01-0843

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 01-0843

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANOU LO,

Defendant-Appellant-Petitioner

Appeal From The Order Entered In The Circuit Court For LaCrosse County, The Honorable Ramona A. Gonzalez, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether this Court's decision in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), should be overruled.

Because both the court of appeals and the circuit court are bound by the decision in *Escalona-Naranjo*, neither court addressed whether that decision should be overruled.

2. The circuit court's jury instructions on unnecessary defensive force (aka "imperfect self-defense") regarding the charge of attempted first degree intentional homicide failed to require the state to disprove beyond a reasonable doubt Lo's actual belief (1) that he was in imminent danger of death or great bodily harm and (2) that the force he used was necessary to defend himself, as required by *State v. Head*, 2002 WI 99, ___ Wis.2d ___, 648 N.W.2d 413. Instead, the instruction only required the state to prove that any such belief was unreasonable. Did this failure to require a jury finding beyond a reasonable doubt on a necessary element of the offense of attempted first degree intentional homicide deprive Mr. Lo of due process.

Because *Head* was not decided until after the Court of Appeals' decision, neither that court nor the circuit court directly addressed this issue. The circuit court denied Lo's general challenge to the self-defense instruction on *Escalona-Naranjo* grounds, while the Court of Appeals deemed his *pro se*, pre-*Head* argument insufficiently developed and affirmed on that ground.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint filed on July 28, 1995, the state charged Anou Lo with one count of attempted first degree intentional homicide while armed, in violation of Wis. Stat. §§939.32(1), 939.63(1)(a)2, and 940.01(1), and one count of first degree recklessly endangering safety while armed, in violation of Wis. Stat. §§939.63(1)(a)3 and 941.30(1). (R5).[1] Mr. Lo, who was 16 years old at the time, previously had been waived from juvenile court (R3; R4). Although the state initially alleged a gang enhancer under Wis. Stat. §939.625(1)(b)(2), it dismissed the enhancer at trial and filed an amended information. (R25; R101:9).

The charges arose from an incident on July 6, 1995, during which Mr. Lo admittedly fired 4-5 shots from a distance of about 40 feet in the direction of Koua Vang in a LaCrosse park. Vang, a gang

[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as App. __.

member who also was carrying a gun that day, was hit once in the right arm.

Following a preliminary hearing, bindover, arraignment on an information alleging the same two charges, and other pretrial proceedings (R8; R92; R93; R94), the case proceeded to a jury trial on January 8, 1996, before the Hon. Ramona A. Gonzalez (R100; R101).

At the trial, Mr. Lo asserted both perfect and imperfect self-defense, supported by his own testimony and that of another witness to the effect that, just prior to Lo drawing his gun and firing, Vang had suddenly turned and made a motion toward his waistband which they interpreted as him going for a gun. It turns out that Vang, an active member of a gang which had made threats to "get" Lo and his brothers, in fact did have a gun in his waistband, although he did not succeed in drawing and firing it.

The jury nonetheless convicted Mr. Lo on January 12, 1996, of attempted first degree intentional homicide of Mr. Vang and first degree reckless endangerment of unidentified bystanders in the park (R54; R55; R86:767-68).

On February 26, 1996, the circuit court, Hon. Ramona A. Gonzalez, presiding, sentenced Mr. Lo to consecutive terms of 20 years incarceration on the attempted homicide and 9 years on the reckless endangerment (R102:32-34), and entered judgment (R59).

Represented by new counsel, Daniel P. Ryan, Mr. Lo filed post-conviction motions pursuant to Wis. Stat. §974.02 and (Rule) 809.30 (1) challenging admission of certain gang-related activities in which Lo was not involved, (2) alleging ineffectiveness of trial counsel for his failure properly to object to unrelated crimes committed by local gangs and irrelevant "other acts" evidence, and his opening the door to admission of prejudicial and otherwise inadmissible "other acts" evidence, and (3) challenging the reckless endangerment instruction on the grounds that the failure to identify specific victims deprived him of a unanimous verdict and ran the risk of double jeopardy should the jury find he endangered Vang. (R64; R65; R66).

Following an evidentiary hearing, at which Mr. Ryan expanded

the challenged evidence and areas of alleged ineffectiveness and Lo withdrew the challenge to the endangerment instruction (R103:60-61), the circuit court denied the motions (R74; R103:64-65).

Lo appealed, again challenging the effectiveness of his trial counsel and the admission of evidence of alleged gang activity. By decision dated June 25, 1998, however, the Court of Appeals affirmed. *State v. Anou Lo*, Appeal No. 97-0023-CR. This Court denied review on August 21, 1998.[2]

After an unsuccessful, *pro se* attempt at federal habeas relief, Mr. Lo, again *pro se*, sought an order from the circuit court directing disclosure to him of certain information "necessary . . . to file post conviction [sic] relief pursuant to 974.06" (R82). The Circuit Court denied the motion by Memorandum Decision and Order dated May 16, 2000, in part on the grounds that Lo should be able to get the requested information from his prior attorneys (R85).

Mr. Lo then filed a lengthy document entitled "Procedural History" (R86), which he apparently intended as a motion under Wis. Stat. §974.06, but which the circuit court apparently viewed as just a miscellaneous document to be placed in the file (*see* R87-R90; R104-R107).

Lo accordingly refiled the document on January 17, 2001 with a cover expressly identifying it as a "974.06 Motion." (R108). Lo identified a number of substantive grounds for relief, including the trial court's failure to instruct on reckless endangerment as a lesser-included offense of the attempted homicide (*id.*:8-19); admission of evidence Lo had sexually assaulted another youth (*id.*:19-28); admission of evidence Lo was on juvenile supervision (*id.*:28-30); failure to identify specifically who was endangered under Count 2 (*id.*:30-33); reversal

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[2] Attorney Ryan's Petition for Review to this Court inexplicably failed to include the ineffectiveness claims, instead challenging only admission of the alleged gang activities. By separate *pro se* habeas petition submitted to this Court on April 30, 2002, Mr. Lo challenges the effectiveness of Mr. Ryan's representation of him in this Court. *See Schmelzer v. Murphy*, 201 Wis.2d 246, 548 N.W.2d 45 (1996) (habeas petition in Supreme Court proper procedure for challenging ineffectiveness of counsel for counsel's failure's in that Court).

was warranted in the interests of justice (*id.*:32-35, 79-80); errors in the instructions and prosecutorial misconduct related to arguments and admission of evidence regarding gang activity (*id.*:35-43); various forms of prosecutorial misconduct and ineffectiveness of counsel for failure properly to object (*id.*:44-49, 71-75); failure to exclude "other acts" evidence and ineffectiveness for not properly objecting to such evidence (*id.*:49-69); ineffectiveness of counsel for not retaining a ballistics expert (*id.*:69-70); presence of a biased juror on the jury (*id.*:76-77); and defective jury instructions regarding reasonable doubt and imperfect self-defense (*id.*:77-78). As "sufficient reason" for not having raised these claims (or not having raised the claims adequately) on his direct appeal, Mr. Lo alleged that he was denied the effective assistance of post-conviction and appellate counsel (*id.*:2-6).

By Memorandum Decision and Order dated March 8, 2001, the circuit court, Hon. Ramona A. Gonzalez, denied the motion (R110; App. 34-38). That court concluded that the "other acts" and ineffectiveness claims already had been raised and decided on Lo's direct appeal (R110:2-3; App. 35-36). Applying *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), the court also summarily held that relief on the remaining grounds was barred by Wis. Stat. §974.06(4) because they could and should have been raised on Lo's direct appeal (R110:3-4; App. 36-37).

Lo once again appealed, still *pro se*, alleging essentially the same claims raised in his §974.06 petition, and once again asserting ineffectiveness of post-conviction and appellate counsel as "sufficient reason" under §974.06(4) for his not having raised the claims on direct appeal. By decision dated December 28, 2001, the Court of Appeals again affirmed (App. 1-33).

In contrast to the circuit court's decision, the Court of Appeals carefully reviewed Lo's claims of "sufficient reason" with regard to each of his substantive claims. The challenge to admission of the gang-related evidence resolved against Lo on direct appeal, for instance, was deemed barred by *State v. Witkowski*, 163 Wis.2d 985, 473 N.W.2d 512 (Ct. App. 1991) (matter once litigated may not be relitigated on

subsequent post-conviction proceeding). (App. 5-7).

Regarding the issues not raised on direct appeal, that Court acknowledged this Court's holding in *Escalona-Naranjo* that §974.06(4) bars post-conviction claims under §974.06 which the defendant could have raised on direct appeal absent "sufficient reason" for the failure to do so (App. 4). That Court further recognized, however, that constitutional ineffectiveness of post-conviction or appellate counsel in failing to raise a valid claim constitutes "sufficient reason" on a subsequent §974.06 petition (App. 7-10). Ineffectiveness of post-conviction or appellate counsel may be raised as an independent, substantive claim for relief, either by habeas petition in the appellate courts, *see State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540, 541 (1992) (substantive claim of ineffectiveness of appellate counsel must be brought in the appellate court), or by §974.06 petition in the circuit court, *see State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136, 138-39 (Ct. App. 1996) (substantive claim of ineffectiveness of post-conviction counsel must be brought in circuit court). Alternatively, however, such claims instead may be raised, not as substantive claims in themselves, but as the basis for the "sufficient reason" showing necessary under *Escalona-Naranjo* to present other substantive claims in a §974.06 petition. (App. 9-10).

Applying the ineffective assistance of counsel standard to the question of "sufficient reason" under §974.06(4), the Court of Appeals further recognized that, although appellate counsel is not required to raise every nonfrivolous claim, "counsel's decisions in choosing among issues cannot be isolated from review" (App. 9). Rather,

> [t]he relevant inquiry is still guided by [*Strickland v. Washington*, 466 U.S. 668 (1984)], and the question of whether postconviction counsel's decisions fell below an objective standard of reasonableness involves a review of the defendant's motion and the circuit court record to assess the relative strength of issues that counsel did not raise. . . . Stated another way, the analysis involves an assessment of the merits.

(App. 9-10 (citing *Gray v. Greer*, 800 F.2d 644, 646-47 (7th Cir.

1986))).

Because "it is often necessary to assess the merits at some level, in order to assess the performance of postconviction counsel," (App. 10), the Court of Appeals individually assessed the merits of each of Mr. Lo's claims, concluded that those issues lacked merit, and accordingly affirmed the circuit court's order (App. 11-30).

Concurring, Judge Deininger noted the "increasingly frequent appearance of the analytical complexities" exemplified by this appeal as a result of the decision in *Escalona-Naranjo* (App. 31-33). He noted that the assessment of whether "sufficient reason" is shown in a given case "will often require a consideration of the merits of the underlying, newly asserted claims" (App. 32). As a result, *Escalona-Naranjo* does not encourage finality, but instead merely creates unnecessary confusion and complexity:

> I believe that the effort to peel through the layers of this onion-like inquiry often results in analyses that are needlessly complex, fraught with the potential for gaps or errors along the way, and, all in all, a frustrating undertaking for courts and respondent's counsel alike.

(App. 3). Judge Deininger accordingly asked the Court to reconsider its holding in *Escalona-Naranjo* (*id.*).

Mr. Lo timely petitioned this Court for review By Order dated April 29, 2002, the Court granted review. While the Court did not limit the issues to be presented, it stated its primary focus to be the concerns raised in Judge Deininger's concurrence. By Order dated June 5, 2002, the Court appointed undersigned counsel to represent Mr. Lo *pro bono* following the death of Dean Howard Eisenberg.

TRIAL EVIDENCE

Although the state presented a substantial amount of evidence on collateral matters, much of the evidence on the core issues at trial was undisputed.

During the early summer of 1995, Anou Lo was scared. The

TMCs, a street gang in his home town of LaCrosse, Wisconsin, had let it be known that they were out to get Lo and his brothers (R101:485-86). On May 31, 1995, a member of the TMCs shot at a car occupied by friends of Lo (*id.*:131-37). While Koua Vang denied it (*id.*:290), he was seen in the group of TMCs from which the shot was fired (R101:144, 157). Lo later was told about the shooting, but he was not present or involved (R101:482-83).

On June 24, 1995, two TMC members, Koua Vang and Chai Thao got into an argument with Lo's brother, David, at a graduation party at the Omni Center in Onalaska, Wisconsin (R101:171-74; *see id.*:272-74, 286, 297). Thao fired four shots and he and Vang then ran (R101:172, 174, 184-85, 300-06; R40:4-5). Again, Lo later was told about the shooting, but he was not present or involved (R101:483-84).

As a result of the threats and the shootings, an acquaintance gave Lo a handgun for his protection following the Omni Center shootings and about a week before the incident in this case (R101:484-86).

On the evening of July 6, 1995, Mr. Lo, two of his brothers, and a deaf-mute friend, Teng Lee, went out to walk Lo's dog. Although some friends had said they would pick him up around 5:30 p.m. so they could spend some time together, they had not arrived. (R101:488-91, 542). Teng Lee had recently been beaten by TMC members (*id.*:193-94; 490). While Lo did not normally carry a gun, his concerns about the threats against him and the beating of Teng Lee led him to take it while they walked the dog (*id.*:491, 512).

While they were walking the dog, Lo's friends finally arrived at around 7:30 p.m. Lo and Teng Lee left with them and Lo's brothers took the dog. (R101:178-79, 186-87, 491-92, 542-45).

While driving to Trane Park, one of the friends in the car mentioned that they had seen TMC members in Hood Park on the way over (R101:179, 190, 493-94, 545-46). Seeing Vang in the park, and knowing Vang was a TMC member, Lo asked the driver to stop so he could go speak with him (R101:179-80, 191, 202, 495-96, 546; *see id.*:274). Justin Stibick joined Lo as he walked into the park while the others remained in the car (*id.*:180-81, 496-97, 547-48).

Once in the park, Mr. Lo stopped about 40 to 50 feet from Vang and called to him (R101:226-27, 249, 255, 500). An argument developed between the two regarding the TMC's threats to get Lo and his brothers (*id.*:238, 281, 500-02, 584-86). Vang told Lo to leave the park and some juvenile name-calling took place. Vang's friend, Hue Lee, felt the need to try to calm Vang down. (*Id.*:227, 229-31, 240, 252, 255-58, 502, 533). After about 5 minutes, however, both Vang and Lo turned to leave (*id.*:238, 246, 503, 585).

The evidence regarding what happened next is in conflict. Mr. Lo testified that, as he turned to leave, he saw Vang quickly turn back, lift up his shirt, and grab for something in the front waistband of his pants. Stibick saw this as well, and both believed Vang was going for a gun. Believing Vang was trying to shoot him, Lo drew his gun and fired four shots in Vang's direction. When Vang turned to run away, Lo and Stibick did as well. (R101:503-07, 531-32, 550-51, 563-64, 586-87, 610-11)

Vang, in fact did have a gun in the front of his pants (R101:267, 282, 296-97). However, he claimed that he did nothing to indicate he had a gun or to provoke the shooting. Instead, he claimed that Lo asked him if he wanted to die[3] and then began shooting. (R40:8; R101:282-84). While Vang denied seeing a gun before Lo began shooting, a close friend of Vang's, Hue Lee, claimed that Lo had pulled up his sweatshirt to reveal the handle of a gun during the argument (R101:229, 245, 249).

Hue Lee testified that Lo began to walk away but then turned back, pulled his gun, and began firing (R101:231). Hue could only see Vang's back at that point, and conceded that Vang could have had his hands in the front of his pants (*id.*:241, 262-63). Vang stood there at first, and then ran (*id.*:231-32).

After the shots were fired, Hue Lee went to Vang, who pulled a gun from his pants and told Hue to get rid of it. Hue hid the gun.

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[3] Lo denied this (R101:502), and Stibick heard no such statement (*id.*:585).

(R101:233, 253, 267, 283, 298).

The bullet that struck Vang entered the rear of his right arm, traveled through a bone and along his forearm, and came to rest near his wrist (R101:88-89, 284).

