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DISTRICT I

September 30, 2019

To:

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Charles Wilson 249903
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You are hereby notified that the Court has entered the following opinion and order:

2018AP95 State of Wisconsin v. Charles Wilson (L.C. # 1999CF5019)

Before Brash, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Charles Wilson, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2017-18)[1] postconviction motion without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. The order is summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

"APPENDIX A. 1"

In May 2000, a jury convicted Wilson on one count of first-degree intentional homicide while armed with a dangerous weapon. He was sentenced to life imprisonment and is eligible for parole beginning in 2043. Wilson, through counsel, filed a postconviction motion raising five issues. The trial court denied the motion without a hearing. Wilson appealed. We affirmed. *See* ***State v. Wilson***, No. 2001AP1028-CR, unpublished slip op. (WI App Jan. 29, 2002).

In October 2017, Wilson filed a *pro se* postconviction motion under WIS. STAT. § 974.06. He identified approximately twenty-four claims of ineffective assistance of trial counsel, twenty claims of prosecutorial misconduct, twenty-two claims of trial court error, and six claims of police misconduct. Wilson also asserted that his postconviction attorney was ineffective for failing to raise all of these "objective allegations" in the prior postconviction proceedings. The circuit court[2] denied the motion without a hearing, noting that the claims of ineffective assistance were "merely conclusory assertions that fail to set forth a viable claim for relief" and that Wilson had not demonstrated "that the issues presented in his motion are clearly stronger than those raised in the postconviction motion" filed by postconviction counsel. Wilson appeals.

After the time for postconviction relief under WIS. STAT. § 974.02 and direct appeal have expired, a person in custody under a sentence of the court may bring a motion under WIS. STAT. § 974.06. *See* ***State v. Balliette***, 2011 WI 79, ¶34, 336 Wis. 2d 358, 805 N.W.2d 334. However, a defendant may not bring claims in a § 974.06 motion if the claims could have been raised in a

[2] The Honorable John J. DiMotto presided at trial and over the initial postconviction proceedings; the Honorable Jeffrey A. Conen reviewed and denied the WIS. STAT. § 974.06 motion. In this opinion, we refer to Judge DiMotto as the trial court and Judge Conen as the circuit court.

prior motion or direct appeal, absent a sufficient reason.[3] *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

In some instances, ineffective assistance of postconviction counsel may constitute a sufficient reason for not raising a claim in an earlier proceeding. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. "An allegation that postconviction counsel failed to bring a claim that should have been brought is an allegation that counsel's performance was constitutionally deficient." ***State v. Romero-Georgana***, 2014 WI 83, ¶43, 360 Wis. 2d 522, 849 N.W.2d 668. To prove the deficiency, the defendant must show the unraised issue was "clearly stronger" than the issues actually pursued by postconviction/appellate counsel. *See* ***id.***, ¶¶44-45. When a claim of ineffective postconviction counsel is based on the failure to raise ineffective assistance of trial counsel, the defendant must also show that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Further, "[a] hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***Allen***, 274 Wis. 2d 568, ¶14. Whether the motion alleges such facts is a question of law. *See* ***id.***, ¶9. If the motion

[3] The circuit court had also determined that the WIS. STAT. § 974.06 motion was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Wilson had previously filed a motion to stop restitution. We question whether that is an appropriate application of the ***Escalona*** bar. *See* ***State v. Starks***, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W.2d 146 (stating that sentence modification is a distinct procedure from § 974.06 motions). However, we need not discuss this portion of the circuit court's decision any further, because the prior postconviction motion and appeal pursued by counsel are sufficient for invoking ***Escalona***.

raises sufficient material facts, the circuit court must hold a hearing. *See* ***id.*** If the motion does not raise sufficient material facts or if it presents only conclusory allegations, the decision to grant or deny a hearing is left to the circuit court's discretion. *See* ***id.*** A circuit court's discretionary decisions are reviewed for an erroneous exercise of that discretion. *See* ***id.***

Here, we agree with the circuit court that Wilson's postconviction motion is wholly and fatally conclusory: it is nothing more than an undeveloped list of purported errors. There are insufficient allegations to show that any of the unraised issues are clearly stronger than those actually raised by postconviction counsel.[4] Wilson's conclusory statement in his appellate brief that the issues he has identified are clearly stronger does not suffice.

