07 AP 795

(5)

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT (I)

OKed by Dist 1 COM 07-14-07 COS

STATE OF WISCONSIN,

plaintiff-respondent,

VS.

CIR.CT.NO:1995CF952095
APPEALS NO: 2007AP000795

Aaron A. Allen,

defendant-appellant.

An appeals from a judgment of conviction and sentence,and order denying motion for postconviction relief,entered in the circuit court of Milwaukee County on March 21,2007, the Honorable Dennis P. Moroney, PRESIDING.

BREIF OF DEFENDANT-APPELLANT

Aaron A. Allen
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P.O. BOX 900
Portage,Wi.53901-0900
PRO-SE LITIGANT.

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STATEMENT ON ORAL ARGUMENTS AND PUBLICATION

Aaron A.Allen, as a PRO-SE Defendant-Appellant, does not reasonably expect to argue his claims orally before this court. However, because the lower courts are mis-interpreting the controlling precedent, and the Wisconsin Supreme Court has not decided the issue, this appeal presents an opportunity for this court to clarify its holding, thus, publication of that clarification in this case, is necessary.

ISSUES PRESENTED FOR REVIEW

1. Whether the Circuit Court incorrectly ruled,thus, erroneously exercised its discretion when it denied Allen's Wis.Stat.974.06(4) postconviction motion under a mistaken view of the law that STATE V. TILLMAN,696 n.w.2d 574 (wis.app.2005) stand for the proposition that a defendant who fails to [respond] to a No-Merit report would be procedurally barred by STATE V. ESCALONA-NARANJO,185 wis.2d 169 (1994) in all subsequent postconviction proceedings ?

2. Whether the Circuit Court erroneously exercised its discretion when it ruled that Allen's 974.06(4) postconviction motion is barred by ESCALONA,supra.?

3. Whether Allen's postconviction counsel rendered ineffective assistance by failing to file a post-conviction motion alleging that trial counsel was ineffective for failing to file a motion to suppress allen's arrest as illegal and violative of the 4th Amendment to the United States Constitution?
   THE CIRCUIT COURT DID NOT ANSWER THE QUESTION!

4. Whether Allen's postconviction counsel rendered ineffective assistance by failing to file a post-conviction motion alleging that trial counsel was ineffective for failing to file a motion to suppress the lineup identification as it was conducted in violation of allen's right to counsel pursuant to 6th Amendment to the United States Constitution and Article I,§7 and 8 of the Wisconsin Constitution?
THE CIRCUIT COURT DID NOT ANSWER THE QUESTION!

5. Whether Allen's postconviction counsel rendered ineffective assistance by failing to file a post-conviction motion alleging that trial counsel should have objected to the state's use of allen's refusal to submit to the lineup as consciousness of guilt, based on the theory that the lineup itself was conducted in violation of allen's right to counsel and, thus, any evidence relevant to the lineup was also inadmissable?
THE CIRCUIT COURT DID NOT ANSWER THE QUESTION!

PROCEDURAL BACKGROUND

On May 17,1995,the defendant appeared before the HON. John J. Valenti,Judicial Court Commissioner,on one count of Armed Robbery and one count of Felon In Possession Of Firearm(65:2). A preliminary hearing was held on May 23,1995,before the Hon. Anthony J. Machi,Judicial court commissioner and the court ultimately found probable cause as to each count and bound the defendant over for trial (66:6). The state filed an information(66:6,5:1),and the defendant entered a plea of not guilty and demanded a speedy trial (66:7).

The defendant eventually waived his right to a speedy trial due to a substitution of attorneys on August 14,1995, before the Hon. David A. Hansher (67:3). After numerous adjournments,the defendant reasserted his right to a speedy

trial on March 3,1997,before the Hon.Timothy J. Dugan (76:2). The speedy trial demand was subsequently withdrawn due to another changeover in attorneys and the defendant ultimately re-entered another speedy trial demand before the Hon.Raymond Gieringer on May 12,1997 (78:2).

This matter was tried January 12,1998,before the HON. David A. Hansher (83:2). That trial ended in a mistrial (84:52).

After another series of adjournments,this matter was retried by Jury to conclusion before the HON. John Dimotto on October 12-15,1998. On October 15,1998,the Jury returned verdicts of guilty as to each count (96:75-76).

On January 7,1999,the defendant appeared before Judge Dimotto for sentencing (93:64). The court sentenced the defendant to a term of thirty-seven(37) years in the Wisconsin State Prison on the Armed Robbery count,consecutive to any other term the defendant was serving,and sentenced the defendant to a term of two(2) years Prison on the Possession of a Firearm count,concurrent to the Armed Robbery count (93:61). On January 19,1999,the defendant filed a Notice of Intent To Pursue Postconviction Relief (57:1).

Rather than file the postconviction motion, postconviction counsel filed a rule 809.32 Wis.Stat.No-Merit report in the Court of Appeals on March 13,2000.

Defendant did not file a response to counsel's No-Merit report,and on August 1,2000,the Wisconsin Court Of Appeals, District 1,affirmed the circuit court's Judgment in a

Summary Disposition. No Petition For Review was taken to the Wisconsin Supreme Court from the court of appeals Summary Judgment.

STATEMENT OF FACTS

On May 14,1995,Aaron Allen(hereinafter referred to as "the defendant") called for a taxi to take him from an address on Sherman Avenue to the area of Appleton and Keefe Avenue in Milwaukee (91:54-55). Fred Owens,who operated what is known as a "lohnny cab" on that day,picked up the defendant at the sherman avenue address (91:52).

A "johnny cab" is an unlicensed and informal cab service run by retired persons who offer rides to people in their personal vehicles in exchange for money (91:52).

Owens noticed that the defendant had with him a white plastic bag that appeared to contain clothes when he picked him up (91:54). The defendant rode in the front right hand passenger side of owens in the 1989 cougar and kept the plastic bag between his knees during the trip (91:55).

It took approximately ten to fifteen minutes to get to the defendant's stop which was located at 6860 w. Appleton Avenue (91:73). Owens denied they made any stops along the way (91:75). Once they arrived at the defendant's destination,the defendant asked owens how much he owed him (91:56). Owens told the defendant the ride would cost him $7.00 (91:56). Owens then turned to his left to look out the driver's side window and felt something cold at the back of his head (91:57). According to owens,the

defendant was pointing what owens believed was a black 9mm pistol at the right rear portion of his head (91:57-58). Owens claimed the defendant told owens to "give me all your money or i'll blow your brains out" (91:57-58).

Owens claim he initially gave the defendant $7.00 from a prior fare (91:58). Owens claimed the defendant then kept nudging him in the back of the head and demanded more money (91:58) and owens then gave the defendant $350.00 from his front left pocket (91:58).