ARGUMENT

I.

BECAUSE *STATE V. ESCALONA-NARANJO*, 185 WIS.2d 168, 517 N.W.2d 157 (1994), IS CONSISTENT WITH NEITHER THE INTENT OF WIS. STAT. 974.06(4) NOR PRINCIPLES OF JUDICIAL ECONOMY, THAT DECISION SHOULD BE OVERRULED

The central issue on which the Court granted review is whether *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), should be overruled in light of the considerations discussed by Judge Deininger. For the reasons which follow, *Escalona-Naranjo* is inconsistent with the language, intent and original understanding of Wis. Stat. §974.06(4). As a practical matter, moreover, that decision also has not had the effect sought, and instead has merely added unnecessary confusion and complexity to post-conviction procedures.

A. Wisconsin's Post-Conviction Remedy Under Wis. Stat. §974.06

Section 974.06 of the Wisconsin Statutes (App. 52) provides a procedure for post-conviction relief applicable 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, 222 N.W.2d 694, 696 (1974). Specifically, §974.06 is limited to jurisdictional and constitutional claims. *See, e.g., id.*, 222 N.W.2d at 695. "Issues of constitutional dimension can be raised on direct appeal and can also be raised on 974.06 motion." *Id.* at 696.

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),

> (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. *Escalona-Naranjo*, 517 N.W.2d at 160; *see* 11A U.L.A. 375 (Master Edition 1995).

At issue in this case is the proper construction of §974.06(4). Statutory construction is reviewed *de novo*. *Escalona-Naranjo*, 517 N.W.2d at 160.

Six years after §974.06 was enacted, this Court held in *Bergenthal v. State*, 72 Wis.2d 740, 242 N.W.2d 199, 202-03 (1976), 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.

For eighteen years, the lower courts in Wisconsin consistently

followed that holding. *E.g.*, *State v. James*, 169 Wis.2d 490, 485 N.W.2d 436 (Ct. App.), *rev. denied*, 491 N.W.2d 766 (1992); *State v. Coogan*, 154 Wis.2d 387, 453 N.W.2d 186, 192 (Ct. App.), *rev. denied*, 454 N.W.2d 806 (1990); *State v. Klimas*, 94 Wis.2d 288, 288 N.W.2d 157, 162-63 (Ct. App. 1979), *rev. denied*, 95 Wis.2d 745, 292 N.W.2d 874, *cert. denied*, 449 U.S. 1016 (1980). In light of *Bergenthal* and the plain language of the statute, those courts had construed §974.06(4) as imposing such a "sufficient reason" requirement only where the defendant had omitted the claim from a prior motion under §974.06. *E.g. James, supra.*

In 1994, however, this Court overruled *Bergenthal* in *State v. Escalona-Naranjo*, 185 Wis.2d 169, 517 N.W.2d 157 (1994), and reinterpreted the "successive petitions" provision of §974.06(4). Pursuant to *Escalona-Naranjo*, when the defendant has filed a post-conviction motion under §974.02 and a direct appeal, he or she may not subsequently raise an issue under §974.06 which could have been raised on the prior motion absent showing of a "sufficient reason" for not having raised the issue in the original motion. *Id.*, 517 N.W.2d at 162.

Declaring that "[w]e need finality in our litigation," 517 N.W.2d at 163, the Court emphasized what it viewed as "the plain language of sec. 974.06(4)," *id.* at 163, 164, and the "primary purpose" of that provision "to require criminal defendants to consolidate all their postconviction claims into *one* motion or appeal." *id.* at 160-61 (emphasis in original).

The dissent in *Escalona-Naranjo* explained that the language and purpose of §974.06(4) both indicated that it distinguished between a prior direct appeal and a prior motion under §974.06. While §974.06(4) barred successive §974.06 motions absent "sufficient reason," it did not bar defendants from raising issues on a first §974.06 motion simply because the issue could have been raised on a prior direct appeal. 517 N.W.2d at 166-67 (Abrahamson, J., dissenting) (emphasis in original; footnotes omitted). While the authors of §974.06(4) and §8 of the Uniform Act were concerned about finality,

they also were concerned that "significant constitutional claims receive a full inquiry on review under sec. 974.06." *Id.* at 168. According to the dissent, "[s]ection 974.06 ensures finality by ordinarily limiting prisoners to a single post-conviction motion" following the direct appeal. *Id.*

The dissent also noted the "procedural morass" resulting in those states which had adopted the majority's approach to motions for collateral relief, where "the litigation has merely shifted the court's attention from the merits of the constitutional claim to arcane procedural issues." *Id.* (footnote omitted).

B. *Escalona-Naranjo* Misconstrued Wis. Stat. §974.06(4)

With all due respect, this Court erred in overruling *Berganthal.* Mr. Lo has no dispute with the Court's recognition in *Escalona-Naranjo* that, although "Wisconsin did not formally adopt the Uniform Post-Conviction Procedure Act, the purpose underlying the original sec. 8 was incorporated into sec. 974.06(4)." 517 N.W.2d at 161. The Court, however, misconstrued that purpose.[4] Finality as an end in itself was not a primary purpose of §8 of the Uniform Act or §974.06(4)

While the Court is correct that the commentary to the 1966 version of the Uniform Act does reflect *an* interest in finality, that was far from the primary concern of the drafters. Rather, the primary concern 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 (App. 53-58) stating the "Reason for Proposed Uniform Act" reflects that concern. The Commissioners there

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[4] Counsel would note that the issue of whether *Berganthal* should be overruled was not fully joined in *Escalona-Naranjo*. Although the state briefed the issue, the defendant's briefs in that case barely touched on it, failing to discuss a number of factors, policy implications, and prior decisions relevant to the issue. In an attempt to assure full briefing on the matter, the state moved for bypass of a separate case then pending in the Court of Appeals, *State v. Jon T. Liegakos*, Appeal No. 93-1523. Although Mr. Liegakos, represented by undersigned counsel, joined the request, this Court nonetheless denied bypass.

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). 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.

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. 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.

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.

While the general purposes of the Uniform Act thus do not support this Court's interpretation of §974.06(4) in *Escalona-Naranjo*, neither do the history and purpose of §8 in particular.

As originally written in the 1955 version of the Uniform Act, the provision which became §974.06(4) was divided between two sections. Section 1 of the 1955 Act made the post-conviction remedy available "provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction." 11A U.L.A 267. Section 1 thus dealt with the effect of a prior proceeding and barred relief *only* if the alleged error had been either finally litigated or waived.

Section 8 of the 1955 Act, in contrast, dealt with successive petitions under the Uniform Act and provided a more extensive bar:

> All grounds for relief claimed by a petitioner under this Act must be raised in his original or amended petition, and any grounds not so raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

11A U.L.A. 268.

The 1955 version of the Uniform Act thus expressly distinguished between prior proceedings in general, which could include a direct appeal (§1), and prior petitions brought under the Uniform Act (§8). Only when the defendant brought a second or subsequent petition under that Act did the Act bar, absent a showing of cause, consideration of errors which could have been raised in an earlier proceeding. A direct appeal barred the presentation of an issue in a first petition

under the Act *only* if the issue was "finally litigated or waived" in the prior proceeding.

Although consolidated into §8 of the 1966 version of the Act which ultimately became §974.06(4), the two provisions did not lose their independent character and effect:

> All grounds for relief available to an applicant under this Act must be raised in his original, supplemental or amended application. 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 applicant has taken to secure relief may not be the basis for a subsequent application, 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 application.

11A U.L.A. 375.

The first sentence expressly refers to the "original, supplemental or amended *application*," an express reference to applications under the Act and not including prior proceedings such as a direct appeal. Thus, according to the second sentence, "[a]ny ground finally adjudicated or *not so raised* [i.e., in the 'original, supplemental or amended application' under the Act] . . . may not be the basis for a subsequent application" absent a showing of "sufficient reason." Similarly incorporating Section 1 of the 1955 Act, §8 likewise bars "[a]ny ground . . . knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief," absent such reason. The comma after "not so raised" distinguishes the clause applicable to prior applications under the Act from that applicable to any prior proceeding for relief, such as a direct appeal.[5]

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[5] Although §974.06(4) substitutes "motion" for "application" and "person" for "applicant," nothing in that language or the history of §974.06 suggests (continued...)

The history of the provisions also reflects that the consolidation of the two provisions in §8 of the 1966 Act was not intended to alter this distinction between issues which could have been raised on direct appeal, which are not barred, and those which could have been raised on a prior motion under the Uniform Act, which are. Rather, as already discussed, the primary purpose of the new version of the Act was to *expand* the use of state collateral relief procedures and to encourage state court decisions on the merits of such claims instead of dismissals on technical procedural grounds. *See* 11A U.L.A. 271.

The Commissioners' comments on "Why is a Revision Needed Now?"demonstrates their intent to *expand* the availability of collateral relief in state courts, not to restrict it:

> Since 1955, when the original Act was promulgated by the National Conference, the cases in the United States Supreme Court have strengthened a requirement that state relief is not adequate if there is a dismissal of the claim without a full and fair evidentiary hearing on the merits when the claim is based on disputed facts. Moreover new grounds for attacking a conviction have developed. The 1966 revision proposed herein is designed to take care of these developments. It is believed that it is now flexible enough so that with sympathetic consideration of pleadings and methods of presenting issues, a prisoner will always be able to raise his claim in a state court and thus, as provided in 28 U.S.C. §2254, there will be no occasion for federal habeas corpus, because a state remedy is available.

11A U.L.A. 271.

The specific commentary to §8 of the Uniform Act further demonstrates that the consolidation of the two provisions was not intended to require a defendant, on threat of forfeiture, to raise all

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[5](...continued)
these minor linguistic changes were intended to result in a change in meaning. *See Escalona-Naranjo*, 517 N.W.2d at 161 (purposes of §8 of Uniform Act incorporated into §974.06).

available claims on direct appeal. Rather, that Comment states that the provision was intended to implement the relatively liberal standards for successive petitions controlling at the time the Uniform Act was approved:

> 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.

11A U.L.A. 375 (App. 59).

Fay and *Sanders* reflected the position that criminal defendants should not be penalized for 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).

Recall again that the primary purposes of the Uniform Act of 1966 were to expand the availability of state collateral review and to encourage resolution of such challenges on their merits in an attempt both to expedite the release of those unconstitutionally imprisoned and to reduce the number of federal habeas cases. Given those purposes,

it would have been silly to impose a bar on successive proceedings under §8 more restrictive than that then enforced under federal habeas law. And, indeed, the Commissioners expressly denied any attempt to do so:

> Since federal and state procedures are closely linked, as indicated above, state procedures ought to be uniform to conform to the uniform federal procedures. The Report of the Special Committee on Habeas Corpus of the Conference of Chief Justices in 1953 gives perhaps the basic reason for uniformity:
>
> > "If any proposition can be stated dogmatically in this field it is this: the state courts must provide post-conviction corrective process which is at least as broad as the requirements which will be enforced by the federal courts in habeas corpus through the due process clause of the 14th amendment. A state can call this remedy whatever it wants, but it must proved some corrective process."

11A U.L.A. at 271-72.

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 with the restrictive "cause and prejudice" standard currently applicable for purposes of federal habeas. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Because §974.06(4) was enacted in light of the permissive standards of *Sanders* and *Fry*, and not the preclusive standard of *Wainwright*, it must be construed as such.

In construing §974.06(4), the Court also must keep in mind that the concern for finality as an end in itself has not always commanded the popularity it has gained over the past 25 years. As already discussed, the Commissioners' commentaries to the 1966 Uniform Act reflect a greater interest in avoiding unconstitutional imprisonment, a situation it deemed "abhorrent to our sense of justice," than in finality

per se. The same balance, elevating individual liberty above technical interests in finality, guided the Supreme Court decisions in *Fay* and *Sanders* incorporated into §8 of the Uniform Act and §974.06(4). It is the same balance which this Court recognized shortly after enactment of §974.06 in holding that "[i]t is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably." *Hayes v. State*, 46 Wis.2d 93, 175 N.W.2d 625, 631 (1970).[6]

The courts and Congress have retreated somewhat from these truths, as reflected in *Wainwright's* and *Escalona-Naranjo's* emphasis on finality as an end in itself and Congress' emasculation of federal habeas review in the so-called Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214. Section 974.06(4), however, must be construed in the context and with the purposes for which it was drafted.

When viewed in that light, this Court was right in *Bergenthal* and wrong in *Escalona-Naranjo*. The latter decision accordingly should be overruled and §974.06(4) returned to its original meaning.

C. *Escalona-Naranjo* Has Not Had, And Cannot Have, Its Desired Effect; Instead, It Has Created Only Unnecessary Complexity, Confusion, And Added Work For Courts And Litigants

Even accepting the need for finality expressed in *Escalona-Naranjo*, the construction of §974.06(4) expressed in that decision has not had the effect of promoting finality. Indeed, given the established right to the effective assistance of post-conviction and appellate counsel as discussed by the Court of Appeals, that decision cannot have its desired effect. Virtually all legitimate claims which a defendant could and should have raised on direct appeal would support either a "sufficient reason" showing or, alternatively, a non-frivolous claim of ineffectiveness of post-conviction or appellate counsel.

It is beyond rational dispute that ineffectiveness of post-

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[6] *Hayes* was overruled on other grounds in *State v. Taylor*, 60 Wis.2d 506, 210 N.W.2d 873, 882 (1973).

conviction or appellate counsel in failing to raise an issue on direct appeal constitutes a "sufficient reason" under §974.06(4) authorizing pursuit of that issue under §974.06. *See State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136, 139 (Ct. App. 1996). *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, 484 N.W.2d 540, 540-41 (1992).

Assessing whether post-conviction or appellate counsel was ineffective in failing to raise a particular issue, as explained below, requires an assessment and comparison of the merits which were raised on appeal versus those which the defendant claims should have been raised (App. 9-10). *See Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996); *Gray v. Greer*, 800 F.2d 644, 646-47 (7th Cir. 1986).

Escalona-Naranjo thus replaces a straight-forward review of the merits of a §974.06 motion with a morass of arcane procedural issues, the ultimate result of which, as in this case, still requires review of the merits. Contrary to the express purpose of the Uniform Act to provide "an expeditious and simplified post-conviction remedy," 11A U.L.A. 270, the result is exactly the type of burdensome "analytical complexities" decried by Judge Deininger below which the Uniform Act was intended to avoid. 11A U.L.A. 271 (noting that it is "less burdensome to the courts and more effective in the long run" for courts to decide post-conviction motions on their merits rather than "to try to administer procedural doctrines to 'save' judicial time and effort").

The complicating effects of *Escalona-Naranjo* are not limited to review under §974.06, however. A direct result of that decision's requirement that all issues be raised on the direct appeal or be deemed waived is the protective ineffectiveness claim which cautious post-conviction or appellate counsel now must include and litigate on

virtually any argued post-conviction motion or appeal. Attorneys for the state are extremely creative in raising novel arguments of waiver or forfeiture, and the appellate courts seem very open to such arguments. *See, e.g., State v. Samuel*, 2001 WI App 25, ¶¶41-43, 240 Wis.2d 756, 623 N.W.2d 565 (where sentencing court first disclosed during its sentencing decision that it had relied on information not accessible by defendant, objection deemed waived when raised in motion under Wis. Stat. (Rule) 809.30 rather than immediately after imposition of sentence, even though state did not raise waiver in the circuit court), *rev'd on other grounds*, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423; *State v. Michael Adam Watts*, Appeal No. 00-0203-CR (Ct. App. February 7, 2001) (unpublished) (finding waiver because, although prosecutor argued at length for lesser-included offense instruction, defense counsel did not expressly join request, and instead incorporated state's argument in his request for additional lesser offense instruction).

