveness was sufficient reason for failure to raise the claim in direct appeal proceedings); and *State v. Howard*, 199 Wis. 2d 454, 462, 544 N.W.2d 626 (Ct. App. 1996) (change in law and inability to foresee later appellate decision at time of prior appeal was sufficient reason for not raising issue at earlier date), *aff'd State v. Howard*, 211 Wis. 2d 269, 564 N.W.2d 753 (1997).

This court in *Howard* reached the same conclusion as the court of appeals. It recognized that *Escalona-Naranjo* had known of the basis for a third ineffectiveness of counsel claim but had failed to assert it when he filed previous postconviction motions raising two other ineffectiveness claims. 211 Wis. 2d at 272. As a result, the court held in *Escalona-Naranjo* that the defendant was barred from asserting that claim in a later § 974.06 motion – because "he had known the basis for that allegation at the time of his earlier motions." *Id.* (citing *Escalona-*

[3] The *Rothering* court noted that in some cases it might be necessary for a circuit court to engage in factfinding before it could "directly rule on the sufficiency of the reason." 205 Wis. 2d at 682. This emphasizes that a "sufficient reason" must be shown, not merely alleged.

Naranjo, 185 Wis. 2d at 184. But *Howard* presented a different situation. Howard's later-filed motion asserted a claim based upon a new appellate decision and "new rule of substantive law," 211 Wis. 2d at 287, announced after an earlier motion and appeal pursued by Howard. This court held that the later-filed claim was not barred under *Escalona-Naranjo*.

> To hold otherwise would require criminal defendants and their counsel to raise every conceivable issue on appeal in order to preserve objections to ruling that may be affected by some subsequent holding in an unrelated case. We do not believe that Wis. Stat. § 974.06 requires so much. Howard's case is just such an example of the 'sufficient cause' exception to the finality of appellate issues under Wis. Stat. § 974.06.

Howard, 211 Wis. 2d at 287-88.

Allen contends that this court's decision in *Howard* provides a "broad interpretation of sufficient reason under § 974.06(4) as not barring claims that were unknown to the defendant during his or her direct appeal[.]" (Brief and Appendix of Defendant-Appellant-Petitioner at 11.) The breadth of *Howard*'s holding is debatable, for it can certainly be viewed as a narrow example of a "sufficient reason," limited to circumstances where a new rule of substantive law is announced after a defendant's previous postconviction motion or appeal. But it is surely of little assistance to Allen in his circumstances. As the State will argue more fully in a later section of this brief, the ineffectiveness of counsel claim that Allen sought to assert in his § 974.06 motion was not based upon a new rule of law; it rested upon a legal standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), many years before Allen's 1998 conviction. Moreover, as far as can be determined from Allen's postconviction motion, the claim was based upon events before and at his trial, matters of which Allen was surely aware at the time of the events, at the time of his no-merit direct appeal, and years before he filed his § 974.06 motion.

Under the clear rule of *Escalona-Naranjo*, a defendant challenging a conviction is required to present all available grounds for postconviction relief in a single postconviction motion or direct appeal OR to later show a sufficient reason for not having done so. When a defendant files a *pro se* postconviction motion, the defendant has an obligation to raise every issue the defendant believes merits review. In a no-merit appeal, the defendant's response to the appointed attorney's no-merit report serves an analogous function: to alert the appellate court to any claim or issue the defendant contends that postconviction counsel should have asserted in the trial court or that appellate counsel should have raised in the no-merit report. By alerting the court of appeals, the defendant permits the court to determine whether it should require counsel to raise an issue in a postconviction motion in the circuit court or in a merits brief on the direct appeal. If a defendant fails to alert the court of appeals to an issue or claim omitted from the no-merit report, it is fair to conclude that the defendant necessarily forfeits or waives the issue for review in a postconviction proceeding after the no-merit direct appeal becomes final.

When his appointed appellate attorney filed a no-merit report on the direct appeal from Allen's conviction, Allen had the specific opportunity to both disagree with his attorney's evaluation of potential appellate issues identified by the attorney and to raise issues of his own. Allen did not take advantage of that opportunity and filed no response to his attorney's no-merit report. Under the principles of *Escalona-Naranjo*, Allen's later § 974.06 motion and its claims were barred unless Allen could allege and show sufficient reason why the claims raised in his belated § 974.06 motion were not raised in a response to his appointed attorney's no-merit brief. Whether he succeeded in his motion in showing such a sufficient reason will be discussed in a later section of this brief. But Allen offers no persuasive rationale for exempting him from the rule of *Escalona-Naranjo* simply because his appointed postconviction/appellate counsel concluded

– and the court of appeals subsequently determined – that "further appellate proceedings would be frivolous and without any arguable merit." Wis. Stat. § (Rule) 809.32(3) (1997-98).