Owens identified the defendant in a police lineup the following day (91:98). Detective Ralph Spano conducted the lineup and testified that the defendant initially refused to participate in the lineup because he demanded his right to counsel presence during the lineup,but then ultimately and reluctantly cooperated once the detective warned that he would be forced to cooperate,if necessary, which would likely draw more attention to himself (91:101).

The defendant testified on his own behalf (91:160) and his version of events differ from owens. The defendant told the Jury that owens picked him up and drove him to the appleton avenue address (91:172). That along the way, they stopped at a red light on Capital Avenue and were approached by some individuals selling flowers for mother's day (91:172). The defendant purchased between $12.00-$15.00 worth of flowers and they proceeded to defendant's destination (91:173). Once they arrived,the defendant went to his pocket to give owens $7.00 for the agreed upon fare (91:174). This was the amount the defendant and owens previously agreed to before the ride (91:175).

Owens then told the defendant that he was going to charge him $12.00 because it was mother's day,and if he took a regular cab the fare would have been much higher (91:174). An argument ensured and the defendant offered owens $8.00 for the fare to resolve the conflict (91:175).

Owens refused to accept anything less than $12.00 and the defendant then placed his money back inside his pocket and went into a residence on appleton avenue (91:176).

On his way to the house,the defendant stopped and points at owens with his finger and told him he was going to report owens to the individual that was the boss at this johnny cab service (91:176). Owens then drove off (91:176).

The defendant also denied that he robbed owens (91:177), and the defendant denied that he was carrying a gun that day (91:177).

Keisha Tucker,who have a child in common with the defendant,initially told the police that she had seen the defendant earlier in the day before the alleged robbery and observed a black handgun fall out of his coat (91:30).

The police reported that Keisha told them she had seen the defendant with the handgun on several other occasions and claims the defendant told her it was a police weapon (91:31). Keisha Tucker denied telling the police she knew it was a real weapon because she had seen the defendant loading bullets into the clip and loading the clip into the gun before (91:32). Keisha Tucker conceded that she had falsely accused defendant of having a gun because she was trying to get him in trouble because he was leaving

to see his girlfriend (91:36&38). Keisha Tucker also testified that she had in the past lied on defendant about carjacking her car with a gun (91:41-42). Keisha also testified that owens came to her house after the alleged robbery and requested that she pay defendant's $12.00 fare (91:40).

Michelle Tucker,the sister of Keisha Tucker who lived in the same duplex,testified that keisha had once falsely accused the defendant of carjacking her with a gun out of anger (91:15-17).

No firearms were found at the defendant's residence when he was arrested in the bedroom during the early morning hours of May 15,1995 (91:125).

STANDARD OF REVIEW

This court reviews the circuit court's decision to grant or deny a collateral challenge to a defendant's judgment of conviction and sentences,under an erroneous exercise of discretion standard. "The exercise of discretion is not the equivalent of unfettered decision-making." HARTUNG V.HARTUNG,306 n.w.2d 16 (1981). To be upheld on appeal,a discretionary act "must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law."Id.

Moreover,"a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and clear reasonable determination." Id.

Therefore, a court erroneously exercises its discretion when it fails to set forth its reasoning and the facts of record do not support its decision.McCLEARY V. STATE, 182 n.w.2d 512 (1971). Further,a court erroneously exercise its discretion when it proceeds under a mistaken view of the law.COOK V.COOK,560 n.w.2d 246 (1997); or makes a mistake with respect to the facts which its order and decision is based,DANIEL-NORDIN V. NORDIN,495 n.w.2d 318, 326 (1993). In the case at bar, defendant will show that not only did the circuit court make a mistake with respect to the facts which its decision is based,but that the court erroneously exercised its discretion when it denied defendant's motion under a mistaken view of the law.

ARGUMENTS

1. The circuit court erroneously exercised its discretion when it denied Allen's Wis. Stat.974.06(4) postconviction motion under a mistaken view of the law that STATE V. TILLMAN,696 n.w.2d 574 (wis.app.2005) stand for the proposition that a defendant who fails to [respond] to a No-Merit report would be procedurally barred by STATE V. ESCALONA-NARANJO,185 wis.2d 169 (1994).

Specifically,on March 16,2007,the defendant filed a pro-se motion for postconviction relief pursuant to section 974.06 Wis.Stat. before the trial court alleging that postconviction counsel was ineffective for several reasons.

The defendant supported his motion with the authority of STATE ex rel. ROTHERING V.McCAUGHTRY,205 wis.2d 675 (ct.app.1996). Under ROTHERING, a defendant may bring a claim under 974.06 wis.stat. The ROTHERING court indicate

that the ineffective assistance of postconviction counsel may be "sufficient reason" under STATE V.ESCALONA-NARANJO, 185 wis.2d 169 (1994),for failing to raise an issue in a previous proceeding.

In the case at bar, here, the circuit court held the defendant had waived the issues because he failed to raise the issues in a [response] to counsel's no-merit report, deciding, TILLMAN holds," defendant's failure to raise issues in response to counsel's no-merit report constitutes a waiver of those issues." (decision and order at pg.2).

This clearly, was a mistaken view of the holding in TILLMAN and the circuit court thus denied defendant's motion under the mistaken view of the law.

The court of appeals in TILLMAN held under the facts and history of that case,that the issues in tillman's current appeal are subject to the procedural bar of THE HOLDING IN ESCALONA-NARANLO,supra.

TILLMAN, stands for the proposition that the procedural bar of ESCALONA-NARANJO, could be applied to a defendants appeal resulting from the denial of a second successive postconviction motion even though the defendant's prior appeal on direct review was processed under the no-merit procedure set forth in WIS.STAT.RULE.809.32.

The TILLMAN court held, that when a defendant's post-conviction [issues] have been addressed by the no-merit procedure under wis.stat.809.32, the defendant may not thereafter [again raise those issues] or other issues that could have been raised in the previous motion, "absent

the defendant demonstrating a sufficient reason for failing to raise those issue previously."

Thus, a clear reading of the holding in TILLMAN, is not that the court in tillman [created] a new procedural bar rule in addition to ESCALONA-NARANJO,but instead, simply [applied] the procedural bar of ESCALONA to tillman appeal because it resulted from a second successive post-conviction motion which raised issues which had been adjudicated under the no-merit procedures.

In the case at bar, the circuit court denied Allen's postconviction motion on the pretenses that his claims are procedurally bar by ESCALONA because he failed to file a [response] to the no-merit report filed by counsel.

The circuit court ruled,that because Allen did not file a [response] to the no-merit report,that TILLMAN mandates that his claims be procedurally bar or waived.

