STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2007AP795
(Milwaukee County Case No. 1995CF952095)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON ANTONIO ALLEN,

Defendant-Appellant-Petitioner.

Appeal from the Final Order
Entered in the Circuit Court for Milwaukee County,
The Honorable Dennis P. Moroney, Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED FOR REVIEW

This case presents a single overriding issue:

> Whether the Court of Appeals properly held that Allen is procedurally barred from raising his claims of ineffective assistance of trial and post-conviction counsel pursuant to Wis. Stat. §974.06.

Subsumed within that question are a number of subsidiary issues previously identified by the Court and in Allen's Supplemental Petition for Review:

> 1. Where a defendant fails to raise a potential claim in response to a no-merit report, what additional showing, if any, is necessary to constitute "sufficient reason" authorizing that defendant to raise the claim in a subsequent motion under Wis. Stat. §974.06;
>
> 2. Whether the no-merit procedure requires a defendant to file a response to avoid waiver of subsequent claims of error;
>
> 3. Whether appointed counsel is required to advise the defendant that a response to a no-merit report is necessary to preserve claims for further review;
>
> 4. Whether requiring a defendant to respond to a no-merit report with arguable claims that were overlooked by appointed counsel, and barring the defendant from ever raising any claim not so raised, conflicts with the right to counsel on direct appeal.

Both the circuit court and the Court of Appeals held that Allen's failure to respond to appointed counsel's no-merit report with claims overlooked by both counsel and the Court of Appeals procedurally barred him from subsequently raising those claims.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

After a three-day trial in 1998 (R90; R91; R92), the jury convicted Aaron Antonio Allen of one count of armed robbery and one count of felon in possession of a firearm (R52; R53). On January 7, 1999, the circuit court, Honorable John J. DiMotto presiding, sentenced Allen to 37 years incarceration (R93:38-62). Allen filed a notice of intent to pursue post-conviction relief pursuant to Wis. Stat. §809.30(2)(b) (R57), and the State Public Defender appointed post-conviction counsel for Allen (R61).

Counsel ultimately filed a no-merit report on Allen's behalf in the Court of Appeals pursuant to Wis. Stat. (Rule) 809.32(1) on March 14, 2000. *See* ***State v. Aaron Antonio Allen***, Appeal Nos. 04-0736-CRNM & 04-0737-CRNM. That report raised three potential issues for appellate review: (1) sufficiency of the evidence, (2) whether the trial court erred in admitting evidence that Allen initially refused to participate in a pre-charging lineup, and (3) whether the sentencing court misused its discretion (*see* R98:2; App. 8).

The record does not reflect what, if any, advice Allen was given regarding either his right to respond to the no-merit report or whether he had any obligation to do so. Allen did not respond to that no-merit report (*see* R98:1-2; App. 7-8). By Order dated August 1, 2000, the Court of Appeals accepted the no-merit report, affirmed Allen's convictions, and relieved post-conviction counsel of further responsibility in the case (R98; App. 7-9). Allen did not file a petition for review of that Order (*see* R99:1-2).

On March 16, 2007, Allen filed a *pro se* motion for post-conviction relief under Wis. Stat. §974.06 (R101). That motion alleged that Allen was denied the effective assistance of post-conviction counsel due to counsel's failure to raise an ineffectiveness challenge to the failure of Allen's trial counsel to (1) seek suppression of the fruits of Allen's unlawful arrest, (2) seek suppression of the illegal lineup and resulting in-court identification, and (3) object to the prosecutor's use of Allen's conduct at the lineup as evidence of consciousness of guilt (*id.*). The state did not file a response.

By Order dated March 21, 2007, the circuit court, Hon. Dennis P. Moroney, presiding, denied Allen's motion on the grounds that he waived the claims by not raising them in response to the no-merit report:

> Defendant could and should have raised all of these issues in response to counsel's no merit report, but he did not. Because he did not, they are deemed waived. ***State v. Tillman***, 281 Wis.2d 157 (Ct. App. 2005) (defendant's failure to raise issues in response to counsel's no merit report constitutes a waiver of those issues). Defendant is barred by ***State v. Escalona-Naranjo***, 185 Wis.2d 169 [sic 168], 178 (1994), from pursuing the current motion for postconviction relief. There is no reason why the defendant could not have raised the current claims in response to counsel's no merit report on appeal, and therefore, the defendant's motion is denied.

(R102:2; App. 6).

Allen appealed, but the Court of Appeals affirmed on March 25, 2008 (App. 1-4). The appellate court likewise held that Allen's failure to raise the claims in response to counsel's no-merit report constituted a "waiver" of those claims:

> ¶6 Here, nothing in Allen's Wis. Stat. §974.06 motion suggests and nothing in the record indicates that Allen was, at the time the no-merit report was filed, unaware of the issues underlying the claims of ineffective assistance of counsel ultimately raised in his motion. Although he blames postconviction counsel for failing to raise the issues in a postconviction motion, he offered no reason as to why he was unable to articulate in a response to the no-merit report the issues he now raises as the basis for his ineffective-assistance-of-counsel claims. The simple contention that counsel could have and should have raised these issues is not, without more, a sufficient reason to overcome the ***Escalona-Naranjo/ Tillman*** bar.

(App. 3-4).

Allen timely petitioned this Court for review. The Court ordered supplemental filings from the parties regarding the petition and appointed undersigned counsel to represent Allen (App. 12-15). By Order dated March 18, 2009, the Court granted review limited to the issues discussed in Allen's Supplemental Petition for Review (App. 10-11).[1]

On February 12, 2010, the Court ordered Allen to file his opening brief by March 15, 2010. Oral argument is scheduled for April 28, 2010.

ARGUMENT

THE LOWER COURTS ERRED IN FINDING THAT ALLEN WAIVED OR FORFEITED HIS CLAIMS

The lower courts held that a defendant's failure to respond to a no-merit report constitutes a waiver barring the defendant from ever raising a claim that was neither identified in the no-merit report nor resolved by the Court of Appeals in response to that report. The lower courts' view of procedural default not only conflicts with the Court of Appeals' own published decisions and those of this Court, but also

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[1] Given the limited nature of his appointment and of the issues upon which the Court granted review, counsel understands that he is only to argue the procedural issue before this Court, and that Allen will be free to argue the merits of his claims in the circuit court should this Court reverse the lower courts' procedural dismissal.

ignores constitutionally mandated standards for waiver and undermines the defendant's constitutional right to the assistance of counsel on appeal.

