01-1402

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 01-1402

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM H. THORNTON, JR.,

Defendant-Appellant-Petitioner.

Appeal From The Order Entered In The Circuit Court For Milwaukee County, The Honorable Clare L. Fiorenza, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

ROBERT R. HENAK
State Bar No. 1016803
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant-Petitioner

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ISSUES PRESENTED FOR REVIEW

1. Whether Thornton's *Peete/Howard* "nexus" claim is barred under Wis. Stat. §974.06(4) and *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994).

Mr. Thornton was convicted following a jury trial and received enhanced sentences based on the dangerous weapons enhancer in Wis. Stat. §939.63. After this Court's decision in *State v. Howard,* 211 Wis.2d 269, 564 N.W.2d 753 (1997), he sought relief in the circuit court under Wis. Stat. §§973.13 & 974.06 based, *inter alia*, on the fact that the jury was not instructed, and accordingly did not decide, regarding the nexus required for application of the enhancer under §939.63. The circuit court, however, held the claim procedurally barred under Wis. Stat. §974.06(4) and *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), due to a prior, *pro se* motion filed by Thornton.

In a split decision, the Court of Appeals affirmed. The majority agreed with the circuit court, holding that Thornton theoretically could have raised the *Howard* nexus claim in his *pro se* §974.06 motion filed on April 2, 1998, and that his ignorance of the basis for such a claim at that time did not constitute "sufficient reason" for his failure to raise it in that motion. Judge Schudson, in dissent, claimed that "sufficient reason" was shown by the facts that Thornton's request for appointment of counsel prior to his April 2, 1998 motion was denied, so he was left without counsel on any potential *Howard* issue, that he did not in fact know the legal basis for the claim prior to denial of his April 2, 1998 motion, and that he did not strategically delay raising the claim, but instead raised it as soon as he became aware of it.

2. Did the trial court's failure to instruct on the nexus between possession of the gun and the substantive offenses of conviction, as required by *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994), and *State v. Howard,* 211 Wis.2d 269, 564 N.W.2d 753 (1997), mandate vacation of the enhancer sentences on those offenses.

Because it concluded that Thornton's claim was barred under

§974.06(4), the circuit court did not address the claim on its merits. For the same reason, neither did the Court of Appeals.

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STATEMENT OF THE CASE

On July 31, 1992, William H. Thornton was convicted following a jury trial of First Degree Reckless Endangering Safety, while armed, Possession of a Controlled Substance (cocaine) with Intent to Deliver, while armed, Bail Jumping, Possession of Controlled Substance (marijuana) while armed, and Failure to pay a Controlled Substance Tax (R67).[1] On August 14, 1992, the Milwaukee County Circuit Court, Hon. Janine Geske, Circuit Judge, presiding, sentenced Thornton to maximum, consecutive sentences of 9 years, 9 years, 9 months, 12 months, and 5 years, respectively, totaling 24 years, 9 months incarceration (R39:1-2; R68:54-55). Of that sentence, 8½ years were attribut-

[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. __.

able to the weapons enhancer.[2]

The court of appeals affirmed Thornton's convictions on direct appeal on June 14, 1994 (R70). The appeal raised no challenge to his convictions for the weapons enhancers.

In December, 1995, while represented by counsel, Thornton filed a motion for post-conviction relief pursuant to Wis. Stat. § 974.06, challenging the effectiveness of trial and post-conviction counsel in connection with a suppression issue (R74). The motion raised no challenge to the "while armed" aspect of his convictions. The circuit court denied the motion (R77), the court of appeals affirmed (82) and this Court denied review (R83).

On June 26, 1997, this Court first mandated retroactive application of its decision in *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994), requiring instructions and a jury finding of a nexus between the weapon and the substantive offense, to cases such as Mr. Thornton's. *See State v. Howard,* 211 Wis.2d 269, 564 N.W.2d 753 (1997).[3]

On April 2, 1998, acting *pro se*, Thornton filed a second §974.06 motion. The motion challenged his drug tax conviction under *State v. Hall*, 207 Wis.2d 54, 557 N.W.2d 778 (1997), but did not challenge the dangerous weapon enhancers (R86). On April 8, 1998, the circuit court vacated Thornton's drug tax conviction but otherwise denied the motion (R91). On May 7, 1998, that court likewise denied Thornton's motion for reconsideration (R92; R93), and Thornton appealed (R94).

Prior to filing his *pro se* motion, Thornton had sought the assistance of the State Public Defender. While that agency appointed

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[2] At the time, the base sentence for first degree reckless endangerment, a Class D Felony, was up to five years, Wis. Stat. §941.30(1) (1991-92), as was that for the cocaine charge, Wis. Stat. §161.41(1m)(c)(2) (1991-92). Each could be enhanced by up to four years if committed while possessing a dangerous weapon. Wis. Stat. §939.63(1)(a)3 (1991-92). The marijuana possession was a 6-month misdemeanor, Wis. Stat. §161.41(3r) (1991-92), which could be enhanced by up to 6 months under Wis. Stat. §939.63(1)(a)1 (1991-92).

[3] This Court overruled a different point in *Howard* in *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

counsel to raise the *Hall* challenge, it refused to permit that counsel to review the case for other challenges to Thornton's convictions (R114 (Affidavit of Background Material)).[4] Because Thornton wished to raise additional claims regarding the search which gave rise to the charges against him, he was forced to proceed without counsel (*Id.*).

Sometime after denial of his motion for reconsideration, Mr. Thornton first learned of the decisions in *Peete* and *Howard* (R114 (Affidavit of Background Material)), and he then took a series of actions seeking to have that issue heard. He moved to remand the case to the circuit court for consideration of the *Peete/Howard* "nexus issue (R99). By Order dated June 30, 1998, that motion was denied (100).

Thornton's motion to the court of appeals for appointment of counsel likewise was denied. *See State v. William Thornton*, Appeal No. 98-1312 (July 6, 1998). He subsequently sought a voluntary dismissal of the appeal so he could raise the "nexus" claim (R101) and, on August 27, 1998, filed a §974.06 motion raising that claim (R102). When Thornton reinstated the appeal effective September 1, 1998 (R103), however, the circuit court dismissed the new motion for lack of jurisdiction (R104). On September 9, 1998, that court similarly denied, for lack of jurisdiction, Thornton's amended §974.06 motion, again raising the "nexus" claim (R105; R106). Several subsequent requests from Thornton to consider this new claim pending the appeal were equally unsuccessful (R107; R108; R109), and the court of appeals rejected similar attempts to include that claim on the appeal. On May 26, 2000, the court of appeals affirmed denial of Thornton's April 2, 1998 motion (R96).

On May 2, 2001, Mr. Thornton filed the motion at issue on this appeal. That motion, *inter alia*, sought vacation of the enhancer

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[4] This means that the representation of your present attorney, William S. Coleman, is limited to the tax stamp count. He is not authorized to, and will in fact not [sic], look into challenges to the other counts.

