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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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

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

A. "Sufficient Reason" Must Be Construed Consistent With Its Original Meaning, Not the State's Desired Revision.

Contrary to the central assumption underlying the state's brief, Thornton does not seek to "broaden" the scope of what may constitute a "sufficient reason" under Wis. Stat. §974.06(4). This Court has never defined "sufficient reason" under that provision, and instead merely has recognized a few specific examples of such reasons. What is at issue in this case thus is not broadening or contracting the definition of "sufficient reason," but providing a more comprehensive standard for assessing allegations of "sufficient reasons" consistent with the original legislative purpose of Wis. Stat. §974.06.

Statutory construction, of course, turns on the legislature's intent at the time of enactment. *E.g.*, *State v. Lo*, 2003 WI 107, ¶14, 264 Wis.2d 1, 665 N.W.2d 756. Thornton discussed the history and intent of §974.06(4) at length in his opening brief, demonstrating that the purpose of the "sufficient reason" language in that provision was to balance interests in finality and justice for those unconstitutionally detained by codifying the relatively permissive standards for successive petitions controlling at the time the Uniform Post-Conviction Procedure Act was approved and §974.06 enacted. While promoting finality by barring the repetition or strategic withholding of claims decried in *State v. Escalona-Naranjo*, 185 Wis.2d 169, 169 N.W.2d 157 (1994),[1] that standard likewise furthers the cause of justice by ensuring that those unlawfully denied their freedom are not left without a remedy due merely to their own ignorance. Thornton's Brief at 16-22.

The state virtually ignores this legislative history, focusing instead on policy reasons which, it suggests, would support a narrower standard for "sufficient reason" than that intended by the legislature when §974.06 originally was enacted. State's Brief at 26-28. However, the state's assertions do not authorize this Court to ignore the legislative intent underlying §974.06(4).

The state, for instance, asserts that construing "sufficient reason" as it was originally intended would somehow encourage incarcerated defendants to remain ignorant of constitutional claims which may set them free. State's Brief at 26-27. Contrary to the state's underlying assumption, however, individuals in state custody have

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[1] As this Court explained in *Escalona-Naranjo*,

> Section 974.06 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.

517 N.W.2d at 164.

every incentive to find and assert such claims as early as possible.[2] There is no need, therefore, to punish ignorance with forfeiture of the right to release from unconstitutional custody.

The Court also should keep in mind that, while wrapped in fancy legal language and discussions of "policy" and "principal," the end result of the state's desired interpretation of "sufficient reason" is that individuals unconstitutionally denied their freedom by the state will be denied relief. This is so, not because of any intentional or knowing act on their part, but purely due to their own ignorance of the law.

Construing "sufficient reason" and §974.06(4) consistent with its purpose to codify the balanced permissiveness reflected in *Sanders v. United States*, 373 U.S. 1 (1963), and *Fay v. Noia*, 372 U.S. 391 (1963), would not result in the unjustified release of a single individual in state custody. Those with valid claims will obtain the relief to which they are entitled, while those without valid claims still will be denied relief on the merits. Under the state's theory, however, unconstitutionally detained individuals will be denied their rights solely due to their ignorance.

That simply is not right as a matter of principle or fairness. As the Supreme Court explained in *Price v. Johnston*, 334 U.S. 255 (1948):

> 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

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[2] Here, for instance, Thornton's ignorance of his "nexus" claim at the time of his April 2, 1998 motion likely resulted in his having to serve four additional years of state custody or supervision even if he is successful here. At the time of the prior motion, this Court had held that such errors could not be deemed harmless. *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 763 (1997). Success on the merits of his nexus claim accordingly would have required vacation of all three enhanced sentences, for a total reduction of 8½ years. Only in *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765, years after completion of the appeal from denial of Thornton's April, 1998 motion, did this Court overrule the "harmless error" holding in *Howard*, reducing the reduction to which Thornton is entitled to 4½ years. See Thornton's Brief at 27-30.

> 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.[3]

Nor, in the end, does the state's "finality uber alis" approach really promote judicial efficiency. As the Commissioners explained in discussing their adoption of the *Fay/Sanders* standard for successive petitions, a "basic principle" of the Uniform Post-Conviction Procedure Act of 1966 was to encourage state court decisions on the merits of constitutional issues rather than technical procedural dismissals. The policies now codified in §974.06(4)'s "sufficient reason" requirement reflected the Commission's conclusion "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 (Master Edition 1995) (App. 19).

While the state is correct that current federal habeas law requires a showing of "cause and prejudice" when a defendant seeks to raise a claim that technically could have been raised earlier, and that the defendant's prior ignorance of the claim does not constitute "cause," State's Brief at 27, that fact is irrelevant to construction of the "sufficient reason" language in §974.06(4). As explained in Thornton's opening brief at 20, the new federal "cause and prejudice" standard was not implemented until years after the standards of *Fay* and *Sanders* were incorporated into Wisconsin law with the enactment of §974.06(4). That provision requires only a "sufficient reason," reminiscent of the permissive standard under *Price*, *not* the restrictive "cause and prejudice" standard of the current Supreme Court majority.