Contrary to the lower courts' "finality über alles" approach here, established legal authority, constitutional principles, and plain common sense dictate that, if neither appointed counsel on the direct appeal nor the Court of Appeals in addressing a no-merit report identify an issue of arguable merit, then the defendant's similar failure to do so in response to that no-merit cannot be used to prevent raising such a claim later under Wis. Stat. §974.06. *E.g.*, ***State v. Fortier***, 2006 WI App 11, 289 Wis.2d 179, 709 N.W.2d 893.

Because the issue presented raises matters of statutory and constitutional law, this Court's review is *de novo*. ***State v. Lo***, 2003 WI 107, ¶14, 264 Wis.2d 1, 665 N.W.2d 756.

A. Applicable Legal Standards

1. The right to the assistance of counsel on appeal

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence, Wis. Const. art. I, §21, and to the effective assistance of counsel on his first appeal as of right in the state courts, ***Douglas v. California***, 372 U.S. 353 (1963); ***Evitts v. Lucey***, 469 U.S. 387 (1985). The right to counsel is intended to help protect a defendant's rights because he cannot be expected to do so himself. ***Evitts***, 469 U.S. at 396 ("An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake").

2. Assistance of counsel rights in a no-merit case

In ***Anders v. California***, 386 U.S. 738 (1967), the Supreme Court addressed appointed counsel's duty to prosecute a first appeal from a criminal conviction. The Court there held that "the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Id.* at 744. The

Court addressed the constitutional adequacy of a procedure in which appointed counsel, upon determining that a criminal appeal would be frivolous, was allowed to withdraw merely upon so notifying the court. *See id.* at 739-40, 742-43.

Although recognizing that not all appeals are meritorious, the Court rejected the California no-merit procedure as constitutionally inadequate. *Id.* at 743-45. To provide an indigent defendant the same protection afforded one who could retain counsel, the Court required the following no-merit procedure:

> Of course, if 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. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 744.[2]

In ***McCoy v. Court of Appeals of Wisconsin, Dist. I***, 486 U.S. 429 (1988), the Court identified the "central teaching of *Anders*" as follows:

> The principle of substantial equality does, however, require that appointed counsel make the same diligent and thorough evaluation of the case as a retained lawyer before concluding that an appeal is frivolous. Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. The appellate lawyer must master the trial record, thoroughly research the law, and exercise

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[2] Although the Court mandated this process in ***Anders***, a bare majority of that Court subsequently retreated from that requirement while upholding a substantially different procedure as "at least comparable" to procedures it had approved. ***Smith v. Robbins***, 528 U.S. 259, 281 (2000).

> judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability. Only after such an evaluation has led counsel to the conclusion that the appeal is "wholly frivolous" is counsel justified in making a motion to withdraw.

486 U.S. at 438-39.

As explained in ***Anders*** and ***McCoy***, the no-merit procedure "was designed to provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their client's appeals to the best of their ability." ***McCoy***, 486 U.S. at 439. That process is necessary in such circumstances to insure both that "the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal" and that "counsel has correctly concluded that the appeal is frivolous." *Id.* at 442. In short, "the function of the [no-merit] brief is to enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court." *Id.* at 439.

Wisconsin law implements ***Anders*** through Wis. Stat. (Rule) 809.32 (App. 17-19), which defines the applicable procedures and obligations of counsel and the Court when appointed counsel determines that any challenge to the defendant's conviction or sentence would be frivolous.

Under Rule 809.32, appointed counsel first must "examine[] the record for potential appellate issues of arguable merit." ***State v. Tillman***, 2005 WI App 71, ¶17, 281 Wis.2d 157, 696 N.W.2d 574; Wis. Stat. (Rule) 809.32(1)(a). Counsel then must discuss with his or her client all potential issues for appeal and their merit. Upon concluding that any appeal would be frivolous, counsel is also required to inform the defendant that he or she has three options: (1) have the attorney file a no-merit report; (2) have the attorney close the file without any further action; or (3) have the attorney close the file, after which the defendant can either proceed *pro se* or hire private counsel. Wis. Stat. (Rule) 809.32(1)(b)(1).

Pursuant to Wis. Stat. (Rule) 809.32(1)(a):

> If an attorney appointed under s. 809.30(2)(e) or ch. 977 concludes that a direct appeal on behalf of the person could be frivolous and without any arguable merit within the meaning of ***Anders v. California***, 386 U.S. 738 (1967), and the person requests that a no-merit report be filed or declines to consent to have the attorney close the file without further representation by the attorney, the attorney shall file with the court of appeals 3 copies of a no-merit report. The no-merit report shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit.

Upon filing a no-merit report, counsel is required to serve a copy of the report on the defendant and file a statement in the Court of Appeals that service has been made. *Id.* (Rule) 809.32(1)(d). "The attorney shall also serve upon the person a copy of the transcript and circuit court case record within 5 days after receipt of a request for the transcript and circuit court case record from the person and shall file a statement in the court of appeals that service has been made on the person." *Id.*

The defendant "may file a response to the no-merit report within 30 days after service of the no-merit report." *Id.* (Rule) 809.32(1)(e).

After the no-merit report, any response, and any supplemental filings are made, the Court of Appeals must determine whether to affirm the conviction and sentence and grant the attorney leave to withdraw:

> In the event that the court of appeals determines that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction or final adjudication and the denial of any postconviction or postdisposition motion and relieve the attorney of further responsibility in the case. . . ..

Wis. Stat. (Rule) 809.32(3). "[A]s contemplated by ***Anders***, 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." ***Tillman***, ¶17; *see* ***Anders***, 386 U.S. at 744-45. The Court of Appeals' no-merit decision must "set[] forth the potential appellate issues and explain[] why each has no arguable

merit." ***Tillman***, ¶17.

3. Wisconsin's post-conviction remedy under Wis. Stat. §974.06

Section 974.06 of the Wisconsin Statutes (App. 16) provides a procedure for post-conviction relief following either completion of a direct appeal or expiration of the time for filing such an appeal. Under §974.06, a person in custody may, after the time for direct appeal expires, move the court which imposed sentence to vacate or set aside that sentence on the grounds, *inter alia*, that it "was imposed in violation of the U.S. constitution or the constitution or laws of [Wisconsin], [or] that the court was without jurisdiction to impose such sentence...." Wis. Stat. §974.06(1).

Although "[a] sec. 974.06 motion is not a complete substitute for an appeal," "[t]his simply means that not every issue which can or should be raised on direct appeal can also be raised by this post-conviction motion." ***Loop v. State***, 65 Wis.2d 499, 502, 222 N.W.2d 694 (1974). Specifically, §974.06 is limited to jurisdictional and constitutional claims. *Id*. at 501. "Issues of constitutional dimension can be raised on direct appeal and can also be raised on 974.06 motion." *Id.* at 502.