Here, the circuit court erroneously exercised its discretion when it proceeded under a mistaken view of TILLMAN. Specifically, TILLMAN did not stand for the proposition that a defendant who failes to [respond] to a no-merit report would be forever procedurally bar of all subsequent meritorious claims. Contrary, the court of appeals applied the ESCALONA rule to tillman's appeal because it resulted from a [second successive postconviction motion which raised issues which had been previously adjudicated on the merits under the no-merit procedures].

Secondly, [responding] to the no-merit report is a defendant's right and not a matter of obligation if the

defendant wanted to preserve any claims for further review.

In other words, while counsel generally advises the defendant that he could respond to the no-merit report, this notification did not advise that a response was not a matter of [right], but instead, a matter of [obligation] if the defendant wanted to preserve his claim(s) for future review. e.g. see,WILKINSON V.COWAN231 f.3d.347,349 (7th cir.2000). Furthermore, most defendant's have very low reading and writing levels and are unable to respond on their own to the no-merit report and certainly cannot be expected to be able to search the records-as laymans-and discern all issues of arguable merits.

Third, a defendant's 6th and 14th Amendment right to counsel during direct appeal stage, mandates that he receive effective assistance of counsel.STATE V.PITSCH, 329 n.w.2d 711,714 (1985); STRICKLAND V.WASHINGTON,466 u.s.668 (1984). The very fact that a defendant [has counsel] during the no-merit procedures, although counsel files a report arguing any appeal would be frivolous,the defendant cannot be held at fault later for relying on [counsel's] decision to file the no-merit report. If,as here, counsel chooses to file a no-merit report asserting any appeal on behalf of a defendant would be frivolous,a defendant must be allowed a forum for raising issues of merit at a later date should he/she or new counsel discover issues of merit that counsel failed to include in the no-merit report. Fourth,it's true Wis.Stat.rule 809.32 incorporates the no-merit procedure set forth in ANDERS

as well as setting forth more detailed requirements.

In addition to appointed counsel examining the record for potential appellate issues of arguable merit, ANDERS contemplates the appellate court not only examines the no-merit report but also conducts its own scrutiny of the record to see if there are any potential appellate issues with arguable merit. see, ANDERS V.CALIFORNIA, 386 u.s. at 744-45, 87 s.ct.1396.

The court's no-merit decision is suppose to set forth the potential appellate issues and explains in turn why each has no arguable merit. However, the Wisconsin Court of Appeals has acknowledged that it doesn't always follow the requirements of ANDERS.

Specifically, in STATE V.FORTIER, a court of appeals case decided after TILLMAN, that court conceded that it had overlooked an issue of arguable merit when it reviewed the no-merit report and conducted an independent review of the appellate record, 709 n.w.2d 898 (ct.app.2005).

In FORTIER, the relevant facts are as follow: Fortier was charged with possession with intent to deliver a controlled substance, cocaine, contrary to wis.stat. 961.16(2)(b)(1) and 961.41(1m)(cm)(3)(1997-98). The state subsequently filed an amended information, which added two new charges: Fortier pled not guilty to all charges. The case proceeded to a Jury trial. Fortier testified in his own defense and admitted that the drugs were his, but denied intending to sell them and claimed that they were for personal use only. The jury ultimately found fortier guilty

of all three counts. The court sentenced fortier to:(1) six years imprisonment for possession with intent to deliver cocaine;(2) five years imprisonment,to be served consecutive to the other sentences,but stayed and replaced by five years probation,to be served consecutive to the other sentences,for failure to pay controlled substance tax;and (3) six months imprisonment to be served concurrent with the sentence on the first count,for possession of marijuana. The court also imposed two six-month suspensions of fortier's driver's license on counts one and three to run concurrently,as well as an additional six month suspension on count two,to run consecutive to the suspensions on counts one and three. Judgment of conviction was entered accordingly. Fortier filed a notice of intent to pursue postconviction relief. Fortier was appointed postconviction counsel who filed a postconviction motion requesting resentencing. The trial court granted fortier's motion for resentencing and vacated the previously imposed sentences. A resentencing hearing was held in front of a judge different from the one who originally sentenced fortier. The new sentences were the same as the original, with a few exceptions. Fortier again filed a notice of intent to pursue postconviction relief. He was again appointed new postconviction counsel,who filed a notice of appeal. Fortier's new attorney then proceeded to file a no-merit report with the court of appeals. Fortier was informed of his right to file a [response] to the no-merit report,but did not do so. The only issue addressed by

the no-merit report was whether the circuit court had erroneously exercised its discretion when it resentenced fortier. The court of appeals concluded that,"while the circuit court could have reduced fortier's sentence,it was not required to do so simply because the original sentencing court imposed its sentence,in part,on erroneous information." Accordingly,the court concluded that the record revealed no issues of potentially arguable merit and summarily affirmed the judgment of conviction. Fortier then filed a motion with the trial court asking it to clarify the judgment as to the driver's license revocation to state that the two five-year periods would run concurrently,and to have the revocation commence on the date of conviction,rather than following release. This motion was denied. Fortier again filed with the trial court,a motion for sentence reduction. The trial court issued a decision and order denying fortier's motion.

The trial court based its decision on ESCALONA,and then concluded that fortier was procedurally barred from pursuing the claim: Fortier appealed the order denying his second motion to reduce sentence.

Relevant to the case at bar, fortier argued in his appeal to the court of appeals,that he should not be precluded from raising the issue of a sentence illegally raised upon resentenceing even though he failed to raise it in a [response] to the no-merit report at the time of the original appeal.

The Wisconsin court of appeals in FORTIER begun their analysis by addressing fortier's argument that he should

be permitted to raise the sentencing issue,because not to do so is unfair and unreasonable and constitutes a sufficient reason under wis.stat.974.06(4) why the issue was not previously raised,even though the issue was not identified by either the appellate attorney or the court after a no-merit report was filed,and that he should not have been required to identify the issue in his [response] to the no-merit report. The court of appeals agreed with fortier and concluded that he was not procedurally barred from raising the sentencing issue, 709 n.w.2d at 896-97 (wis.app.2005).

In agreeing with fortier,the court relied on facts and procedures similar to those Allen now relies on. In FORTIER, it is undisputed that fortier was informed by his appellate counsel of his right to file a response to the no-merit report and that fortier did not file a response. However,it is equally undisputed that in his no-merit report,fortier's appellate counsel failed to raise the fact that an illegally raised sentence at re-sentencing could be a meritorious issue,and on the contrary,stated that no issues of arguable merit existed.

Similarly, it is also clear that the court of appeals did not identify the increased sentence as a potential appellate issue,but instead concluded:

> "the court has reviewed the no-merit report and has conducted an independent review of the appellate record.Based upon that review, the court concludes that there would be no arguable merit to any issue that could be raised on appeal. We therefore summarily affirm the judgment of conviction."

The fortier court finally held,"it is now evident that

the issue of a sentence illegally increased at sentencing, which was eventually raised by fortier in a motion to reduce sentence,is indeed an issue of arguable merit."