(R114 (letter, William J. Tyroler to William Thornton (7/23/97)).

portions of his sentence pursuant to Wis. Stat. §§973.13 and 974.06, on the grounds that the jury was not instructed on the *Peete/Howard* nexus requirement and accordingly did not find that essential element of the dangerous weapons enhancer. (R114). Mr. Thornton explained in a supporting affidavit that he was *pro se*, had no previous legal education, and was not aware of the decisions in *Peete* and *Howard* until after he filed his appeal from denial of his April 2, 1998 motion. (R114).

On April 5, 2001, the circuit court, Hon Clare L. Fiorenza, found that Thornton could have raised this issue in his April 2, 1998 motion and concluded that it therefore was barred under Wis. Stat. §974.06(4) and *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). (R115; App. 9-12). The court denied Thornton's reconsideration motion (R116) on May 7, 2001 (R117; App. 13).

Thornton appealed *pro se* and, on March 5, 2002, the court of appeals affirmed. While two members of that court agreed that Thornton's claim is barred by §974.06(4) and *Escalona-Naranjo*, Judge Schudson in dissent argued that it was not. (App. 1-8).

TRIAL EVIDENCE

Shortly before 8:00 p.m. on February 10, 1992, an under cover police officer unsuccessfully attempted to purchase cocaine from Derrick Crawley at 3317-A North Fourth Street in Milwaukee (R59:44-46). Soon thereafter, a team of police officers executed a "no knock" search warrant naming Derrick at that address (R59:60-66, 153-60; R61:12). The officers, wearing black hooded sweatshirts, body armor, and masks, broke down the door and quickly ran upstairs sounding like "a heard of elephants" (R59:62, 110-13, 155-56; R62:5; R64:29-30). As they burst into the kitchen area of the upstairs apartment, Thornton fired a single shot while backing out of the room, missing the officers but striking a tear gas canister on the belt of one officer (R59:66-72, 78-79, 94, 115-16, 169-62).

The police returned fire as Thornton backed through a doorway

and out of the room, but they also missed (R59:71, 163; R60:31-32). Thornton was captured by other officers after he attempted to escape by jumping off the second floor porch (R59:55, 60-62, 118-19, 126-28, 172-81). While in the ambulance to the hospital following for treatment of injuries incurred during the arrest, Thornton stated that he would not have shot had he known it was the police (R60:187).

The police ultimately found about 3½ grams of marijuana and about 16½ grams of cocaine on a living room table in the apartment (R59:104-05; R60:69-70, 86-87; R63:16; R64:111-12). Derrick Crawley, who left the premises shortly before execution of the warrant, was arrested nearby (R59:47-49).

Thornton testified that he was at the apartment to visit Derrick Crawley (R64:120; R65:53). While there, he smoked a couple of marijuana cigarettes and used some of Crawley's cocaine (R64:123, 127, 130). Others arrived and they all shot dice for a while, with Thornton winning about $1,700 (R64:126). Some time after the others left, and after Thornton had used more cocaine and marijuana and felt high, he was preparing to leave when Crawley asked to borrow his car for a few minutes (R64:130-33; R65:49-50, 75-76, 88-89).

While waiting for Crawley to return, Thornton heard a loud bang and then shouting and saw a guy with a mask and a gun enter the kitchen (R64:135-36). Thornton feared for his life. He did not know who was breaking into the apartment and did not realize that they were police until after he had shot in what he believed to be self-defense (R64:137-38, 140-41; R65:94-96, 101-02). Thornton admitted possessing the marijuana, knowing that the drugs were there, and that he was there to use marijuana and cocaine (R65:3-4, 49). He also knew that Derrick Crawley sold drugs from that house, although Thornton did not participate and did not intend to sell any (R65:19, 65-66, 99).

Having been robbed previously, Thornton possessed the gun for his own protection against persons who might try to harm him (R65:89-90). He knew it was illegal, but "felt like [he] had to look out for [his] life before the law" (R65:90). He "was prepared to use it if [his] life

was ever chanced [sic]" (*Id.*).

SUMMARY OF ARGUMENT

Under Wis. Stat. §974.06(4) and *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), a criminal defendant seeking to raise a new challenge to his or her conviction or sentence under Wis. Stat. §974.06 following a prior challenge must show a "sufficient reason" why the new claim was not raised (or was inadequately raised) in the prior proceedings. While the courts have identified a few specific circumstances constituting "sufficient reason," such as ineffectiveness of post-conviction or appellate counsel or the intervening pronouncement of a new legal rule, the broader meaning of "sufficient reason" remains undefined. This case addresses the broader meaning of that term.

As is more fully explained below, there are at least three possible interpretations of the "sufficient reason" standard. The circuit court and the court of appeals majority take the most strident approach, holding that relief is barred whenever a claim theoretically was available at the time of a prior post-conviction motion. Because this Court had decided *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997), before Thornton's April 2, 1998, *pro se* §974.06 motion, relief is barred under that theory (App. 3-5), even though it is undisputed that Thornton did not in fact know of that possible ground for relief at the time and had received no assistance of counsel with regard to that claim.

Judge Schudson's dissent takes a more practical and equitable approach (App. 6-8), analyzing whether the defendant knew of the basis for the claim and strategically chose not to raise it in a previous motion and whether the defendant had the assistance of counsel with regard to the specific claim.

The legislative history of §974.06(4), however, reflects the most appropriate and equitable standard. That history reflects an intent to incorporate into state law the same relatively permissive standards for

procedural default then dictated by the United States Supreme Court for successive federal habeas petitions. Under that standard, the types of "sandbagging" or strategic withholding of claims decried by this Court in *Escalona-Naranjo* are prevented. At the same time, however, the overriding goal of justice is furthered because there is no bar unless the defendant in fact knew the basis for the claim and intentionally omitted it from the prior motion.

On the substantive issue, the state has never disputed Thornton's claim that he was denied the right to a jury verdict on the necessary elements of the weapons enhancer under *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994), and *State v. Howard,* 211 Wis.2d 269, 564 N.W.2d 753 (1997), focusing instead solely on the asserted procedural default under §974.06(4). Because his trial suffers from the same defects deemed fatal in *Peete* and *Howard*, Thornton is entitled to vacation of the weapons enhancers on Counts 1, 3, and 5 and the sentences on those counts.

ARGUMENT

I.

THORNTON'S "NEXUS" CLAIM IS NOT BARRED BY WIS. STAT. §974.06(4)

Although the *Peete/Howard* issue raised in Thornton's §974.06 motion was not raised on his direct appeal or his first two §974.06 motions, he is not barred from raising that issue now under Wis. Stat. §974.06(4) as construed in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994).[5] A motion under Wis. Stat. §974.06 remains

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[5] Thornton's various *pro se* motions filed between June and December, 1998 (R99-R109), are irrelevant to the "sufficient reason" analysis. Because the case was then pending in the Court of Appeals, the circuit court was without jurisdiction to hear the motions and dismissed them accordingly. *See* Wis. Stat. §808.075(3). Motions dismissed on procedural grounds do not count as prior (continued...)

appropriate where, as here, the defendant has "sufficient reason" for not having raised the issue on direct appeal. Wis. Stat. §974.06(4); *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 761-62 (1997).