The right to seek relief from constitutional or jurisdictional violations under §974.06(1) is not unlimited, however. Pursuant to Wis. Stat. §974.06(4),

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

While most of §974.06 was derived from the federal post-conviction remedy as then codified in 28 U.S.C. §2255, §974.06(4) was adapted from Section 8 of the 1966 version of the Uniform Post-Conviction Procedure Act. ***State v. Escalona-Naranjo***, 185 Wis.2d

168, 176-78, 517 N.W.2d 157 (1994); *see* 11A U.L.A. 375 (Master Edition 1995).

Six years after §974.06 was enacted, this Court held that criminal defendants were entitled to judicial consideration of constitutional challenges to their convictions and incarceration under §974.06 "[e]ven though the issue might properly have been raised" on the defendant's direct appeal. ***Bergenthal v. State***, 72 Wis.2d 740, 748, 242 N.W.2d 199 (1976). Some 18 years later, however, this Court reinterpreted the "successive petitions" provision of §974.06(4). Pursuant to ***State v. Escalona-Naranjo***, 185 Wis.2d 169, 517 N.W.2d 157 (1994), when the defendant has filed a post-conviction motion under §974.02 or a direct appeal, he or she may not subsequently raise an issue under §974.06 which could have been raised on the prior motion or appeal absent showing of a sufficient reason for not having raised the issue in the original motion. *Id.* at 181-84.[3]

Although §974.06(4) does not define what reasons are "sufficient" to entitle a defendant to raise a claim under §974.06 that was either waived, not raised, or finally adjudicated in a prior post-conviction motion or appeal, the lower courts have recognized a few specific circumstances that satisfy that standard. Thus, the discovery of new evidence after trial can constitute sufficient reason for bringing a claim based on that evidence. ***State v. Edmunds***, 2008 WI App 33, ¶10, 308 Wis.2d 374, 746 N.W.2d 590. Similarly, ineffectiveness of post-conviction or appellate counsel can constitute sufficient reason. *E.g.*, ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) ("the ineffective assistance of post-conviction counsel may be sufficient cause" under §974.06(4)); ***State***

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[3] This Court's reinterpretation of §974.06(4) has produced exactly the "procedural morass" predicted by the ***Escalona-Naranjo*** dissent, where "the litigation has merely shifted the court's attention from the merits of the constitutional claim to arcane procedural issues." *Id*. at 196 (Abrahamson, J., dissenting) (footnote omitted); *see, e.g.*, ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶¶21-25, 314 Wis.2d 112, 758 N.W.2d 806. The Court nonetheless reaffirmed that interpretation in ***State v. Lo***, 2003 WI 107, 264 Wis.2d 1, 665 N.W.2d 756, and that matter appears settled.

v. Hensley, 221 Wis.2d 473, 585 N.W.2d 683 (Ct. App. 1998) (inability of trial counsel to assert own ineffectiveness constitutes sufficient reason). ***Accord Murray v. Carrier***, 477 U.S. 478 (1986) (ineffective assistance of appellate counsel meets "cause and prejudice" standard permitting federal habeas review despite failure adequately to present underlying issue to state courts). Indeed, it must be sufficient, as the ineffective assistance of counsel under those circumstances renders the initial appeal or post-conviction proceedings themselves constitutionally defective. ***Murray***, 477 U.S. at 488; *see* ***State v. Knight***, 168 Wis.2d 509, 511-12, 484 N.W.2d 540 (1992).

This Court's decisions, however, reflect a much broader interpretation of "sufficient reason" than these few examples would suggest, consistent with the provision's original purpose to allow defendants to freely raise claims they did not personally and intentionally choose to forego in a prior motion or appeal. In ***State v. Howard***, 211 Wis.2d 269, 564 N.W.2d 753 (1997),[4] for instance, this Court addressed a challenge under §974.06 based upon ***State v. Peete***, 185 Wis.2d 4, 517 N.W.2d 149 (1994). ***Peete*** had held that conviction for a dangerous weapon enhancer under Wis. Stat. §939.63(1)(a) requires, not merely simple possession of the weapon, but also proof that the defendant "possessed the weapon to facilitate commission of the predicate offense." 185 Wis.2d at 9; *see id.* at 18.

The ***Howard*** Court reaffirmed ***Peete***, and further held that Howard's failure to raise his "nexus" claim on direct appeal did not bar relief under §974.06(4) and ***Escalona-Naranjo***. ***Howard***, 211 Wis.2d at 286. The Court distinguished ***Escalona-Naranjo*** on the grounds that Escalona-Naranjo had known the basis for his ineffective assistance of counsel claims at the time he failed to raise them on direct appeal. However, the Court deemed it "impractical to expect a defendant to present a legal argument until a higher authority adopts it." *Id.* (agreeing with court of appeals' conclusion).

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[4] This Court overruled a different portion of ***Howard*** on other grounds in ***State v. Gordon***, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

The Court in ***Howard*** further emphasized Howard's actual ignorance of the legal basis for his claim at the time of the prior challenge to his conviction:

> Unlike the defendant in ***Escalona-Naranjo***, Howard was not aware of the legal basis for his present motion at the time of his trial and sentencing. Nor was Howard aware of the nexus requirement at the time of his earlier postconviction motions and appeal.

Id. at 287-88. Thus, even though Howard technically had the same opportunity to raise the claim as did Peete before him, the Court held that Howard's case represented an example of sufficient reason under §974.06(4). *Id.* at 289-90.

This approach likewise is fully consistent with the Court's analysis in ***Escalona-Naranjo***. The Court there was concerned with abuses caused by the strategic withholding of certain claims. The Court rejected the "finality über alles" approach since taken in several unpublished lower court decisions, emphasizing that it intended neither to "forego[] fairness for finality" nor to "abdicate [its] responsibility to protect federal constitutional rights." 185 Wis.2d at 185. The Court, moreover, summarized its holding in language barring claims which were intentionally withheld from a prior motion while permitting those of which the defendant previously had no knowledge:

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

Id. (emphasis added).

This Court's 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 is fully consistent with the original intent of that provision. In assessing the scope of the sufficient reason standard, it is important to keep in mind that this standard was adopted from the Uniform Post-Conviction Procedures Act (1966). *See* ***Escalona-Naranjo***, 185 Wis.2d at 178. And, while finality was a concern, finality as an end in itself was not a purpose of §8 of the

Uniform Act or §974.06(4).