Further concluding," the issue was hence overlooked not only by fortier,but also by his appellate counsel,who filed the no-merit report addressing only the issue of erroneous exercise of sentencing discretion and concluding that no issues of arguable merit remained,and by this court,that agreed with the no-merit report." (emphasis added).

In the case at bar,here, it is undisputed that allen was informed by his appellate counsel of his right to file a response to the no-merit report and that allen did not file a response. However,it is equally undisputed that in his no-merit report,allen's appellate counsel failed to raise the fact that the issues identified in allen's 974.06(4) postconviction motion could be meritorious issues,and on the contrary,stated that no issues of arguable merit existed. Similarly,like the court in FORTIER,this court also did not identify the issues now submitted as potential appellate issues,but instead concluded:

> "the court has reviewed the no-merit report and has conducted an independent review of the appellate record.Based upon that review, the court concludes that there would be no arguable merit to any issue that could be raised on appeal.We therefore, summarily affirm the judgment of conviction."

As the court held in FORTIER,"it is now evident that the issue of a sentence illegally increased at sentencing, which was eventually raised by fortier in a motion to

reduce sentence,is indeed an issue of arguable merit",this court will find it evident that the issues now presented to this court which were presented to the trial court in his first 974.06(4) postconviction motion,are indeed issues of arguable merit.

Finally, like the court in FORTIER,the issues allen submits was hence overlooked not only by the layman defendant,but also by his appellate counsel who filed the no-merit report addressing only one issue and concluding that no issues of arguable merit remained,and by this court,that agreed with the no-merit report.

Here, in allen's case, had his appellate counsel performed the requisite "CONSCIENTIOUS EXAMINATION" of his case,ANDERS, he would have clearly identified the issues presented [now] as potential appellate issues and would not have filed a no-merit report asserting that any further appeal would be frivolous. Likewise, because this court failed to identify the existence of these issues of arguable merit,"A FULL EXAMINATION" was not conducted.

Here, as in FORTIER,this court should conclude that the no-merit procedures,under ANDERS and wis.stat.rule 809.32, were not followed, and agree that allen's appellate counsel [and] this court should have identified the issues presented in allen's 974.06(4) postconviction motion as issues of arguable merit. Because this court cannot fault allen for his reliance on his appellate counsel's assertion in the no-merit report that there were no issues of arguable merit,this court should find that allen has shown a "sufficent reason" for failing to raise the issue in

a response to the no-merit report,wis.stat.974.06(4),and rule that TILLMAN,supra., does not procedurally bar allen from raising the enclosed issues that were the same as presented to the trial court in his postconviction motion.

2. The circuit court erroneously exercised its discretion when it ruled that allen's 974.06 postconviction motion is barred by STATE V. ESCALONA-NARANJO,185 wis.2d 169 (1994).

Specifically, section 974.06 provides for the filing of a postconviction motion after the time for appeal and postconviction remedies under wis.stat.974.02 and rule 809.30 has expired. This section permits a defendant to raise,among other things,the argument that the sentence was imposed in violation of the United States Constitution or Constitution or laws of this state. If the court finds that there had been a denial or infringement of the constitutional rights of the defendant as to render the judgment vulnerable to collateral attack, the judgment is to be set aside and a new trial is to be granted,see Wis.Stat. 974.06(3)(d).

The Due Process Clause of both the United States and Wisconsin Constitutions requires that the defendant receive effective assistance of counsel at trial. The failure to receive effective assistance of counsel can serve as the basis for a motion under 974.06, STATE V.LUKASIK,304 n.w.2d 62 (ct.app.1983); HALL V.STATE,217 n.w.2d 352(1974).

Beyond this,the trial court is the appropriate forum for raising the issues pursued by the defendant in his

motion. The thrust of the defendant's motion is that he received ineffective assistance of counsel at the trial stage. He further asserts that his postconviction counsel was ineffective for failing to raise these issues during the direct appeal in his case. Therefore,the motion raises a "mix of claims of ineffective postconviction and in-effective assistance of counsel at the trial stage."see, STATE ex rel. ROTHERING V. McCAUGHTRY,556 n.w.2d 136 (wis.app.1996). The issues raised here could not have been pursued on direct appeal absent a postconviction motion in the trial court. If the issues had been raised for the first time on appeal,the wisconsin court of appeals would not have addressed them.STATE V. WAITES,462 n.w.2d 206,213 (1990)[a claim of ineffective assistance of counsel not preserved by raising it at a postconviction hearing before the trial court is deemed waived]. see also, PAGE V. FRANK,343 f.3d 901 (7th cir.2003),rejecting the state's argument that page's failure to address the issue of in-effective assistance of trial counsel in his response to the ANDERS no-merit brief constitutes a waiver and ought not be excused. The PAGE court holds,first,"we do not believe that an evenhanded application of wisconsin law permits such a result. That it is clear wisconsin law would not have permitted page to make such an argument before the court of appeals of wisconsin without its having been raised initially before the trial court",343 f.3d at 908. The PAGE court further held,when page's post-conviction counsel failed to assert a claim of ineffective

assistance of trial counsel in the wis.stat.974.02 motion before the trial court,he foreclosed page's opportunity to argue such a claim on direct appeal. Consequently,the appropriate forum for page's challenge to the ineffective assistance of postconviction counsel for failure to raise the issue of ineffective assistance of trial counsel was in a collateral motion under wis.stat.974.06, PAGE,343 f.3d at 908.(citing,ROTHERING). see also,STATE V.NEITA, no.95-2858-cr-nm,1996 WL 426110,at 3 (ct.app.1996) (unpublished opinion)(declining to address ineffective assistance of counsel claims raised in response to no-merit brief because the matter was not raised in trial court first);STATE V.FADNESS,no.87-2093-cr-NM,1988 WL 148281,at 1 (wis.app.1988)(unpublished opinion)(same).

The issues raised on this appeal are not barred under 974.06(4),even though they were not raised in the direct appeal. A motion under wis.stat.974.06 remains appropriate, where,as here,the defendant has "SUFFICIENT REASON" for not having raised the issue on direct appeal.STATE V. HOWARD,564 n.w.2d 753,761-62 (1997). Therefore,this appeal is not barred under STATE V.ESCALONA-NARANJO,517 n.w.2d 157 (1994). see also, MASSARO V.UNITED STATES,123 s.ct. 1690 (2003)(held,an ineffective assistance of counsel claim may be brought in a collateral proceeding,whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective assistance claims on direct appeal does not promote the procedural default rule's objectives)(emphasis added).