Of course, the state is not always as creative in its waiver arguments, nor are the appellate courts always as open to such novel claims. Still, cautious post-conviction counsel must and do act to protect their clients in the post-*Escalona-Naranjo* world by filing protective ineffectiveness claims in the circuit court (and arguing them on appeal) in every case in which there is any possibility of waiver, however remote. To do otherwise constitutes a bar to relief should the appellate courts unexpectedly find the issue to have been waived as in the cases cited above.

Escalona-Naranjo accordingly also results in additional work for litigants and the courts at the direct appeal stage due to the need to litigate potential ineffectiveness claims which may never arise but for that decision.

The apparent fear of "sandbagging" by defense counsel expressed in *Escalona-Naranjo*, moreover, is vastly overblown. *See* 517 N.W.2d at 164. For exactly the same reasons stated by the Court, rational counsel will in fact raise all known claims with a reasonable chance of success on the direct appeal. "At that point, everyone's memory is still fresh, the witnesses and records are usually still

available, and any remedy the defendant is entitled to can be expeditiously awarded." *Id.* No remotely rational defendant would wait to raise potentially meritorious claims if they could result in his or her release from custody immediately on the direct appeal. If one adds the fact that the right to appointed counsel applies only to the direct appeal, such that claims under §974.06 generally are pursued *pro se*, the likelihood of a rational strategic decision to delay pursuit of a potentially meritorious claim until after the direct appeal becomes remote in the extreme.

The absence of a right to counsel also means that most §974.06 motions are filed *pro se* by inmates without legal training and without substantial legal resources. Of course, this will happen regardless whether this Court chooses to overrule *Escalona-Naranjo* and return §974.06(4) to its original meaning. That decision, however, adds another layer of complexity, the only effect of which (given that nonmeritorious claims would be denied anyway) is to thwart valid claims for relief.

Undersigned counsel can attest to the fact that the existing complexity of post-conviction practice under *Escalona-Naranjo* is enough to confound even experienced counsel, and Judge Deininger attests to its effects on the judiciary. It can easily defeat the *pro se* litigant, even one with legitimate claims and valid grounds for alleging "sufficient reason," but who does not have the experience or knowledge necessary to circumvent the procedural land mines spread by *Escalona-Naranjo*.

Returning to the original meaning of §974.06(4) thus will serve not only the principles of justice, as those unconstitutionally incarcerated will no longer be denied relief due to a legal technicality or oversight of counsel, but judicial economy as well. *Escalona-Naranjo* has not promoted finality and cannot effectively do so in light of the defendant's constitutional right to the effective assistance of post-conviction and appellate counsel. Those rights guarantee that the defendant must be provided a remedy even after the direct appeal. All *Escalona-Naranjo* can do, and all it has done, is (1) turn a relatively

straight-forward analysis of the merits of a defendant's claims under §974.06 into a "procedural morass" which, in the end, still requires exactly the same thing, (2) increase the workloads of counsel and the courts on direct appeal, and (3) deny relief to those unconstitutionally incarcerated without any corresponding benefits to the public.

* * *

Escalona-Naranjo was wrong when it was written and it remains wrong today. Worse, as reflected in Judge Deininger's concurrence below, it is counter-productive, increasing the workloads of litigants and the courts with no corresponding benefit to the public. It should be overruled.

II.

THE ERRONEOUS INSTRUCTION ON IMPERFECT SELF-DEFENSE DENIED LO DUE PROCESS AND MANDATES REVERSAL AND A NEW TRIAL

Although instructing the jury on perfect and imperfect self-defense/ unnecessary defensive force as defenses to the charge of attempted first degree intentional homicide, the circuit court's instructions failed to require a jury finding beyond a reasonable doubt that Lo did not actually believe that he was in imminent danger of death or great bodily harm, as required by this Court's recent decision in *State v. Head*, 2002 WI 99, ___ Wis.2d ___, 648 N.W.2d 413. Rather, consistent with *dicta* in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), the court required only that the state prove any such belief to have been unreasonable.

Because the jury instructions accordingly failed to require a jury verdict beyond a reasonable doubt on every element necessary for a finding of guilt on the charge of attempted first degree intentional homicide, Lo was denied his rights to due process. *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997); *State v. Peete*, 185 Wis.2d

4, 517 N.W.2d 149 (1994).

A. Background.

The defense in this matter was self-defense, based, among other things, upon evidence that the complainant (1) was a member of a gang which had threatened to "get" Lo and his brothers, (2) had been involved in other shootings within five weeks of this encounter, and (3) made a quick move to his waistband (where he in fact did have a gun) immediately prior to Lo's drawing his weapon and firing in the complainant's direction. Without objection, the circuit court determined that the defense was adequately raised to require instructions on both perfect and imperfect self-defense as defenses to the charge of attempted first degree intentional homicide (R101:569-70, 663).

Consistent with Wis. J.I.–Crim. 1014 and this Court's decision in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), the circuit court's instructions defined imperfect self-defense as requiring that Lo "reasonably believed" that he was preventing or terminating an unlawful interference with his person:

> If the defendant intended to kill Koua Vang; his acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some other extraneous factor; *and he did not reasonably believe that he was preventing or terminating an unlawful interference with his person* or did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is guilty of attempted first degree intentional homicide.

(R101:671 (emphasis added); *see id.*:673, 676-77; App. 43, 45, 48-49).

B. The Imperfect Self-Defense Instruction Misstated the Law, Depriving Lo of a Jury Verdict Beyond a Reasonable Doubt on an Essential Element of the Offense of Attempted First Degree Intentional Homicide.

The circuit court's instruction on imperfect self-defense did not accurately state the law. As a result, it failed to require a jury determination beyond a reasonable doubt on an essential element of the state's proof on the charge of attempted first degree intentional homicide.

In relevant part, Wisconsin law defines first degree intentional homicide as follows:

> (1) OFFENSES. (a) Except as provided in sub. (2) whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.
>
> * * *
>
> (2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> * * *
>
> (b) Unnecessary defensive force. Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

Wis. Stat. § 940.01. The burden of disproving unnecessary defensive force beyond a reasonable doubt is on the state. Wis. Stat. §940.01(3).

Second-degree intentional homicide is defined as follows:

> (1) Whoever causes the death of another human being with intent to kill that person or another is guilty of

a Class B felony if:

> (a) In prosecutions under s. 940.01, the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist as required by s. 940.01(3);
>
> * * *
>
> (3) The mitigating circumstances specified in s. 940.01(2) are not defenses to prosecution for this offense.

Wis. Stat. § 940.05.

As this Court explained recently in *State v. Head*, 2002 WI 99, ¶70, ___ Wis.2d ___, 648 N.W.2d 413,

> under the present statutes, to prove first-degree intentional homicide, the state must prove that the defendant caused the death of another with intent to kill. Wis. Stat. § 940.01(1). If perfect self- defense is placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that one of the defendant's beliefs was not reasonable. Wis. Stat. § 939.48(1). If unnecessary defensive force is been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the defendant did not actually believe she was preventing or terminating an unlawful interference with her person *or* did not actually believe that the force she used was necessary to prevent imminent death or great bodily harm-- even if those beliefs were unreasonable--to sustain a conviction for first- degree intentional homicide.

At the time of Lo's trial, it was generally assumed that a defendant's actual, subjectively held belief in the need to act in self-defense was insufficient to mitigate an attempted or completed intentional homicide to second degree. This Court had suggested as much in *Camacho*, 501 N.W.2d at 388, albeit in *dicta*, and the pattern instructions reflected that assumption, *see* Wis. J.I.–Crim. 1014 (1994).

In *Head*, however, this Court rejected the *Camacho* suggestion that a defendant must satisfy some objective threshold to raise a unnecessary defensive force/imperfect self-defense claim. Instead, the court construed the relevant statutes as requiring that the state disprove beyond a reasonable doubt a defendant's claim that he *actually* believed in the need to act in self-defense:

> Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no actual belief that she was in imminent danger of death or great bodily harm, or no actual belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide but should be found guilty of second-degree intentional homicide.

Head, 2002 WI 99, ¶103. When the issue of unnecessary defensive force has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt under sub. (1)." Wis. Stat. § 940.01(3); *see Head*, 2002 WI 99, ¶107.

The defenses of perfect and imperfect self-defense were placed in issue in this case and the circuit court instructed the jury on those offenses (R101:669-71; App. 41-43). The state, however, was not required to prove beyond a reasonable doubt that Lo had no actual belief that he was in imminent danger of death or great bodily harm or no actual belief that the amount of force he used was necessary to prevent or terminate this interference. Instead, the jury was instructed that the state need only show that any such belief was objectively unreasonable (R101:671, 673, 676-77; App. 43, 45, 48-49).

Given the trial court's instructions, the conviction for attempted first degree intentional homicide may have been based on a jury

finding that, although Lo *actually* believed that he was in imminent danger of death or great bodily harm and that the amount of force used was necessary to prevent that or terminate that danger, such a belief was unreasonable. Although those instructions were consistent with Wis. J.I.–Crim. 1014 (1994) and *Camacho*, they did not accurately state the law. *Head*, 2002 WI 99, ¶¶143-47 ("Wis JI--Criminal 1014 is inconsistent with our interpretation of Wis. Stat. §§940.01 and 940.05, and our determination that no threshold determination of a *reasonable* belief in an unlawful interference is required to mitigate first-degree intentional homicide based on the use of unnecessary defensive force" (emphasis in original)).

C. Lo is Entitled to Reversal and a New Trial on the Attempted First Degree Intentional Homicide Count.

The circuit court's failure to require a jury finding beyond a reasonable doubt on the question of whether Lo *actually* believed the he was preventing or terminating an unlawful interference with his person requires that he be granted a new trial on the charge of attempted first degree intentional homicide. *See State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997); *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994).

In *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994), this Court held that, when a person is charged with a crime "while possessing ... a dangerous weapon" in violation of Wis. Stat. §939.63(1)(a), simple possession is not enough. Rather "the state must prove that the defendant possessed the weapon to facilitate commission of the predicate offense." 517 N.W.2d at 150; *see id.* at 153-54. Because the trial court's instructions did not require the jury to find that required nexus, the Court was obliged to reverse Peete's conviction:

> The nexus required by the "while possessing" language of sec. 939.63 is an element of sec. 939.63. The Due Process Clause of the Fourteenth Amendment requires that the State prove beyond reasonable doubt every element of the crime charged. [Citations omitted]. In

> Peete's case the judgment of conviction under sec. 939.63 must be reversed because the court did not require that the jury find beyond reasonable doubt that Peete possessed a dangerous weapon to facilitate the commission of the predicate drug offense.

Id. at 154.

The *Peete* Court rejected as irrelevant the state's suggestion that the evidence would have supported a conclusion that the nexus requirement was satisfied:

> We are unable to make that determination because a court may not direct a verdict of guilt against a defendant in a criminal case. *State v. McAllister*, 107 Wis.2d 532, 533, 319 N.W.2d 865 (1982). Where the finder of fact is a jury, proof of all essential elements must be tendered to the jury. *Id.* The jury must make the factual finding of whether Peete possessed a handgun to facilitate the commission of the predicate crime.

Peete, 517 N.W.2d at 154.

In *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997), this Court reaffirmed the holding in *Peete*. It further expanded application of that decision to clarify that (1) the requirement of instruction and a jury finding on the required nexus applies regardless whether the weapons possession is constructive or actual, 564 N.W.2d at 759, (2) the holding in *Peete* is fully retroactive to cases on collateral review, *id.* at 759-61, (3) the pre-*Peete* failure to object to omission of the nexus element did not waive the claim, *id.* at 762-63, and (4) harmless error analysis does not apply in such cases, *id.* at 763-65.

This Court further held that Howard's failure to raise his "nexus" claim on direct appeal did not bar relief under Wis. Stat. §974.06(4) and *Escalona-Naranjo*. 564 N.W.2d at 761-62. 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.* at 762 (agreeing with court of appeals' conclusion).

This 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. 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.*

This case is on all fours with *Peete* and *Howard*. This Court's rejection in *Head* of *Camacho's* "objective threshold" requirement for imperfect self-defense constituted a new rule of substantive law, just as recognition of the "nexus" requirement did in *Peete*. Prior to *Head* the courts and pattern jury instructions reflected the *Camacho* misinterpretation of that defense.[7]

As in *Howard*, Lo "was not aware of the legal basis for his present motion at the time of his trial and sentencing. Nor was [Lo] aware of the ['no actual belief'] requirement at the time of his earlier postconviction motions and appeal." 564 N.W.2d at 762. Accordingly, the "sufficient reason" requirement of §974.06(4) is satisfied here even if this Court chooses not to overrule *Escalona-Naranjo*. *Howard*, 564 N.W.2d at 762 ("Howard's case is just such an example of the 'sufficient reason' exception to the finality of appellate issues under Wis. Stat. §974.06").

For the same reasons stated in *Howard*, the failure of Lo's

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[7] Indeed, counsel for Ms. Head apparently did not even challenge the *Camacho* interpretation before this Court; the issue was raised in an *amicus* brief. *Head*, 2002 WI 99 ¶51.

counsel to object to the erroneous instruction likewise does not constitute a waiver of this claim:

> Here, Howard and his counsel in 1990 had no way to know how this court would construe Wis. Stat. §939.63 by the time it decided *Peete* in 1994. We agree that Howard's counsel had an obligation to object at the instructions conference based on incompleteness or other error about which he knew or should have known. We cannot agree that Howard's counsel could have state grounds for an objection "with particularity," based on the absence of a nexus element and corresponding instruction. *See* Wis. Stat. §805.13(3). Howard has not waived this issue.

564 N.W.2d at 763.

Like Howard, Lo and his counsel in 1996 had no way to know how this Court would construe the elements of imperfect self-defense by the time it decided *Head* in 2002. Because they thus could not reasonably be expected to state the objection "with particularity" in 1996, their failure to do so is not a waiver. *Id.*

For the same reasons stated in *Howard*, this Court's interpretation of the elements which the state must prove in response to a defense of imperfect self-defense also is fully retroactive. This Court in *Head* provided a substantive interpretation of imperfect self-defense. As the Court recognized in *Howard*, "the doctrine of non-retroactivity found in [*Teague v. Lane*, 489 U.S. 288 (1989)] does not apply to substantive interpretations." 564 N.W.2d at 761.

Nor does it matter that the substantive interpretation of imperfect self-defense can be effectuated only through jury instructions:

> We hold that in this case, where a substantive right is recently identified on collateral review, and that right can only be effectuated by instructing the jury to make a specific finding, jury instruction is a necessary part of the substantive right. The defendant's substantive right to have the nexus element proven can only be met after the jury has received the necessary instruction on the element.

Howard, 564 N.W.2d at 761.

Finally, the doctrine of harmless error does not bar relief in this case. First, as explained once again in *Howard*, that doctrine simply does not apply where, as here, the instruction on a particular element of an offense is not merely flawed, but non-existent. 564 N.W.2d at 763-64. While the jury was instructed generally about the doctrine of imperfect self-defense, at no time was it instructed, as required by *Head*, that the state must disprove beyond a reasonable doubt Lo's actual belief that he was preventing or terminating an unlawful interference with his person. Rather, it was instructed that the state need only prove that any such belief was unreasonable.

"The court cannot direct a verdict of guilty, no matter how overwhelming the evidence." *Howard*, 564 N.W.2d at 763 (citation omitted). The total failure to instruct the jury on a necessary element of the state's proof, however, precludes the jury from giving that element the controlling effect it requires, and thus renders the resulting conviction "'fundamentally unfair.'" *Howard*, 564 N.W.2d at 764. Accordingly, where, as here, "the circuit court fails to instruct a jury about an essential element of the crime and the jury must find that element beyond a reasonable doubt, there is an automatic reversal of the verdict." *Id.*, citing *State v. Avila*, 192 Wis.2d 870, 893a, 532 N.W.2d 423 (1995). *See also State v. Perkins*, 2001 WI 46, ¶¶50-59, 243 Wis.2d 141, 626 N.W.2d 762 (Wilcox & Crooks, JJ, concurring) ("jury instructions that fail to set forth all the requisite elements of the charged offense always are grounds for reversal"(citations omitted)).

