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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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REPLY BRIEF OF
DEFENDANT-APPELLANT-PETITIONER

ARGUMENT

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

A. The Issue Here Is Not Whether Wis. Stat. §974.06(4)'s "Sufficient Reason" Requirement Applies, but How it Applies

Much of the state's argument is based on the mistaken assertion that Allen seeks to overturn this Court's holdings in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994), and ***State v. Lo***, 2003 WI 107, 264 Wis.2d 1, 665 N.W.2d 756. *E.g.*, State's Brief at 7-10. He does not. Neither Allen nor his counsel, who also argued ***Lo***, dispute that some accommodation must be made between finality and fairness. The question is where the Legislature set that balance when enacting Wis. Stat. §974.06(4) in 1970.

Although the state spends much ink seeking to transform Allen's argument, Allen does not here dispute this Court's interpretation of §974.06(4) in ***Escalona-Naranjo*** and ***Lo*** to the effect that Wis. Stat.

§974.06(4) "requir[es] a defendant to present all of his or her claim(s) for attack on a conviction or sentence in his or her initial postconviction proceeding, unless there exists a sufficient reason why the claim(s) were not raised in the initial proceeding." ***Lo***, 2003 WI 107, ¶20 (citations omitted).[1]

Nor does Allen challenge the application of that standard where, as here, the initial post-conviction proceeding took the form of a no-merit appeal under Wis. Stat. (Rule) 809.32. *See* Allen's Brief at 14-15; ***State v. Tillman***, 2005 WI App 71, 281 Wis.2d 157, 696 N.W.2d 574.

No, contrary to the state's persistent misstatement of the dispute, Allen does not assert "exempt[ion]" from ***Escalona-Naranjo*** and §974.06(4), but compliance with the "sufficient reason" standard. The question here thus is not *whether* §974.06(4) applies, but *how* it applies. The lower courts here erred, not because they applied ***Escalona-Naranjo*** and §974.06(4), State's Brief at 10, but because they *misapplied* them.

Although ignored by the state, the language and history of §974.06(4) demonstrate that the Legislature intended the statutory "sufficient reason" standard to provide a fair accommodation of *both* the defendant's interests in freedom from an unfair conviction or sentence and the state's interests in finality. This Court's decisions in ***State v. Howard***, 211 Wis.2d 269, 564 N.W.2d 753 (1997), and ***Escalona-Naranjo*** are consistent with the Legislature's intent that sufficient reason exists whenever the defendant did not know of the claim and intentionally withhold it from the initial post-conviction proceedings. Allen's Brief at 9-14.

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[1] Although generally asserting the proper standard, the state at one point erroneously asserts that the defendant must show why the issue "could not have been raised" in the earlier proceedings. State's Brief at 14. While an inability to raise an issue in the prior proceedings logically would constitute "sufficient reason" under §974.06(4), the statutory language requires only sufficient reason why the issue *was not raised* (or was inadequately raised), not why it could not have been raised.

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

As explained in his opening brief at 17-29, Allen's failure to respond to his appointed counsel's failure to identify and include non-frivolous claims in his no-merit report neither waived those claims nor properly resulted in their forfeiture. Although the no-merit appeal constitutes a prior proceeding, thus requiring a showing of sufficient reason under §974.06(4), ***Tillman***, *supra*, Allen made that showing. Sufficient reason is demonstrated by (1) Allen's actual ignorance of the claims at the time of the no-merit proceedings, (2) the fact that appointed counsel and the Court of Appeals also overlooked the claims, *see* ***State v. Fortier***, 2006 WI App 11, ¶23-24, 27, 289 Wis.2d 179, 709 N.W.2d 893, and (3) the ineffectiveness of post-conviction counsel in failing to identify the claims and raise them in the circuit court, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996). Allen's Brief at 17-29.

Although the state repeatedly asserts that the failure to respond to a no-merit report should result in forfeiture or waiver of any claims later raised by that defendant, *see* State's Brief at 13, 21-22, 25, it never explains why. It seems to believe that this consequence necessarily flows from ***Escalona-Naranjo***, but the Court there said nothing about the meaning of "sufficient reason" other than to explain that sufficient reason is shown where subsequent events are not foreseen at the time of the initial appeal. 185 Wis.2d at 182 n.11.

Nor does the state address the fact that its argument irrationally assumes that the defendant, left to fend for himself in responding to counsel's no-merit report, is more legally sophisticated and knowledge-able than either his appointed counsel or the Court of Appeals, faulting him for missing a valid issue that likewise was overlooked by them. *Compare* ***Fortier***, 2006 WI App 11, ¶¶23-24, 27 (finding sufficient reason under these circumstances).