There is virtually no case law as to what constitutes a "sufficient reason" under 974.06(4). However,it is well settled that constitutionally deficient performance of appellate or postconviction counsel will overcome a allegation of procedural default,MURRAY V.CARRIER,477 u.s.478 (1986). Indeed,it must be sufficient,as the ineffective assistance of counsel under those circumstances renders the initial appeal or postconviction proceedings themselves constitutionally defective,STATE V.KNIGHT,484 n.w.2d 540-41 (1992).

While the defendant asserts that the facts here demonstrate ineffective assistance of postconviction counsel for failure to raise the claims set out at length below in the direct appeal,he respectfully submits that postconviction counsel's conduct or "omissions" need not fall to the level of constitutionally ineffective assistance in order to meet the "sufficient reason" standard under 974.06(4). Such a failure of counsel would in of itself constitute independently sufficient constitutional basis for relief. Therefore,it is irrational to require constitutionally ineffective assistance of postconviction counsel in order to establish "sufficient reason". As was stated in MURRAY V.CARRIER,supra., that court ruled that ineffective assistance of appellate counsel met the "cause and prejudice" standard permitting Federal Habeas Corpus review despite failure to adequately present underlying issue to state courts.

Please resort to the statutory history surrounding the adoption of wis.stat.974.06,likewise supports the

defendant's position that failure of postconviction counsel to raise on direct appeal the kinds of issues complained of below constitutes "sufficient reason" under 974.06.

The "sufficient reason" standard was adopted from the Uniform Postconviction Procedures Act of 1996. The commissioner's comments to the Uniform Act makes it clear that the provision was intended to implement the liberal standards for successive motion in the federal system that were controlling at the time the Uniform Act was passed:

> "The supreme court has directed the lower federal courts to be liberal in entertaining successive Habeas Corpus petitions despite repetition of issues, SANDERS V.UNITED STATES, 373 u.s.1,(1963). By adopting a similar permissiveness, this section will postpone the exhaustion of state remedies available to the applicant which FAY V.NOIA, 372 u.s.391 (1963) holds is required by statute for Federal Habeas Corpus Jurisdiction, 28 u.s.c.§2254. Thus, the adjudication of meritorious claims will increasingly be accomplished within the state court system." (emphasis added).

The FAY and SANDERS cases cited by the committee stand for the proposition that criminal defendant's "should not be penalized" by the defaults of their attorneys in which they themselves did not participate. Indeed, where a defendant has no right to insist upon inclusion of any particular issues in the postconviction motion on appeal, imposing default on the defendant for counsel's errors is especially unfair, JONES V.BARNES, 463 u.s.745 (1983).

SANDERS directed the federal courts to consider successive petitions on the merits unless (1) the specific ground alleged was heard and determined on the merits on a prior application, or (2) the prisoner personally

either deliberately withheld an issue previously or deliberately abandoned an issue previously raised,373 u.s.at 15-19. Likewise,FAY held that federal Habeas relief should not be denied on the basis of "procedural default" unless the inmate "had deliberately bypassed the orderly procedure of the court",by personal waiver of the claim amounting to "an intentional relinquishment or abandonment of a known right or privilege."Id.at 439. Therefore,what constitutes a "sufficient reason" under wis.stat.974.06(4) should be determined in light of the permissive standards of SANDERS and FAY upon which wis.stat.974.06(4) is based.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant effective assistance of counsel on his first appeal as of right,EVITTS V.LUCEY,469 u.s.387 (1985); STATE V.KNIGHT,484 n.w.2d 540 (1992).

If indeed postconviction counsel here was ineffective for failing to raise the ineffective assistance of trial counsel,the defendant "is entitled to a procedure and forum for asserting his claims".KNIGHT,484 n.w.2d at 540 (1992). This court must make a determination as to whether or not postconviction counsel was ineffective for failure to raise the ineffectiveness of trial counsel in the direct appeal. Without such a hearing,in regards to the defendant allegations,would deny him the very rights established by the EVITTS and KNIGHT decisions cited above.

The very reasons articulated by the Wisconsin Supreme Court in ESCALONA-NARANJO, for barring successive post-conviction motions is not present in the defendant's motion. There,unlike here,the defendant had raised the

ineffective assistance of counsel issue in his original direct appeal. The defendant's failure there was to include all bases for arguing ineffective assistance of counsel in his original petition. That is,while raising some,he held back others,raising them later in a 974.06 motion.

It was this "tactical decision" that the Supreme Court took issue with,517 n.w.2d at 164.

Such a strategy,apparently present in ESCALONA-NARANJO, can hardly be attributed to the defendant herein. As set out above,far from intentionally withholding his constitutional claim of ineffective assistance of trial counsel during his direct appeal,he had no idea of the "issues with merit" that postconviction counsel failed to raise.

That this was not done was not his fault. Thus,rather than saddle this defendant under a waiver theory with decisions made by postconviction counsel,but clearly not joined in by this defendant,the facts set out above and below should be found to constitute "sufficient reason" for permitting review of his claims.

Beyond this,finding that the defendant under the circumstances here is barred from arguing that he received ineffective assistance of counsel would be inconsistent with that line of cases dealing with waiver of one's Sixth Amendment right to counsel in criminal cases. The right to counsel,and therefore effective counsel,under both the federal and state Constitutions is well established as a "Bedrock Fundamental Right". GIDEON V.WAINWRIGHT,372 u.s.335 (1963); VILLAGE OF BIG BEND V. ANDERSON,308 n.w.2d 887 (ct.app.1981). The right to counsel can be

waived by the defendant only so long as the waiver of the right is knowing,voluntary,and intelligent:

> "because of its fundamental character,it has long been held that a knowing and intelligent waiver of the right to counsel is an "essential" pre-requisite to a defendant's proceeding alone once that right has attached,PICKENS V.STATE,219 n.w. 2d 601 (1980),citing JOHNSON V.ZERBST,304 u.s. 458,464 (1938).

The PICKENS court also stated that:

> "so important is the right to attorney representation in a criminal proceeding that non-waiver is presumed and waiver must be affirmatively shown to be knowing and voluntary in order for it to be valid", 96 wis.2d at 555.

The PICKENS court continued with even stronger language which has application here:

> "in order for an accused's waiver of his right to counsel to be valid,the record MUST reflect not only his DELIBERATE CHOICE to proceed without counsel,....unless the record does reveals the defendant's deliberate choice and his awareness of these facts,a knowing and voluntary waiver will not be found",PICKENS,96 wis.2d at 563.

Thus,the Sixth Amendment right to counsel is fundamental and is not easily waived. It goes without saying then that one's right to effective assistance of counsel is fundamental as well. These rights being so fundamental, this court would be hard pressed to find that defendant here has waived his right to challenge his conviction based on ineffective assistance of counsel claims through a "waiver" argument where the background record establishes that it was not a deliberate choice.

Finally,this defendant finds support for his position in STATE V.HENSLEY,there the defendant had been found guilty of two counts of first degree murder. His conviction was affirmed on appeal in an unpublished decision.