If Allen disputed his appointed counsel's conclusion and wanted to avoid the court of appeals' subsequent determination, he had the opportunity to raise objection and assert any claim he believed worthy of consideration in a response to his attorney's no-merit report. He did not exploit that opportunity. He remained silent and filed no response, waiting almost seven years before filing a § 974.06 motion asserting ineffectiveness of trial counsel claims that apparently could have been raised seven years earlier.

The *Escalona-Naranjo* rule, of course, was announced in the customary circumstances where a direct appeal conducted pursuant to Wis. Stat. §§ 974.02 and (Rule) 809.30 preceded a later § 974.06 motion. But the Wisconsin Court of Appeals has determined that the rule also applies where the prior direct appeal was conducted pursuant to the no-merit process of Wis. Stat. § (Rule) 809.32. T*illman*, 281 Wis. 2d 157, ¶¶ 19-20 (*Escalona-Naranjo*'s procedural bar applies to defendants whose direct appeal was conducted pursuant to the no-merit procedure, as long as the no-merit procedures were followed, and the record demonstrates a sufficient degree of confidence in the result).

A no-merit appeal *is* a direct appeal. There is no reason why it should not qualify as a prior appeal under the *Escalona-Naranjo* doctrine, barring a subsequent § 974.06 postconviction motion absent a sufficient showing as to why claims raised in the later motion could not have been raised in the earlier no-merit direct appeal context. *Tillman*, 281 Wis. 2d 157, ¶ 19. Where a prior appeal proceeds under the no-merit procedure. a defendant's case has had the benefit of a searching analysis by counsel and an independent review of the case by the court of appeals, seeking to determine whether the

case provides any basis for arguable claims beyond those contemplated by counsel and – where the defendant exercises the opportunity to respond to the no-merit report – by the defendant. Since the statutory no-merit procedure specifically provides the defendant with an opportunity to file a response to the attorney's no-merit report in which he or she can disagree with counsel's evaluation of potential claims and raise entirely different claims – indeed, the chance "to raise any points that he chooses," *Anders*, 386 U.S. at 744 – it encourages the defendant to raise claims not asserted by counsel. Thus, the no-merit procedure can be seen as providing an even stronger basis for enforcement of the *Escalona-Naranjo* procedural bar against the later assertion of claims that could have been – but were not – raised on direct appeal.

The court of appeals expressly recognized these points in *Tillman*:

> [I]n some facets, the no merit procedure affords a defendant greater scrutiny of a trial court record and greater opportunity to respond than in a conventional appeal. . . . [T]he defendant in a conventional appeal does not receive the benefit of a skilled and experienced appellate court also examining the record for issues of arguable merit. . . . . Nor, as a general rule, is the defendant in a conventional appeal permitted to separately weigh in by raising objections to counsel's brief or by raising additional issues.

Tillman, 281 Wis. 2d 157, ¶ 18.

Allen does not question the validity or reasoning of the court of appeals' *Tillman* decision. And it is undisputed that the statutory no-merit procedures were followed at the time of Allen's no-merit direct appeal. Allen had the opportunity to respond to his appointed counsel's no-merit report; he merely chose not to do so.

Allen reads *Tillman* and the court of appeals' subsequent decision in *State v. Fortier*, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, as standing for the

proposition that the use of *Escalona-Naranjo*'s procedural bar – based on a defendant's failure to respond to a no-merit petition – "is inappropriate when appointed counsel and the Court of Appeals fail to comply with Rule 809.32 by failing to identify an arguable claim. Alternatively stated, the defendant has 'sufficient reason' for not raising an arguable claim in response to a no-merit petition where both appointed counsel and the Court of Appeals have overlooked the same claim." (Brief and Appendix of Defendant-Appellant-Petitioner at 16.)

