

07AP 795

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2007AP795

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CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON ANTONIO ALLEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION,
THE HONORABLE JOHN J. DIMOTTO,
PRESIDING, AND AN ORDER DENYING
POSTCONVICTION MOTION FOR RELIEF, THE
HONORABLE DENNIS P. MORONEY, PRESIDING,
BOTH ENTERED IN THE CIRCUIT COURT
FOR MILWAUKEE COUNTY

BRIEF AND APPENDIX
OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666

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**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

Plaintiff-respondent the State of Wisconsin (“the State”) disagrees with defendant-appellant Aaron Antonio Allen (“Allen”) that publication is warranted. This case may be resolved by applying well-established legal principles to the facts of this case. The State agrees,

however, that oral argument is not required, because the briefs filed by the parties adequately develop the facts and legal arguments necessary for decision. The State also respectfully submits that summary disposition under Wis. Stat. § 809.21 is appropriate and warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

After a three-day jury in 1998 (90; 91; 96), Allen was convicted of one count of armed robbery and one count of felon in possession of firearm (52; 53).¹ Allen was sentenced to 37 years in prison as a result of the convictions (56; 93:61).

Allen appealed his conviction (63), and Allen's attorney indicated that he would be filing a no-merit appeal, pursuant to Wis. Stat. § 809.32(2) (64). Allen, however, did not respond to counsel's no-merit report (98:1-2 [R-Ap. 101-102]). Accordingly, this court affirmed Allen's conviction in an order dated August 1, 2000, holding that an independent review of the record as mandated by *Anders*² and Wis. Stat. § 809.32(1) did not reveal any meritorious issues (98:1-3 [R-Ap. 101-103]). Allen did not file a petition for review of this court's August 1, 2000 order (99:1-2 [R-Ap. 104-105]).

Nearly seven years later, Allen commenced the current action when he filed a *pro se* postconviction motion pursuant to Wis. Stat. § 974.06 (101). In an order filed on March 21, 2007, the circuit court denied Allen's postconviction motion on the grounds that Allen's claims were procedurally barred under the rule of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157

¹As Allen notes in his brief (Allen's brief at 3), he had previously been on trial for the same charges (83; 84), but the first trial resulted in a mistrial (84:54) as the result of the State's witness testifying that Allen was on parole for felony murder (84:52-54).

²*Anders v. California*, 386 U.S. 738 (1967).

(1994), prohibiting unjustified serial postconviction litigation (102 [A-Ap. Appendix A:1-2]).

Allen now appeals the circuit court's March 21, 2007 order denying his Wis. Stat. § 974.06 postconviction motion (103).

SUPPLEMENTAL STATEMENT OF FACTS

No additional facts are necessary to dispose of Allen's claims. See Wis. Stat. § 809.19(3)(a) (respondent may choose to exercise its option not to present a full statement of facts).

ARGUMENT

ALLEN'S CLAIMS ARE PROCEDURALLY BARRED UNDER *ESCALONA-NARANJO*.

A. Introduction.

Because Allen's postconviction motion in this case is so clearly procedurally barred under the rule of *Escalona-Naranjo*, 185 Wis. 2d 168, prohibiting unjustified serial postconviction litigation, the State submits that this court should not address the merits of Allen's claims, but should instead affirm the order on the ground that Allen's motion was not properly brought in the first instance.³

Strong reasons for applying the *Escalona-Naranjo* procedural bar exist in this case. An assessment of

³If this court disagrees, however, and wishes to address the merits of Allen's claims, the State respectfully requests leave to file a supplemental brief addressing the merits of Allen's claims. See *State v. Tillman*, 2005 WI App 71, ¶ 13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574 (approving the procedure of first addressing the *Escalona-Naranjo* procedural bar, and then allowing the State to file supplemental brief if this court decides to reach the merits of the claims).

whether a Wis. Stat. § 974.06 motion has been properly brought or is barred under *Escalona-Naranjo* should be the very first step taken by a court – and encouraged by the State’s attorney – when a Wis. Stat. § 974.06 motion has been filed. If a circuit court conducts proceedings on the merits of a motion that is barred under *Escalona-Naranjo*, it wastes judicial resources and postpones the attainment of finality in criminal cases.