A. Legal Background.

1. The "sufficient reason" requirement.

Thornton raised his claims in this matter, in part, under Wis. Stat. §974.06(1). Section 974.06 of the Wisconsin Statutes (App. 14) 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

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[5](...continued)
motions triggering the "sufficient reasons" requirement of §974.06(4). *Cf. Estate of Pfaff*, 41 Wis.2d 159, 163 N.W.2d 140 (1968) (prior dismissal of premature appeal not res judicata because it did not reach merits presented on this appeal); *Matter of J.S.*, 144 Wis.2d 670, 425 N.W.2d 15, 17 n.2 (Ct. App. 1988) (prior appeal dismissed as moot -- prior judgment not law of the case). *See also Stewart v. Martinez-Villarial*, 523 U.S. 637 (1998) (dismissal of federal habeas petition on procedural grounds does not render later petition a "second or successive petition" subject to special requirements).

violations under §974.06(1) is not unlimited, however. Pursuant to Wis. Stat. §974.06(4),

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

Id.; *see State v. Lo*, 2003 WI 107, 264 Wis.2d 1, 665 N.W.2d 756; *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994).

Prior to *Escalona-Naranjo* in 1994, §974.06(4) was understood only to bar a second or subsequent §974.06 motion. *See, e.g.*, *Bergenthal v. State*, 72 Wis.2d 740, 242 N.W.2d 199 (1976); *State v. James*, 169 Wis.2d 490, 485 N.W.2d 436 (Ct. App. 1992). *Escalona-Naranjo* changed the law by overruling *Bergenthal*. Declaring that "[w]e need finality in our litigation," 517 N.W.2d at 163, the Court held that "[s]uccessive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation." *Id.* at 164.

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

517 N.W.2d at 164. Pursuant to *Escalona-Naranjo*, when the defendant has filed a post-conviction motion under Wis. Stat. §974.02 and a

direct appeal, he or she may not subsequently raise an issue 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.* at 162.

Because this was not Thornton's first challenge to his conviction, he was required under §974.06(4) to show "sufficient reason" why he had not raised his claims in the earlier proceedings. However, neither the statute nor *Escalona-Naranjo* defines what reasons are "sufficient" and, with limited exceptions, the scope of the "sufficient reason" requirement under §974.06(4) remains unclear.

It is well-settled that constitutionally deficient performance of appellate or post-conviction counsel will overcome an allegation of procedural default. *See, e.g., 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); *see State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136, 139 (Ct. App. 1996). 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).

"Sufficient reason" likewise is shown when a defendant seeks to challenge the effectiveness of counsel who represented him or her both at trial and on direct appeal. *State v. Hensley*, 221 Wis.2d 473, 585 N.W.2d 683 (Ct. App. 1998); *State v. Robinson*, 177 Wis.2d 46, 501 N.W.2d 831, 834 (Ct. App. 1993); *see United States v. Taglia,* 922 F.2d 413, 418 (7th Cir. 1991) (counsel cannot be expected to attack his own effectiveness)

It also is now established that "sufficient reason" is shown when the legal basis for a claim did not exist until after the defendant's prior efforts at post-conviction relief. *State v. Howard,* 211 Wis.2d 269, 564 N.W.2d 753, 761-62 (1997); *Escalona-Naranjo*, 517 N.W.2d at 162

n.11 (discussing *State v. Klimas*, 94 Wis.2d 288, 288 N.W.2d 157 (Ct. App. 1979)).

At issue in this case is the broader meaning of the "sufficient reason" requirement in §974.06(4) beyond these few established examples. Statutory construction seeks to "discern and give effect to the intent of the legislature" and is reviewed *de novo*. *Lo*, ¶14.

2. The *Peete/Howard* "nexus" requirement.

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.[6] 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

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[6] Wis. Stat. §939.63(1)(a) provides:

> If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment may be increased . . ..

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, such as Thornton's, 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.*

Most recently, in *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765, this Court reaffirmed the *Peete/Howard* nexus requirement. *Id.* ¶31-32 (where jury instructed on "possession" alternative for weapons enhancer, failure to explain requirement that defendant possessed weapon to facilitate underlying crime is error). However, *Gordon* overruled *Howard's* holding that such errors are not subject to harmless error review. *Id.* ¶¶34-40. Rather, such errors are harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* ¶36.

B. Thornton's "Nexus" Claim is Not Barred by §974.06(4)

The central question before the Court is whether §974.06(4) bars Thornton's nexus claim because he failed to raise it in his second §974.06 petition, filed *pro se* on April 2, 1998. Because Thornton's direct appeal was decided before *Peete* and his first §974.06 petition came before this Court held *Peete* to be retroactive in *Howard*, "sufficient reason"exists under settled law for his not having raised that claim during those proceedings. *See Howard*, 564 N.W.2d at 761-62 (sufficient reason shown where legal basis for claim not established until after prior postconviction proceedings); *Escalona-Naranjo*, 517 N.W.2d at 162 n.11 (same).

Because the circuit court had no jurisdiction to hear them,

Thornson's various attempts to raise this claim during the appeal of his second §974.06 petition are irrelevant. *See* footnote 4, *supra*. The issue thus boils down to whether he had "sufficient reason for not raising the nexus claim in his *pro se* §974.06 petition filed on April 2, 1998.

For several reasons, Mr. Thornton's claim is not barred by §974.06(4). First, "sufficient reason" need not be shown where the claimed error voids application of a sentence enhancer. Second, even if "sufficient reason" must be shown, it exists where the defendant did not know the basis for the claim and intentionally omit it from a prior post-conviction motion. And finally, "sufficient reason" is shown regarding a claim when the *pro se* defendant (1) did not knowingly and intentionally omit a newly available claim, but (2) raised it as soon as he or she learned the basis for the claim and (3) that defendant was not previously represented by counsel who reasonably would have known of the availability of the claim.

1. "Sufficient reason" need not be shown where, as here, the claimed error renders the sentencing enhancer void.

Given the prior dismissal of the drug tax count, the maximum authorized sentence in this matter was 11 years, 3 months. Yet, Thornton is serving a sentence of 19 years, 9 months; 8½ years of that sentence are directly attributable to the weapons enhancer. *See* Footnote 2, *supra*.

In both his *pro se* §974.06 motion and in his appellate briefs, Thornton argued that the "sufficient reason" requirement of §974.06(4) does not apply where, as here, the sentence is in excess of that authorized by law. The motion expressly relied upon Wis. Stat. §973.13 (R114), which provides as follows:

> Excessive sentence, errors cured. In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the

> sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

Wis. Stat. §973.13. "When a court imposes a sentence greater than that authorized by law, § 973.13 voids the excess." *State v. Spaeth,* 206 Wis.2d 135, 556 N.W.2d 728, 736-37 (1996) (applying § 973.13 to sentence imposed upon conviction for OAR).