The alternative interpretation is a curious reading of the two cases, since their conclusions are not consistent. *Tillman* held that *Escalona-Naranjo* barred the defendant from pursuing a new "spin" on a claim previously rejected on a no-merit direct appeal because he "failed to present a sufficient reason" why the new argument was not previously raised. 281 Wis. 2d 157, ¶¶ 21-25. *Fortier*, conversely, held that a defendant's failure to file a response to a no-merit report did not preclude his pursuing a claim in a subsequent § 974.06 motion. 289 Wis. 2d 179, ¶¶ 25-29. The apparent difference in the case outcomes was the nature and quality of the newly asserted claims. In *Tillman*, the new claim apparently had no arguable merit; thus, the court of appeals could conclude that the no-merit deliberative process had worked. In *Fortier*, on the contrary, the newly asserted sentencing challenge apparently had more than arguable merit; thus, the court concluded that the no-merit procedures had not been followed and the no-merit process had failed in the sense that an issue of significant merit had been missed. 289 Wis. 2d 179, ¶ 27. In actuality, these cases reached different results not because one defendant had a sufficient reason for not raising a claim and the other defendant did not, but because one court concluded its no-merit process had missed no issue of arguable merit and the other court acknowledged its process had failed to identify an issue of substantial merit.

Later argument in this brief will demonstrate that Allen's case is one in which there is no genuine reason to believe that an arguable issue was overlooked in the no-merit process.

C. The Seventh Circuit's *Page v. Frank* decision reflects a misunderstanding of Wisconsin postconviction practice that this court can and should eliminate.

Earlier orders of this court (Pet-Ap. 12-13 and Pet-Ap. 14-15) directed the parties to include a discussion of the decision of the United States Court of Appeals for the Seventh Circuit in *Page v. Frank*, 343 F.3d 901 (7th Cir. 2003), with respect to issues identified in the court's orders.

Although the Seventh Circuit in *Page*, at the time it was decided in 2003, did not appear to believe that, as a matter of state law, a Wisconsin defendant must respond to a no-merit report in order to avoid waiver in the state courts, *Page* does hold that a defendant's failure to respond to a no-merit report in the state courts does not necessarily preclude the defendant from seeking subsequent federal habeas relief on the same claims. *Page*, 343 F.3d at 909 (holding that Wisconsin's *Escalona-Naranjo* procedural bar in the no-merit context has not been applied in a "consistent and principled" way, thereby allowing claims to proceed in federal habeas proceedings).

Page is a decision on a Wisconsin prisoner's appeal from a federal district court order denying the prisoner's petition for a writ of habeas corpus under 28 U.S.C. § 2254. The prisoner's conviction had been affirmed on direct appeal in the Wisconsin courts on a no-merit appeal. *Page*, 343 F.3d at 904. In the no-merit process, the prisoner had filed a response to his attorney's no-merit report in which he asserted several issues in

addition to those addressed in counsel's report. *Id.* After the affirmance of his conviction, the prisoner filed a § 974.06 motion raising additional claims; the motion was denied in part because he had failed to show sufficient reason under *Escalona-Naranjo* why the claims were not raised in the earlier no-merit process. *Id.* The Wisconsin court of appeals affirmed, ruling that the claims had been waived by the prisoner's failure "to raise these issues in his response to the no-merit brief on direct appeal." *Id.* On this basis, the federal district court held that the prisoner was not entitled to federal habeas relief on the claims barred in the state courts under *Escalona-Naranjo*. His waiver of the claims constituted a state law procedural default that barred a federal habeas court's review of the claims. *Id.*[4]

The Seventh Circuit disagreed. Ruling on the availability of federal habeas review, *not* the legality of *Escalona-Naranjo*, the federal court of appeals held that the *Escalona-Naranjo* bar in the state courts to the prisoner's assertion of his new claims did not preclude the federal habeas corpus court from reviewing the new claims. The court concluded that various Wisconsin unpublished decisions of the Wisconsin Court of Appeals had ruled inconsistently on whether a defendant's failure to argue ineffective assistance of trial counsel claims in initial direct appeal proceedings in the Wisconsin courts barred a defendant from raising the ineffectiveness claims in later collateral proceedings. *Page*, 343 F.3d at 908-09. As a result, the federal appellate court concluded, the state court preclusion of the claims in the case did not constitute an "adequate" state ground barring review of the claims in the federal habeas proceeding.

