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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT (I)

STATE OF WISCONSIN,
plaintiff-respondent,

VS.

APPEAL NO: 2007AP00795
CIR.CT.NO: 1995CF952095

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.

REPLY-BRIEF OF DEFENDANT-APPELLANT

Aaron A. Allen,
2925 Columbia Drive
P.O. BOX 900
Portage,Wi.53901-0900
PRO-SE LITIGANT.

TABLE OF CONTENTS

PAGES

TABLE OF CONTENTS.....I.

ARGUMENTS

A. REBUTTAL INTRODUCTION.....1-2.

B. ALLEN'S CLAIMS ARE NOT PROCEDURALLY BARRED UNDER THE ESCALONA-NARANJO RULE.....2-8.

CONCLUSION.....9.

CERTIFICATION.....10.

CASES CITED

GRAY v.GREER,
800 f.2d 644 (7th cir.1985).....7.

PAGE v.FRANK,
343 f.3d 901 (7th cir.2003).....4.

PAGE v.UNITED STATES,
884 f.2d 300 (7th cir.1989).....6.

STATE ex rel. ROTHERING v. McCAUGHTRY,
556 n.w.2d 136 (wis.app.1996).....4.

STATE v. FORTIER,
709 n.w.2d 898 (ct.app.2005).....8.

STATE v. HOWARD,
564 n.w.2d 753,761-62 (wis.1997).....7.

STATE v. KNIGHT,
484 n.w.2d 540-41 (wis.1992).....4.

ARGUMENTS

ALLEN'S CLAIMS ARE NOT PROCEDURALLY BARRED UNDER THE ESCALONA-NARANJO RULE !

A. REBUTTAL INTRODUCTION.

The respondent seeks to have this court issue a ruling "that courts are PER SE required to independently give all wis.stat.974.06 motions a ESCALONA-NARANJO screening ex parte." (resp.br.pg.4,par.1). The respondent further pleads " that when circuit courts reaches the merits of a petitioner's wis.stat.974.06 motion....rather than bar the motion outright....is a wastes of judicial resources and postpones the attainment of finality in criminal law cases." (resp.br.at pg.4,par.1).

First, the respondent forgets that courts already do conduct preliminary review of wis.stat.974.06 motions to discern (1) IF THE MOTION IS A SECOND motion, and (2) whether or not the petitioner has shown a "sufficient reason" for failing to include all claims for relief in his or her original wis.stat.974.06 motion.

Secondly, the respondent seeks to have this court legislate from the bench is unreasonable. The respondent would have this court create an executive order,mandate, or policy that circuit courts do an EX PARTE ESCALONA-NARANJO screening on all wis.stat.974.06 motions.

This court is without authority to issue executive orders, and moreover, the law in Wisconsin is well-settled regarding the procedures for filing postconviction motions.

Furthermore, the law in Wisconsin is well-settled as it relates to the proper standard of review courts are to apply to postconviction motions and wis.stat.974.06 motions in particular.

B. ALLEN'S POSTCONVICTION MOTION IS NOT BARRED UNDER THE ESCALONA-NARANJO RULE.

ESCALONA-NARANJO, when read correctly, does not stand 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." The ESCALONA-NARANJO rule, as discussed in allen's Brief at pgs.18-27, stand for the proposition that " if a petitioner seeks to file a SECOND wis.stat.974.06 motion, he or she must show a sufficient reason for omitting the claims of error in his first(original) wis.stat.974.06 motion. Respondent's reading of ESCALONA-NARANJO holding, is misplaced and overreaching.

Additionally and contrary to respondent's confusion of the case at bar, the principles of ESCALONA-NARANJO is inapplicable to allen's procedural history.

Here, allen, never filed ANY OTHER wis.stat.974.06 motion in this matter, thus, the instant appeal cannot be said to result from the filing and subsequent denial

of an "SUCCESSIVE MOTION". Likewise, allen's postconviction counsel never filed ANY wis.stat.974.02 postconviction motions in the trial court addressing the present claims, and therefore, respondent fails to show what motion which constitutes allen's original motion making the motion now appealed from successive to the first?