Rather, the primary concern of the Commissioners who drafted the Uniform Act was the effect of inadequate state post-conviction remedies on the explosion in federal habeas corpus actions under 28 U.S.C. §2254. The Prefatory Note stating the "Reason for Proposed Uniform Act" reflects that concern (App. 22-25). The Commissioners there observed that "[g]reat attention has been given in recent years to the federal habeas corpus jurisdiction and the federal-state conflicts believed to be engendered by the use of the federal writ by state prisoners," and that "it is clear that the continuing use and, indeed, the rapid increase in federal habeas corpus petitions for prisoners in state custody is closely related to the adequacy of post-conviction process in the state courts." 11A U.L.A. 269 (Master Ed. 1995) (App. 22). They noted that many states had so limited the availability of post-conviction remedies that prisoners in those states "who have bona fide claims of infringement of constitutional right must resort to federal habeas corpus." *Id.* Even when adequate state remedies were available, the multiplicity and complexity of the available procedures often resulted in "long delays in criminal administration" and, even when successful, the judgment to this effect occurs only after years of imprisonment which has turned out to be illegal." *Id*. They also emphasized that the unconstitutional imprisonment of a person "is abhorrent to our sense of justice." *Id.* at 270 (App. 23).

While mentioning the expense of litigating groundless motions, *id*., the Commissioners made no reference whatsoever to finality in the "Reasons for Proposed Uniform Act" as a significant purpose of the Act. *See id.* at 269-70 (App. 22-23). Rather, it expressly stated the purposes of the Act to encourage the availability of adequate and simplified post-conviction remedies, both to meet minimum standards of criminal justice and to reduce the use of federal habeas corpus. *Id.* at 270 (App. 23).

The remainder of the Prefatory Note confirms that the Commissioners were concerned with expeditious and simplified procedures to ensure state resolution of constitutional claims, and not

with finality as an end in itself. Indeed, they expressly stated a "basic principle" of the Act to encourage state court decisions on the merits of constitutional issues rather than technical procedural dismissals:

> A basic principle of this Act is that it is preferable to deal with claims on their merits rather than to seek an elaborate set of technical procedures to avoid considering claims which we may assume not to be meritorious. It is believed that it will be less burdensome to the courts and more effective in the long run for courts to decide that claims are not meritorious and so state in written conclusions than to try to administer procedural doctrines to "save" judicial time and effort.

11A U.L.A. 271 (App. 24).

Consistent with these stated concerns, the Commissioners' Comment to the Uniform Act states that the "sufficient reason" provision was intended to implement the relatively liberal standards for successive petitions controlling at the time the Uniform Act was approved (and §974.06 enacted):

> 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, 83 S.Ct. 1068, 10 L.Ed.2d 148 (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, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) holds is required by statute for federal habeas corpus jurisdiction, 28 U.S.C. Sec. 2254. Thus, the adjudication of meritorious claims will increasingly be accomplished within the state court system.

11 U.L.A. 375 (Master Edition 1995) (App. 26).

Fay and ***Sanders*** reflected the position that criminal defendants should not be penalized by the defaults of their attorneys in which they themselves did not participate. ***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. ***Fay*** similarly held that federal habeas relief would not be denied on the basis of "procedural default" unless the inmate had "deliberately by-passed the orderly procedure of the state

courts," 372 U.S. at 438, by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege,'" *id.* at 439 (citation omitted).

Only years after the standards of ***Fay*** and ***Sanders*** were incorporated into Wisconsin law with the adoption of §974.06(4) did the United States Supreme Court replace those standards for purposes of federal habeas with the restrictive "cause and prejudice" standard. *See* ***Wainwright v. Sykes***, 433 U.S. 72 (1977). Construction of the "sufficient reason" standard in §974.06(4) thus must be made in light of the permissive standards of ***Sanders*** and ***Fay***, not the preclusive standard of ***Wainwright***. The purpose of statutory construction, after all, is "to discern and give effect to the intent of the legislature." ***Lo***, 2003 WI 107, ¶14.

As this Court held in ***Escalona-Naranjo***, "the purpose underlying the original sec. 8 was incorporated into sec. 974.06(4)." 185 Wis.2d at 178. While barring the type of strategic withholding of claims condemned in ***Escalona-Naranjo***, that section does not act to promote finality at the expense of justice. ***Escalona-Naranjo***, 185 Wis.2d at 185-86; *cf.* ***Hayes v. State***, 46 Wis.2d 93, 105, 175 N.W.2d 625 (1970) ("It is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably").[5] Rather, a petitioner's lack of knowledge or informed personal involvement in the failure previously to present an issue constitutes "sufficient reason" to permit the person claiming unlawful confinement to raise his or her claims under §974.06.

4. Application of *Escalona-Naranjo* and §974.06(4) to motions following a no-merit appeal

In ***State v. Tillman***, 2005 WI App 71, 281 Wis.2d 157, 696 N.W.2d 574, the Court of Appeals expanded application of ***Escalona-Naranjo*** and §974.06(4)'s "sufficient reason" requirement to circum-

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[5] ***Hayes*** was overruled on other grounds in ***State v. Taylor***, 60 Wis.2d 506, 521-22, 210 N.W.2d 873 (1973).

stances in which the defendant files a §974.06 motion after an appeal processed under the no-merit procedures of Rule 809.32. The ***Tillman*** Court held that,

> when a defendant's postconviction issues have been addressed by the no merit procedure under Wis. Stat. Rule 809.32, the defendant can 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 issues previously.

Tillman, ¶19, citing ***Escalona-Naranjo***, 185 Wis.2d at 181-82. The ***Tillman*** Court emphasized, however, that "the procedural bar of ***Escalona-Naranjo*** is not an ironclad rule, *id.* ¶20, and that,

> in considering whether to apply the procedural bar of ***Escalona-Naranjo,*** in a given case, the court (both trial and appellate) must pay close attention to whether the no merit procedures were in fact followed. In addition, the court must consider whether that procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case.

Id. (footnote omitted).

As an example where the procedural bar would not be appropriate, the ***Tillman*** Court cited ***Wilkinson v. Cowan***, 231 F.3d 347 (7th Cir. 2000). There, the Court held that a defendant was not procedurally barred from raising a claim of ineffectiveness because, "[w]hile the clerk of the federal district court advised the defendant that he could respond to the no merit report, this notification did not advise that a response was a matter of *right* and a matter of *obligation* if the defendant wanted to preserve his claim for further review." ***Tillman***, ¶20 fn.5, citing ***Wilkinson***, 231 F.3d at 351.[6]

In ***State v. Fortier***, 2006 WI App 11, 289 Wis.2d 179, 709

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[6] Tillman raised only what the Court of Appeals referred to as a "resurrection of his prior arguments under new labels," ***Tillman***, ¶24, and offered no excuse other than trial counsel's ineffectiveness (a claim rejected in the no-merit decision) for not previously casting his issue in those terms, *id.* ¶25. The Court therefore found no sufficient reason for not having raised the claims previously. *Id.* ¶26.