While *Page* correctly applied federal law on the existence of an independent and adequate state ground of

[4] If a state court declines to address a prisoner's federal claims because the prisoner failed to comply with a state law procedural requirement, the independent and adequate state grounds doctrine bars federal review of that state court judgment. *E.g., Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991).

decision, it reflects a misunderstanding of Wisconsin postconviction practice in the no-merit appeal context. This is a misunderstanding that this court can eliminate.

Page is a decision on the availability of federal habeas corpus relief to a state prisoner under 28 U.S.C. § 2254. The decision interpreting federal habeas relief under a federal statute has no binding or controlling effect on the Wisconsin courts' interpretation and application of *Escalona-Naranjo* and Wis. Stat. § 974.06. The federal and state courts are free to provide different procedures for collateral review of a conviction; they have chosen to do so. But this court is the final arbiter of the meaning and application of Wisconsin law. "State courts are the ultimate expositors of their own states' laws," and federal habeas courts are bound by a state's construction of its own law. *Cole v. Young*, 817 F.2d 412, 416 (7th Cir. 1987). Thus, this court's decision on a matter of Wisconsin postconviction and appellate practice *is* binding on the Seventh Circuit on the meaning and application of Wisconsin law. A clarifying decision by this court on a point of Wisconsin postconviction practice law will not only guide, but bind, the federal courts.

The Seventh Circuit in *Page* opined that when a state prisoner's postconviction/appellate counsel failed to assert a claim of ineffectiveness of trial counsel by a postconviction motion in the state circuit court, and then later filed a no-merit report on direct appeal, that totally precluded the prisoner from asserting a claim of ineffectiveness of trial counsel in the direct appeal proceedings. The federal court stated: "It is clear that Wisconsin law would not have permitted Mr. Page to make such an argument before the Court of Appeals of Wisconsin without its having been raised initially before the trial court." *Page*, 343 F.3d at 908-09. Further explaining its understanding of Wisconsin postconviction procedure, the federal court concluded:

> The practical effect of the Court of Appeals of Wisconsin's conclusion – that the failure to

> identify ineffective assistance of trial counsel as an issue in response to an *Anders* no-merit brief constitutes a waiver – is to require Mr. Page to have asserted a claim before the court of appeals that, under established Wisconsin case law, he could not bring initially in that form because it had not been brought to the attention of the trial court.

Page, 343 F.3d at 909. These statements do not accurately reflect Wisconsin postconviction procedure in the no-merit appeal context.

A Wisconsin defendant can assert a claim of ineffectiveness of trial counsel in a response to a no-merit report, even if no postconviction motion on that ground was filed in the circuit court. When it reviews counsel's no-merit report and the defendant's response, the Wisconsin Court of Appeals can then assess whether the ineffectiveness of counsel claim can be decided on the record before it or whether a remand to the circuit court for the filing of a postconviction motion and the conducting of an evidentiary hearing on the motion is appropriate. Wisconsin defendants are not prohibited under Wisconsin law from asserting a claim of ineffectiveness of trial counsel in response to a no-merit report.

As this court fully knows, when an attorney appointed to represent a convicted defendant for postconviction/appellate purposes chooses to file a no-merit report, the scope of the appellate court's examination of the case extends beyond the potential appellate issues identified in the attorney's report. The court is obliged under *Anders* and *McCoy* to consider any response to the report filed by the defendant and then to independently examine the case record to determine whether it raises any potential arguable basis for challenging the conviction – either on appeal or by a postconviction motion. Accordingly, the result of a no-merit appeal may include the rejection of an attorney's no-merit report and the remanding of the case to the circuit

court for the filing of a postconviction motion raising a claim that was either asserted by the defendant in a response to the no-merit report or discerned by the appellate court during its independent review of the case. The question before the court after the filing of the no-merit report is not simply whether an appeal should proceed. The court is authorized and obliged to determine whether the next step should be appellate OR postconviction motion proceedings. These proceedings can clearly encompass a return to circuit court for the filing of a motion asserting claims of trial counsel ineffectiveness.

A Wisconsin defendant whose appointed attorney has filed a no-merit report can file a response to the report asserting the existence of claims not previously raised by postconviction motion in the state circuit court. Indeed, a failure to do so should be regarded as a waiver of those claims under *Escalona-Naranjo*, unless a sufficient reason is demonstrated for the defendant's failure to raise them. A later assertion of the claims in a § 974.06 motion should be held procedurally barred under *Escalona-Naranjo*. The enforcement of that state procedural bar and rule – if applied in a consistent fashion in the Wisconsin courts – would be recognized in a later federal habeas corpus action as an independent and adequate state ground for decision precluding federal habeas review of the underlying claim under the federal habeas law of procedural default. In this manner Wisconsin's enforcement of its state procedural rules would be recognized and honored by the federal courts in habeas corpus actions.