There are also insufficient allegations to demonstrate that trial counsel actually was ineffective. For example, Wilson alleged that trial counsel was ineffective for "failing to object to the admission of evidence." However, he does not allege what the evidence was, point us to where the evidence was actually admitted, or identify a basis on which an objection would have been successful. Thus, he has not demonstrated that trial counsel was deficient or that the failure to object was prejudicial. *See, e.g.*, ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (stating that counsel is not ineffective for failing to pursue a meritless motion).

In short, Wilson's motion fails to allege sufficient material facts that, if true, would entitle him to relief. *See* ***Allen***, 274 Wis. 2d 568, ¶14. Attempts to remedy this deficiency by way of the appellate briefs does not suffice, as we review the allegations "within the four corners

[4] To the extent that Wilson identifies issues that postconviction counsel did raise, a matter once litigated cannot be relitigated. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

of the [motion] itself" for sufficiency. *See* ***id.***, ¶23. While Wilson is correct that we are to liberally construe prisoners' pleadings, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983), "there is a limit to our lenience. A reviewing court might avert its eyes from the flaws on the peripheries, but it will not ignore obvious insufficiencies at the center of a motion." ***Romero-Georgana***, 360 Wis. 2d 522, ¶69. The circuit court appropriately determined Wilson was not entitled to an evidentiary hearing on his motion.[5] *See* ***Balliette***, 336 Wis. 2d 358, ¶68 (stating that an evidentiary hearing "is not a fishing expedition to discover ineffective assistance").

IT IS ORDERED that the order appealed from is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[5] Wilson filed two notices of supplemental authority, *see* WIS. STAT. RULE 809.19(1), both of which direct our attention to ***Flowers v. Mississippi***, 139 S. Ct. 2228 (2019). ***Flowers***, like ***Batson v. Kentucky***, 476 U.S. 79 (1986), deals with the issue of racially discriminatory use of peremptory challenges by the State during jury selection. However, the argument Wilson makes in his postconviction motion is that the trial court only allowed twenty-seven out of thirty-four jurors to be questioned during *voir dire*, and some of the seven not questioned were African-American, so the trial court was "very bias." While we have reviewed the supplemental authority cited, Wilson's allegations in the postconviction motion do not establish a ***Batson*** or a ***Flowers*** issue.

APP. A. 5

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DISTRICT I

October 16, 2019

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P.O. Box 200
Fox Lake, WI 53933-0200

You are hereby notified that the Court has entered the following order:

2018AP95 State of Wisconsin v. Charles Wilson (L.C. # 1999CF5019)

Before Brash, P.J., Kessler and Dugan, JJ.

On September 30, 2019, the court issued its opinion in this appeal. Charles Wilson, *pro se*, now moves the court to reconsider that opinion. The court has reviewed Wilson's motion in light of the briefs and the decision in this matter, and concludes that reconsideration is not warranted.

IT IS ORDERED that the motion for reconsideration is denied.

Sheila T. Reiff
Clerk of Court of Appeals

App. A. 6

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
Branch 30

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 99CF005019

CHARLES WILSON,

Defendant.

DECISION AND ORDER DENYING MOTION TO VACATE JUDGMENT OF CONVICTION AND GRANT A NEW TRIAL; AND ORDER SETTING RESTIUTION AT ZERO NUNC PRO TUNC TO DATE OF SENTENCING

On October 6, 2017, the defendant filed a *pro se* motion to vacate the judgment of conviction and grant a new trial under section 974.06, Wis. Stats., and also a motion for a refund of funds paid in restitution. The defendant was charged with and convicted of first degree intentional homicide with use of a dangerous weapon. On July 19, 2000, the Hon. John DiMotto sentenced him to life in prison and ordered restitution to be determined. On August 25, 2017, this court ordered restitution to be set at zero. The court will order restitution set at zero *nunc pro tunc* to the date of sentencing for purposes of providing the defendant with an opportunity to seek reimbursement from the Department of Corrections. The issue of reimbursement must be addressed to the Department of Corrections as this court has no authority over the Department to order it to return the funds to the defendant's inmate account.