More than eight years later,the defendant filed a 974.06 motion raising several claims alleging ineffective assistance of trial and appellate counsel,585 n.w.2d 683 (ct.app.1998). The trial court held that ESCALONA barred the motion. The defendant hensley,argued that under STATE V.ROBINSON,501 n.w.2d 831 (ct.app.1993),he had a right to raise a 974.06 motion because his trial and appellate counsel were one and the same person.

The state argued that ESCALONA had overruled ROBINSON.

It further argued,that if a prisoner opts for allowing his trial counsel to proceed as appellate counsel a defendant must be required to articulate why,if claims of ineffective assistance of counsel were known to him at the time of the direct appeal,he did not raise them.

The state suggested that a defendant was required to obtain different counsel for purpose of appeal to raise the ineffective assistance of counsel claim on direct appeal or should be found to forever have waived same.

The Wisconsin Court of Appeals reversed the dismissal of the motion and remanded the case to the trial court finding that ROBINSON was still good law and that the motion was not barred,585 n.w.2d 683 (ct.app.1998).

Allen,here,is in a similar position analytically.

In HENSLEY,supra.,the defendant's appellate counsel was unable to raise ineffective assistance of counsel in the direct appeal because he would have been challenging his own trial competency. In essence,the court of appeals found that this was a "sufficient reason" to permit raising an ineffective of counsel claim in a petition under 974.06.

In the case at bar,while the defendant had a different attorney on appeal than he did at trial,he found himself in the same position. That is,he wanted issues raised that his postconviction counsel declined to pursue,and apparently wasn't going to claim his own ineffectiveness in the no-merit report to the court of appeals. In both cases,the defendants were unable to raise issues that apparently existed and which they wanted litigated. The relief should be the same!

3. Postconviction counsel should have filed a postconviction motion alleging that trial counsel was ineffective for failing to file a motion to suppress defendant's arrest as illegal and violative of the 4th Amendment to the United States Constitution!

In the case at bar,the defendant was arrested in his home when there was no warrant for his arrest.Specifically, detective Thomas Fischer,a Milwaukee Detective,along with his partner proceeded down to the city of Racine and then in Caledonia at which they went to an apartment they had believed defendant to be in,and knocked on the door,and while defendant was in the bed sleeping,arrested him without a arrest warrant (91:123-128)(see also,appendix-b).

The Wisconsin Supreme Court has faced the question of whether or not a warrantless arrest inside a home,such as the case with defendant allen,was unlawful. In STATE V.WALKER,453 n.w.2d 127 (wis.1990),THE DEFENDANT WALKER was suspected of committing four armed robberies.

Approximately 8 days later,at 9:15 p.m.,walker was

arrested in the fenced-in backyard of his home. The arrest was made without a warrant. The next morning walker,who WAS ONLY A SUSPECT in the four above-mentioned armed robberies,was placed in a lineup consisting of six black males. Five of the eye-witnesses from the four different robberies identified walker as the robber. On September 25,1986, a criminal complaint was filed charging walker with four counts of armed robbery. Prior to trial, Walker's counsel filed two motions:(1) to dismiss the action on the ground that the court lacked jurisdiction because walker was brought before the court pursuant to an illegal arrest. The circuit court denied the first motion relying on STATE V.SMITH,388 n.w.2d 601 (1986), in which that court held that an illegal arrest would no longer deprive the court of personal jurisdiction over the defendant. (2) Walker's counsel filed a second motion to suppress evidence with respect to lineup,photographic,and in-court identification of walker on the ground that any such identification would violate multiple federal and state constitutional protections.

Rather than proceed on this second motion,walker counsel orally withdrew the above motion. Walker was then subsequently found guilty in a jury trial of all four counts of armed robbery. Walker then filed a postconviction motion alleging that his trial counsel was ineffective for a number of reasons. Relevant to the issue now before this court,walker's motion, postconviction motion alleged that trial counsel was ineffective because he did not attempt to suppress the lineup and in-court identification

evidence as the fruit of his allegedly unlawful arrest.

The circuit court after a hearing,denied walker's post-conviction motion. The Wisconsin Court of Appeals,certified walker's appeal to the Wisconsin Supreme Court and the Supreme Court accepted the certification. Although the wisconsin supreme court granted walker a new trial based on a error that's not present in allen's case,(BATSON CHALLENGE), that court nevertheless went on to decide whether walker's arrest was lawful.

The Wisconsin Supreme Court in WALKER, relied on the United States Supreme Court decision in PAYTON V.NEW YORK, 445 u.s.573 (1980), which held that the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits police from making a warrantless and non-consensual entry into a felony suspect's home to arrest the suspect....absent probable cause [and] exigent circumstances. The PAYTON court also determined that the Fourth Amendment Protections that attach to the home like-wise attaches to the curtilage,which is defined generally as "the land immediately surrounding and associated with the home."

The court in WALKER, also relied on OLIVER V.UNITED STATES,466 u.s.170,180 (1984) for guidance. In OLIVER, the court reasoned that the curtilage receives the Fourth Amendment Protections that attach to the home because "at commom law,the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." (quoting,BOYD UNITED STATES,116 u.s.616 (1886).

The WALKER court,concluded,that read together, PAYTON and OLIVER require that police obtain a warrant before entering either the home or its curtilage to make an arrest absent [probable cause] and [exigent circumstances],

The Wisconsin Supreme Court in WALKER, further held that under PAYTON and OLIVER, therefore, absent probable cause and exigent circumstances, walker's warrantless arrest was unlawful. The walker court in applying PAYTON and OLIVER to walker's claim, held, assuming that probable cause to arrest existed,the prosecutor nevertheless did not offer proof with respect to exigent circumstances.

Similarly, because the WALKER court held the prosecutor had the burden of proof to show exigent circumstances as well but did not,based on this rationale, the Wisconsin Supreme Court concluded that walker's arrest was unlawful.

Analogously,there is no doubt that allen,here,was indeed arrested in the bedroom of his home while he was in the bed sleeping,(91:123-128). Like WALKER, the arresting officers did not have a valid warrant for allen's arrest before entering the home. Conversely, assuming there exist probable cause to arrest allen for the armed robbery to owens,the police nor the prosecutor never offered any proof whatsoever with respect to any exigent circumstances.

Moreover, it was the prosecutor's burden of proof to show exigent circumstances as well as probable cause,and they totally failed in this endeavor. In simpler terms, based on WALKER,and PAYTON,and OLIVER, the conclusion is that allen's arrest was also unlawful and should have been asked to be suppressed. (emphasis added).

Since the Supreme Court concluded that walker's arrest was unlawful, that court went on to determine whether the lineup and in-court identification of walker by the witnesses were the forbidden fruit of the unlawful arrest. see,WONG SUN V.UNITED STATES,371 u.s.471 (1963);and UNITED STATES V.CREWS,445 u.s.463 (1980).