Although this Court has not expressly overruled *Howard*'s harmless error discussion, recent decisions suggest that it has pulled back from *Howard's* recognition that the failure to instruct on an essential element of the state's proof renders the resulting conviction fundamentally unfair and inherently deprives the defendant of the substantial right of a jury verdict regarding the necessary elements of the charged offense. *See State v. Harvey*, 2002 WI 93, ___ Wis.2d ___, 647 N.W.2d 189; *State v. Tomlinson*, 2002 WI 91, ¶¶59-61, ___ Wis.2d ___, 648 N.W.2d 367.

Yet, even if the court's directing of a verdict of guilt is now permissible, such that harmless error doctrine could be deemed to apply in this case, the state cannot rationally suggest that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Head*, 2002 WI 99 ¶44.

Self-defense was the central issue in dispute at the trial, with Lo testifying that he only drew his gun and shot toward Vang after Vang suddenly turned on him, lifted his shirt, and grabbed toward his waistband in a manner in which both Lo and Justin Stibick believed was an attempt to draw a gun. Lo fired only until Vang turned to run away, at which point Lo did likewise. This testimony was corroborated by the facts that Vang did have a gun in his waistband, that Vang was a member of a gang which had threatened to "get" Lo and his brothers and had recently beaten Teng Lee, that Vang was involved in two gang-related shootings within weeks of this incident, and that Vang grew quite agitated during the discussion with Lo, to the extent that Vang's friend, Hue Lee, had to try to calm him down.

Harmless error analysis does not permit this Court to interpose itself as some sort of "super-jury." *Neder v. United States*, 527 U.S. 1, 19 (1999). Where, as here, the defendant contested the issue and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. *Head*, 2002 WI 99, ¶113; *see Neder*, 527 U.S. at 19 ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless"). *Compare id.* at 17 (jury instruction that improperly omits an essential element from the charge constitutes harmless error if "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error"); *Harvey*, 2002 WI 93, ¶48 (instructional error harmless where "[t]he elemental fact on which the jury was improperly instructed is undisputed and indisputable"); *Tomlinson*, 2002 WI 91, ¶63 (improper mandatory conclusive presumption harmless where presumed fact beyond question).

While the jury apparently determined that Lo's belief in the need to act as he did in self-defense was unreasonable, there is nothing rationally to suggest that it necessarily would have found that Lo did not in fact harbor that belief. Given the ample corroboration, a rational jury easily could have credited Lo's testimony while still finding his beliefs regarding the need to act unreasonable. Indeed, even without that corroboration, there was nothing about Lo's testimony which would render it incredible as a matter of law.

The trial evidence, in short, adequately placed self-defense in issue. *See Head*, 2002 WI 99, ¶¶105-125. The circuit court found as much in choosing to instruct on perfect and imperfect self-defense. Indeed, the state had requested the imperfect self-defense instruction (R101:663). The circuit court's failure to instruct the jury on a necessary element of the state's proof accordingly was not harmless. *See Head*, 2002 WI 99, ¶¶130-142 (where evidence was sufficient to place issue of imperfect self-defense in issue, failure to instruct on that defense not harmless); *State v. Warren*, 608 N.W.2d 617, 623 (Neb. App. 2000) (improper self-defense instruction not harmless under *Neder* where defendant contested issue of self-defense and evidence supported instruction on the defense).

CONCLUSION

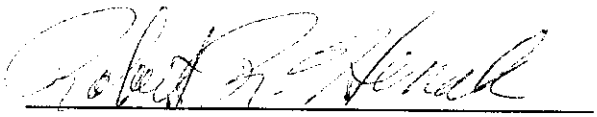
For these reasons, Mr. Lo respectfully asks that the Court (1) overrule *Escalona-Naranjo* and (2) reverse the decisions below and remand with directions to grant him a new trial on the charge of attempted first degree intentional homicide.

Dated at Milwaukee, Wisconsin, September 17, 2002.

Respectfully submitted,

ANOU LO, Defendant-Appellant-Petitioner

HENAK LAW OFFICE, S.C.



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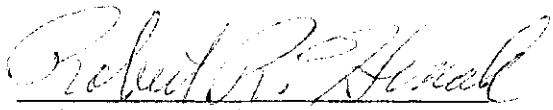
RULE 809.19(8)(d) CERTIFICATION

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 10,969 words.



Robert R. Henak

Brf cert.wpd

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 01-0843

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANOU LO,

Defendant-Appellant-Petitioner

APPENDIX OF DEFENDANT-APPELLANT

COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0843 Cir. Ct. No. 95-CF-1243

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANOU LO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. Following a trial and a direct appeal of his convictions for attempted first-degree intentional homicide and first-degree recklessly endangering safety, Anou Lo filed a postconviction motion seeking a new trial on numerous grounds. The circuit court denied the motion in all respects without conducting an evidentiary hearing. As to each issue raised on this appeal,

we reach one of three conclusions: (1) that Lo is barred from raising the issue in a postconviction motion, (2) that he has failed to allege sufficient facts in his motion to raise a question of fact or (3) that the record conclusively demonstrates that he is not entitled to relief. Accordingly, we affirm the circuit court's order denying Lo's postconviction motion. We further conclude that a new trial in the interests of justice is not warranted.

BACKGROUND

¶2 The charges in this case arose from the July 6, 1995 shooting of K.V. in Hood Park in La Crosse, Wisconsin. Lo was arrested in connection with the shooting and was charged with attempted first-degree homicide and first-degree recklessly endangering safety, both involving use of a dangerous weapon. Although he was sixteen years old at the time of the shooting, Lo was tried in criminal court as an adult. At trial, Lo did not dispute that he was responsible for shooting K.V.

¶3 The prosecution's theory of the case was that Lo sought out and shot K.V. in retaliation for previous shootings involving rival gangs. The prosecution introduced evidence to prove (1) that K.V. was a member of a gang called the TMC, (2) that Lo was associated with the Imperial Gangsters (IG), and (3) that there was a history of violence between the TMC and the IG.[1]

¶4 Lo testified and denied that he had any gang association at the time of the shooting. He sought to convince the jury that the shooting was an act of

[1] Initially, the charges against Lo included an enhancer for gang-related activity. However, the State voluntarily dropped the enhancer just before trial.

self-defense that occurred when he saw K.V. reach for a gun after the two had an argument. It was undisputed that both Lo and K.V. were carrying handguns at the time of the shooting.

¶5 The jury found Lo guilty of attempted first-degree homicide of K.V. and first-degree reckless endangerment of bystanders who were at the park when the shooting occurred. After sentencing, Lo was appointed new postconviction counsel. This attorney filed postconviction motions arguing for a new trial on several grounds, including ineffective assistance of trial counsel. The circuit court denied these motions, and Lo appealed to this court. We affirmed the judgment and the postconviction order. Many of the rulings on that appeal were based on our disagreement with Lo's contention that evidence concerning gang-related activities and materials was irrelevant and unfairly prejudicial. We concluded that such evidence was relevant to the State's theory on motive (*i.e.*, that the shooting was gang-related retaliation) and that the gang-related evidence did not cause the jury to find Lo guilty based on improper or extraneous considerations. The Wisconsin Supreme Court denied Lo's subsequent petition for review.

¶6 Lo next initiated habeas corpus proceedings in federal court, which were deemed procedurally improper. He then returned to the La Crosse County circuit court and filed a motion for postconviction relief under WIS. STAT. § 974.06 (1999-2000).[2] The motion alleged ineffective assistance of trial counsel, postconviction counsel, and appellate counsel. Lo also sought a new trial in the interest of justice due to the cumulative effect of counsels' alleged errors, the

[2] All further references to the Wisconsin Statutes are to 1999-2000 version unless otherwise noted.

circuit court's alleged errors, and what Lo characterized as "prosecutorial misconduct." In denying all requested relief, the circuit court divided the issues raised in Lo's motion into three general categories: (1) issues raised on Lo's direct appeal that could not be re-litigated in a subsequent postconviction motion, (2) issues that were barred from review under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and (3) an allegation of ineffective assistance of appellate counsel over which the circuit court concluded that it did not have jurisdiction.

DISCUSSION

Standard of Review.

¶7 WISCONSIN STAT. § 974.06(4) bars a defendant from bringing postconviction claims, including constitutional claims, under § 974.06 if the defendant could have raised the issues in a previous postconviction motion or on direct appeal, unless the defendant has a "sufficient reason" for failing to do so. ***Escalona***, 185 Wis. 2d at 181-82, 517 N.W.2d at 162. A claim brought under § 974.06 is likewise barred if it has been finally adjudicated during a previous appeal. ***Id.*** Whether any of Lo's claims brought pursuant to § 974.06 are barred by the application of § 974.06(4) and ***Escalona*** presents a question of law which we review *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175, 176 (Ct. App. 1997).

¶8 Whether Lo's counsels' actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Hereford***, 224 Wis. 2d 605, 612, 592 N.W.2d 247, 250 (Ct. App. 1999). The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***Id.*** Whether counsel's conduct was deficient and whether it

was prejudicial to the defendant are questions of law reviewed *de novo* by this court. ***State v. Franklin***, 2001 WI 104, ¶12, 245 Wis. 2d 582, 629 N.W.2d 289.

¶9 A two-part analysis controls our review of the circuit court's decision to deny Lo's postconviction motion without a hearing. If the motion on its face alleges facts which if proved would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50, 53 (1996). Whether the motion does so is a question of law that we review *de novo*. ***Id.*** However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to deny the postconviction motion without a hearing. ***Id.*** at 310-11, 548 N.W.2d at 53-54. When reviewing a circuit court's discretionary act, we apply the deferential erroneous exercise of discretion standard. ***Id.***

Claims Previously Addressed.

¶10 We agree with the circuit court that many of the issues raised in Lo's postconviction motion represent an attempt to relitigate issues that he raised on his direct appeal. In particular, Lo seeks review of the circuit court's decision to admit evidence of prior shootings, two gun shop robberies, a photo album, and a notebook. We squarely addressed each of these alleged evidentiary errors on Lo's direct appeal, holding that all of the challenged evidence was relevant, that it was admissible to prove the State's theory of motive/intent and that it was not unfairly prejudicial to Lo.

¶11 Lo's attempt to challenge these rulings under various "new" theories—such as arguing that introducing the evidence represented prosecutorial

misconduct—does not change the fact that we have previously addressed the issues. As we stated in ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991), "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." In addition, to the extent that any of the challenged evidence might be considered "other acts" evidence, we note that our analysis on the previous appeal reflects the standard set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998), even though we did not expressly cite that case.[3] Finally, the only reason Lo offers to avoid the bar imposed by WIS.

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[3] Lo argues in his motion and on appeal that, especially because the prosecution dropped the gang-related enhancer but went forward with extensive evidence and argument about gang-related activity, the circuit court should have provided a limiting instruction and specifically advised the jury that Lo's position was that the shooting of K.V. was not gang-related. This contention has no merit. Whether the shooting did or did not involve gang-related retaliation was a central factual dispute at trial. The issue went to the heart of the prosecution's theory of motive. That the issue was in dispute needed no clarification. Moreover, we note that the circuit court gave a lengthy preliminary instruction concerning other evidence of alleged gang activity. That instruction included the following words of caution:

> The State in this case intends to present evidence regarding other incidents involving gang members of the Imperial Gangsters and members of the TMC for which the defendant is not on trial. Such evidence will be admitted solely on the issue of motive. You may not consider such evidence to conclude that the defendant has a certain character or certain character trait or to further conclude that he acted in conformity with that trait or character [trait] with respect to the offense charged in this case.
>
> ....
>
> You may consider the evidence of other incidents involving Imperial Gangsters or TMC only for the purposes that I have described to you in this instruction, assigning the evidence such weight as you determine it deserves. You may not, however, consider this evidence to determine whether the defendant is probably guilty of this offense because of prior conduct of the members of the Imperial Gangsters or the TMC.

(continued)

STAT. § 974.06 and ***Escalona*** is ineffective assistance of postconviction and/or appellate counsel. As the admissibility of the evidence was challenged on Lo's direct appeal, there is no possibility that Lo's postconviction counsel or his appellate counsel could be found ineffective for failing to put those issues before the court. Accordingly, Lo may not seek further review of these issues under § 974.06 in Wisconsin courts. *See* ***Escalona***, 185 Wis. 2d at 181-82, 517 N.W.2d at 162 ("[I]f the defendant's grounds for relief have been finally adjudicated [or] waived ... in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion .... *unless* the court ascertains that a "sufficient reason" exists for ... the failure ... to adequately raise the issue in the original, supplemental or amended motion.").

Claims Not Raised Previously.

¶12 Lo also raises a number of issues in his WIS. STAT. § 974.06 postconviction motion and on this appeal that he did not raise on his direct appeal. In an effort to avoid ***Escalona***, Lo asserts that he was the victim of ineffective assistance of postconviction and appellate counsel. His argument is that counsel failed to properly preserve all of his appealable issues, either by failing to bring them in a postconviction motion before the circuit court or by failing to pursue them on his direct appeal.

¶13 The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just

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To the extent that the State's evidence of uncharged gang-related activity needed to be placed in context for the jury, this instruction was clearly sufficient.

result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). Wisconsin courts apply a two-pronged test to determine whether the assistance was so defective that reversal of conviction is required. ***Franklin***, 2001 WI 104 at ¶11. Under this test, a defendant must show (1) that counsel's representation was deficient, and (2) that this deficient performance resulted in prejudice to the defense. ***Strickland***, 466 U.S. at 687.

¶14 The test for deficient performance is whether counsel's representation fell below the representation that a reasonably effective attorney would provide. ***Id.*** at 688. To prove prejudice, a defendant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. The appellant must prevail on both prongs of the ***Strickland*** test to obtain relief. *See* ***Franklin***, 2001 WI 104 at ¶13.

¶15 Lo's assertion that his postconviction counsel and appellate counsel were both ineffective presents two preliminary issues. The first issue is procedural in nature: Claims of ineffective assistance of postconviction counsel are brought by filing a motion in the circuit court under WIS. STAT. § 974.06, while claims of ineffective assistance of appellate counsel are brought by filing a petition for habeas corpus directly in the court of appeals. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540, 541 (1992); ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 680-82, 556 N.W.2d 136, 138-39 (Ct. App. 1996). Recognizing this distinction, Lo asserts in his reply brief that he will be filing a separate ***Knight*** petition to address the claim that he received ineffective

assistance of appellate counsel. To date, no such petition has been filed.[4] Nonetheless, we note that where we address the merits of particular issues raised by Lo (as opposed to applying waiver under ***Escalona***), our disposition effectively addresses claims of ineffective assistance of both postconviction and appellate counsel.

¶16 The second preliminary issue concerns the manner in which we apply ***Escalona*** when a defendant's reason for not raising an issue on direct appeal is that postconviction (or appellate counsel) was ineffective in neglecting to raise the claims. It is clear that postconviction counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue. *See* ***Smith v. Robbins***, 528 U.S. 259, 287-88 (2000) (citing the Court's previous holding ***Jones v. Barnes***, 463 U.S. 745 (1983)). Rather, it is part of the function of postconviction counsel to select from among the potential issues in order to maximize the likelihood of success on a postconviction motion. *See* ***Robbins***, 528 U.S. 287-88. However, as the Seventh Circuit pointed out in ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986), counsel's decisions in choosing among issues cannot be isolated from review. The relevant inquiry is still guided by ***Strickland***, and the question of whether postconviction counsel's decisions fell below an objective standard of reasonableness involves a review of the defendant's motion and the circuit court record to assess the relative strength of issues that counsel did

[4] A remedy is not available to one who unreasonably delays in filing a ***Knight*** petition. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 800, 565 N.W.2d 805, 808 (Ct. App. 1997). We note but do not decide the issue of whether Lo's failure to file his ***Knight*** petition so that the overlapping issues could be decided in a consolidated fashion amounts to unreasonable delay.

not raise. *See* ***Gray***, 800 F.2d at 646-47. Stated another way, the analysis involves an assessment of the merits.