After sentencing, the defendant by his attorney filed a motion for postconviction relief under section 809.30, Wis. Stats., seeking a new trial on the basis of ineffective assistance of trial counsel. It was denied by Judge DiMotto on March 26, 2001 and followed by a notice of appeal. On January 29, 2002, the Court of Appeals affirmed the judgment of conviction and

"APPENDIX B.7"

Here, the defendant asserts that postconviction counsel was ineffective for failing to raise multiple meritorious issues in his original postconviction motion and appeal – 24 of them to be exact. They are set forth in the defendant's motion as follows:

(1) Second trial counsel failed to object to abuse of discretion by the trial court, prosecutorial misconduct and police misconduct.

(2) Trial counsel failed to object to the admission of evidence.

(3) Trial counsel failed to ask for a continuance for purposes of contacting Detective Billy Ball and Detective Wong, and thus was not able to impeach State's witness Rockie Carney.

(4) Trial counsel failed to subpoena Dorothy Moffett, who pointed out Rockie Carney as a suspect to police.

(5) Detective Wong was not available to impeach State's witness Eugene Ward who was inside the crime scene with the victim.

(6) Second trial counsel failed to subpoena Elizabeth Clatton who lived across the street from the crime scene.

(7) Trial counsel failed to impeach Reginald Templin, the State's firearm witness, and failed to call a defense firearms witness to rebut his testimony.

(8) Trial counsel failed to tell the jury that Rockie Carney admitted smoking marijuana before he went to purchase drugs from the victim the day he was killed.

(9) Juror No. 24 was the victim of an armed robbery and should have been struck.

(10) Prior inconsistent statements should have been presented.

(11) Counsel failed to object to Jury Instruction 140.

(12) Counsel failed to challenge witnesses' statements during pretrial proceedings.

(13) Counsel failed to move for a mistrial during the testimony of Detective Mark Peterson.

(14) Counsel failed to move to suppress a suggestive in-court identification photo line-up.

(15) Counsel failed to provide the jury with hotel receipts from the Belmont Inn.

(16) Counsel failed to impeach defendant's brother with a statement he previously gave to Detective Billy Ball.

(17) Counsel failed to request any pretrial hearings to challenge the statements made by the State's witnesses outside the presence of the jury.

(18) Counsel failed to impeach State's witness Trivon Carter with his prior statement.

(19) Counsel failed to impeach State's witness Sharon Yarbor with her prior statement and first trial testimony.

(20) Counsel failed to object to State's Exhibit 1 – the diagram of the crime scene.

(21) Counsel talked him out of testifying, and thus, his decision not to testify was not made freely and voluntarily.

(22) Counsel failed to explain lesser included offenses to him.

(23) Counsel was ineffective for showing his booking photo to the jury.

(24) Counsel's closing argument was prejudicial.

(*Defendant's motion at pp. 6-11*).

Following the above, the motion presents the defendant's arguments in support of his claims. He first discusses prosecutorial misconduct and sets forth numbered points, all either conclusory or without specific support in the law or in fact. The next heading is entitled "Abuse of Discretion" in which he conclusorily lists the points he believes support his assertions without any application of the law to the facts or how it relates to his case. The third heading is "Police

Misconduct," and again, he presents factual assertions from his perspective that are not tied to any meaningful discussion of the law or how it relates to his case. None of the 24 allegations of ineffective assistance are developed to any extent. They are merely conclusory assertions that fail to set forth a viable claim for relief. In addition, the defendant has not shown that the issues presented in his motion are clearly stronger than those raised in the postconviction motion that was filed by postconviction counsel on March 9, 2001. *See* ***State v. Romero-Georgana***, 347 Wis. 2d 549 (2014). The court finds they are not, and their utter insufficiency requires the court to deny the motion. Therefore, even if the court were to find that his current motion is not barred by ***Escalona, supra***, the motion does not pass muster in articulating a valid claim for relief.