As respondent suggests, the circuit court should have screened whether or not allen had previously filed a wis. stat.974.06 motion before ruling that escalona-naranjo presented a procedure bar to the matter that was before that court. Clearly, here, the circuit court did not examine whether allen had previously filed a 974.06 motion, but instead, applied Escalona-Naranjo as a blanket bar to all wis.stat.974.06 motions. This was a clear example of a trial court erroneously exercising discretion, as the Escalona-Naranjo bar --- applicable to second sucessive motions --- is inapplicable to allen's case as his constitute an appeal from the denial of his first (original) wis.stat.974.06 postconviction motion.

As for the present claims of errors not being raised during his direct appeals stage, clearly allen's post-conviction counsel was ineffective for his failure to present such DEADBANG issues in an wis.stat.974.02 motion to the trial court. Allen's Brief-in-Chief at pgs.8-27, adequately points out and sets forth sufficient arguments as to why,what,who,when,where,and how he has shown an "sufficient reason" for not bringing these claims of error

in a wis.stat.974.02 postconviction motion during his direct appeals stage.

The respondent has not presented any real challenge to allen's position on this point, and again, the law in Wisconsin is well-settled that a petitioner can show "sufficient reason" for failing to bring claims on direct appeal based on ineffective assistance of postconviction counsel,STATE ex rel.ROTHERING v. McCAUGHTRY,556 n.w.2d 136 (wis.app.1996), or ineffective assistance of appellate counsel,STATE v. KNIGHT,484 n.w.2d 540-41 (wis.1992), or ineffective assistance of trial counsel,PAGE v. FRANK, 343 f.3d 901 (7th cir.2003).

Contrary to respondent's reading of allen's brief and the record in this case, allen hasn't just made a hollow allegation that counsel was ineffective at the pretrial stage and appeal stage. Allen specifically set forth who failed to do something, what they failed to do, when it wasn't done, where it should have been done, and the impact of how counsel's omissions at both trial and appeal stages, has harmed allen. As stated supra., a claim of ineffective assistance of postconviction counsel, is one that Wisconsin court's recognizes as "sufficient reason" why a defendant did not bring certain claims of error on direct appeal.

Contrary to respondent's contentions(resp.br.pg.5), allen is not barred by the holding in STATE v. TILLMAN, 696 n.w.2d 574 (ct.app.2005). Again, respondent misreads tillman. According to respondent, the court in Tillman

issued that decision with the intentions of creating a rule independent of the Escalona-Naranjo rule which would forever procedurally bar all claims of error of those defendant's who failed to respond to appellate counsel's no-merit report.

As discussed in Allen's Chief-Brief at pgs.8-18, Tillman does not propose a bar independent of the Escalona-Naranjo rule. The court in Tillman merely applied the Escalona-Naranjo bar to Tillman's appeal, because his appeal had resulted from the filing and subsequent denial of tillman's second wis.stat.974.06 motion. The Tillman court held that Escalona-Naranjo could bar claims presented in a SUCCESSIVE MOTION even though a defendant's direct appeal was processed pursuant to the no-merit procedures. The court in tillman did not, nor could it have, ruled that defendant's no longer have a statutory right to file and have reviewed a wis.stat.974.06 motion. Thus, the question in tillman was whether or not the appeal resulted from the filing of claims not presented in his first(original) wis.stat.974.06 motion. The tillman court only mentioned the no-merit procedure, to point out that not only had tillman filed successive motions contrary to the statute of 974.06 itself, but that tillman had the opportunity during the no-merit procedure to bring the claims to the court's attention but did not. There is nothing in the holding of Tillman, to suggest that court had established a rule procedurally barring all subsequent claims of

defendant-appellant's who failed to respond to counsel's no-merit report. Indeed, to do so would be a Great Miscarriage of Justice, totally unfair to defendant's unable to read or write, and violate numerous Constitutional protections.

Here, although allen did not respond to counsel's no-merit report, counsel was entrusted with the duty of effectively advocating allen's claims of error on appeal.