The state's attempted analogy between the no-merit response and a *pro se* motion, thereby laying all the blame on the defendant when an issue is not raised during the no-merit appeal, State's Brief at

13, completely distorts that process. Although composed of various parts, the no-merit process under Rule 809.32 is a single appeal, not divided into separate attorney and defendant components. Accordingly, when a court assesses whether sufficient reason exists why a particular claim was not asserted, or was inadequately asserted, in that process, it must consider the actions or inaction of *all* the relevant participants. That is exactly what the Court of Appeals did in ***Fortier***, *supra*, in holding that the defendant, left to fend for himself, should not be expected to identify and raise viable claims his appointed attorney and the Court of Appeals failed to identify. Under circumstances like those here, the no-merit process was not followed. ***Fortier***, 2006 WI App 11, ¶27.[2]

Equally illogical is the state's suggestion that, since Allen would have known at the time of trial about the facts on which his §974.06 claims were based, and because the ineffectiveness standard previously was established in ***Strickland v. Washington***, 466 U.S. 668 (1984), Allen thus necessarily knew of his claims at the time of the no-merit appeal. State's Brief at 12. Applying the facts to the law is often a difficult task even if one knows and fully understands the applicable legal principles, as any litigator and the many volumes of appellate decisions can attest. Expecting a defendant to make the necessary connection when, as here, both appointed counsel and the Court of Appeals failed to do so, is neither fair nor rational. ***Fortier***, *supra*.

The state's argument also ignores the fact that, unlike the situation in merits appeals prior to ***Escalona-Naranjo***, there is no rational incentive for an indigent defendant to withhold known claims in response to a no-merit report. *See* Allen's Brief at 20-21. It is only through such a response that the defendant, who insisted on a no-merit report and the assistance of counsel in the first place, can hope to obtain the assistance of counsel in the prompt assertion of claims he believes

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[2] Contrary to the state's suggestion, State's Brief at 5, 15, the fact that both Allen's appointed counsel and the Court of Appeals failed to identify non-frivolous issues on the no-merit appeal demonstrates that the no-merit process was not followed. Allen's Brief at 17-22; *see* ***Fortier***, 2006 WI App 11, ¶27.

to have merit but which were not raised in the no-merit itself. There is thus ample reason to believe, as is implicitly alleged in Allen's §974.06 motion and expressly alleged in his *pro se* brief in the Court of Appeals at 17, 24, that he did not in fact know that the claims raised in his motion were viable at the time of the no-merit appeal.

The state's attempt to attribute the different results in ***Tillman***, *supra* and ***Fortier***, *supra*, to inconsistent legal standards, State's Brief at 16, necessarily fails for the reasons stated in Allen's Brief at 14-17 and in ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶16, 314 Wis.2d 112, 758 N.W.2d 806. Both ***Tillman*** and ***Fortier*** applied ***Escalona-Naranjo***. Although ***Tillman*** found no sufficient reason where the defendant merely repackaged claims already raised by him and expressly rejected on a prior no-merit appeal, ***Tillman***, 2005 WI App 71, ¶¶24-26, it acknowledged that sufficient reason would be shown where, as here and in ***Wilkinson v. Cowan***, 231 F.3d 347, 351 (7th Cir. 2000), the defendant was not advised that a response was required to preserve issues not contained in appointed counsel's no-merit report. ***Tillman***, 2005 WI App 71, ¶20 fn.5.[3]

Fortier's holding that sufficient reason exists where, although overlooked by appointed counsel and the Court of Appeals on the no-merit appeal, the new issue had arguable merit, ***Fortier***, ¶¶23-24, 27, thus is fully consistent with ***Tillman***. *See also* ***Panama***, 2008 WI App 146, ¶16. Unlike the decisions below in Allen's case, that holding also happens to be consistent with the legislative purpose of §974.06(4) and this Court's decisions in ***Howard*** and ***Escalona-Naranjo***. *See* Allen's Brief at 9-22.

Finally, because requiring a defendant to respond to a no-merit report, upon pain of forfeiture for failure to do so, necessarily conflicts with the right to counsel on direct appeal, *see* Allen's Brief at 25-26; ***Page v. Frank***, 343 F.3d 901, 909 (7th Cir. 2003), the state's conclusory

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[3] Significantly, the state here concedes that there is no requirement under Wisconsin law that the defendant be advised of any obligation to respond to a no-merit report in order to preserve issues not raised in that report. State's Brief at 24.

assertions to the contrary are puzzling. State's Brief at 24-25. It may be acceptable, although likely unworkable, to require defendants to raise *known* claims in response to the no-merit report. However, as previously demonstrated, there are ample incentives already for defendants to do just that. Allen's Brief at 20. What is *not* constitutionally acceptable is the position that default or waiver can be imposed, as here, for failure to raise unknown claims in response to the no-merit. ***Page***, 343 F.2d at 909.

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

In an attempt to dismiss his post-conviction ineffectiveness claim, the state relies upon the type of hyper-technical reading of Allen's §974.06 motion that this Court has rejected when reviewing *pro se* pleadings. State's Brief at 25-27. *See, e.g.*, ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶29 fn.11, 234 Wis.2d 626, 610 N.W.2d 821. *See* Allen's Brief at 21, fn.7. Even without the liberal reading required by ***Anderson-El***, however, the state's argument fails.