> If the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Nelson v. State, 54 Wis.2d 489, 497-498 (1972).

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion to vacate the judgment of conviction and award a new trial is **DENIED.**

IT IS FURTHER ORDERED that the defendant's motion for a refund in restitution payments is **DENIED.**

IT IS FURTHER ORDERED that the court's prior order setting restitution at zero shall be *nunc pro tunc* to the date of sentencing in this case.

Electronically signed by Honorable Jeffrey A. Conen

Circuit Court Judge/Circuit Court Commissioner/Register in Probate

Circuit Court Judge

Title (Print or Type Name if not eSigned)

10/16/2017

Date

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Supreme Court of Wisconsin

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February 11, 2020

Amended April 15, 2020

To:

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You are hereby notified that the Court has entered the following **AMENDED** order (as to the year of order):

No. 2018AP95 State v. Wilson L.C. #1999CF5019

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Charles Wilson, pro se, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

"APPENDIX C.12"

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Supreme Court of Wisconsin

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February 26, 2020

Amended April 15, 2020

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You are hereby notified that the Court, by its Clerk and Commissioners, has entered the following **AMENDED** order (as to the year of order):

No. 2018AP95 State v. Wilson L.C. #1999CF5019

The court having considered the motion of defendant-appellant-petitioner, Charles Wilson, to reconsider its February 11, 2020, order denying the petition for review filed in this case, and the court noting that there is no statutory authority permitting a motion for reconsideration of an order denying a petition for review, Archdiocese of Milwaukee v. City of Milwaukee, 91 Wis. 2d 625, 284 N.W.2d 29 (1979);

IT IS ORDERED the motion is dismissed. No costs.

Sheila T. Reiff
Clerk of Supreme Court

"APPENDIX D.13"

Goldstein, on behalf of Mr. Wilson, you may make your closing argument.

MR. GOLDSTEIN: Your Honor, Madam District Attorney, ladies and gentlemen of the jury. This is a situation in which I believe at the beginning of this trial I told you that the only relationship that it might have to television-type homicide cases is the so-called love triangle, and I think that is what you are left with at the conclusion of the case.

I don't think that we need to talk about whether this was an intentional homicide. I don't think we really need to debate whether this was a homicide committed with a dangerous weapon, because obviously that is what the facts show in the case. There is no doubt that tragically, unfortunately, independent of the fact that Mr. Ivery may have been a drug dealer, that his life was brought to an end by a person who intended to kill him.

Now, the only connection that the drug matter may have with this is the type of activity that Mr. Ivery was engaged in, which is a fairly commonly known dangerous activity to be involved in. However, you have as a duty, as a member of the jury, and I believe I also told you that at voir dire and during opening, you are going to have to have the duty to determine credibility in this case.

I only get to talk to you once, and I'm only

"APPENDIX E.14"

motivated by who killed Mr. Ivery, it was not by drug dealing, it was not to get the drugs, it was not the money, it was something else. That other thing was the love triangle that Mr. Goldstein conceded in this case.

Mr. Goldstein talked to you about the things that haven't been done in the case and in particular, you know there was some stuff back and forth with some stipulations about the medical examiner's bullets going to the crime lab. And the stipulation is they didn't go to the crime lab until earlier this week. That's when they went. So what? Earlier this week they were tested and they were found to be -- have been fired from the same gun as the bullets that were found on the scene. Would it have been nice if I had made the arrangements to have that known four months ago? Should, would have been, and that is my responsibility as the attorney who has to present evidence to you. But it has nothing to do with the defendant's guilt as guilt is properly proven.