¶17 Here, Lo argues in several instances that *postconviction* counsel was ineffective for failing preserve a claim of ineffective assistance of *trial* counsel. The latter claim is the substantive claim for relief, while the former claim is Lo's answer to ***Escalona***. *See, e.g.*, ***Rothering***, 205 Wis. 2d at 682, 556 N.W.2d at 139 (noting that ineffective assistance of postconviction counsel may be a "sufficient reason" for failing to bring a claim on direct appeal). We analyze these nested claims of ineffective assistance of counsel by focusing on the performance of trial counsel, and, in effect, we apply the two-pronged ***Strickland*** test.

¶18 Lo also contends that postconviction counsel failed to preserve several additional claims of error. According to Lo, postconviction counsel was constitutionally ineffective for letting these issues drop. Lo contends that they are strong claims for relief that a reasonably effective attorney would not have ignored. Again, as to these claims, it is often necessary to assess the merits at some level, in order to assess the performance of postconviction counsel.[5]

[5] The State asserts that we should affirm the circuit court's decision in its entirety. In doing so, the State relies on the argument that ***Escalona*** bars our consideration of most of Lo's claims. However, despite expressly arguing that the analysis of some of Lo's claims involves an analysis of the strength (*i.e.*, the merits) of those claims, the State has not briefed the merits of a single issue raised by Lo. This approach is inadequate and singularly unhelpful to our consideration of Lo's appeal.

(continued)

1. Jury instruction issues.

a. Lesser- included offense.

¶19 Lo contends that the circuit court erred in denying his request to instruct the jury on attempted first-degree and attempted second-degree recklessly endangering safety as a lesser-included offense to count one, attempted first-degree intentional homicide. After hearing argument from each side, the circuit court explained on the record its decision to instruct the jury on both first-degree and second-degree intentional homicide, but to deny the requested instructions on recklessly endangering safety:

> I do not believe that in this case a lesser – any more lesser included [than] second degree intentional homicide is supported by the evidence, and I'm not going to send that to the jury.

¶20 Because Lo's trial counsel requested the instructions and because the circuit court denied the instructions stating its reasoning on the record, we conclude that the issue was preserved for direct appeal regardless of whether postconviction counsel raised the issue through a postconviction motion. *See* WIS. STAT. § 974.02(2) (issues "previously raised" may be appealed by filing a notice

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Lo has explained in some detail why he believes the issues he raises entitle him to a new trial and why he believes they should have been raised by his postconviction and/or his appellate counsel. In response, the State asserts only that "Lo has woefully failed to allege sufficient facts to demonstrate either deficient performance or prejudice." This is the legal conclusion that the State would like us to reach, but the State makes no effort to explain (*e.g.*, through analysis of the record and the applicable law) why we should reach that conclusion. In a recent unpublished opinion, we addressed an identical concern and, after noting the inadequacy of the State's brief, stated, "We anticipate that counsel's future briefs will fully address relevant issues." ***State v. Quinn***, No. 00-3174, unpublished slip. op. at ¶15 n.5 (WI App July 26, 2001). We now emphatically repeat our expectation that the State will provide full briefing of relevant issues. We also caution the State that waiver rules apply to both appellants and respondents.

of appeal without a postconviction motion). Accordingly, postconviction counsel was not ineffective for failing to raise the issue before the circuit court, and we could apply ***Escalona*** to this claim. However, we choose to reach the merits because we believe the record conclusively establishes that the circuit court properly denied the requested instructions.

¶21 Whether the evidence supports the submission of a lesser-included offense is a question of law, which we review *de novo*. *See* ***State v. Kramar***, 149 Wis. 2d 767, 791, 440 N.W.2d 317, 327 (1989). An instruction on a lesser-included offense is appropriate only when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. ***State v. Glenn***, 199 Wis. 2d 575, 585, 545 N.W.2d 230, 234 (1996).[6] In deciding whether the evidence supports an instruction requested by a defendant, courts must view the evidence in a light most favorable to the defendant. ***State v. Fitzgerald***, 2000 WI App 55, ¶7, 233 Wis. 2d 584, 608 N.W.2d 391.

¶22 Lo contends that there are reasonable grounds in the evidence from which the jury could have concluded that he did not have the "intent to kill" required for conviction under WIS. STAT. §§ 940.01 or 940.05,[7] but that he did

[6] We have previously held that first-degree reckless endangerment under WIS. STAT. § 941.30(1) is a lesser-included offense of attempted first-degree intentional homicide under WIS. STAT. §§ 939.32 and 940.01. *See* ***State v. Weeks***, 165 Wis. 2d 200, 206, 477 N.W.2d 642, 644 (Ct. App. 1991).

[7] The relevant portions of the statutes relating to attempted first-degree and attempted second-degree intentional homicide, taken from the 1995-96 version of the Wisconsin Statutes, are as follows:

> **940.01 First-degree intentional homicide.**
>
> **(1)** OFFENSE. Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

(continued)

have the *mens rea* necessary for conviction under WIS. STAT. § 941.30.[8] He further argues that the supreme court's decision in ***State v. Cartagena***, 99 Wis. 2d

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940.05 Second-degree intentional homicide.

(1) Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class B felony if:

[the state fails to prove or concedes that it is unable to prove that the mitigating circumstances specified in § 940.01(2) did not exist.]

939.23 Criminal intent.

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

939.32 Attempt.

(3) An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

[8] The relevant portions of the statutes relating to recklessly endangering safety, taken from the 1995-96 version of the Wisconsin Statutes, are as follows:

941.30 Recklessly endangering safety.

(1) FIRST-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class D felony.

(2) SECOND-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety is guilty of a Class E felony.

(continued)

657, 299 N.W.2d 872 (1981), conclusively establishes his right to an instruction on the lesser-included offense and that the circuit court's denial of that instruction requires a reversal of his conviction. We disagree.

¶23 ***Cartagena*** was decided prior to a broadening of the definition of the phrase "with intent to," as that phrase is used in WIS. STAT. §§ 940.01 and 940.05. Under the version of the statutes in effect at the time of Lo's offense, a jury could convict a defendant of attempted first-degree intentional homicide if, in addition to the other elements of the offense, it found beyond a reasonable doubt that the defendant was "aware that his or her conduct is practically certain to cause" the death of another human being. WIS. STAT. § 939.23(4) (1995-96).[9] Given the evidence presented by the prosecution and the defense and assuming that the jury rejected Lo's claim that he acted in self-defense, no reasonable jury could find that Lo was not at least aware that firing five shots at K.V. from a handgun was "practically certain" to cause K.V.'s death. Simply put, repeatedly firing a handgun at another person—which (excepting self-defense) is the view of Lo's conduct that is most favorable to him—is practically certain to cause that person's death. *See, e.g.*, ***State v. Weeks***, 165 Wis. 2d 200, 210-11, 477 N.W.2d 642, 646-47 (Ct. App. 1991) (holding that the circuit court properly refused to instruct the jury on recklessly endangering safety as a lesser-included offense to attempted

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939.24 Criminal recklessness.

(1) In this section, "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.

[9] The definition of "intent to kill" that the court addressed in ***Cartagena*** required a jury to find that the defendant had "the mental purpose to take the life of another human being." ***State v. Cartagena***, 99 Wis. 2d 657, 658 n.2, 299 N.W.2d 872, 874 n.2 (1981).

first-degree homicide when, during an armed robbery, one of the perpetrators turned and blindly fired a shotgun toward a door that had just closed knowing that a person was standing behind the door); *see also* ***id.*** at 212-13, 477 N.W.2d at 647 (Fine, J., concurring). The fact that K.V. did not die reduced the crime to an attempt, but it did not negate Lo's criminal intent under the applicable statutes. Accordingly, Lo was not entitled to the lesser-included offense instructions.

b. Recklessly endangering safety.

¶24 Lo next claims that the court's jury instructions on recklessly endangering safety were deficient because they did not sufficiently identify the person or persons whom he allegedly endangered and because they incorporated self-defense as one of the deciding factors. Lo contends that (1) the instructions denied him the right to a unanimous verdict because the individual jurors might have disagreed about who was endangered, and (2) the instructions allowed the jury to convict him of recklessly endangering K.V., which would present a double jeopardy problem.

¶25 First, we conclude that Lo has not alleged sufficient facts to call into question the statement in the record that he was personally consulted and personally agreed during postconviction proceedings not to pursue the issue of whether the instructions on recklessly endangering safety created a unanimity problem. Lo's trial counsel had objected to the instructions on the grounds that they failed to identify a specific person who was endangered. The circuit court overruled the objection, concluding that it was a fact question for the jury whether any bystander in the park was close enough to the shooting to be endangered. Lo's postconviction counsel raised the issue a second time by motion, but informed the court at the postconviction hearing that, upon conferring with Lo and

obtaining Lo's consent, he was withdrawing the motion. Because Lo has failed to provide any explanation of the sequence of events leading to the decision to voluntarily withdraw the motion, he has not alleged sufficient facts in his motion to raise a question of fact concerning the alleged ineffectiveness of postconviction counsel. Accordingly, ***Escalona*** clearly applies to bar Lo from raising this claim for relief under WIS. STAT. § 974.06.

¶26 Second, we see no error in the references to self-defense that appear in the final instructions on reckless endangerment. Those instructions informed the jury that if it determined that Lo was lawfully acting in self-defense, it could not convict him of recklessly endangering the safety of another in connection with the shooting. Lo's interpretation of these references is unreasonable.

¶27 Third, we see no danger that the jury convicted Lo of recklessly engendering the victim, K.V., as opposed to a separate bystander. The information, which was read to the jury during both preliminary and final instructions, expressly accused Lo of recklessly endangering the safety of "bystanders" in the park. And, under Lo's own account of the shooting, he was standing at a shouting distance (about forty feet) from K.V. when he fired the shots, and there may have been a bystander five to ten feet from K.V. Reading the instructions as a whole and considering the evidence produced at trial, we have no doubt that the jury understood that the second count did not relate to K.V. *See* ***State v. Skaff***, 152 Wis. 2d 48, 59, 447 N.W.2d 84, 89 (Ct. App. 1989) (stating that appellate courts consider the instructions given to the jury in their entirety to determine whether the jury was fully and fairly instructed).

c. Self-defense.

¶28 Lo raises but not does not develop (either in his motion or his brief) an argument that the jury instructions on imperfect self-defense were legally insufficient. We will not consider this undeveloped argument. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987) (proper appellate argument contains the contention of the party, the reasons therefore, with citation of authorities, statutes and that part of the record relied on; inadequate argument will not be considered).

2. Lo's juvenile adjudication.

¶29 Lo next challenges the circuit court's decision to allow testimony concerning Lo's juvenile adjudication for sexual assault. He claims that under WIS. STAT. § 48.35(1)(b) (1995-96), the circuit court committed plain error in allowing the prosecution to cross-examine defense witnesses about the juvenile adjudication, that his trial counsel was ineffective for failing to object under § 48.35(1)(b) and for failing to seek a curative instruction and that postconviction counsel was ineffective for failing to raise trial counsel's ineffectiveness.[10]

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[10] WISCONSIN STAT. § 48.35(1)(b) (1995-96) provides as follows:

> **48.35 Effect of judgment and disposition. (1)** ...
>
> (b) The disposition of a child, and any record of evidence given in a hearing in court, shall not be admissible as evidence against the child in any case or proceeding in any other court except:
>
> 1. In sentencing proceedings after conviction of a felony or misdemeanor and then only for the purpose of a presentence study and report;

(continued)

¶30 In his earlier appeal, Lo argued that his trial counsel was ineffective for "opening the door" to cross-examination of a defense character witness on Lo's juvenile record. Lo's argument centered on trial counsel having asked Lo's foster parent whether he was aware of any episodes that would have gotten Lo into trouble. The foster parent responded that he was not aware of any such incidents. The prosecution then questioned the foster parent about a sexual assault Lo had committed while he was in that foster parent's care:

> Q: You did have one problem with him while he was in the group home approximately two months after he returned, correct? He returned in January?
>
> A: Yes.
>
> Q: And there was a problem in March, right?
>
> A: Uhm, yes.
>
> Q: He had, on multiple occasions, sexual intercourse with –
>
> [DEFENSE ATTORNEY]: Your honor, I'm going to object as to the specifics of –
>
> [PROSECUTOR]: Well, he's testified that there were no problems that he was aware of, everybody adored him. I'm entitled to inquire as to specific instances that bear on that.
>
> THE COURT: Objection overruled. You may proceed.
>
> BY [PROSECUTOR]:

> 2. In a proceeding in any court assigned to exercise jurisdiction under this chapter and ch. 938; or
>
> 3. In a court of civil or criminal jurisdiction while it is exercising the jurisdiction of a family court and is considering the custody of children.

> Q: ...[O]n multiple occasions in March of 1995, Anou Lo had sexual intercourse with another 12-year-old resident, correct?
>
> A: After –after investigation it was perceived to be so.
>
> Q: And he was adjudicated for that?
>
> A: Yes, he was.
>
> Q: Is having sexual intercourse with a 12-year-old child on multiple occasions, another resident, consistent with not having any problems while he was living with you?
>
> A: What I meant by problems was as far as violence or something of really majorly disorderly conduct.

¶31 In addressing Lo's argument on his direct appeal, we noted that it was trial counsel's decision to call the foster parent as a character witness—not the specific question asked on direct examination—that had "opened the door" to cross-examination concerning the sexual assault. We then held that the decision to call the foster parent was a rational one that did not constitute deficient performance. Implicit in this analysis was consideration of the rule that when an accused places a relevant aspect of his character at issue, the prosecution may respond with inquiry as to whether the witness is aware of relevant specific instances of conduct by the defendant. *See* WIS. STAT. §§ 904.04(1)(a) and 904.05(1) (1995-96). We do not revisit those conclusions here. Lo attempted to establish that he did not have a violent or assaultive character to bolster his claim that he was not associated with a violent gang. The state responded to Lo's character witnesses with inquiry into an act of sexual assault. It was within the circuit court's discretion to permit that testimony. *See* ***King v. State***, 75 Wis. 2d 26, 41-42, 248 N.W.2d 458, 465-66 (1977).

¶32 As for Lo's claim that any express reference to his juvenile adjudication was improper under WIS. STAT. § 48.35(1)(b), we conclude that any such error was harmless and non-prejudicial. Because the jury heard questions and testimony about the sexual assault *as conduct* that was relevant under WIS. STAT. §§ 904.04(1)(a) and 904.05(1), the further references to the juvenile adjudication that resulted from that conduct do not undermine our confidence in the outcome of the trial. Under the same reasoning, we conclude that there is no reasonable possibility that the result of the proceeding would have been different but for the evidentiary error Lo alleges occurred in regard to mentioning his juvenile adjudication. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 368-69, 588 N.W.2d 606, 622-23 (1999), *modified on other grounds*, 225 Wis. 2d 121, 591 N.W.2d 604. Finally, Lo is incorrect to assert that a curative instruction was necessary to erase any association in the juror's minds between the sexual offense and Lo's character. As established above, the cross-examination concerning Lo's conduct in committing the sexual assault was offered and properly admitted for the express purpose of rebutting the testimony of Lo's character witnesses. *See* WIS. STAT. §§ 904.04(1)(a) and 904.05(1).

3. Failure to have a defense ballistics expert.

¶33 Lo contends that his postconviction counsel was ineffective because he failed to argue that trial counsel was ineffective for failing to retain and present a ballistics expert to rebut the prosecution's expert, who testified that the gun Lo used to shoot K.V. was the same gun that was used in a prior house shooting. The State then argued the inference that both shootings were part of series of related gang activity.