Respondent's arguments are Disingenuous, it is the defendants with all the Constitutional rights not counsel.

The Attorney works for the defendant, and is given duties that entails protecting a clients constitutional rights. Even if a defendant was blind, deaf,dumb or handicapped, these shortcomings doesn't relieve counsel of his or her duty. Likewise,counsel could be constitutionally deficient in omitting a Dead-Bang winner even while zealously pressing other strong claims,PAGE V. U.S.,884 f.2d 300 (7th cir.1989).

When a defendant discovers, or subsequent counsel finds DEAD-BANG claims of error, even seven years later, the law in Wisconsin says that this same defendant have a remedy available to petition the government for the redress of his Constitutional claims. Wis.Stat.974.06, allows a defendant the opportunity to collacteral attack his convictions and sentences AFTER the time for direct appeal has expired. Even if a defendant had not taken an direct appeal and didn't have any appeal processed through the no-merit procedures, he or she would still be allowed

to petition the court for redress of claims of Jurisdictional and Constitutional dimension in a wis.stat.974.06 motion,STATE V. HOWARD,564 n.w.2d 753,761-62 (wis.1997).

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the court must examine the trial court record to determine whether on direct appeal counsel failed to present significant and obvious issues on appeal. While it is true that decisions which were arguably correct at the time will not be second guessed, A reviewing court must initially determine whether such decisions were, in fact, strategic. In conducting such an examination, courts should be guilded by defendant careful presentation of those issues which allegedly should have been raised on appeal, with accompanying citations to the trial record,GRAY v. GREER,800 f.2d 644 (7th cir.1985).

Here, allen has not abused any rights or privileges granted by statute, and he has filed only one wis.stat. 974.06 motion within which he raised all grounds for relief in his original motion.

Finally, there was never any competency hearing held in which a Judge determined that allen had the mental, physical,and educational abilities to search legal records, examine legal transcripts and then discern whether or not there was standing in the Law supporting any potential claims. UNless some court has made the determination that allen was not only able to respond to counsel's no-merit

report, but that allen was competent to search legal record and put forth claims of constitutional violations, he cannot be punished or penalized for that which he did not have the competency to do.

Moreover, allen has a right to direct appeal pursuant to Wisconsin Law. Attached to that right, is the right to be represented with effective assistance of counsel at public expense after Indigency determination. Appointed Appellate counsel has the responsibility of performing an "conscientious examination" of the record. Indeed, in most cases, the defendant doesn't even have a copy of the complete record. Appellate counsel ultimately decide which claims to argue and how those claims will be brought to a court's attention.

When appellate counsel fails his duty on appeal, as is the case herein, respondent cannot now whine because another attorney...or in this case, a jail-house litigant.. searched allen's records and found Meritorious issues that should have been presented by appellate counsel on direct appeal, but wasn't. Rahter than argue that a blanket procedural bar rule should be created by this court, the respondent should be asking this court to create a rule sanctioning appellate attorney's who files no-merit appeals when other dead-bang issues exist in the record. LIkewise, it cannot be said that this court will always catch each and every Meritorious issue during its separate review of the records,STATE v. FORTIER,709 n.w.2d 898(ct.app.2005)

CONCLUSION

FOR THE REASONS SET FORTH, Defendant-Appellant, Aaron A. Allen, respectfully request that this court reject the respondent's proposition and reverse the circuit court of Milwaukee County's denial of his wis.stat.974.06 motion and grant the relief of a new trial or other relief this court deems appropriate.

Dated this 2nd day of October, 2007.

Respectfully submitted,

Aaron A. Allen

Aaron A. Allen
Defendant-Appellant
Pro-Se Litigant
P.O. BOX 900
Portage,Wi.53901-0900

CERTIFICATION

I hereby certify that this REPLY BRIEF conforms to the rules contained in Wis.Stat.809.19(4)(b) for a Brief produced with a Monospaced Font. The lenght of this brief is 12 in pages.

Aaron A. Allen

Aaron A. Allen
Defendant-Appellant
Pro-Se Litigant.