Allen's §974.06 motion asserted that he was denied the effective assistance of trial counsel on various grounds, and that he was denied the effective assistance of post-conviction counsel due to his appointed attorney's failure to raise those trial ineffectiveness claims (R101).

The state does not dispute the adequacy of Allen's pleadings on either the deficiency or the resulting prejudice prongs of his trial ineffectiveness claims. *See* State's Brief at 25-27. *See also* ***Strickland***, *supra*. Rather, the state's argument appears to be that Allen failed to include sufficient factual allegations regarding "post-conviction counsel's actions, inactions [sic], reasoning, or decision-making" in failing to raise the trial ineffectiveness claims. State's Brief at 26.

The state's argument might have had some merit if Allen had a merits appeal rather than a no-merit appeal. The same ***Strickland*** standard for ineffectiveness applies, with appropriate modifications, to assess the constitutional effectiveness of post-conviction or appellate counsel. ***Smith v. Robbins***, 528 U.S. 259, 285-88 (2000); *see* ***State v.***

Ziebart, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369.

The Seventh Circuit has summarized the standards as follows:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient . . . and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (state appellate attorney's failure to raise preserved hearsay issue constituted ineffective assistance of appellate counsel, mandating federal habeas relief). On a merits appeal, therefore, the question is whether counsel had a strategic reason for not raising a particular claim.

Allen's, however, was a no-merit appeal, with appointed counsel claiming there were *no* non-frivolous issues. Because no-merit counsel has an obligation to identify and raise "anything in the record that might arguably support the appeal," Wis. Stat. (Rule) 809.32(1)(a); ***Tillman***, ¶17, deficient performance is shown here simply by the fact that such issues existed that appointed counsel failed to identify. Contrary to the state's suggestion, State's Brief at 23, 24, there can be no rational strategic or tactical reason for not raising an arguable claim and instead pursuing a no-merit appeal. At best, appointed counsel overlooked the issues later raised in Allen's §974.06 motion. ***Strickland's*** deficiency prong is met when counsel's performance was the result of oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989).[4]

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[4] Again, it is ironic that the circuit court barred Allen from raising his claims on the grounds that Allen "could and should have raised all these issues in response to counsel's no merit report" (R102:2; App.6), while the Court of Appeals concludes, in almost identical language, that allegations that counsel "could and should have raised" them it is inadequate to satisfy the sufficient reason requirement (App. 3-4).

D. The Impact of *Page v. Frank*

Although the state significantly misconstrues the holding and effect of ***Page v. Frank***, 343 F.3d 901 (7th Cir. 2003), State's Brief at 17-21, Allen agrees that the Court can and should clarify whether trial ineffectiveness claims can be raised in a no-merit appeal, whether appointed counsel are obligated to identify and address ineffectiveness issues in the no-merit report, and the procedure for doing so.

Contrary to the state's suggestion, State's Brief at 19-20, there is nothing inaccurate about either ***Page's*** recognition that a Wisconsin defendant cannot raise an ineffectiveness claim on appeal without first presenting it to the circuit court, *e.g.*, ***State v. Waites***, 158 Wis.2d 376, 392, 462 N.W.2d 206 (1990), or, in light of unpublished Wisconsin authority so holding and the absence of published authority to the contrary, that ineffectiveness claims accordingly cannot be raised in a no-merit appeal absent such a motion. There certainly is nothing inaccurate in ***Page's*** recognition that Wisconsin law does not require a defendant to respond to the no-merit report to avoid waiver. *E.g.*, ***Fortier***, *supra*; ***Tillman***, *supra*.

While Wisconsin law does not clearly require appointed counsel to identify and raise ineffectiveness claims in a no-merit report, such a requirement would be consistent with ***Anders v. California***, 386 U.S. 738 (1967), and Rule 809.32. However, doing so raises significant issues of attorney-client privilege, *see* ***State v. Meeks***, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859, and problems concerning the consideration and presentation of facts outside the appellate record that go far beyond the issues presented here. Any pronouncement on the point can have no effect on Allen's entitlement to relief in any event, Allen's Brief at 24.

Finally, the state ignores the fact that ***Page*** did not rest solely on its interpretation of Wisconsin law. Rather, it cites as "an even more fundamental reason" for rejecting the waiver/forfeiture theory relied upon by the state court there and the state again here. 343 F.3d at 909. That is, such a ban violates the right to counsel on the direct appeal:

> 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.

Id.

The Court thus can and should begin to clarify whether and when trial ineffectiveness can or must be raised on a no-merit appeal. However, it should be under no misconception that doing so would either remove the constitutional defects in the state's misplaced waiver/forfeiture theory, allow its application to Allen, or raise a bar to federal habeas review of claims deemed procedurally defaulted under that theory.

CONCLUSION

For these reasons, and for those in his opening brief, 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, April 22, 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 reply brief produced with a proportional serif font. The length of this brief is 2,797 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.

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Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 22nd day of April, 2010, I caused 22 copies of the Reply Brief 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.

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Robert R. Henak

Consol. Allen SCT Reply.wpd