¶34 Where a defendant alleges that trial counsel was deficient for failing to investigate certain aspects of the case, the defendant must "allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. More than speculation about what further investigation would have revealed is necessary. ***Id.***

¶35 Here, Lo contends that his trial counsel should have presented an expert witness because it was known that the bullets examined by the prosecution's expert were fragmented and misshaped in various ways, and therefore the results of the laboratory examination were likely not reliable. However, Lo has not alleged that he has spoken with an expert who will provide testimony at a ***Machner*** hearing that would be sufficient to show prejudice under ***Strickland***, and he has not provided an affidavit from an expert in the field who has actually examined the bullets and stated a conclusion that would have rebutted the testimony of the State's witness. Accordingly, he has not alleged facts that, if believed, would entitle him to relief. Neither Lo nor this court is in a position to offer an opinion concerning the point at which the condition of bullets prevents a reliable examination. Because Lo has not presented facts sufficient to show that a defense expert could have rebutted the State's expert's testimony and because we cannot reasonably conclude that a more detailed discussion of the characteristics of the bullets would have had a material impact on the case,[11] it would be pure speculation to conclude that trial counsel was deficient for failing to solicit

[11] We note that our review of the record shows that trial counsel provided very able cross-examination of the State's expert, raising for the jury's consideration many of the points that Lo argues concerning the condition of the bullets.

additional expert testimony or advice on this subject, or that there is a reasonable probability his failure to do so affected the outcome of the case.

¶36 The only case Lo cites on this issue, ***Barnard v. Henderson***, 514 F.2d 744, 746 (5th Cir. 1975), is inapposite due to the nature of the claim raised. ***Barnard*** involved a federal habeas appeal. The trial court had denied the defendant's pretrial motion to allow inspection of the murder weapon and bullet by a ballistics expert of his own choosing. ***Id.*** The Fifth Circuit concluded that the motion was not frivolous; seventy-percent of the slug had been destroyed and there was a "possibility" that a ballistics expert would have been helpful to the defense on the issue of weapon identification. ***Id.*** The court then held that the trial court's decision to deny the motion had violated the defendant's due process rights because it denied him the means necessary to conduct his defense. ***Id.*** Here, Lo's claim is that trial counsel was ineffective for failing to present rebuttal expert testimony. Under the standard set forth in ***Strickland***, 466 U.S. at 688, 693-94, the defendant has the burden to show that the alleged deficiency fell below the representation that a reasonably effective attorney would provide and that it had more than "some conceivable effect on the outcome of the proceeding." Here, Lo's failure to pursue postconviction discovery regarding ballistics evidence and his failure to provide even a hint that an actual expert in the field would validate his speculation convince us that he could not meet his burden under ***Strickland*** even if a hearing were held on the issue.

*4. **Juror bias.***

¶37 Lo also claims error for failing to excuse a juror who stated during *voir dire* that he was an acquaintance of an officer who testified for the prosecution. Lo's trial counsel did not seek dismissal of the juror for cause, nor

did counsel use one of his five peremptory strikes to dismiss the juror. Lo now argues that "[i]t cannot be said with certainty that [the juror] did not bring into the jury room evidence not adduced at trial." This allegation is based solely on following exchange, which took place during *voir dire*:

> [Prosecutor]: .... Investigator Byerson is an investigator with the La Crosse Police Department.
>
> [Juror]: I know him, but just an acquaintance.
>
> [Prosecutor]: Okay. Anything about that that would –
>
> [Juror]: None.

¶38 There is nothing in this exchange, elsewhere in the record, in Lo's motion or in his brief that is sufficient to raise an issue as to the juror's potential subjective or objective bias. *See* ***State v. Lindell***, 2001 WI 108, ¶¶34-40, 245 Wis. 2d 689, 629 N.W.2d 223 (setting forth standards for evaluation of claims of juror bias). The acquaintanceship with a witness is not enough to suggest that dismissal for cause was required, and Lo offers only speculation that the juror may have known about facts not in evidence. We conclude that there was no error in retaining the juror. Accordingly, we also conclude that postconviction counsel was not ineffective for failing to raise the issue in a postconviction motion and that Lo was not denied a fair trial by the inclusion of the juror on the panel that heard his case.

5. Prosecutorial misconduct.

¶39 Lo also contends that his trial was tainted by prosecutorial misconduct. Some of the allegations of "misconduct" relate to the introduction of gang-related evidence and the cross-examination of Lo's character witnesses (particularly concerning the sexual assault). These issues have been adequately

addressed either on direct appeal or as part of this decision. Several of the allegations simply have no merit. For example, there was no misconduct involved in dropping the gang-related enhancer, in eliciting testimony concerning Lo's demeanor during the investigation of the shooting, or in seeking an explanation from Lo as to why he initially denied having shot K.V., but then later changed his story to assert that he shot K.V. in self-defense. We also disagree that there is any basis for Lo's allegation that the prosecutor attempted to play on racial biases.

¶40 The remaining allegations of misconduct adequately developed for our consideration are that (1) the prosecutor vouched for the truthfulness of K.V. during closing argument; (2) the prosecutor referred to Lo as a gang member; (3) the prosecutor's remarks during opening and closing argument were inflammatory because he referred to Lo as a "gangster" and a "gangster punk;" and (4) the prosecutor misstated the time-line of events during opening and closing statements to make events appear retaliatory in nature.

¶41 Prosecutors must refrain from using methods calculated to produce a wrongful conviction. ***United States v. Young***, 470 U.S. 1, 7 (1985). Prosecutorial misconduct violates due process where it "poisons the entire atmosphere of the trial." ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376, 378 (Ct. App. 1996) (internal quotation omitted). When the misconduct is serious and the evidence of a defendant's guilt is weak, we will not hesitate to reverse the resulting conviction and order a new trial. ***Id.*** However, "[r]eversing a criminal conviction on the basis of prosecutorial conduct is a 'drastic step' that 'should be approached with caution.'" ***Id.*** (quoting ***State v. Ruiz***, 118 Wis. 2d 177, 202, 347 N.W.2d 352, 364 (1984).

¶42 Lo's trial counsel did not object to or move for a mistrial as to any of the four acts of alleged prosecutorial misconduct. Further, postconviction counsel did not choose to pursue prosecutorial misconduct as an avenue for postconviction relief. Accordingly, our review of the issue is limited. We reverse only if Lo establishes plain error. *See* ***State v. Street***, 202 Wis. 2d 533, 552, 551 N.W.2d 830, 839 (Ct. App. 1996) (noting that, in order to constitute plain error, an error must be obvious and substantial, and so fundamental that a new trial or other relief must be granted).

a. Vouching for K.V.'s truthfulness.

¶43 Lo contends that the prosecutor improperly vouched for K.V.'s truthfulness during the State's closing argument. The prosecutor said:

> I'm also going to be upfront with you in the sense that I think [K.V.] lied when he testified. I'm not going to defend that. The young man took the witness stand, and with respect to the Omni Center shooting at least retracted statements that he had made to Investigator Byerson. And he retracted those statements saying he didn't know what he was saying, he was in the hospital, didn't know what was going on. I think you heard the tape. Certainly it was my impression that in giving answers he knew what he was being asked and responded appropriately. So we're not defending [K.V.] here.
>
> [K.V.] I think was honest with Investigator Byerson when he spoke originally. You heard the taped statement. Maybe he didn't appreciate the consequences of what he was saying, that at some point later on he would be called into court and possibly used as a witness against his TMC buddy, [C.T.]. But at least when he spoke with Investigator Byerson, he was upfront and clear about what had happened about the Omni Center ....
>
> So when you look at [K.V.], I don't think you disregard what he says entirely. I think you look very, very carefully at what he said on the witness stand the other day. But I think you can be much more trusting of what he said to Investigator Byerson. What he said to Investigator

> Byerson was corroborated in many respects by other witnesses.

¶44 We conclude that the prosecutor's statements do not constitute either an explicit personal assurance of the witness's veracity or an implicit indication that information not presented to the jury supports the witness's testimony. *See, e.g.*, ***United States v. Bowie***, 892 F.2d 1494, 1498 (10th Cir. 1990). In Wisconsin courts, a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on the evidence presented. ***State v. Adams***, 221 Wis. 2d 1, 16-18, 584 N.W.2d 695, 702-03 (Ct. App. 1998). The prosecutor's comments here do not stray from the standard applied in ***Adams***.

b. Referring to Lo as a gang member.

¶45 Lo also claims error because the prosecutor referred to him as a gang member as there was no direct testimony that Lo was a member of IG. We conclude that Lo is incorrect to assume that the prosecutor was foreclosed from arguing the inference, based on circumstantial evidence, that Lo was associated with IG at the time of the shooting. The evidence produced at trial was sufficient for the jury to draw the inference that Lo was a member of, or at least associated with the IG. Our review of the transcript shows that although the prosecutor referred to Lo as a gang member and to the IG as "defendant's gang," the State's closing argument expressly apprised the jury of the fact that this was an argument based on circumstantial, rather than direct, evidence.

c. Inflammatory statements.

¶46 Lo contends that the State exceeded the bounds of proper argument by referring to him as a "gangster" and a "gangster punk."[12] While we agree with Lo that these references serve no legitimate purpose and that they might have drawn a sustainable objection, we disagree that they rise to the level of plain error. Along the continuum of cases evaluating improper comments by the prosecutor in particular fact situations, the comments at issue here are tame in comparison to the comments at issue in, for example, ***Shepard v. Lane***, 818 F.2d 615, 621-22 (7th Cir. 1987) (holding that prosecutor's comments, while grossly improper, did not deprive defendant of a fair trial). Lo cites ***United States v. Cannon***, 88 F.3d 1495, 1502-03 (8th Cir. 1996) to support his contention that the prosecutor's comments require a new trial. In ***Cannon***, however, the court was not only concerned about the references to defendants as "bad people," but also with a "thinly veiled appeal to parochial allegiances" in the prosecutor's remarks. *See* ***id.*** at 1502. In any event, we rest our decision here on our review of the prosecutor's comments in the context of Lo's entire trial.

d. Misstating the time-line of events.

¶47 The prosecutor stated in his opening statement to the jury that he would prove a sequence of four shootings. The first would be a TMC shooting, the second an IG shooting, the third a TMC shooting, and the fourth would be Lo, whom the prosecutors sought to prove was associated with the IG, shooting K.V.,

[12] Lo also contends that the prosecutor referred to Lo and his associates as "gang bangers" and "street thugs," but he provides no citations to the record for those quotations. Upon our own review of the State's opening and closing arguments, we found no such references.

a TMC. Lo contends that the prosecutor intentionally misrepresented the sequence of the second and third shootings to conform to his argument that there was repeated back-and-forth retaliation between the gangs.

¶48 Although Lo may be correct that the prosecutor confused the time-line of events, Lo has not provided citations to the record that would demonstrate that his asserted sequence was established. Our own review of the trial transcript shows only that the second and third shootings occurred on the same night, but which one occurred first was not clear. We also note that during the State's closing argument, the prosecutor stated only that the second and third shooting occurred on "[t]hat same night." This presentation conformed to the evidence produced at trial. We conclude that Lo has not shown that the failure to explicitly clarify the time-line set forth in the opening, even if erroneous, rendered his trial unfair or that it resulted in any prejudice to his defense. Taken in context of the whole trial, the specific sequence of the second and third shootings was not an important issue. In summary, we conclude that none of the alleged acts of prosecutorial misconduct reached the level of plain error or rendered the trial unfair.

Issue not Briefed on Appeal.

¶49 Lo's motion under WIS. STAT. § 974.06 raises an issue as to whether the circuit court erred by not requiring the jury to answer a "special fact question" related to the issue of self-defense. He has not pursued this issue on appeal, and we conclude that the claim has been abandoned.

Denial of Lo's Motion without an Evidentiary Hearing.

¶50 For the reasons set forth above, we conclude as to each issue raised on this appeal of Lo's postconviction motion either that Lo is barred from raising the issue under WIS. STAT. § 974.06 and ***Escalona***, that he has failed to allege sufficient facts in his motion to raise a question of fact or that the record conclusively demonstrates that Lo is not entitled to relief. Based on our examination of the record and the issues raised in Lo's motion, we conclude that the circuit court's decision to deny the motion without a hearing was correct. *See* ***Bentley***, 201 Wis. 2d at 309-11, 548 N.W.2d at 53-54.

New Trial in the Interest of Justice.

¶51 Lo also seeks a new trial "in the interests of justice" under WIS. STAT. § 752.35. *See* ***State v. Neuser***, 191 Wis. 2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995). Our power of discretionary reversal under § 752.35, however, "may be exercised only in direct appeals from judgments or orders.... When an appeal is taken from an unsuccessful collateral attack under sec. 974.06, Stats., against a judgment or order, that judgment or order is not before us." ***State v. Allen***, 159 Wis. 2d 53, 55-56, 464 N.W.2d 426, 427 (Ct. App. 1990). Section 752.35 does not permit us to go behind an order denying a WIS. STAT. § 974.06 postconviction motion to reach the judgment of conviction. ***Id.***

¶52 A new trial would not be warranted under WIS. STAT. § 752.35 in any event. The real controversy here concerned whether or not Lo acted in self-defense, whether he intended to kill K.V., and whether he recklessly endangered the safety of a bystander in the park when he fired his gun five times. No grounds exist to conclude that the case was not fully tried. Nor are we persuaded that the fundamental reliability of the trial was impugned such that

justice miscarried or that there is a substantial probability that a new trial would produce a different result. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567, 579 (Ct. App. 1998).

CONCLUSION

¶53 As to each issue raised on this appeal, we reach one of three conclusions: (1) that Lo is barred from raising the issue in a postconviction motion, (2) that he has failed to allege sufficient facts in his motion to raise a question of fact or (3) that the record conclusively demonstrates that he is not entitled to relief. Accordingly, we affirm the circuit court's order denying Lo's postconviction motion. We further conclude that a new trial in the interests of justice is not warranted.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶54 DEININGER, J. (*concurring*). I concur in the result and the reasoning of the majority opinion but write separately to comment on the increasingly frequent appearance of the analytical complexities which this appeal presents.

¶55 WISCONSIN STAT. § 974.06(4) provides as follows:

> 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.

The supreme court, concluding in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), that "[w]e need finality in our litigation," ***id.*** at 185, held that a defendant may not bring postconviction claims under § 974.06 if the defendant could have raised the claims in his or her previous postconviction motion, or on a prior direct appeal, unless the defendant presents "sufficient reason" for having failed to do so. ***Id.*** at 181-82.

¶56 In an increasing number of appeals from the denial of motions brought under WIS. STAT. § 974.06, especially those brought by pro se inmates, we are seeing an assertion that the reason the newly raised claims of error were not raised in previous postconviction or appellate proceedings is that postconviction or

appellate counsel rendered ineffective assistance by failing to present the allegedly meritorious claims. In order to determine whether the new claims are properly before the court, the circuit court and/or this court must first evaluate the "sufficiency" of the proffered reason, which, as the majority's present analysis demonstrates, will often require a consideration of the merits of the underlying, newly asserted claim. And, even if we or the circuit court conclude that the claim has no merit, and thus that postconviction or appellate counsel's failure to raise the claim did not represent either deficient performance or prejudice to the defendant, the defendant has essentially obtained what § 974.06 and ***Escalona-Naranjo*** ostensibly deny: the consideration of the merits of the defendant's newly asserted claim, for which sufficient reason has not been shown for an earlier failure to raise it.

¶57 Further complicating the analysis is the fact that many of the newly raised claims, as in this case, involve an assertion that *trial* counsel was ineffective for failing to make some request or objection during trial or pre-trial proceedings, and that subsequent counsel were ineffective for failing to raise a claim of ineffective assistance of trial counsel. Thus, on a record which contains neither a trial court ruling on a now disputed issue, nor a ***Machner***[13] hearing on why trial counsel failed to raise the issue, we or the circuit court must ponder the following question: Is there merit to the now raised issue, such that trial counsel was deficient for not making a request or objection regarding it, thereby prejudicing the defendant, and thereby also rendering postconviction and/or appellate counsel's performance deficient and prejudicial for failing to assert trial counsel's

[13] ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

ineffectiveness, such that the defendant has presented a sufficient reason for the failure to raise the issue in earlier postconviction or appellate proceedings, which would permit him to now bring the issue before the court for a consideration of its merits?