The state also relies upon the asserted difficulty in disputing claims of ignorance to legitimize the continued incarceration of those

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

unconstitutionally denied their freedom. State's Brief at 27-28. As an example, the state cites its difficulty in disproving Thornton's sworn statement of prior ignorance of his "nexus" claim as grounds for continuing his custody for 4½ longer than it admits is constitutionally permissible. *Id.*; *see id.* at 29-30 (conceding Thornton's "nexus" claim on its merits).

Contrary to the state's suggestion, factual allegations underlying a defendant's claim of actual ignorance can be tested in an evidentiary hearing and assessed by a judge just as any other statement of fact. Presumably, the defendant has the burden of establishing his actual ignorance or other facts underlying his claim of "sufficient reason" just as he does other factual issues. *See* Wis. Stat. §974.06(6) (burden of proof on petitioner). And, presumably, the state will be free to dispute that claim through cross-examination or otherwise.

The state's difficulty in disputing Thornton's claim here arises, not from any inherent difficulty in disproving ignorance, but from the facts. Thornton raised several issues in his April 2, 1998 motion. His failure to raise the "nexus" claim corroborates his sworn assertion that he in fact did not know about it at the time. There would have been no possible rational reason to withhold a claim which would reduce his sentence by 8½ years if he had in fact known about it.

Thornton's subsequent actions further corroborate his claim of prior ignorance. When he first learned of the basis for the "nexus" claim shortly after filing the notice of appeal from denial of his April 2, 1998 motion, Thornton took a number of actions over a short period of time, all directed at trying to have that nexus claim heard. *See* Thornton's Brief at 3. While all were unsuccessful, the vehemence and persistence with which he tried to present the claim, in contrast to the prior absence of such efforts, suggests quite strongly that he in fact did not previously know the basis of the claim. What possible strategic advantage could Thornton have attained by withholding the claim from his April 2, 1998 motion, only to raise it as he attempted to do shortly after that motion was denied?

The state's request for an "objective" standard for assessing "sufficient reason," State's Brief at 27-28, is directly contrary to this Court's application of a subjective standard in *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997). 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, noting that, "[u]nlike 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." 564 N.W.2d at 762.

B. "Sufficient Reason" Need Not Be Shown Where, As Here, The Claimed Error Renders The Sentencing Enhancer Void

Responding to Thornton's demonstration that he need not show "sufficient reason" in any event to the extent his motion was based on Wis. Stat. §973.13, Thornton's Brief at 14-16, the state asserts that §973.13 does not really mean what it says and what both the Court of Appeals and this Court have said it says. State's Brief at 21-23. The state is wrong.

If there is no jury verdict beyond a reasonable doubt on a fact necessary for an enhanced sentence, then the enhancement is not authorized. There is nothing unreasonable or unfair about that. The Court of Appeals recognized as much in *State v. Flowers*, 221 Wis.2d 20, 586 N.W.2d 175, 176-79 (Ct. App. 1998). Also, while the state takes an unelaborated swipe at *Flowers*, *see* State's Brief at 22, the fact is that this Court has twice approved both the rationale and the holding which the state baldly asserts was "wrongly decided." *State v. Hanson*, 244 Wis.2d 405, 628 N.W.2d 759, 763-64 (2001); *State v. Saunders*, 2002 WI 107, ¶7 n.8, 255 Wis.2d 589, 649 N.W.2d 263.

Contrary to the state's assertion, State's Brief at 22, this Court's

decision in *Howard* does not call either *Flowers* or §973.13 into doubt. Nothing in that decision suggests that the effect of §973.13 was even before the Court. Rather, that decision discusses *only* §974.06, suggesting that §974.06 was the only procedure there raised and argued. The Court's failure to discuss application of another procedural ground for raising the same issue, §973.13, does not suggest that §973.13 would have been an inappropriate basis for the motion.

CONCLUSION

For these reasons, as well as for those in his opening brief, 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, February 17, 2004.

Respectfully submitted,

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

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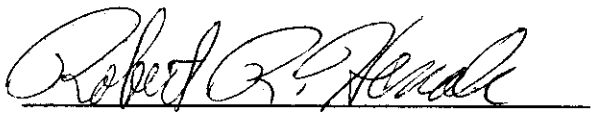

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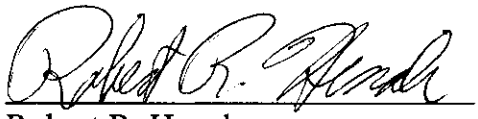
Thornton S.Ct. Reply.wpd

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 reply brief produced with a proportional serif font. The length of this brief is 1,943 words.



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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 17th day of February, 2004, I caused 22 copies of the Reply 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.

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