D. Allen defaulted the ineffectiveness of counsel claims asserted in his § 974.06 motion.

Contrary to Allen's contentions, the circumstances of this case demonstrate that Allen defaulted on the counsel ineffectiveness claims of his § 974.06 motion by

failing to raise the claims in response to his appointed attorney's no-merit report.

Allen's § 974.06 motion, filed in March of 2007, more than six years after his conviction was affirmed on direct appeal, asserted a claim of "cascading ineffective assistance of counsel," *Owens v. Boyd,* 235 F.3d 356, 358 (7th Cir. 2001). First, he alleged that his postconviction counsel on his direct appeal was ineffective in failing to file a postconviction motion alleging the ineffectiveness of trial counsel for failing to file a motion to challenge his arrest (101:9; R-Ap. 109). Next, he alleged that his postconviction counsel was ineffective in failing to file a postconviction motion challenging the effectiveness of his trial counsel for failing to move for suppression of his identification in a lineup (101:11; R-Ap. 111). Finally, he alleged that his trial counsel was ineffective in failing to object to the state's use of evidence of his initial refusal to submit to a lineup (101:13; R-Ap. 113).

This court should uphold the lower courts' rulings that Allen defaulted on these ineffectiveness claims.

1. Allen's motion did not claim that he was ignorant of the ineffectiveness claims raised in his § 974.06 motion.

Allen initially argues that his ignorance or unawareness of the ineffectiveness claims – presumably at the time of his no-merit direct appeal – constituted a sufficient reason for his failure to assert them in response to his counsel's no-merit report. The first response to this argument is that no such claim is asserted in Allen's § 974.06 motion; indeed, no reason of any kind is offered in his motion for his failure to raise his ineffectiveness claims at the time of his no-merit direct appeal. Second, it is apparent from the references to the trial transcript in his motion that his ineffectiveness claims arose from events before and at trial – events that Allen must have known at

the time or, at the latest, when he reviewed the transcripts after his conviction. Allen also advances the illogical argument that any inference that he knew of the bases for his ineffectiveness claims at the time of his no-merit direct appeal is unfounded, because neither his appointed counsel or the court of appeals raised the claims in the no-merit proceedings. One conclusion is not supported by the other. The fact that neither his attorney or the court raised an ineffectiveness claim may simply have reflected a shared conclusion that the claim would have been frivolous and without arguable merit. In any event, it tells us nothing about when Allen was aware of the claims.

2. Allen's failure to respond to the no-merit report waived his ineffectiveness claims.

Since 1994, *Escalona-Naranjo* has provided that "due process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error." *Macemon*, 216 Wis. 2d at 343. "[C]laims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal." *Lo*, 264 Wis. 2d 1, ¶ 44 (citing *Escalona*). A no-merit appeal is a direct appeal, and *Tillman*'s explicit application of *Escalona* to no-merit appeals was hardly a new or unanticipated holding. It was, instead, merely a specific application of the long-standing general rule applicable to direct appeals in Wisconsin. Allen did not allege in his § 974.06 motion that he was unaware of the *Escalona-Naranjo* rule.

3. Current Wisconsin law imposes no obligation on appointed counsel or court to advise a defendant that a response to a no-merit report is necessary to preserve claims for further review.

As already argued, *Escalona-Naranjo* has required since 1994 that legal challenges a defendant failed to raise in a direct appeal or initial postconviction motion may not be asserted in a subsequent § 974.06 motion in the absence of a defendant's showing of sufficient reason for the failure. No specific obligation to advise a defendant of the *Escalona-Naranjo* rule has been imposed upon court or counsel. And Wisconsin law to date has imposed no obligation on appointed counsel or a court to advise a defendant specifically that a response to a no-merit report is necessary to preserve claims for later assertion. The decision whether to impose such an obligation – and upon whom the obligation should rest – is a subject more appropriate for "wise policymaking," *Lo*, 264 Wis. 2d 1, ¶ 56, than constitutional or statutory adjudication.