¶58 I believe that the effort to peel through the layers of this onion-like inquiry often results in analyses that are needlessly complex, fraught with the potential for gaps or errors along the way, and, all in all, a frustrating undertaking for courts and respondent's counsel alike. I thus have some sympathy for the unenviable task which faces counsel for the State in attempting to respond to the issues presented in the posture of an appeal such as the present one. (See majority opinion, ¶18 n.5.) I also suggest that, when given the opportunity to do so, the supreme court should revisit the ***Escalona-Naranjo*** holding to consider whether, in light of the foregoing, a meaningful bar to "successive motions and appeals" continues to exist under WIS. STAT. § 974.06(4). ***Escalona-Naranjo***, 185 Wis. 2d at 185.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | LA CROSSE COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

ANOU LO,
Defendant.

MEMORANDUM DECISION AND ORDER

Case No. 95-CF-1243

This case is before the Court on Anou Lo's "974.06 Motion". Mr. Lo argues that if the Court finds that there has been "a denial or infringement of the constitutional rights of the defendant as to render the judgment vulnerable to collateral attack, the judgment is to be set aside and a new trial is to be granted." (Def. 974.06 Motion at 2). Mr. Lo argues that (1) he had ineffective assistance of counsel; (2) the trial Court failed to give a lesser included offense; (3) § 48.35(1), Stats., was violated; (4) the Court erroneously allowed testimony of the defendant's juvenile history; (5) there was a special fact question as to the issue of self-defense; (6) the Court failed to tell the jury that this was not a gang-related shooting; (7) there was prosecutorial misconduct; (8) the Court failed to exclude other acts evidence; (9) counsel failed to get a ballistics expert; and (10) there was a biased juror.

Although Anou Lo provides 80 pages of lengthy dissertation about why he is entitled to relief, the Court is satisfied that his arguments regarding ineffective assistance of trial counsel and an erroneous inclusion of "other acts" evidence has been previously addressed by this Court and the Court of Appeals. Furthermore, his remaining claims have not been previously raised in a postconviction motion, pursuant to Wis. Stats. § 974.06(4), therefore, he is not entitled to relief. Accordingly, his motion is denied.

DECISION

Under Wis. Stats. § 974.06(1):

> "After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

However, under Wis. Stats. § 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." (Emphasis added).

Moreover, when "a defendant brings a sec. 974.06(6), Stats., motion for postconviction relief, he carries the burden not only of overcoming the finality of his sentence by clear and convincing evidence, see ***State v. Walberg***, 109 Wis. 2d 96, 102-03, 325 N.W.2d 687 (Ct. App. 1982), cert. denied, 474 U.S. 1013 (1985), but also, as a threshold matter, he must allege in his motion papers sufficient facts to raise a question of fact." ***State v. Flores***, 158 Wis. 2d 636, 642, 462 N.W.2d 899 (Ct. App. 1990).

I. Ineffective Assistance Of Counsel & Inclusion Of "Other Acts" Evidence

Anou Lo has previously filed postconviction motions for a new trial based on ineffective assistance of trial counsel and inclusion of certain "other acts" evidence relating to gang activity.

The Court denied his motions for a new trial. Mr. Lo appealed his judgment of conviction and the order denying his postconviction motions to the Court of Appeals. The Court of Appeals affirmed this Court finding that "defense counsel's performance was not deficient and the evidence of gang-related activities was relevant to establish motive." ***State v. Anou Lo***, No. 97-0023-CR, slip op. at 2 (Ct. App. June 25, 1998). Because these issues have already been addressed by this Court, and the Court of Appeals, the defendant's motion is denied.

Additionally, Mr. Lo asserts that he had ineffective assistance of appellate counsel because his appellate counsel failed to raise the ineffective assistance of trial counsel claim in the State Supreme Court. (Def. Motion at 2). This Court does not have proper authority to address the ineffective assistance of appellate counsel claim, under § 974.06, Stats. The Wisconsin Supreme Court has held that "the appropriate procedure is a habeas corpus proceeding and the proper forum is the court that considered the appeal". ***State v. Knight***, 168 Wis. 2d 509, 513-14, 484 N.W.2d 540 (Wis. 1992). "[T]he appellate court that rendered the decision in the appeal is in the best position to evaluate claims of ineffective assistance of appellate counsel. The appellate court heard the initial appeal and may best judge the conduct of appellate counsel." *Id.* at 518-19 (citation omitted). Thus, Mr. Lo has chosen the wrong forum and the wrong procedure to make the claim of ineffective assistance of appellate counsel; accordingly, this Court cannot address the claim.

II. **Failure To Give Lesser Included Offense, Violation Of § 48.35(1); Testimony Of Defendant's Juvenile History; Issue Of Self-Defense; Failure to Advise Jury That It Was Not A Gang-related Shooting; Prosecutorial Misconduct; Failure To Have Ballistics Expert; and Biased Juror**

First of all, "all grounds for relief under sec. 974.06 must be raised in a petitioner's original, supplemental, or amended motion. Second, if the defendant's grounds for relief have been finally adjudicated, waived, or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994) (emphasis added). However, § 974.06(4), Stats., does permit a claim, that has not been previously raised, where "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". Wis. Stats. § 974.06(4).

Here, the Court is satisfied that Anou Lo has not previously raised the above-listed grounds for relief in his original, supplemental, or amended motion for postconviction relief. Furthermore, Mr. Lo has failed to establish that there is sufficient reason why he failed to bring these grounds for relief in his original postconviction motion. He merely asserts, "there is no hint that defendant Lo ever intentionally waived the issues raised here during his direct appeal." (Def. Motion at 2). This conclusion is not enough to meet the burden, of clear and convincing evidence, necessary to obtain relief.

Although § 974.06(1), Stats., allows a prisoner to seek postconviction relief on jurisdictional or constitutional grounds even if the time to appeal from a criminal conviction has expired, "[s]uch a motion cannot be used as a substitute for an appeal." ***State v. Nicholson***, 148 Wis. 2d 353, 360, 435 N.W.2d 298 (Ct. App. 1988). Mr. Lo seeks a remedy under § 974.06, Stats., however, it is clear that this motion is actually a substitute for an appeal. He raises issues that should have originally been addressed in his motion for a new trial and in his appeal of the judgment of conviction.

Mr. Lo does not establish, by clear and convincing evidence, that his sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack. Accordingly, his motion is denied.

ORDER

For the above stated reasons:

The defendant's "974.06 Motion", in case 95-CF-1243, is DENIED.

Dated at La Crosse, Wisconsin, this 8 day of March, 2001.

BY THE COURT:

Ramona A. Gonzalez
Circuit Judge, Branch 1

cc: Anou Lo
District Attorney

guilty.

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

The crime of attempt, as defined in Statute Section 939.32 of the Criminal Code of Wisconsin, is committed by one who, with intent to perform acts and

attain a result which, if accomplished, would constitute a crime, does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

The defendant in this case is charged with attempted first degree intentional homicide, and you must first consider whether the defendant is guilty of that offense. If you are not satisfied that the defendant is guilty of attempted first degree intentional homicide, you must consider whether or not the defendant is guilty of attempted second degree intentional homicide which is a less serious degree of criminal homicide.

The crimes referred to as attempted first and second degree intentional homicide are different degrees of attempted homicide. Attempted homicide is the attempt to take the life of another human being. The degree of attempted homicide defined by the law depends on the facts and circumstances of each particular case.

Before you may find the defendant guilty of either offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the

following two elements were present.

First, that the defendant intended to kill Koua Vang. Second, that the defendant's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some other extraneous factor. It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

Self-defense is an issue in this case. The law of self-defense allows a person to threaten or intentionally use force against another under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in self-defense.

The law allows the defendant to act in self-defense only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person and believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference.

"Unlawful" means "either tortuous or expressly prohibited by criminal law or both."

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

"Reasonably believes" means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous.

The phrase "in the defendant's position under the circumstances that existed at the time of the alleged offense" is intended to allow consideration of a broad range of circumstances that relate to the defendant's situation.

As applied to this case, the effects of the law of self-defense is that if the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person and reasonably believed the force used was necessary to prevent

imminent death or great bodily harm to himself, the defendant is not guilty of either attempted first or second degree intentional homicide.

If the defendant intended to kill Koua Vang; his acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some other extraneous factor; and he did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is guilty of attempted first degree intentional homicide.

If the defendant intended to kill Koua Vang; his acts demonstrated unequivocally, under all circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some other extraneous factor; and he reasonably believed that the was preventing or terminating an unlawful interferences with his person, and actually but unreasonably believed the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is guilty of attempted second degree intentional homicide.

Because the law provides that it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for attempted first or second degree intentional homicide. If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty.

The facts necessary to constitute each crime will now be defined for you in greater detail.

First I'm going to define attempted first degree intentional homicide.

Attempted first degree intentional homicide, as defined in Section 939.32 of the Criminal Code of Wisconsin, is committed by one who intends to cause the death of another human being and who's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed another human being except for the intervention of another person or some other extraneous factor. In this case, attempted first degree intentional homicide also requires that the defendant did not reasonably

believe that he was preventing or terminating an unlawful interference with his person or did not actually believe the force used was necessary to prevent imminent death or great bodily harm.

Before the defendant may be found guilty of attempted first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

First, that the defendant intended to kill Koua Vang.

Second, that the defendant's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some other extraneous factor.

Third, that the defendant did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself.

The first element requires that the defendant acted with intent to kill Koua Vang.

Under the Criminal Code, the phrase "with intent

to kill" means the defendant had the mental purpose to take the life of another human being or was aware that his conduct was practically certain to cause the death of another human being.

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed or that the act be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill, which is an essential element of this offense, is no more or less than the mental purpose to kill or the awareness that the conduct was practically certain to cause the death of another, formed on the instant preceding the act or sometime before that and which continued to exist at the time of the act.

Intent to kill must be found as a fact before you can find the defendant guilty of attempted first degree intentional homicide. You cannot look into a person's mind to find out his intent. You may determine such intent directly or indirectly from all the facts in evidence concerning this offense. You may consider any statement or conduct of the

defendant which indicate his state of mind. You may find intent to kill from such statements or conduct, but you are not required to do so. You are the sole judges of the facts, and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to kill.

Proof of motive to commit a crime is not necessary to a conviction. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict him. Evidence of motive does not by itself establish guilt. It is to be given such weight by the jury as you believe it is entitled to, under all of the circumstances.

The second element of this offense requires that the defendant's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some other extraneous factor.

"Unequivocally" means that no other interference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

"Another person" means anyone but the defendant

and may include the intended victim.

An "extraneous factor" is something outside the knowledge of the defendant or out of his control.

The third element requires that the defendant did not reasonably believe that he was preventing or terminating the unlawful interference with his person or did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires the State to prove any one of the following:

1) that the defendant did not reasonably believe he was preventing or terminating an unlawful interference with his person; or

2) that the defendant did not actually believe he was in imminent danger of death or great bodily harm; or

3) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to himself.

When attempted first degree intentional homicide is considered, the reasonableness of the defendant's belief is an issue only with respect to the belief that the defendant was preventing or terminating an unlawful interference with his person. The reasonableness of that belief must be determined from

the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.

With respect to the belief that the unlawful interference presented an imminent danger of death or great bodily harm and the belief that the force used was necessary to prevent or terminate such danger, the reasonableness of the belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.

You should also consider whether the defendant provoked the attack. A person who engaged in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

However, if the attack which follows causes the person reasonably to believe that he is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or

threaten force intended to or likely to cause death or great bodily harm unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.

A person who provoked an attack whether by lawful or unlawful conduct with intent to use such an attack as an excuse to cause death or great bodily harm to another person is not entitled to use or threaten force in self-defense.

If you are satisfied beyond a reasonable doubt that the defendant intended to kill Koua Vang; that his acts demonstrated unequivocally that he intended to kill and would have killed Koua Vang except for the intervention of another person or some other extraneous factor; and that the defendant did not act lawfully in self-defense, you should find the defendant guilty of attempted first degree intentional homicide.

If you are not so satisfied, you must not find the defendant guilty of attempted first degree intentional homicide, and you must consider whether the defendant is guilty of attempted second degree intentional homicide, as defined in Section 940.05 of the Criminal Code of Wisconsin, which is a lessor included offense of attempted first degree intentional

homicide.

You should make every reasonable effort to agree unanimously on the charge of attempted first degree intentional homicide before considering the offense of attempted second degree intentional homicide. However, if after full and complete consideration of the evidence you conclude that further deliberation would not result in unanimous agreement on the charge of attempted first degree intentional homicide, you should consider whether the defendant is guilty of attempted second degree intentional homicide.

Now I will instruct you more specifically as to the definitions of attempted second degree intentional homicide.

Before you may find the defendant guilty of attempted second degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

First, that the defendant intended to kill Koua Vang.

Second, that the defendant's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed Koua Vang, except for the intervention of another person or some

(2) If the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, as provided by s. 809.10(2)(b).

(3) Permission of the trial court is not required for the state to appeal, but the district attorney shall serve notice of such appeal or of the procurement of a writ of error upon the defendant or the defendant's attorney.

Historical and Statutory Notes

Source:

L.1969, c. 255, § 63, eff. July 1, 1970.
L.1971, c. 298, § 25, eff. May 13, 1972.
S.Ct. Order, dated Feb. 17, 1975, eff. Jan. 1, 1976.
L.1977, c. 187, § 129, eff. Aug. 1, 1978.
1983 Act 219, § 45, eff. April 27, 1984.
1991 Act 39, § 3651, eff. Aug. 15, 1991.
1993 Act 486, § 738, eff. June 11, 1994.

Prior Laws:

L.1909, c. 224.
L.1911, c. 187.
St.1911, § 4724a.
L.1925, c. 4.
St.1925, § 358.12.
L.1941, c. 306.
L.1949, c. 631, § 152.
L.1955, c. 660, § 13.
St.1955, § 958.12.
St.1967, § 958.12.

974.06. Postconviction procedure

(1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(2) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be made at any time. The supreme court may prescribe the form of the motion.

(3) Unless the motion and the files and records of the action conclusively show that the person is entitled to no relief, the court shall:

(a) Cause a copy of the notice to be served upon the district attorney who shall file a written response within the time prescribed by the court.

(b) If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977.

(c) Grant a prompt hearing.

(d) Determine the issues and make findings of fact and conclusions of law. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the person as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the person or resentence him or her or grant a new trial or correct the sentence as may appear appropriate.

(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.

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The motion may be heard under s. 807.13.

(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the person.

(7) An appeal may be taken from the order entered on the motion as from a final judgment.

(8) A petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

Historical and Statutory Notes

Source:

L.1969, c. 255, § 63, eff. July 1, 1970.
L.1971, c. 40, § 93.

UNIFORM POST-CONVICTION PROCEDURE ACT

1966 ACT

See, also, the 1980 version of the Uniform Post-Conviction Procedure Act, supra.

Table of Jurisdictions Wherein Act Has Been Adopted [1]

Jurisdiction	Laws	Effective Date	Statutory Citation
Idaho	1967, c. 25		I.C. §§ 19-4901 to 19-4911.
Iowa	1970, c. 1276	7-1-1970	I.C.A. §§ 822.1 to 822.11.
Minnesota	1967, c. 336	5-11-1967	M.S.A. §§ 590.01 to 590.06.
Oklahoma	1970, c. 220	7-1-1970	22 Okl.St.Ann. §§ 1080 to 1089.
Rhode Island	1974, c. 220		Gen.Laws 1956, §§ 10-9.1-1 to 10-9.1-9.
South Carolina	1969, (56) 158	5-1-1969	Code 1976, §§ 17-27-10 to 17-27-120.