In *State v. Flowers*, 221 Wis.2d 20, 586 N.W.2d 175, 176-77, 178-79 (Ct. App. 1998), the court of appeals relied upon §973.13 to allow challenge to a faulty repeater enhancement despite the defendant's three prior post-conviction motions. The court reasoned that the enhancer applies *only* if the state satisfies its burden of proof and that, "[i]f the State does not meet the proof requirements of [Wis. Stat.] §973.12(1), the trial court is *without authority* to sentence the defendant as a repeat offender." *Id.*, 586 N.W.2d at 179 (emphasis in original, citation omitted). The court concluded that, "if a defendant is sentenced under a penalty enhancer and the State has either failed to prove the prior conviction or gain the defendant's admission for such facts, then §973.13 becomes applicable." *Id.*

> To adopt the State's argument would promote finality, but at the expense of justice. It would raise the specter of a defendant being incarcerated for a term (possibly years) in excess of that prescribed by law simply because he or she failed to raise the issue earlier. Such a result is in direct conflict with the explicit language of §973.13. The State is without authority to incarcerate individuals for a term longer than the maximum term authorized by law. Therefore, we conclude that the express statutory mandate in § 973.13 to alleviate all maximum penalties imposed in excess of that prescribed by law applies to faulty repeater sentences and is not "trumped" by a procedural rule of exclusion.

Id.

In *State v. Hanson*, 244 Wis.2d 405, 628 N.W.2d 759, 763-64

(2001), this Court approved both the rationale and holding in *Flowers*, holding that "to allow the imposition of a criminal penalty where none is authorized by the legislature, simply on the basis of waiver, would ignore the dictate of §973.13." *Id.*, 628 N.W.2d at 764. *See also State v. Saunders*, 2002 WI 107, ¶7 n.8, 255 Wis.2d 589, 649 N.W.2d 263.

Because the jury did not find the "nexus" element essential to application of the weapons enhancer, *Peete* and *Howard* dictate that the circuit court had no authority to enhance Thornton's sentence under §939.63. *See also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (any fact (other than prior conviction) that increases the maximum penalty must be found by jury beyond reasonable doubt). As recognized in *Flowers* and *Hanson*, therefore, §973.13 applies and Thornton was entitled to decision on the merits of his *Peete/Howard* "nexus" claim without a showing of "sufficient reason" under §974.06(4).

2. "Sufficient reason" exists where the defendant did not know the basis for a claim and intentionally omit it from a prior post-conviction motion.

Even if the "sufficient reason" standard applies to *Peete/Howard* errors, it is satisfied where, as here, the defendant did not knowingly and intentionally omit the claim from a prior post-conviction motion.

Because the meaning of "sufficient reason" in §974.06(4) is neither defined in that statute nor clear from its context, construction of that term turns on legislative intent. *E.g.*, *Lo*, ¶14. Direct evidence of the Legislature's intent in enacting §974.06(4) is minimal, limited as it is to a comment to that section:

> [Subsection] (4) is taken from the Uniform Post-Conviction Procedure Act [of 1966] and is designed to compel a prisoner to raise all questions available to him in one motion.

Legislative Note to sec. 974.06, Ch. 255, sec. 63, Laws of 1969,

reprinted in Wis. Stat. Ann. sec. 974.06 comment (West 1998).

As this Court has recognized, 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)." *Escalona-Naranjo*, 517 N.W.2d at 161.

The commentary to the 1966 version of the Uniform Act reflects an attempt to expand the availability of state remedial measures in criminal cases to reduce the use of federal habeas corpus, while acknowledging as well the expense of groundless litigation. 11A U.L.A. 269-70 (Master Edition 1995) (App. 17-18).

The primary concern of the drafters was the effect of inadequate state post-conviction remedies on the explosion in federal habeas corpus actions under 28 U.S.C. §2254. 11A U.L.A. 269-70 (App. 17-18) (stating the "Reason for Proposed Uniform Act"). The Commissioners 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." *Id.* at 269 (App. 17). They noted that many states had so limited the availability of post-conviction remedies that prisoners in those states "who have bona fide claims of infringement of constitutional right must resort to federal habeas corpus." *Id.* Even when adequate state remedies were available, the multiplicity and complexity of the available procedures often resulted in "long delays in criminal administration" and, even when successful, the judgment to this effect occurs only after years of imprisonment which has turned out to be illegal." *Id.* They also emphasized that the unconstitutional imprisonment of a person "is abhorrent to our sense of justice." *Id.* at 270 (App. 18).

At the same time, the Commissioners noted the effect of litigating groundless motions on the judicial system and observed that

"[t]he element of expense is not to be ignored." *Id.* Still, the Commissioners primarily were concerned with expeditious and simplified procedures to ensure state resolution of constitutional claims, and not with finality as an end in itself. Indeed, they expressly stated a "basic principle" of the Act to encourage state court decisions on the merits of constitutional issues rather than technical procedural dismissals:

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

11A U.L.A. 271 (App. 19).

The specific commentary to §8 of the Uniform Act provides further insight to the intended balance between expanding the availability of post-conviction remedies and minimizing the costs of meritless litigation; between fairness and finality. That Comment reflects that, far from adopting the strident, absolutist approach championed by the Court of Appeals majority here (App. 3-5), 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. 21).

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. 271-72 (App. 19-20).

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 for purposes of federal habeas. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977). Construction of the "sufficient reason" standard in §974.06(4) thus must be made in light of the permissive standards of *Sanders* and *Fry*, not the preclusive standard of *Wainwright*. While barring the type of strategic withholding of claims condemned in *Escalona-Naranjo*, that section, as originally intended, did not act to promote finality at the expense of justice. *Cf. Hayes v. State*, 46 Wis.2d 93, 175 N.W.2d 625, 631 (1970) ("It is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably").[7] Rather, a petitioner's lack of knowledge or personal involvement in the failure previously to present an issue constitutes"sufficient reason" to permit the person claiming unlawful confinement to raise his or her claims under §974.06.

This is not to say that the defendant's lack of knowledge is a necessary prerequisite for a finding of "sufficient reason." The Supreme Court recognized in *Price v. Johnston*, 334 U.S. 266, 292 (1948), that,

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

> even if it is found that petitioner did have prior knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should be dismissed without further opportunity to amend the pleadings or without holding a hearing. If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Id. at 292.[8]

This Court's decision in *Howard* is reminiscent of *Price* and further supports this construction of the "sufficient reason" standard. In holding that Howard's claim was not barred under §974.06(4), despite the theoretical availability of the claim at the time of his direct appeal, the Court emphasized Howard's subjective ignorance of the legal basis for the claim. 564 N.W.2d at 762.

As in *Howard*, Thornton "was not aware of the legal basis for his present motion at the time of his trial and sentencing. Nor was [Thornton] aware of the nexus 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 for the same reasons it was satisfied in *Howard*. *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").

This approach likewise is fully consistent with this Court's

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[8] *Price* was overruled as part of the "cause and prejudice" trend in *McCleskey v. Zant*, 499 U.S. 467 (1991).

analysis in *Escalona-Naranjo*. The Court there was concerned with abuses caused by the strategic withholding of certain claims. The Court emphasized that it intended neither to "forego[] fairness for finality" nor to "abdicate [its] responsibility to protect federal constitutional rights." 517 N.W.2d at 164. The Court summarized its holding in language barring claims which were intentionally withheld from a prior motion while permitting those of which the defendant previously had no knowledge:

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

Id. (emphasis added).