Prior opinions of Wisconsin, held that a lineup identification may not be suppressed on the grounds that it is the fruit of an illegal arrest.see, e.g. SCHAFFER V. STATE,250 n.w.2d 326 (1977)(quoting, STATE V.BROWN,185 n.w.2d 323 (1971).

In line with CREWS and WONG SUN, the Wisconsin Supreme Court overruled BROWN and SCHAFFER insofar as they hold that lineup identification evidence may not be suppress as the fruit of an unlawful arrest.

Relying on WONG SUN, the walker court held that the state has the burden to prove that an identification evidence,derived from an unlawful arrest,is admissible once the defendant has established the existence of the "primary illegality." see also,BROWN V.ILLINOIS,422 u.s. 590 (1975).

In applying the principles enumerated in WONG SUN to the facts in walker's case, the Wisconsin Supreme Court was unable to apply those factors on the underdeveloped record and, thus, ordered the case be remanded to resolved this point. However, the WALKER court made it clear the burden of proof on the question of admissibility is on the prosecution and the matter must be resolved at a fair and full hearing.

LIkewise, in allen's case, a determination must be made whether the lineup and in-court identification evidence of allen by the witness owens were the forbidden fruits of the unlawful arrest. This determination must be measured according to the principles and factors as enumerated in WONG SUN and CREWS.

By analogy with the facts in WALKER,here, likewise the record is underdeveloped and,thus,the matter must be resolved at a hearing in which the burden of proof on the question of admissibility rest with the prosecutor.

Alternatively, the record here is adequate to make the determination that, indeed, the lineup was the fruit of the unlawful arrest and consequently, must be suppress.

In response to the question of whether the in-court identification of walker was admissible, the Wisconsin Supreme Court stated if on remand the circuit court on review determines that the lineup identification evidence is the fruit of the unlawful arrest, the circuit court must then determine whether the in-court identification by any witness who viewed walker in the lineup must also be excluded as the fruit of the unlawful arrest. citing, CREWS,supra.

The WALKER court further stated, in determining whether an in-court identification is the fruit of an unlawful arrest, the primary question is whether the lineup identification, suppressed as the fruit of an unlawful arrest, has affected the reliability as well,citing, UNITED STATES V. WADE,388 u.s.218 (1967) as the precedent which set forth the governing legal principles on whether an in-

court identification is the fruit of an unlawful lineup.

Here, in allen's case, this court must also determine whether owens in-court identification of allen is the fruit of his unlawful lineup, or whether the unlawful lineup in any way has affected the reliability of the in-court identification,making it inadmissible as well, STATE V,DUBOSE,699 n.w.2d 582 (wis.2005).

In the case at bar,defendant was arrested within his bedroom without a warrant and the detective who arrested allen had not even gained reasonable suspicion that allen had committed the alleged armed robbery against owens.

Although the detective investigation took him to allen's daughter's mother's address, the location of which owens claimed to have picked up the robbery suspect (91:124), and Keisha Tucker gave the detective defendant's name as the one who called owens for cab services (91:27),owens failed to identify defendant from the photo array on the day of the alleged crime (see appendix-C). THus, because owens could not identify the suspect and did not identify defendant from the photo array at that time, there was no probable cause for the warrantless arrest of defendant.

Additionally, there was no exigent circumstances in this case,there was not a situation present whereas the detective was in [hot pursuit] of defendant at the scene of the crime and immediately after the alleged robbery.

Also, the victim/witness was not injured during the robbery, thus, there was no danger of losing the witness identification and the detective knew the whereabouts of defendant. For these reasons, there was no reason the

detective could not secure a proper warrant for defendant's arrest. Therefore,pursuant to WALKER, the defendant's arrest was unlawful and trial counsel should have moved to have his arrest dismissed as violative of the Fourth Amendment to the United States Constitution. Because trial counsel did not object to the unlawful arrest,his total representation was deficient according to STRICKLAND V. WASHINGTON,466 u.s.668 (1984). see also, STATE V.THIEL, 665 n.w.2d 305 (wis.2003)(finding prejudice based on the cumulative effect of each deficient act or omission).

4. Defendant's lineup was conducted in violation of his Sixth Amendment right to counsel according to the United States Constitution and,thus,must be suppressed as a matter of law. Counsel's mere failure to object to the admissibility of this identification evidence,was ineffective assistance!

Specifically, detective Ralph Spano,a Milwaukee police detective,forced defendant to stand in a lineup against his will and while defendant demanded the presence of counsel (91:96-101). As his request for counsel fail on death-ears,defendant was put in a lineup as he was angry to have been forced to do so without attorney representation which was his right.

The United States Supreme Court dealt with the issue of whether a suspect in a crime had the right to counsel at the CUSTODIAL STAGE, before the police could subject that person to a live lineup for the purpose of identification,UNITED STATES V.WADE,87 s.ct.1926 (1967).

Defendant Wade was a suspect in a bank robbery. Wade was arrested, and counsel was appointed to represent him.

Fifteen days later an F.B.I.agent,without notice to wade's counsel,arranged to have the two witness from the bank observe a lineup. Wade and five or six other prisoners were in the lineup and each person in the lineup wore strips of tape such as allegedly worn by the robber and upon direction each said the words alleged uttered by the robber. Both bank employees identified wade in the lineup as the bank robber.

At trial,the two employees identified wade as the robber. At the close of trial testimony,wade's counsel moved for a judgment of acquittal or,alternatively,to strike the witnesses courtroom identifications on the grounds that conduct of the lineup,without notice to and in the absence of his appointed counsel,violated his fifth Amendment Privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and wade was convicted.

The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded,holding that although the lineup did not violate wade's fifth Amendment rights,"the lineup,held as it was,in the absence of counsel,already chosen to represent wade,was a violation of his Sixth Amendment rights", the United States Supreme Court granted Certiorari, and set the case for oral arguments with GILBERT V.STATE OF CALIFORNIA,388 u.s.263, and STOVALL V.DENNO,386 u.s.293 (1967).

In deciding the issue of whether wade's lineup was a violation of his Sixth Amendment rights,the WADE court

stated the following:

> "the framers of The Bill Of Rights envisage a broader role for counsel than under the practice then prevailing in England of merely advising his client in "matters of law",and eschewing any responsibility for "matters of facts." That the Constitution in at least 11 of the 13 states expressly or impliedly abolish this distinction. POWELL V.STATE OF ALABAMA,287 u.s.45 (1964).
> "Though the colonial provisions about counsel were in accord on few things,they agreed on the mere necessity of abolishing the facts-law distinction; the colonists appreciated that if a defendant were forced to stand alone against the state,his case was FOREDOOMED." (EMPHASIS ADDED).