N.W.2d 893, the Court of Appeals found sufficient reason based on this proviso of ***Tillman***. Fortier's appointed attorney filed a no-merit report raising a single issue. Fortier was informed of his right to respond, but did not do so. ***Fortier***, ¶11. He subsequently filed a §974.06 motion challenging certain aspects of the sentence that neither appointed counsel nor the Court of Appeals had identified as raising a viable issue on the no-merit appeal. *Id.* ¶13. Although the circuit court deemed the claim barred by ***Escalona-Naranjo***, *supra*, the Court of Appeals reversed. ***Fortier***, ¶¶13, 28.

Relying on ***Tillman*** and ***Wilkinson***, the ***Fortier*** Court held that, although Fortier was advised of his right to respond to the no-merit report and technically could have raised the issue then, his failure to do so did not procedurally bar him from raising it in his §974.06 motion. The Court noted that, because the issue had arguable merit but nonetheless was also overlooked by both appointed counsel and the Court in deciding the no-merit appeal, the no-merit procedures mandated by ***Anders*** and Rule 809.32 were not followed and the Court could not fault Fortier for failing to identify a valid issue that was overlooked by both his counsel and the Court. ***Fortier***, ¶¶23-24, 27.

Tillman and ***Fortier*** thus are consistent and stand for the proposition that imposition of the procedural bar under §974.06(4) and ***Escalona-Naranjo*** based on the 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.

The Court of Appeals subsequently made clear in ***Panama***, *supra*, that sufficient reason under the ***Tillman-Fortier*** analysis does not turn on whether appellate counsel was constitutionally ineffective. ***Panama***, ¶16. Rather, it was the failure of *either* counsel or the Court to identify an arguably meritorious issue that reflected the breakdown of the no-merit process and constituted sufficient reason, not merely the

attorney's error:

> ***Fortier*** is best understood as concluding that counsel's failure to raise an *arguably meritorious* issue in a no-merit report is a "sufficient reason" under ***Escalona-Naranjo*** for the defendant's failure to raise the issue in a response, thus preventing the no-merit procedure from serving as a procedural bar in a subsequent WIS. STAT. § 974.06 motion, regardless of whether counsel's failure met both the deficient performance and prejudice standards of an ineffective assistance claim.

Panama, ¶16 (emphasis in original).

B. Allen Did Not Default His Ineffective Assistance of Counsel Claims

In light of these established authorities, the lower courts erred in concluding that Allen somehow waived or forfeited his ineffective assistance of counsel claims by failing to respond to the no-merit report. To the contrary, the circumstances here demonstrate sufficient reason under ***Escalona-Naranjo*** and §974.06(4) why those claims were not raised earlier.

1. Allen's ignorance, at the time of the no-merit process, of the claims he later raised in his §974.06 motion constitutes sufficient reason, authorizing him to raise them now

By allowing for a second or successive post-conviction motion whenever a defendant can show sufficient reason why the claim either was not raised, or was inadequately raised, in a prior proceeding, the legislature determined in §974.06(4) that finality must be tempered by justice in individual cases. This Court's authority in ***Escalona-Naranjo*** and ***Howard***, and the Court of Appeals' authority in ***Tillman*** and ***Fortier***, recognize that fact and hold that a defendant's prior ignorance of the factual or legal basis of a claim constitutes "sufficient reason" justifying its later presentation in a motion under §974.06.

Recognizing that the defendant's prior unawareness that a particular claim either existed or could be raised in a prior proceeding constitutes sufficient reason under §974.06(4) is consistent with the legislative purpose of Section 8 of the Uniform Post-Conviction Procedures Act of 1966, which this Court deemed necessarily

incorporated into §974.06(4), *see* ***Escalona-Naranjo***, 185 Wis.2d at 178, to implement the then-controlling deliberate bypass rule. It also is consistent with this Court's rationale for extending application of §974.06(4)'s sufficient reason requirement to a first §974.06 motion.

Where the defendant fails to raise a claim due to unawareness, he or she is not acting pursuant to the type of strategic and intentional withholding of certain claims condemned in ***Escalona-Naranjo***. *See* 185 Wis.2d at 185-86. Rather, he or she is raising claims that, although perhaps hypothetically available at the time of the prior motion or appeal, in fact could not have been raised at that time due to the defendant's ignorance of them. *See, e.g.*, ***Howard***, 211 Wis.2d at 289-90 (sufficient reason standard met where defendant unaware of potential claim despite its hypothetical availability). It is reasonable to require defendants to raise "constitutional issues *of which he or she is aware* as part of the original postconviction proceedings." ***Escalona-Naranjo***, 185 Wis.2d at 185-86 (emphasis added). However, the Court cannot reasonably expect a defendant to raise claims of which he or she is, in fact, unaware. *See id.* at 182 fn.11 (sufficient reason where subsequent events not foreseen at time of initial appeal); *cf.* ***Edmunds***, 2008 WI App 33, ¶10 (newly discovered evidence constitutes sufficient reason under §974.06(4)).

This principle is especially applicable where, as here, the prior appeal was under Rule 809.32. *See* ***Fortier***, *supra*. Criminal defendants have a right to the assistance of counsel on appeal because they are otherwise "unable to protect the vital interests at stake." ***Evitts***, 469 U.S. at 396. The same applies even when the appeal is handled pursuant to the no-merit procedures of ***Anders*** and Rule 809.32. Indeed, the ***Anders*** Court's central concern was that requiring the defendant to raise arguable claims on his own compels him to "shift entirely for himself" while simultaneously leaving the court to review a cold record "without the help of an advocate." 386 U.S. at 745.

Yet, application of those procedures results in exactly the same consequences where, as here, the no-merit attorney fails to identify one or more arguable issues. *Cf.* ***Smith v. Robbins***, 528 U.S. at 284

(recognizing that, under Wisconsin's no-merit procedure, "bad judgment by the attorney in selecting the issues to raise might divert the court's attention from more meritorious, unmentioned, issues"). As where the attorney files nothing but a conclusory assertion that any appeal would be frivolous, the defendant is left to "shift entirely for himself" regarding any claims not identified in the no-merit report.

Compelling the defendant to respond to the no-merit report with arguable issues missed by appointed counsel, upon pain of forfeiture for failing to do so, is both unfair and unreasonable. ***Fortier***, *supra*. Such a penalty attributes to the defendant a level of knowledge and sophistication greater than the attorney (or the appellate court which likewise missed the issue), directly contrary to the constitutional rationale for the requirement of counsel on appeal. Yet, the individual defendant could be illiterate, mentally or physically handicapped, delusional, or one who speaks or writes only in a language other than English. But even for a defendant who is otherwise intelligent and capable of understanding, the courts cannot rationally assume that he or she will be more able to identify viable legal claims than his or her attorney or the court.