The state has not disputed that Thornton in fact lacked knowledge of the basis for his *Peete/Howard* "nexus" claim prior to decision on his April 2, 1998 motion. Once he learned of the basis for that claim, he promptly made every effort to present it to the courts. Under the original intent of §974.06(4), his lack of knowledge regarding the basis for this claim constitutes "sufficient reason" for his not having raised it previously.

3. "Sufficient reason" exists where defendant did not knowingly and intentionally omit a newly available claim from a prior motion and was not previously represented by counsel regarding the claim.

Even if "sufficient reason" were not otherwise shown, it exists for the reasons stated in Judge Schudson's dissent below. Specifically, Thornton had "sufficient reason" for not previously raising his *Peete/Howard* "nexus" claim because (1) he did not in fact know of the

claim and intentionally or strategically omit it from his *pro se*, April 2, 1998 motion, (2) he attempted to raise the claim as soon as he learned the basis for it, and (3) he was not previously represented by counsel who reasonably would have known of the availability of the claim. (App. 6-8).

Pro se inmates seeking collateral review of their convictions occupy a unique position in the law. While not legally entitled to counsel following the direct appeal, the courts acknowledge that the special disabilities suffered by *pro se* inmates in seeking collateral review of their incarceration mandates a certain level of flexibility regarding procedural niceties, especially when violation results in waiver:

> Prisoners are often unlearned in the law.... Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession.

Price v. Johnston, 334 U.S. 266, 292 (1948), overruled on other grounds by *McCleskey v. Zant*, 499 U.S. 467 (1991). *See also Holiday v. Johnston*, 313 U.S. 342, 350 (1941) (*pro se* petition for habeas corpus ought not be scrutinized for technical nicety); *Brown v. Roe*, 279 F.3d 742, 746 (9th Cir. 2002); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988) ("This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements").

Contrary to the court of appeals' suggestion (App. 4), this Court is in accord, holding that *pro se* prisoners "deserve some leniency with regard to waiver of rights." *Waushara County v. Graf*, 166 Wis.2d 442, 480 N.W.2d 16, 19 (1992) (citation omitted).

> We recognize that the confinement of the prisoner and the necessary reasonable regulations of the prison, in

> addition to the fact that many prisoners are "unlettered" and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting his grievances to a court.

State ex rel. Terry v. Traeger, 60 Wis.2d 490, 211 N.W.2d 4, 7-8 (1973).[9] *See also State ex rel. Anderson-El v. Cooke*, 2000 WI 40 ¶¶28-29, 234 Wis.2d 626, 610 N.W.2d 821, 827-28 & n.11.

Given this leniency, Thornton's actual ignorance of the *Peete/Howard* "nexus" claim at the time of his prior motion, and the total absence of the type of strategic withholding of claims which concerned this Court in *Escalona-Naranjo*, *see* 517 N.W.2d at 164, he has demonstrated "sufficient reason" for failing to include that claim in his prior motion.

II.

THORNTON IS ENTITLED TO RELIEF UNDER *PEETE* AND *HOWARD*

Because they concluded that Thornton's claims were barred by §974.06(4), neither the circuit court nor the court of appeals addressed those claims on the merits. The state, moreover, chose below not to dispute the merits of Thornton's claims, focusing solely on the

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[9] Similar concerns underlie the due process right to counsel on direct appeal:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that--like a trial--is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake.

Evitts v. Lucey, 469 U.S. 387, 396 (1985).

perceived procedural bar. *See* Brief of Plaintiff-Respondent State of Wisconsin in Court of Appeals. Under firmly established law, however, Thornton is entitled to relief.

Thornton was convicted of three counts to which the state attached the weapons enhancer under Wis. Stat. §939.63: first degree reckless endangerment, possession of cocaine with intent to deliver, and simple possession of marijuana. The circuit court imposed the maximum, consecutive sentences on each count, resulting in a total sentence 8½ years longer than that permitted without the weapons enhancers. *See* Footnote 2, *supra*.

Imposition of the weapons enhancer in this case fails for the same defect found to have violated Due Process in *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997), and *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994). Here, as in *Peete*, the trial "court did not require that the jury find beyond reasonable doubt that [Thornton] possessed a dangerous weapon to facilitate the commission of the predicate offense[s]." 517 N.W.2d at 154. *See also Apprendi*, *supra*. Instead, the court instructed the jury in language conceptually indistinguishable from that found unconstitutional in both *Peete* and *Howard*:

> If you find the defendant guilty of any of the foregoing offenses, you must answer the following questions, and these questions are actually found on the verdicts. Did the defendant commit the crime of attempted first degree intentional homicide or first degree recklessly endangering safety or second degree recklessly endangering safety while possessing a dangerous weapon?
>
> Before you may answer this question yes, you must be satisfied beyond a reasonable doubt that the defendant committed the crime while possessing a dangerous weapon. Dangerous weapon means any firearm.
>
> If you are satisfied beyond a reasonable doubt that

the defendant committed the crime of attempted first degree intentional homicide or first degree recklessly endangering safety or second degree recklessly endangering safety while possessing a dangerous weapon, you should answer the question yes. If you are not so satisfied, you must answer the question no.

* * *

If you find the defendant guilty of either possession with intent to deliver or possession of cocaine, you must answer the following question: Did the defendant commit the crime of possession of cocaine with intent to deliver or possession of cocaine while possessing a dangerous weapon? Before you may answer this question yes, you must be satisfied beyond a reasonable doubt that the defendant committed the crime while possessing a dangerous weapon. Dangerous weapon means any firearm.

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of possession of cocaine with intent to deliver or possession of cocaine while possessing a dangerous weapon, you should answer the question yes. If you are not so satisfied, you must answer the question no.

* * *

Count 5 of the Information alleges not only the defendant committed the crime of possession of controlled substance, marijuana, but also that he did so while possessing a dangerous weapon. If you find the defendant guilty of Count 5, you must answer the following the [sic] question: Did the defendant commit the crime of possession of controlled substance, marijuana, while possessing a dangerous weapon?

Before you may answer this question yes, you must be satisfied beyond a reasonable doubt the defen-

> dant committed the crime while possessing a dangerous weapon. Dangerous weapon means any firearm.
>
> If you are satisfied beyond a reasonable doubt that the defendant committed the crime of possession of controlled substance, marijuana, while possessing a dangerous weapon, you should answer the question yes. If you are not so satisfied, you must answer the question no.

(R66:29-30, 44, 47-48).

Because the jury was instructed solely on the "possesses" alternative for the weapons enhancer but was not told that Thornton must have possessed the weapon to facilitate the underlying offenses, Thornton was denied due process. *See Howard*, 564 N.W.2d at 756 n.3; *Peete*, 517 N.W.2d at 152; *see also Gordon*, ¶32.

Thornton understands, however, that this Court recently overruled the automatic reversal rule of *Howard*, and now subjects *Peete/Howard* claims to harmless error analysis. *Gordon*, ¶¶34-40. Although Thornton respectfully submits that the Court's analysis in *Howard* and the dissent in *Gordon* more accurately state the law in this regard,[10] he understands that the Court rejected that position in *Gordon*.