[1] A number of jurisdictions which have not adopted either the 1966 or 1980 versions of the Uniform Post-Conviction Procedure Act have, however, substantially adopted the original 1955 version of the act. For a listing of these jurisdictions, see General Statutory Notes, infra.

Historical Notes

The 1966 Uniform Post-Conviction Procedure Act was superseded by the 1980 Uniform Post-Conviction Procedure Act approved by the National Conference of Commissioners on Uniform State Laws in August 1980.

The revised Uniform Post-Conviction Procedure Act was approved by the National Conference of Commissioners on Uniform State Laws, and the American Bar Association, in 1966. It derived from the original Uniform Post-Conviction Procedure Act approved by these bodies in 1955, the text of which read as follows:

1955 Act

§ 1. [Remedy—To Whom Available—Conditions].—Any person convicted of a felony and incarcerated under sentence of [death or] imprisonment who claims that the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction but, except as otherwise provided in this Act, it comprehends and takes the place of all other common law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of [death or] imprisonment, and shall be used exclusively in lieu thereof. A petition for relief under this Act may be filed at any time.

§ 2. [Exercise of Original Jurisdiction in Habeas Corpus].—[[The Supreme Court, Circuit Court, District Court] in which, by the Constitution of this State, original jurisdiction in habeas corpus is vested, may in accordance with its rules, entertain a proceeding under this Act in an exercise of its original jurisdiction. In this event, the provisions of this Act, to the extent applicable, shall govern the proceedings.]

§ 3. [Commencement of Proceedings—Verification—Filing—Service].—[Except in a proceeding brought under Section 2 of this Act,] the proceeding is commenced by filing a petition verified by the petitioner with the clerk of the court in which the conviction took place. Facts within the personal knowledge of the petitioner and the authenticity of all documents and

exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The [Supreme Court, Court of Appeals] may by rule prescribe the form of verification. The clerk shall docket the petition upon its receipt and bring it promptly to the attention of the court and the [prosecuting attorney, county attorney, state's attorney, attorney general].

§ 4. **[Petition—Contents].**—The petition shall identify the proceedings in which the petitioner was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the petition is based, and clearly state the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from other allegations of facts, and shall be verified as provided in section 3 of this Act. Affidavits, records, or other evidence supporting its allegations shall be attached to the petition or the petition shall state why they are not attached. The petition shall also identify any previous proceedings that the petitioner has taken to secure relief from his conviction. Argument, citations, and discussion of authorities shall be omitted from the petition.

§ 5. **[Proceeding as a Poor Person].**—The petition may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation is true, it shall order that the petitioner proceed as a poor person, and appoint counsel for him. If after judgment, a review is sought by the petitioner, and the hearing court is of the opinion that the review is requested in good faith, and finds that the petitioner is unable to pay the costs of the review, the court shall order that all necessary costs and expenses incident thereto, including all court costs, stenographic services, printing, and reasonable compensation for legal services, be paid by [the county in which the judgment is rendered].

§ 6. **[Pleadings].**—Within [thirty (30)] days after the docketing of the petition, or within any further time the court may fix, the State shall respond by answer or motion. No further pleadings shall be filed except as the court may order. The court may grant leave, at any time prior to entry of judgment, to withdraw the petition. The court may make appropriate orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of the filing of any pleading other than the original petition.

§ 7. **[Hearing—Evidence—Order].**—[Except in a proceeding brought under Section 2 of this Act,] the petition shall be heard in the court in which the conviction took place and before any judge thereof. The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before it for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The order making final disposition of the petition shall clearly state the grounds on which the case was determined and whether a federal or a state right was presented and decided. This order constitutes a final judgment for purposes of review.

§ 8. **[Waiver of Claims].**—All grounds for relief claimed by a petitioner under this Act must be raised in his original or amended petition, and any grounds not so raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

§ 9. **[Review].**—A final judgment entered under this Act may be reviewed by the [Supreme] Court of this State on [appeal, writ of error] brought by either the petitioner or the state within [six (6) months] from the entry of the judgment.

§ 10. **[Uniformity of Interpretation].**—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 11. **[Short Title].**—This Act may be cited as the Uniform Post-Conviction Procedure Act.

§ 12. **[Severability].**—If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 13. **[Repeal].**—The following Act is repealed: "An Act [etc.] ...."

or

The following Acts and parts of Acts are repealed:

(1) "An Act [etc.] ..... "
(2) Section _____ of "An Act [etc.] ..... "

§ 14. **[Time of Taking Effect].**—This Act shall take effect .....

POST-CONVICTION PROCEDURE (1966)

Prefatory Note

Reason for Proposed Uniform Act

Great 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. In 1964 over 6000 petitions for writs of habeas corpus were filed in the federal courts and more than half of these were for persons in custody pursuant to judgment of a state court. The total in 1964 increased by 1600 over 1963 and all but 11 of the increases were for persons in custody pursuant to judgment of a state court.

As long ago as 1934 the United States Supreme Court stated that the states must afford prisoners some method by which they may raise claims of denial of federal right. See Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791. In 1949 it stated that the method must be clearly defined. Young v. Ragen, 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333. In Case v. Nebraska, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965), the United States Supreme Court held that absence of a post-conviction remedy may itself be a denial of due process under the 14th amendment.

Title 28 of the United States Code, Section 2254, provides that an application for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." This section continues with the statement that a prisoner has not exhausted his remedies "if he had a right to raise his question by any available procedure under state law." See also Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950). Thus, many of the abuses which have arisen in connection with federal habeas corpus can be eliminated through constructive action at the state level. This was the conclusion of a special committee on habeas corpus of the Conference of Chief Justices of the states at its annual meeting in 1953. (Report of Special Committee on Habeas Corpus, Proceedings, Conference of Chief Justices, 1953, p. 11.) Thus, 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.

At common law the writ of habeas corpus was the proper remedy when the convicting court did not have jurisdiction over the subject or the person. But unless the state has extended this remedy or provided another remedy, a claim that the conviction in a court which had jurisdiction occurred in disregard of constitutional right cannot be asserted. The writ will not lie when it is sought to impeach a record of conviction or to correct a record. Consequently, in those states which have a narrow view of habeas corpus and which have not provided another remedy, the post-conviction relief available to a prisoner is not as broad as the claims which may be made under the 14th amendment of the United States Constitution. In such states prisoners who have bona fide claims of infringement of constitutional right must resort to federal habeas corpus. The ancient common law writ of error *coram nobis* is equally beset, in many states, with technical restrictions on availability. Confusion exists when the writ will lie. Because of the multiplicity and inadequacy of many post-conviction remedies, long delays in criminal administration occur and when a claim of constitutional right is successfully asserted the judgment to this effect occurs only after years of imprisonment which has turned out to be illegal. A very substantial number of states lack a unified all-embracing system of post-

conviction relief capable of affording the prisoner a forum for his claims based on the United States Constitution.

It is true that the states are faced with a dilemma. If a person has been unconstitutionally imprisoned while the numerous state remedies are pursued for from two to ten years, the situation is abhorrent to our sense of justice. On the other hand, if the greatest number of applications for post-conviction relief are groundless, the wear and tear on the judicial machinery resulting from years of litigation in thousands of cases becomes a matter of serious import to courts and judges. The element of expense is not to be ignored.

Even if there were no problem of tension between the federal and state systems, a minimum standard of criminal justice would seem to require an expeditious and simplified post-conviction remedy. Many states can achieve such a post-conviction remedy by adoption of appropriate rules of court. The present Act, as did its predecessor, the 1955 Uniform Post-Conviction Procedure Act, seeks to meet two objectives: to establish a post-conviction procedure which meets the minimum standards of justice; and to reduce the use of federal habeas corpus to review decisions of state courts to the extent this can be done by state law or by rule of court. The Act may be adapted to rule of court if the courts are so inclined or the Act may be enacted by legislatures.

What the Proposed Act Does

(1) It provides a single, unitary, post-conviction remedy to be used in place of all other state remedies (except direct review). Section 1(b).

(2) It provides a remedy for all grounds for attacking the validity of a conviction or sentence in a criminal case. The grounds included are a claim of a violation of the United States Constitution and the State Constitution and laws; a claim that the court lacked jurisdiction over the person or subject matter; a claim that the sentence was unlawful as in excess of the maximum authorized by law; a claim that there exists evidence of material facts not previously presented and heard which should in justice be heard; that the sentence has expired or that parole, probation, or conditional release has been unlawfully revoked; and any other ground heretofore available under any common law or statutory remedy. See section 1(a).

(3) It makes available discovery and other pre-trial devices used customarily in civil proceedings to bring to the attention of the court the evidentiary bases for the post-conviction claims. See section 7.

(4) It provides for the making of a record which fully and carefully records the proceedings so that the evidentiary basis for the findings of fact will be available on review. See section 7.

(5) It provides that orders of the court should state explicitly the legal basis for the decision. See section 7.

(6) It provides that the expenses of representation including legal services should be provided to applicants who are unrepresented and without funds to pay for their own lawyers even to the extent of legal aid in preparation of the application. See section 5.

(7) It restricts attempts to finally dispose of application for relief on the basis simply of the sufficiency of allegations and it prohibits disposition on the pleadings and record if there is a material issue of fact. See section 6.

(8) It permits the court to obtain improvement in presentation of claims by applicants through development by the court of standardized forms but it directs the court to consider substance and not defects in form in disposition of applications. See section 3.

(9) It requires an applicant to present all of his claims for attack on his conviction or sentence in his initial post-conviction proceeding. It provides that any ground finally adjudicated in one proceeding or not raised in that proceeding or not knowingly, voluntarily, and intelligently waived in the proceeding may not be the basis for a subsequent application, but it gives the court discretion to find that a ground for relief asserted in a subsequent application was, for sufficient reason, not asserted or was inadequately raised in that proceeding. It provides no fixed period after conviction in which an application for post-conviction relief may be sought. See section 8.

Will This Act Meet the Objectives?

A minimum standard of criminal justice requires expeditious and simplified post-conviction procedures and it is believed that the Act is consistent with standards of criminal justice.

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.

There are several indications that an Act of the type here presented will aid in the reduction of applications for federal habeas corpus. As Mr. Justice Clark pointed out in Case v. Nebraska, 381 U.S. 336, 340, 85 S.Ct. 1486, 14 L.Ed.2d 422, the Illinois Post-Conviction Act on which this draft is partially based produced after its enactment a considerable drop in federal applications from state prisoners. The experience under the federal post-conviction procedure (entitled motion to vacate sentence), 28 U.S.C. § 225, would seem to support the same conclusion. While habeas corpus petitions in the federal court since enactment of the federal law in 1949 have increased, the increase in applications by federal prisoners is substantially less than the increase in applications by state prisoners. While federal applications increased 129%, state applications increased 174%.

Why is a Revision Needed Now?

Since 1955, when the original Act was promulgated by the National Conference, the cases in the United States Supreme Court have strengthened a requirement that state relief is not adequate if there is a dismissal of the claim without a full and fair evidentiary hearing on the merits when the claim is based on disputed facts. Moreover new grounds for attacking a conviction have developed. The 1966 revision proposed herein is designed to take care of these developments. It is believed that it is now flexible enough so that with sympathetic consideration of pleadings and methods of presenting issues, a prisoner will always be able to raise his claim in a state court and thus, as provided in 28 U.S.C. § 2254 there will be no occasion for federal habeas corpus, because a state remedy is available.

Why Uniformity?

Since federal and state procedures are closely linked, as indicated above, state procedures ought to be uniform to conform to the uniform federal procedures. The Report of the Special Committee on Habeas Corpus of the Conference of Chief Justices in 1953 gives perhaps the basic reason for uniformity:

> "If any proposition can be stated dogmatically in this field it is this: the state courts must provide post-conviction corrective process which is at least as broad as the requirements which will be enforced by the federal

courts in habeas corpus through the due process clause of the 14th amendment. A state can call this remedy whatever it wants, but it must provide some corrective process."

It may be added that the requisite uniformity can be obtained either by statute or by rules of court. Uniformity would not be sacrificed if the substance of the accompanying Act were promulgated by the supreme court of the state by rule.

What State Laws Should be Repealed

Section 1(b) of the Act makes the remedy provided a substitute for all common law-statutory or other remedies heretofore available for challenging the conviction or sentence (other than direct review). A state should consider repealing its existing statutes on habeas corpus, *coram nobis* and statutory remedies, if any. Whether these are repealed or not, the direction in section 1(b) would seem to require a court to treat an application under such a remedy as made under this Act and governed by its provisions as to pleadings and procedure.

General Statutory Note

Adoption of Original 1955 Act

The following jurisdictions have not adopted either the 1966 or 1980 versions of the Uniform Post-Conviction Procedure Act and therefore do not appear on the Table of Adopting Jurisdictions for either of those versions. However, they have substantially adopted the original 1955 version of the act. These jurisdictions are as follows:

Maryland (Code 1957, art. 27, §§ 645A to 645J)

Montana (MCA 46-21-101 to 46-21-203)

Oregon (ORS 138.510 to 138.680)

Action in Jurisdictions Adopting 1966 Act:

Idaho. Adds section as follows:

"19-4905. Costs of State.

"All costs and expenses necessarily incurred by the state in the proceedings shall be paid by the county in which the application is filed."

Iowa. Adds section as follows:

"822.1 Statutes not applicable to convicted persons

"The provisions of sections 663.1 through 663.44, inclusive, shall not apply to persons convicted of, or sentenced for, a public offense."

Minnesota. While the Minnesota act is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission and additional matter cannot be clearly indicated by statutory notes.

Nevada. Repealed the Uniform Post-Conviction Procedure Act (1966) (N.R.S. 177.315 to 177.385) by L.1991, c. 44, effective Jan. 1, 1993.

North Dakota. Repealed the Uniform Post-Conviction Procedure Act of 1966 (NDCC 29-32-01 to 29-32-10) by L.1985, c. 366, and enacted in lieu thereof the Uniform Post-Conviction Procedure Act of 1980. For future material relating to the North Dakota act, see said Uniform Post-Conviction Procedure Act of 1980, supra.

Oklahoma. Adds a section which reads:

"§ 1089 Capital cases—Post-conviction relief

"A. The application for post-conviction relief of a defendant who is under the sentence of death and whose death sentence has been reviewed by the Court of Criminal Appeals in accordance with the provisions of Section 701.13 of Title 21 of the Oklahoma Statutes, and affirmed, shall be expedited as provided in this section.

"B. The Oklahoma Appellate Public Defender System shall represent all indigent defendants in capital cases seeking post-conviction relief upon appointment by the appropriate district court after a hearing determining the indigency of any such defendant.

"C. 1. The application for post-conviction relief shall be filed in the district court which imposed the sentence within sixty (60) days:

"a. from the expiration date of the time for filing a petition for a writ of certiorari with the United States Supreme Court; or

"b. from the date that the United States Supreme Court denied the defendant's petition for writ of certiorari.

"2. The state shall have fifteen (15) days thereafter within which to file a response to the application. The district court shall make its

§ 8. [Waiver of or Failure to Assert Claims].

All grounds for relief available to an applicant under this Act must be raised in his original, supplemental or amended application. 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 applicant has taken to secure relief may not be the basis for a subsequent application, 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 application.

Comment

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.

Action in Adopting Jurisdictions

Variations from Official Text:

Rhode Island. Section reads: "All grounds for relief available to an applicant at the time he commences a proceeding under this chapter must be raised in his original, or a supplemental or amended, application. 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 applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds that in the interest of justice the applicant should be permitted to assert such a ground for relief."

Library References

American Digest System

Proceedings for post-conviction relief; presentation of question in prior proceeding, see Criminal Law ⇐998(3).

Encyclopedias

Proceedings to vacate or set aside judgment or sentence in general, see C.J.S. Criminal Law § 1628.

WESTLAW Electronic Research

Criminal law cases: 110k[add key number].
See, also, WESTLAW Electronic Research Guide following the Explanation.

Notes of Decisions