The Court should keep in mind that defendants often do not have a copy of the complete record. The State Public Defender's Office generally does not provide copies of the transcripts and other record documents until after the no-merit report is filed. A defendant confronted with a no-merit report must request the record from counsel, receive it, review it, and file a response within 30 days. Wis. Stat. (Rule) 809.32(1)(e). *Compare* Wis. Stat. (Rule) 809.30(2)(h) (appointed counsel has 60 days to review file and file post-conviction motion or notice of appeal). Although the 30-day deadline can be extended, *see* Wis. Stat. (Rule) 809.82(2), defendants left to fend for themselves do not necessarily know that. Many, if not most, are incarcerated, with little or no access to legal research materials, even if they have the ability to use them.

It is more than a little ironic, therefore, that the circuit court here condemned Allen's failure to raise claims the court believed he "could and should have raised" in response to the no-merit report (R102:2;

App. 6), while the Court of Appeals summarily rejected Allen's "sufficient reason" argument that counsel "could have and should have raised" the same claims. (App. 3-4).

Nor is there any reason to assume knowledge where, as here, both no-merit counsel and the Court of Appeals missed arguably meritorious issues. By insisting on a no-merit report rather than consenting to closing the case or proceeding *pro se*, the defendant expresses his or her desire, not only to challenge the conviction or sentence, but to do so as part of the direct appeal and with the assistance of counsel. Under those circumstances, the most likely, if not only, rational basis for not raising possible issues in response to the no-merit report is that the defendant either did not know of the claims, did not know they can or must be raised in such a response, or did not have the ability to raise them. Unlike the strategic withholding of claims addressed in ***Escalona-Naranjo***, the indigent no-merit defendant knows that convincing the court to reject the no-merit report is almost certainly his or her *only* chance of raising any claims with the assistance of counsel. Intentionally withholding viable claims of which the defendant is aware in response to a no-merit report would directly conflict with the reasons for insisting on a no-merit appeal in the first place. By doing so, the defendant not only would lose the assistance of counsel on those claims, but would delay decision on claims that could result in his or her freedom.

Given all of these factors, the Court of Appeals in ***Fortier*** was correct in holding that the courts "cannot fault [a defendant] for his reliance upon his appellate counsel's assertion in the no-merit report that there were no issues of arguable merit," and that appointed counsel's failure to identify and raise an issue of arguable merit in a no-merit report accordingly constitutes sufficient reason under §974.06(4) and ***Escalona-Naranjo***, despite the defendant's failure to identify and raise that issue in response to the no-merit report. ***Fortier***, 2006 WI App 11, ¶27.

At the time of his no-merit appeal, Allen did not in fact know of the claims he later raised in his *pro se* §974.06 motion. *See* Allen's

Brief of Defendant-Appellant at 17, 24 (Ct. App.). This fact is corroborated by the additional facts that (1) it would have been irrational not to raise them at the time if he had known of them, *see supra*, and (2) he did not subsequently raise them until nearly seven years after decision on the no-merit appeal (*see* R101 (post-conviction motion filed March 16, 2007)).[7]

There likewise can be no dispute that neither appointed counsel nor the Court of Appeals on the no-merit appeal identified or decided the issues Allen subsequently raised under §974.06. Although the no-merit report is not in this record (another reason why the circuit court's summary denial was inappropriate), the Court of Appeals' no-merit decision identifies only three specific issues raised in that report

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[7] This Court should repudiate the type of summary denial of §974.06 motions on ***Escalona-Naranjo*** grounds used by the circuit court here without the opportunity to correct perceived defects. (*See* R102; App. 5-6). Pleading defects and procedural default can be waived by the state, ***State v. Avery***, 213 Wis.2d 228, 247-48, 570 N.W.2d 573 (Ct. App.1997) (state waived ***Escalona-Naranjo*** defense by failing to raise it in circuit court), and the type of pleading defects so common in *pro se* pleadings, such as the failure to utter the "magic words" sometimes necessary to satisfy the sufficient reason requirement, often can be corrected promptly in the circuit court following notice of the specific defects. Compare, for instance, Allen's discussion of sufficient reason in his post-conviction motion (R101:1-3) with that in his court of appeals brief.

Section 974.06(3) permits summary denial only where "the motion and the files and records of the action conclusively show that the person is entitled to no relief." *Pro se* pleadings are to be construed liberally to protect the litigant's rights. ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶29 fn11, 234 Wis.2d 626, 610 N.W.2d 821 ("we 'follow a liberal policy in judging the sufficiency of pro se complaints filed by unlettered and indigent prisoners,'" and in assessing whether an unrepresented inmate's failure to object constitutes default). A mere pleading defect, such as the easily-correctable failure to utter the "magic words," does not "conclusively show that the person is entitled to no relief."

Respect for the criminal justice system is undermined where the same type of hyper-technical errors condoned when committed by a prosecutor are deemed fatal without opportunity for correction when committed by a *pro se* defendant seeking relief from an unjust conviction. *See* ***Anderson-El***, 2000 WI 40, ¶26 (respect for penal system enhanced where inmates see prison authorities abide by the rules; "It would be hypocritical for the prison system to force inmates to 'obey the rules' when the officers in charge do not"). *Compare* decisions below with, *e.g.*, ***State v. Smaxwell***, 2000 WI App 112, ¶5, 235 Wis.2d 230, 612 N.W.2d 756 (sufficiency of complaint turns on "'minimal adequacy, not in a hypertechnical but in a common sense evaluation'" (citation omitted)).

(R98:2; App. 8). Although the Court stated that it had conducted an independent review and found no other meritorious issues, it does not identify any potential appellate issues that it considered and found to lack arguable merit (R98:2; App. 8). *See* ***Fortier***, ¶21; ***Tillman***, ¶17.

Because Allen was unaware of the issues raised in his §974.06 motion at the time of the no-merit appeal, and because neither his appointed counsel nor the Court of Appeals identified those arguable issues, he cannot be faulted for failing to raise them earlier. ***Fortier***, ¶27. Allen therefore has demonstrated sufficient reason why he did not raise them in his response to the no-merit report. *Id.*

2. Allen did not waive his claims by failing to respond to the no-merit report

The preceding section makes clear that Allen did not waive the claims raised in his §974.06 motion by failing to respond to the no-merit report. Although Rule 809.32(1)(e) grants no-merit defendants an opportunity to respond, neither that provision nor any published authority imposes an *obligation* to respond. Moreover, since Allen was unaware of the claims he raised seven years later under §974.06, he had no obligation to respond to the no-merit report in any event.