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

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[10] Automatic reversal should be required here because "[t]he 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 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)).

a reasonable doubt that a rational jury would have found the defendant guilty [of the weapons enhancers] absent the error,'" *Gordon*, ¶36 (citation omitted), at least with regard to the drug charges.

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. *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"); *State v. Harvey*, 2002 WI 93, ¶48, 254 Wis.2d 442, 647 N.W.2d 189 (instructional error harmless where "[t]he elemental fact on which the jury was improperly instructed is undisputed and indisputable"); *State v. Tomlinson*, 2002 WI 91, ¶63, 254 Wis.2d 502, 648 N.W.2d 367 (improper mandatory conclusive presumption harmless where presumed fact beyond question).

Thornton must concede that, under the harmless error standards deemed applicable by this Court, the *Peete/Howard* error was harmless regarding the reckless endangerment charge under Count 1. This Court in *Peete* noted that the required nexus exists where the defendant committed the offense by use of a dangerous weapon. 517 N.W.2d at 154.

Given this authority, Thornton cannot dispute that the absence of a "nexus" instruction regarding the reckless endangerment charge was harmless. It was his allegedly reckless use of the gun which constituted the crime. *See Gordon*, ¶42 (*Peete/Howard* error harmless where defendant's possession of knives "not only 'facilitated' the disorderly conduct, it was what made his conduct disorderly in the first

place;" knives "were actually *used* to commit the underlying crime" (emphasis in original)).

The drug charges, however, are a different matter. Unlike the reckless endangerment, Thornton's use of the gun did not constitute the drug offenses.

It is true that drug dealers often carry guns to protect their drugs and drug proceeds, and that such a connection between weapon and contraband is sufficient for the nexus required by *Peete*. 517 N.W.2d at 154 (possession of weapon to protect contraband facilitates crime and establishes required nexus). A jury thus reasonably could determine beyond a reasonable doubt that Thornton possessed the gun to facilitate his possession of the drugs.

Such a result is not mandated by the evidence, however. A reasonable jury likewise could have credited Thornton's testimony that he possessed the gun solely to protect himself from harm as he had once been the victim of a robbery (R65:89-90). After all, there was no evidence that Thornton made any effort to protect the drugs by taking them with him as he exited the apartment.

Although Thornton admitted possessing the weapon, and even conceded that he possessed the drugs "while armed" under the pre-*Peete* view of the law because he simultaneously possessed the gun and the drugs (R59:39; *see* R66:84, 104), he at no time conceded that he possessed the gun to facilitate possession of the drugs. The enhancer was "undisputed" at trial only because the parties were unaware at that time prior to *Peete* that the weapons possession must be for the purpose of facilitating the underlying offense.

Because a reasonable jury could have determined from these facts that the state failed to prove beyond a reasonable doubt that Thornton possessed the gun to facilitate possession of the drugs, it cannot rationally be asserted that such a purpose was "undisputed and indisputable." *See Harvey, supra*. Even though he could not foresee *Peete's* "nexus" requirement, Thornton's testimony regarding why he possessed the gun raised a dispute for the jury regarding whether he had

the gun to facilitate the drug crimes, or merely to protect himself from those who may seek to harm him. The error accordingly was not harmless regarding the drug charges. *E.g.*, *Neder*, *supra*.

"Because the circuit court did not instruct the jury on the nexus requirement, the jury did not find beyond a reasonable doubt the existence of each element of sec. 939.63 necessary to convict a person for committing the predicate offense 'while possessing ... a dangerous weapon.'" *Peete*, 517 N.W.2d at 150. [11] At least regarding the drug charges, the error was not harmless. The convictions on the weapons enhancers accordingly are void and must be reversed and the portion of the sentence attributable to those enhancers must be vacated. *Id.* at 154. *See Apprendi*, *supra* (where jury not required to find element necessary to enhanced sentence beyond a reasonable doubt, enhanced portion of sentence constitutionally invalid).

CONCLUSION

For these reasons, Mr. Thornton respectfully asks that the Court reverse the decisions below and remand with directions to vacate the weapons enhancers and sentences on Counts 1, 3, and 5.

Dated at Milwaukee, Wisconsin, December 15, 2003.

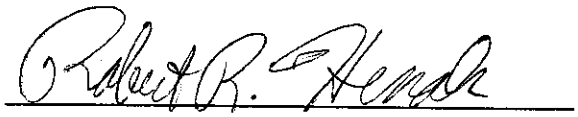
---

[11] While this error superficially could be viewed as a challenge to the jury instructions which could be deemed waived by Thornton's failure to object, *see State v. Schumacher*, 144 Wis.2d 388, 424 N.W.2d 672, 680 (1988) (failure to object at trial to proposed instructions constitutes a waiver of any right to challenge them on appeal), the Court in *Peete* held to the contrary. The Court stated that this was not a question of an erroneous jury instruction, but rather a question of statutory construction, what the jury was required to find under the instruction as given, and the sufficiency of the evidence. 517 N.W.2d at 152. Accordingly, the issue is not waived. *Howard*, 564 N.W.2d at 762-63.

Respectfully submitted,

WILLIAM H. THORNTON, JR.,
Defendant-Appellant-Petitioner

HENAK LAW OFFICE, S.C.



Robert R. Henak
State Bar No. 1016803

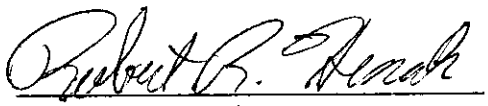
P.O. ADDRESS:

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Thornton S.Ct. Brf.wpd

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,300 words.



Robert R. Henak

Brf cert.wpd

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 01-1402

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM H. THORNTON, JR.,

Defendant-Appellant-Petitioner.

APPENDIX OF
DEFENDANT-APPELLANT-PETITIONER

COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1402 **Cir. Ct. No. 92CF920660**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM H. THORNTON, JR.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 WEDEMEYER, P.J. William H. Thornton, Jr. appeals from orders denying his WIS. STAT. § 974.06 motion, seeking dismissal of his penalty enhancer convictions based on ***State v. Peete***, 185 Wis. 2d 4, 517 N.W.2d 149 (1994) (holding state must prove nexus between underlying crime and weapon possession penalty enhancer) and ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d

753 (1997) (holding that ***Peete*** should be applied retroactively). Thornton claims the trial court erred in ruling that his § 974.06 motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Because Thornton's postconviction motion, filed subsequent to the Wisconsin Supreme Court's decisions in ***Peete*** and ***Howard***, failed to raise this issue, Thornton's claim is barred by ***Escalona-Naranjo***.

I. BACKGROUND

¶2 During the summer of 1992, a jury found Thornton guilty of first-degree recklessly endangering safety, possession of cocaine with intent to deliver, and possession of marijuana, all while armed with a dangerous weapon.[1] Thornton's conviction was affirmed on direct appeal on June 14, 1994. The direct appeal did not raise any issue relative to the weapon possession penalty enhancer.

¶3 The Wisconsin Supreme Court decided the ***Peete*** decision in June 1994. In December 1995, Thornton's counsel filed a WIS. STAT. § 974.06 postconviction motion on his behalf. The motion did not raise any issue relative to the weapon possession penalty enhancer. The motion was denied, and the order denying the motion was later affirmed on appeal.