In contrast, if this court affirms the order denying Allen’s postconviction motion solely on *Escalona-Naranjo* grounds, it will encourage circuit courts and prosecutors to conduct that initial screening assessment. Without such encouragement, the objectives of *Escalona-Naranjo* will never be fully attained. Exclusive reliance on the rule of *Escalona-Naranjo* as the ground of appellate decision is the only effective means of enforcing its ban on unjustified postconviction litigation.

B. Allen’s postconviction motion
is procedurally barred under
Escalona-Naranjo.

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). Convicted defendants are not entitled to pursue an endless 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. Thus, pursuant to *Escalona-Naranjo*, where a defendant’s claim for relief could have been, but was not, raised in a prior

postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it. *Escalona-Naranjo*, 185 Wis. 2d at 185. See also *State v. Casteel*, 2001 WI App 188, ¶¶ 17-18, 247 Wis. 2d 451, 634 N.W.2d 338 (failure to raise claims on previous appeals renders claims untimely and thereby barred by *Escalona-Naranjo* and Wis. Stat. § 974.06(4)).

Although Allen baldly asserts—without references to facts in the record—that his postconviction counsel was ineffective (Allen’s brief at 8, 23-24), this bald assertion is not a “sufficient” reason under *Escalona-Naranjo* to justify Allen’s failure to raise in his earlier no-merit response the issues he now raises.⁴ And although Allen asserts that his failure to respond to the previous no-merit report does not preclude him from raising the issues now (Allen’s brief at 8-11), Allen’s claim is contrary to law. As this court is well aware, this court recently recognized that the procedural bar under *Escalona-Naranjo* is applicable when a defendant’s direct appeal is resolved via the no-merit procedure pursuant to Wis. Stat. § 809.32. *State v. Tillman*, 2005 WI App 71, ¶ 19, 281 Wis. 2d 157, 696 N.W.2d 574. Application of *Escalona-Naranjo* to a no-merit case is appropriate as long as the no-merit procedures were in fact followed, and carry “a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case.” *Id.* at ¶ 20.

Here, although the record does not contain Allen’s counsel’s no-merit report, this court’s decision affirming Allen’s conviction makes clear that this court followed the no-merit procedures and properly found that none of the issues in Allen’s appeal had arguable merit (98:1-3 [R-Ap. 101-103]). Allen did not respond to his counsel’s no-merit report, and he cannot now raise the issues that he

⁴Indeed, the State disagrees with Allen’s claim that he that properly raised ineffective assistance of counsel in his direct appeal (Allen’s brief at 23-24), because Allen did not even file a response to his counsel’s no-merit report (98:1-2 [R-Ap. 101-102]).

should have raised nearly seven years ago on direct appeal. Because Allen fails to offer a sufficient reason why he did not raise these issues in a no-merit response, other than to baldly assert ineffective assistance of counsel, this court should find that Allen's current claims are barred under *Escalona-Naranjo*, because the no-merit procedures were followed and provided the requisite "sufficient degree of confidence" in the outcome. *Tillman*, 281 Wis. 2d 157, ¶ 20.

Accordingly, the circuit court's order denying Allen's postconviction motion should be affirmed on the procedural ground of *Escalona-Naranjo* alone.

CONCLUSION

For the reasons set forth, the State respectfully requests that this court affirm the judgment of conviction, and the circuit court's March 21, 2007 order denying Allen's postconviction motion for relief.

Dated this 12th day of September, 2007.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General



SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666

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 1,325 words.



SARAH K. LARSON

Assistant Attorney General