Also, the record does not contain a copy of the no-merit report itself, nor does it reflect what, if any, advice appointed counsel may have provided Allen. The no-merit procedures under Rule 809.32 do not require that post-conviction or appellate counsel advise the client that a response is necessary to avoid waiver, so the provision of such advice cannot be presumed. The circuit court, moreover, summarily denied Allen's §974.06 motion without even requiring a response from the state to flesh out the record. There thus is no evidence in the record that appellate counsel (or anyone else) advised Allen that his failure to respond to the no-merit report would waive any future challenge to his conviction.

This Court "must indulge every reasonable presumption against the loss of constitutional rights." ***Illinois v. Allen***, 397 U.S. 337, 343 (1970). Waiver of the assistance of counsel thus cannot be presumed

from a silent record, *e.g.*, ***Boykin v. Alabama***, 395 U.S. 238, 243 (1969), and instead must be knowing, voluntary and intelligent. ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938).

Imposing waiver in the no-merit context is especially inappropriate where, as here, the omitted issue concerns the alleged ineffectiveness of counsel. First, ineffective assistance claims must be raised in the circuit court and subject to a ***Machner*** hearing before they can be the subject of an appeal. *E.g.*, ***State v. Waites***, 158 Wis.2d 376, 392, 462 N.W.2d 206 (1990) (ineffective assistance of counsel claim waived because not first raised in post-conviction motion before circuit court). Accordingly there is significant dispute in the Court of Appeals' unpublished decisions regarding whether ineffective assistance claims can even be addressed on a no-merit appeal, and no published state decision appears to resolve it. *See* ***Page v. Frank***, 343 F.3d 901, 908-09 (7th Cir. 2003), citing ***State v. Neita,*** No. 95-2858-CR-NM, 1996 WL 426110, at *3 (Wis. 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), and ***State v. Fadness,*** No. 87-2093-CR-NM, 1988 WL 148281, at *1 (Wis. App. 1988) (unpublished opinion) (same). A lay defendant can hardly be required to raise an issue, on pain of waiver or forfeiture for failing to do so, when no consensus exists that the Court of Appeals can even resolve the issue under Rule 809.32.

Second, given the absence of published state authority holding either that appointed counsel and the Court of Appeals *must* address potential ineffectiveness claims or that the defendant *must* raise such claims in response to a no-merit report to avoid waiving the issue, a lay defendant easily could be confused by federal authority on point. Specifically, the United States Supreme Court has held that ineffectiveness claims may be raised on collateral review in the federal system even though the defendant could have raised the claim on direct appeal. ***Massaro v. United States***, 538 U.S. 500 (2003). Although ***Massaro*** is not directly applicable to Wisconsin appellate procedure, lay defendants do not necessarily know that.

Third, given the absence of published state authority on point, defendants understandably will seek guidance from the only published authority directly addressing whether ineffective assistance of counsel claims may be raised in Wisconsin no-merit appeals. The Seventh Circuit in ***Page v. Frank*** concluded that they may not. 343 F.3d at 908-09.

The absence of any evidence in the record that Allen was advised that his failure to respond to the no-merit report would constitute a waiver of the right to the assistance of post-conviction counsel or to raise challenges to his conviction thus itself mandates reversal of the lower courts' orders. *See also* ***Wilkinson v. Cowan***, 231 F.3d 347, 351 (7th Cir. 2000) (no default where defendant was advised that he could respond to no-merit report but was not advised that he *must* do so to preserve issues for review).

Finally, even if this Court should clarify the applicable procedures now to require that known claims of trial ineffectiveness be raised through the no-merit procedure, Allen's unawareness of that new requirement ten years ago during the no-merit process necessarily bars any finding of a knowing waiver here. ***Zerbst***, *supra*; ***Wilkinson***, *supra*; *cf.* ***Escalona-Naranjo***, 185 Wis.2d at 182 fn.11. *See also* ***Ford v. Georgia***, 498 U.S. 411 (1991) (retroactive application of new contemporaneous objection rule not adequate and independent state ground barring federal review of federal constitutional claim).

3. Appointed counsel has no obligation to advise the defendant that a response to a no-merit report is necessary to preserve claims for further review

As already demonstrated, a defendant's failure to respond to a no-merit report does not legitimately bar him or her from raising additional claims in the future that were unknown to the defendant at the time of the no-merit appeal. An attorney's advice to the contrary, that the failure to respond *would* waive any other issues, accordingly would be erroneous and inappropriate. At best, an attorney may be permitted to advise the client that the failure to raise any *known* issues

could result in waiver. However, it is unlikely that situation would arise because, if the attorney knows that the defendant is aware of such issues, the attorney would be obligated to raise them in the no-merit report. Wis. Stat. (Rule) 809.32(1)(a).

4. Requiring a defendant to respond to a no-merit report with arguable claims that were overlooked by appointed counsel, and barring the defendant from ever raising any claim not so raised, conflicts with the right to counsel on direct appeal

There is no dispute that the no-merit procedure under Rule 809.32 complies with ***Anders*** and the constitutional right to counsel. The Supreme Court so held in ***McCoy v. Court of Appeals of Wisconsin, Dist. I***, 486 U.S. 429 (1988). As already discussed, however, a rule placing the obligation on the indigent defendant to identify and raise potential issues in response to appointed counsel's no-merit report, upon pain of default for the failure to do so, would conflict with both the right to the assistance of counsel on appeal and the purposes of the no-merit procedure required by ***Anders*** and Rule 809.32.

An indigent defendant is entitled to the assistance of counsel on appeal and therefore cannot constitutionally be forced by the state to represent himself or herself. *E.g.*, ***Penson v. Ohio***, 488 U.S. 75, 82-83 (1988); ***Evitts***, *supra*; ***Douglas***, *supra*. Yet, imposing an obligation on defendants to raise potential issues missed by appointed counsel does just that. Such an obligation requires them to do exactly what the Supreme Court has recognized cannot be expected of them – identify and protect their own rights. *E.g.*, ***Evitts***, 469 U.S. at 396 ("An unrepresented appellant–like an unrepresented defendant at trial–is unable to protect the vital interests at stake"). A defendant facing a no-merit appeal, moreover, is as much denied the assistance of counsel regarding any issues not identified in the no-merit report as is a defendant confronting the conclusory no-merit letter rejected as constitutionally impermissible in ***Anders***. In both circumstances, the defendant is left to "shift entirely for himself" and is denied the advocacy of counsel on any potential issues not identified and

specifically raised by counsel. ***Anders***, 386 U.S. at 745.[8]

The Seventh Circuit thus was correct in holding that imposition of a procedural bar in such circumstances would conflict with the right to counsel:

> It would be incongruous to maintain that Mr. Page has a Sixth Amendment right to counsel on direct appeal, but then to accept the proposition that he can waive such right by simply failing to assert it in his pro se response challenging his counsel's ***Anders*** motion.