¶4 In June 1997, the Wisconsin Supreme Court decided the ***Howard*** case. On April 2, 1998, acting *pro se*, Thornton filed another WIS. STAT. § 974.06 motion. The motion did not raise any issues related to the weapon possession penalty enhancer. The order disposing of his motion denied his ineffective

[1] The jury also found Thornton guilty of failing to pay the controlled substance tax. This conviction, however, was vacated after the Wisconsin Supreme Court's decision in ***State v. Hall***, 207 Wis. 2d 54, 557 N.W.2d 778 (1997).

assistance claim, and vacated the conviction for failure to pay a controlled substance tax. This court summarily affirmed the trial court's order in May 2000.

¶5 On August 27, 1998, Thornton filed another *pro se* WIS. STAT. § 974.06 motion, and challenged the "while armed with a dangerous weapon" penalty enhancer for the first time, based on the ***Peete*** and ***Howard*** decisions. However, because of proceedings in the appellate court, the trial court lacked jurisdiction to decide the motion.

¶6 On March 2, 2001, Thornton filed another WIS. STAT. § 974.06 motion, which asserted that his convictions related to the weapon possession penalty enhancer should be vacated based on ***Peete*** and ***Howard***. The trial court acknowledged that Thornton could not have raised this issue during his direct appeal in 1993, because the cases had not been decided yet. Nevertheless, the trial court ruled that Thornton could have raised the ***Peete/Howard*** issue in his April 1998 § 974.06 motion. As a result, the trial court ruled that Thornton's failure to do so barred his claim under ***Escalona-Naranjo***. An order to that effect was entered. Thornton filed a motion for reconsideration, which was also denied by order. Thornton appeals from those orders.

II. DISCUSSION

¶7 The issue in this case is whether or not Thornton's ***Peete/Howard*** claim is precluded by ***Escalona-Naranjo***. We agree with the trial court that it is precluded.

¶8 In ***Escalona-Naranjo***, our supreme court ruled that a prisoner may not file successive postconviction motions if the issues raised could have been raised in the original motion or appeal. *Id.*, 185 Wis. 2d at 185. The reason for

this is because "[w]e need finality in our litigation." ***Id.*** If a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it. ***Id.***

¶9 Here, it is undisputed that Thornton filed a postconviction motion subsequent to ***Peete/Howard***. Thornton filed a postconviction motion in April of 1998, long after the Wisconsin Supreme Court decided the ***Peete*** and ***Howard*** cases. The only reason Thornton offers for his failure to raise this issue in that postconviction motion is because he was ignorant of the law and not very good at researching. Ignorance is not a sufficient excuse. ***Douglas County Child Support Enforcement Unit v. Fisher***, 185 Wis. 2d 662, 670, 517 N.W.2d 700 (Ct. App. 1994). Moreover, *pro se* litigants are held to the same rules that apply to attorneys on appeal. ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

¶10 To allow Thornton an exception based on these facts and his claimed ignorance would be to eviscerate the rule. The policy behind ***Escalona-Naranjo*** strongly suggests that defendants should take seriously the "single opportunity to raise claims of error." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). This policy necessarily includes the principle that a defendant should exercise caution to ensure that any potentially meritorious issues are discovered before filing the postconviction motion. This rule is absolutely essential to the efficient due administration of justice. Accordingly, we conclude that when Thornton filed his postconviction motion in April 1998, he

should have raised the ***Peete/Howard*** issue therein. His failure to do so precludes his right to do so in subsequent postconviction motions.[2]

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[2] Thornton raises two additional issues: (1) his postconviction counsel provided ineffective assistance for failure to raise the ***Peete/Howard*** issue; and (2) his transfer to an out-of-state prison was illegal. We reject both issues for the same reasons discussed in the body of this opinion. Thornton could have raised both issues in his April 1998 postconviction motion. Failure to do so without any justification for the failure precludes his right to raise the issues here. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

¶11 SCHUDSON, J. (*dissenting*). On August 27, 1998, Thornton filed a *pro se* § 974.06 motion presenting his ***Peete/Howard*** challenge for the first time. Thornton could not have raised the ***Peete/Howard*** claim before June 26, 1997, when the supreme court decided ***Howard*** but, theoretically at least, he could have done so in April 1998 when he filed his earlier § 974.06 motion. Does ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), require dismissal of his ***Peete/Howard*** challenge? Of course not.

¶12 In his affidavit supporting his August 27 motion, Thornton explained why he had failed to raise the ***Peete/Howard*** issue four months earlier. Simply stated, he had been effectively denied appellate counsel and, left to his own devices, he had not become aware of the legal developments allowing for the ***Peete/Howard*** challenge. As soon as he became aware of them, however, Thornton presented his ***Peete/Howard*** motion.

¶13 As verified by the July 23, 1997 letter from First Assistant State Public Defender William Tyroler ("I am denying your request for counsel on counts other than the tax stamp."), and the September 30, 1997 letter from his assigned attorney, William Coleman ("... I am authorized to represent you only on the tax stamp matter, and on nothing else."), Thornton was left without appellate representation on any potential ***Peete/Howard*** issue. Additionally, in his affidavit, Thornton stated:

> Upon my awareness of the ***Peete*** and ***Howard*** rulings, I attempted to raise the ***Peete*** error claim during[] my [a]ppeal from the second § 974.06 ... [m]otion(s). However, the [c]ourt notified me that I was

> [j]urisdictionally precluded from maintaining [b]oth an appeal and [p]ost-conviction [m]otions simultaneously....
>
> ....
>
> ... [T]he [d]efendant ... could not have foreseen the subsequent decisions in ***Peete*** and ***Howard*** and [their] [e]ffect on the present case. It is unknown why previous [c]ounsel[] who[] are learned and skilled in the science of law did not raise the ***Peete*** error claim.

¶14 As Thornton points out, the circuit court did not address his explanation for his failure to present the ***Peete/Howard*** challenge four months earlier. The court stated only: "Neither [WIS. STAT. § 974.06] nor ***Escalona[-Naranjo]*** permit [sic] a defendant to file additional postconviction motions whenever he may discover other issues that apply to his case. Such a system would wholly emasculate ***Escalona[-Naranjo]*** and render it meaningless." Sadly, the majority echoes the circuit court's unexamined ***Escalona-Naranjo*** analysis.

¶15 ***Escalona-Naranjo*** never was intended to close the courtroom door to an inmate under circumstances such as these. ***Escalona-Naranjo*** properly prevents strategic delay and never-ending litigation. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185-86. Here, obviously, Thornton's delay was not strategic—he would have had no conceivable reason not to promptly pursue the ***Peete/Howard*** issue. And here, the inconsequential delay would not lead to prolonged litigation.