4. Requiring a defendant to respond to a no-merit report with claims he or she believes should be considered on a no-merit direct appeal does not conflict with the right to counsel on direct appeal.

Allen contends that imposing an obligation on defendants to raise potential issues not raised in defense counsel's no-merit report would conflict with the right to counsel on direct appeal. The State views this argument as a non-sequitur. An appointed counsel may justifiably conclude that an identified claim would have no arguable merit and should not be advanced on appeal. The defendant may disagree but has no power to force counsel to assert a claim that counsel concludes is frivolous.

Under *Anders*, the right to respond to counsel's no-merit report provides the defendant the opportunity "to raise any points that he chooses." *Anders*, 386 U.S. at 744. Allen does not contend that the availability or exercise of that opportunity would conflict with the defendant's right to counsel on direct appeal. The State fails to see how a requirement that the defendant raise any claim he chooses in response to counsel's no-merit report – or be barred from later assertion of the claim in the absence of a sufficient reason for failing to assert it on direct appeal – could conflict with the right to counsel. It merely seeks to bring a regularity and finality to the postconviction process, while preserving a "sufficient reason" escape route for the later assertion of claims that could not have been raised at the time of direct appeal.

E. Allen has failed to demonstrate that his postconviction counsel's ineffectiveness provides "sufficient reason" for his failure to assert his § 974.06 motion claims of trial counsel ineffectiveness in response to his counsel's no-merit report.

The State agrees with the general proposition that a postconviction counsel's ineffectiveness may provide a sufficient reason and answer for "why an issue which could have been raised on direct appeal was not." *Rothering*, 205 Wis. 2d at 682. But a defendant seeking to establish a "sufficient reason" must support it, not merely assert its existence. Allen's motion does the latter, not the former.

The motion asserts, in an utterly conclusory fashion, that "postconviction counsel was ineffective for failing to file a postconviction motion alleging that pretrial counsel was ineffective when he failed to file any motions to suppress the unlawful arrest, the illegal lineup, and the prosecution's use of defendant['s] conduct prior to the lineup to show consciousness of the defendant's alleged

guilt" (101:8; Pet-Ap. 108). The motion contains no other allegations pertaining to postconviction counsel's actions, inactions, reasoning, or decision-making. Thus, the motion contains no specific factual allegations that, if proven at an evidentiary hearing, would establish the first of the two required showings for counsel ineffectiveness under *Strickland*, 466 U.S. at 687, counsel's deficient performance.

To prove deficient performance by postconviction counsel, Allen would have to show that his attorney made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* And because professionally competent assistance encompasses a wide range of behaviors, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

But despite the passage of seven years between his former postconviction counsel's filing of his no-merit report and Allen's filing of his § 974.06 motion, Allen's motion contains no factual allegations seeking to "reconstruct the circumstances of counsel's challenged conduct." Allen might have communicated with his former counsel, might have asked about his reasoning and his evaluation of possible appellate or postconviction issues, and he then might have included this factual information in his motion. Allen might also have included his former attorney's no-merit report with his motion. But none of these "mights" were accomplished, and none of the facts material to counsel's performance that might have been discovered were presented in Allen's § 974.06 motion. As a result, the motion is devoid of any factual information material to *Strickland*'s deficient performance prong. And the only specific material information in the record bearing upon postconviction counsel's performance is the court of appeals' no-merit decision on Allen's direct appeal, where the court noted that one of the three

potential appellate issues Allen's counsel had identified – and had determined to lack arguable merit – was "whether the trial court erred in admitting evidence of Allen's initial refusal to participate in a pre-charging lineup" (98:3; Pet-Ap. 8). This material does not help support Allen's claim of postconviction counsel's ineffectiveness.

Allen argues to this court that an assessment of the effectiveness of his postconviction counsel's performance must await subsequent proceedings, presumably in the circuit court. That puts the cart ahead of the horse. To warrant evidentiary inquiry on the effectiveness of Allen's postconviction counsel, the first requirement is a motion containing sufficient relevant factual allegations of counsel's deficient performance.

CONCLUSION

For the reasons argued in this brief, the State of Wisconsin respectfully requests that this court affirm the decision of the court of appeals affirming the circuit court order denying Allen's § 974.06 motion for postconviction relief.

Dated at Madison, Wisconsin, this 13th day of April, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,876 words.

Dated this 13th day of April, 2010.

_____
William L. Gansner
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of April, 2010.

_____
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