Page v. Frank, 343 F.3d 901, 909 (7th Cir. 2003).

C. Ineffectiveness of Post-conviction Counsel Independently Constitutes Sufficient Reason Here

Regardless whether Allen's unawareness of his current claims at the time of his no-merit appeal would constitute sufficient reason under §974.06(4), he based his §974.06 motion on the unreasonable failure of his post-conviction/appellate attorney to pursue certain allegations of trial ineffectiveness via a post-conviction motion in the circuit court. Allen argued that, because such a motion is a prerequisite to an appeal on trial-ineffectiveness grounds, ***Waites***, 158 Wis.2d at 392, the failure to raise such a claim denied him the effective assistance of post-conviction counsel under ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996). This ineffectiveness of post-conviction counsel claim independently satisfies that standard.

As noted in Section A,3, *supra*, there is no real dispute that ineffectiveness of post-conviction or appellate counsel constitutes sufficient reason under §974.06(4) and ***Escalona-Naranjo*** for the failure to raise claims that a reasonable attorney would have raised during the direct appeal process under Wis. Stat. §974.02 and (Rule)

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[8] *See also* ***State ex rel. McCoy v. Wisconsin Court of Appeals, District I***, 137 Wis.2d 90, 101-02, 403 N.W.2d 449 (1987) (Wisconsin no-merit procedure's requirement that counsel explain why potential issue lacks merit necessary to demonstrate constitutionally required diligence and preparation by appointed counsel).

809.30.[9] Had Allen's prior attorney unreasonably failed to pursue such a motion as part of an appeal raising other claims, therefore, there would be no question that Allen could pursue the matter under §974.06. *See* ***Rothering***, *supra*.

The lower courts, however, did not reach that issue, finding instead that Allen waived the ineffectiveness of post-conviction counsel claim by not raising it in response to the no-merit report (R102:2; App. 1-4, 6). For the reasons stated in Section B,2, *supra*, that novel waiver theory does not hold water. No statute, rule, or published authority requires a defendant to raise an ineffectiveness claim in response to a no-merit report, even if the defendant knows of it. Indeed, the only published decisions suggest just the opposite. *See* ***Massaro***, *supra*; ***Page***, *supra*.

Even if this Court should create such a rule now, it could not apply retroactively to Allen and, in any event, could not act to bar subsequent claims of ineffectiveness of counsel based on errors committed during the no-merit appeal process. *E.g.*, ***Wilkinson***, *supra*. The Supreme Court has expressly acknowledged that no-merit counsel's errors are subject to collateral ineffectiveness review. ***Smith***, 528 U.S. at 284-89.

Also, ineffective assistance of post-conviction or appellate counsel cannot reasonably be asserted in the no-merit procedure. Regardless whether appellate counsel can be expected to raise potential claims of ineffectiveness regarding different trial counsel, the law is clear that appellate counsel cannot reasonably challenge his or her *own* prior effectiveness. ***State v. Robinson***, 177 Wis.2d 46, 52-53, 501 N.W.2d 831 (Ct. App. 1993) (counsel's inability to argue own prior ineffectiveness constitutes sufficient reason under §974.06(4)); *see*

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[9] Although Allen argued below that ineffectiveness of post-conviction counsel satisfied the sufficient reason requirement (R101:1-3), *see* Allen's Court of Appeals Brief at 21, 27-41, the state rested its response entirely on its misplaced waiver theory. *See* State's Court of Appeals Brief at 3-6. That which is not disputed it deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 108-09, 279 N.W.2d 493, 499 (Ct. App. 1979).

State v. Miller, 2009 WI App 111, ¶19 fn.9, 320 Wis.2d 724, 772 N.W.2d 188 (same); ***State v. Hensley***, 221 Wis.2d 473, 585 N.W.2d 683 (Ct. App. 1998) (same). *See also* ***United States v. Taglia,*** 922 F.2d 413, 418 (7th Cir. 1991) (counsel cannot be expected to attack his own effectiveness). Yet, no-merit counsel remains obligated to advocate for the client, creating an inherent conflict in addressing his or her own effectiveness, again leaving the client effectively without representation on such a claim.

Finally, there is a special irony, if not full-blown constitutional defect, in punishing defendants who insist on a process intended to protect their rights to the assistance of counsel by denying them the ability to challenge the effectiveness of that assistance. Had Allen declined the no-merit option and merely closed his case, he would be entitled to raise his ineffectiveness claims now. *See, e.g.*, ***Lo***, 2003 WI 107, ¶44, fn11 (absent prior motion or appeal, sufficient reason unnecessary). Had Allen's prior appointed counsel missed the trial ineffectiveness claim and pursued a frivolous appeal on other grounds, or had Allen retained post-conviction counsel who closed the case without filing post-conviction motions or an appeal, Allen would be entitled to challenge their unreasonable failure to challenge the effectiveness of trial counsel in a post-conviction motion. *E.g.*, ***Lo***, *supra*; ***Rothering***, *supra*.

However, according to the lower courts, Allen cannot do so here because he was sophisticated enough to know that he could not plausibly represent himself, but not sophisticated enough to know that the lawyer appointed to protect his rights had screwed up. That simply makes no sense. ***Evitts***, 469 U.S. at 396 (appellate representation necessary because the unrepresented appellant "is unable to protect the vital interests at stake"). Contrary to the lower courts' holdings, therefore, the effectiveness of post-conviction or appellate counsel is not an appropriate subject for the no-merit proceedings. Just as assessment of trial counsel's effectiveness generally must await the appeal, the effectiveness of post-conviction or appellate counsel must await subsequent proceedings.

Whether or not Allen can establish ineffectiveness of post-conviction counsel, and thus has shown sufficient reason on this ground, goes to the merits of his claims. That question was not resolved by the lower courts and goes beyond the scope of both the issues on which review was granted and counsel's appointment. Should the Court determine that Allen has not otherwise demonstrated sufficient reason under §974.06(4), remand thus is necessary for the circuit court to address that matter in the first instance.

CONCLUSION

For these reasons, Aaron Antonio Allen respectfully asks that the Court reverse the Court of Appeals' decision and remand this matter to the circuit court for full hearing and decision on the merits of his ineffective assistance of counsel claims.

Dated at Milwaukee, Wisconsin, March 15, 2010.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,954 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Robert R. Henak

Consol. Allen SCT Brf.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 15th day of March, 2010, I caused 22 copies of the Brief and Appendix of Defendant-Appellant-Petitioner to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Robert R. Henak

Consol. Allen SCT Brf.wpd