Thus, in deciding wade's claim, the UNited States Supreme Court relied on their prior rationale's in several cases. The WADE court said, as early as POWELL V. ALABAMA they recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings during which the accused requires the guiding hand of counsel"id.,at 69,53 s.ct. at 64, if the guarantee is not to prove an empty right. In ESCOBEDO V.ILLINOIS,378 u.s.478, the Supreme Court said that the right to counsel was guaranteed at the point where the accused,prior to arraignment, was subject to secret interrogation despite repeated requests to see his lawyer. The ESCOBEDO court, again noted the necessity of counsel's presence if the accused was to have a fair opportunity to present a defense at the trial itself.(citations omitted).(quoting,HAMILTON V. ALABAMA,368 u.s.52; and MASSIAH V.UNITED STATES,377 u.s.210).

In another case, the United States Supreme Court held that the rules established for custodial interrogation

included the right to the presence of counsel,MIRANDA V. STATE OF ARIZONA,384 u.s.436.

Relying on its prior rationales in POWELL, the WADE court ruled that wade's right to counsel was violated.

Holding, "insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial,the accused is deprived of the right of cross-examination which is an essential safeguard to his right to confront the witness against him",POINTER V.STATE OF TEXAS,380 u.s.400, and even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accurancy and reliability. Thus, in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the state aligned against the accused, the witness the sole Jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness....."that's the man."

For the reasons discussed above, the WADE court ruled, "since it appears that there is grave potential for mere prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and

since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] as at the trial itself." 87 s.ct. at 1936,1937 (1967).

Finally, in ruling that a defendant have a Sixth Amendment right to counsel at [all] critical stages of the proceedings and that CUSTODIAL LINEUPS were a CRITICAL STAGE, the WADE court further held WONG SUN,supra., provides the test of whether evidence come at by exploitation of the illegal lineup, can be sufficiently separated to be purged of the primary taint,WADE at 87 s.ct.1939.

Here, in Allen's case, it is clear that allen was subjected to the lineup without counsel presense. Even though allen repeatedly requested counsel, his request fail on death-ears, was told that he did not have the right to counsel, and then was forced to submit to the lineup. Clearly, allen was in custody and inline with WADE, had a Sixth Amendment right to counsel at the lineup, a CRITICAL STAGE of the proceedings against him. Thus, the lineup identification of allen by owens should have been suppressed, and pretrial counsel's failure to file motions to suppress the lineup was well-below reasonable representation and caused prejudicial identification evidence to be admitted against his client. The identification of defendant by owens at all subsequent identifications, must be suppressed as the "fruit of the tainted tree."WONG SUN,supra.,and STATE V.McMORRIS,570 n.w.2d 384 (wis.1997).

[NOTE], should the respondent contend that the defendant arrest was supported by a warrant, then that position will give support to defendant's position that he, indeed, had a right to counsel during the lineup. In STATE V. DAGNALL,612 n.w.2d 680 (wis.2000), the Wisconsin Supreme Court said, the right to counsel under the 6th Amendment arises after adversary judicial proceedings have been initiated....IN WISCONSIN, by the filing of a criminal complaint or THE ISSUANCE OF AN ARREST WARRANT. (citing, McNEIL V.WISCONSIN,501 u.s.171,177-78 (1991).

It goes without saying then, either the defendant's warrantless arrest was unlawful.....or his 6th Amendment right to counsel during the lineup was violated. In either above situation, the defendant should be granted the relief as requested.

5. Allen's postconviction counsel rendered ineffective assistance by failing to file a postconviction motion alleging that trial counsel should have objected to the state's use of allen's refusal to submit to the lineup as consciousness of guilt, based on the theory that the lineup itself was conducted violative of allen's right to counsel and, thus, any evidence relevant to the lineup was also inadmissible!

Specifically,the prosecutor sought to use allen's refusal to participate in the lineup,as a means to show the jury, that allen was attempting to avoid being identified by owens. The message the prosecutor wanted to convey to the jury with this evidence, was that allen didn't want to participate in the lineup because he knew that he was

guilty of the armed robbery and didn't want to be identified by owens. On October 13,1998, the state argued before the trial court a motion to allow defendant's conduct before the lineup, be used to show that defendant was attempting to avoid being identified by the witness owens, (91:129-137). Subsequently, the court found that this evidence reached the realms of relevant evidence pursuant to Wis.Stat.904.03 and several case law decided by the Wisconsin Supreme Court and Court of Appeals (91:137-142).

In light of the trial court granting the prosecutor's motion, the state did solicited testimony in trial regarding defendant's refusal to submit to the lineup (91:99-101), for the sole purpose to give the jury the impression that defendant wanted to avoid being identified by owens because he knew he was guilty for the armed robbery. This was very likely, prejudicial and devastating evidence. The jury may well have decided defendant's fate based on imflamatory evidence. Counsel should have objected to its admissibility on the grounds that the lineup was illegal and, thus, defendant's conduct before the lineup was also inadmissible evidence. Because counsel failed to do so,he rendered unreasonable representation and allows prejudicial and devastating testimony to be used against his client. Conversely, trial counsel's failure to move to have this evidence suppressed was so unreasonable according to the standards set forth in STRICKLAND,supra., that there could be no strategic or tactical explanation for counsel's decision to forego a suppression motion, 466 u.s.668 (1984).

The [cumulative] effect of counsel's deficiencies as a whole,amount to prejudice,STATE V.THIEL,665 n.w.2d 305 (wis.2003). In STATE V.DYESS,370 n.w.2d 222 (1985), the court held that the only reasonable test to assure that a trial error did not work an injustice, is to hold that, where error is present, the reviewing court MUST set aside the verdict unless it is sure that the error(s) did not influence the jury or had such slight effect as to be minimus.

IN the case at bar, whereas the evidence wasn't direct evidence,there is much contradiction in the witness owens testimony,the case rested on the credibility of the parties here, there is a reasonable probability that the outcome may well have been different without the prosecution's usage of the tainted and inadmissible identification evidence. In fact, the inadmissible and prejudicial identification evidence, so clouded the TRUTH-SEEKING function of the trial, that it may be fairly said that the real controversy was not fully or fairly tried.

CONCLUSION

FOR THE ABOVE REASONS, the defendant here, at a minimum, should be granted a new trial.

Defendant request that he be given the relief requested.

RESPECTFULLY SUBMITTED,

Aaron A. Allen

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CERTIFICATION

I certify that this Brief conforms to the rules as contained within Wis.Stat.809.19(8) for a Brief using the folowing font:

MONOSPACED FONT: DOUBLE SPACED;
1.5. inch margin on left side;
1 inch margin on other three sides;
The length of this Brief is 42 pages....PLUS APPENDIXES.

Dated this 14th day of July 2007.

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