¶16 Thornton was without appellate counsel with respect to any potential ***Peete/Howard*** issue. Proceeding *pro se* approximately nine months after ***Howard*** was decided, he filed a § 974.06 motion but did not raise the ***Peete/Howard*** issue. But approximately four and one-half months later, he not only filed a ***Peete/Howard*** motion but also, in his affidavit supporting that motion, he acknowledged his obligation to explain why he had failed to raise the issue earlier. Thornton's affidavit traced the circumstances and stated that as soon as he became

aware of the ***Peete/Howard*** issue, he pursued it. *The State does not dispute that Thornton raised the* ***Peete/Howard*** *issue as soon as he became aware of it. See* ***Escalona-Naranjo***, 185 Wis. 2d at 185-86 ("[T]he defendant should raise the constitutional issues *of which he or she is aware* as part of the original postconviction proceedings.") (emphasis added).

¶17 Thus, according to the undisputed record, Thornton, *pro se*, did the best he could and, unless ***Escalona-Naranjo*** is to become a close-the-courtroom-door game of "gotcha," his best was quite good enough to gain his day in court. Accordingly, I respectfully dissent.

STATE OF WISCONSIN CIRCUIT COURT Branch 3 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

WILLIAM H. THORNTON, Jr.

Defendant.

5B92CF920660

Case No. 92CF960660

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On March 2, 2001, the defendant filed a *pro se* motion for postconviction relief pursuant to section 974.06, Wis. Stats. This is his fifth motion. Thornton was sentenced on multiple counts by the Hon. Janine P. Geske on August 14, 1992. After a notice of intent to pursue postconviction relief was filed, all transcripts were provided to Attorney Joel Rosenthal for postconviction/appellate purposes. On August 6, 1993, a notice of appeal was filed, and on June 14, 1994, the Court of Appeals affirmed the judgment of conviction. Various issues were raised on appeal, including the validity of the search and the issue of the defendant's standing at the location of the search. On December 22, 1995, the defendant by Attorney Russell Bohach filed a motion for postconviction relief arguing that the performance of Attorney Rosenthal, who was both trial counsel and first postconviction counsel, was ineffective because he failed to call the defendant during the suppression hearing and failed to challenge the search warrant. On January 3, 1996, the Hon. Maxine A. White denied the motion, and the defendant appealed. On January 21, 1997, the Court of Appeals affirmed the order of the circuit court denying Thornton's postconviction motion.

On April 2, 1998, the defendant filed a *pro se* motion for postconviction relief pursuant to section 974.06, Wis. Stats., and Rothering v. McCaughtry, 205 Wis.2d 675 (Ct. App. 1996). It was assigned to the Hon. David A. Hansher, who denied the motion on April 8, 1998. In this motion the defendant claimed that second postconviction counsel was ineffective for failing to raise Sixth Amendment claims pertaining again to Attorney Rosenthal's performance. He faulted both attorneys for failing to call him as a witness in the suppression motion in order to establish standing. He also faulted them for failing to challenge the validity of the no knock search warrant. Judge Hansher denied the motion on the basis that the defendant had previously litigated the standing issue during the trial proceeding, in his first postconviction motion, and on appeal, and that Thornton had reraised issues that had previously been addressed and decided by both the trial court and the appellate court.

On August 10, 1998, the defendant filed a *pro se* motion in the appellate court to voluntarily dismiss his appeal for purposes of filing another postconviction motion in the trial court under section 974.06, Wis. Stats., for purposes of raising additional arguments. The Court of Appeals granted the motion, but informed Thornton that the circuit court was not obliged to consider a new postconviction motion and that the appellate court would no longer review the merits of his appeal from the trial court's April 8, 2000 order. It allowed Thornton twenty days to decide if he wished to reinstate his appeal.

Thornton not only reinstated his appeal, but filed a new motion for postconviction relief in the trial court on August 27, 1998. The Court of Appeals ordered the defendant's appeal reinstated on September 1, 1998. On September 3, 1998, the Hon. Dennis P. Moroney dismissed defendant's August 27, 1998 motion for lack of jurisdiction because an appeal was still

pending. The defendant filed an amended motion for postconviction relief, which was also dismissed for lack of jurisdiction on September 9, 1998. Thornton then filed a motion for alternate relief with the trial court on September 11, 1998, which was denied on November 30, 1998. Following that on December 17, 1998 came a motion for reconsideration, which was denied on December 18, 1998. Thornton also filed a motion for reconsideration on December 18, 1998, requesting the circuit court to "petition the appellate court to remand copies of the relevant portions of the defendant's record back to the circuit court, so that it can review defendant's current claims on its merits." Judge Moroney denied this claim as frivolous on December 18, 1998.

On May 26, 2000, the Court of Appeals issued a decision affirming Judge Hansher's April 8, 1998 order, agreeing that the issues of standing and the validity of the search warrant had previously been raised and litigated.

The defendant has now filed a new section 974.06 motion for postconviction relief asserting that additional issues must be addressed based on the holdings of State v. Peete, 185 Wis.2d 4 (1994), 517 N.W.2d 149 (1994), and State v. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997). He believes he is entitled to an order vacating the judgments of conviction and sentences with respect to counts one, three, and five based on the holdings of these cases.

State v. Escalona-Naranjo, 185 Wis.2d 169, 179 (1994), precludes Thornton from pursuing the current motion for postconviction relief. Section 974.06(4), Wis. Stats., requires a defendant to raise all grounds for postconviction relief in his original motion or appeal. Failure to do so precludes a defendant from raising additional issues, including claims of constitutional or jurisdictional violations, in a subsequent motion or appeal where those issues

could have been raised previously. Escalona, *supra*. Although the defendant could not have raised this issue in his first appeal in 1993 because both Peete and Howard were subsequently decided, there is no reason why Thornton could not have raised these issues previously in any one of his multiple *pro se* postconviction motions in the context of Rothering. Neither section 974.06, Wis. Stats., nor Escalona permit a defendant to file additional postconviction motions whenever he may discover other issues that apply to his case. Such a system would wholly emasculate Escalona and render it meaningless. Consequently, this court concludes that the defendant is barred from filing the current motion on grounds that he could have raised the Peete issue previously in his first *pro se* motion filed with Judge Hansher.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

Dated this 5th day of ~~March~~ April, 2001, at Milwaukee, Wisconsin.

BY THE COURT:

/s/ Clare L. Fiorenza

Clare L. Fiorenza
Circuit Court Judge

Def copy

STATE OF WISCONSIN CIRCUIT COURT Branch 3 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 92CF920660

WILLIAM H. THORNTON, JR.,

Defendant.

DECISION AND ORDER
DENYING MOTION FOR RECONSIDERATION

On May 2, 2001, the defendant filed a motion for reconsideration of the court's decision and order dated April 5, 2001 denying his fifth motion for postconviction relief. The court has reviewed the defendant's motion to reconsider and finds that it sets forth nothing which would alter the court's original decision in this matter. For the reasons enumerated in the court's April 5, 2001 decision, the relief sought is not warranted.

This is the court's final decision in this matter. Further motions raising the same issues will be filed in the file and will not be considered.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for reconsideration is **DENIED.**

Dated this 7th day of May, 2001, at Milwaukee, Wisconsin.

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

BY THE COURT:

/s/ Clare L. Fiorenza

Clare L. Fiorenza
Circuit Court Judge

(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 .....

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

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 15th day of December, 2003, I caused 22 copies of the Brief of Defendant-Appellant-Petitioner William H. Thornton, Jr., to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Robert R. Henak

Cert. of Mailing.wpd