Mr. Goldstein also talked to you about the clothing, that this is the clothing the defendant wore. Well this is clothing that has been identified by a couple people as the defendant's work clothes. This is not necessarily the clothing that the defendant wore during the course of the homicide. There's been no evidence that that's what he was wearing during the time he did the

It's a traumatic event for anybody who was involved in this. From the other witnesses who testified, from Eugene Ward who watched his friend get shot and had to run for his life, all the people, all the witnesses who testified, and I dare say a good number of other people were traumatized by the event.

It is a sad, sad thing that the defendant killed Mr. Ivery. But kill him he did. Mr. Ward saw that. The other witnesses saw that. In total five people have stood in court or sat in court and said that the person who shot Mr. Ivery is here in court. In fact, as Trivon Carter said to Mr. Goldstein about the description of the person that he had seen, he said, quote, as I recall, "You're sitting right next to him."

Mr. Goldstein told you that this was a love triangle. I'll adopt that. And that's true. That's what this is about. It's not about drug dealing, it's not about robbery, it's not about anything else, it's about a lover scorned. A man who's going to reclaim his possession, that woman who had been hiding from him just a couple of days before. It's a triangle. It's a triangle of Terri Thompson, it's a triangle of Antonio Ivory, and it's a triangle of the man who killed Antonio Ivery on September 28th, 1999. That person is Charles Wilson seated in court. Thank you, ladies and gentlemen.

APP. E. 16

dangerous. And the needs of society to be protected from this sort of behavior and the choices he has made repeatedly, and then particularly in regard to this offense, need to be addressed by a period of confinement.

There is nothing that anyone at this point can do to replace Antonio Ivery, but the court can protect society. I'm asking the court to follow my recommendation because I think that that will punish the defendant, protect the society and address the very egregious offense that was committed here. Thank you.

THE COURT: Thank you very much. Mr. Goldstein.

MR. GOLDSTEIN: Yes, Your Honor. With regard to this matter, sentencing is very difficult in this type of case because the client, of course, continues to maintain his innocence. And he has indicated in the presentence report probably, as well as to me, that he has no remorse for the death of Mr. Ivery because he did not kill him.

Now, the defendant has expressed to me on a number of occasions that he has sympathy for Mrs. Ivery, the mother of the victim. And I also have that sympathy both as an experienced lawyer

"APPENDIX F 17"

and as a parent. And I can understand that irrespective of her son's lifestyle or conduct or involvement in this whole matter, he is her son and she loves him dearly. And I am sure that she misses him.

Mr. Wilson has expressed his sympathy for the brothers and the sisters of Mr. Ivery. He's expressed his sympathy for his own brothers, his sister and his own mother for all of the heartache, the aggravation and the hate and hurt that this entire matter has caused.

Now, it's difficult when you're represent a defendant to avoid any sermonizing, but I think in this case that there are some things that would best serve both the defendant, would best serve the Ivery family, and it would certainly serve Miss Thompson to know about in terms of this whole matter.

When I first contacted Miss Loebel with regard to this case, she had just transferred to the homicide division, I think, shortly before that. And I remembered one of her very first statements was that this is another one of those cases where a principal actor in the case is really not party to the crime, and under our system goes

unpunished.

This is about the third or fourth case that I've had in the last two years as homicides, or attempted homicides, where an underlying individual's conduct substantially contributed to what ultimately turns out to be a terrible if not the most terrible crime.

As I've indicated earlier, Terri was not Wilson's ex-girlfriend. She was his girlfriend. She continued to be his girlfriend. She has regularly come to see him since his conviction in this matter. They lived together in an over five-year relationship, if I recall my calculations.

They had two children together. And the defendant raised both those children and Terri's children of a prior relationship and/or marriage as his own children. And I have no doubt that Mr. Ivery probably liked those young children and also did his best to help care for them.

Now, shortly after Mr. Wilson goes to the House of Correction, Terri Thompson takes up with Mr. Ivery while she is then still seeing Mr. Wilson. Terri, of course, was on drugs. I don't think there's any doubt about the fact that

Mr. Ivery was giving her drugs as well as selling drugs out of that house in a very lucrative enterprise.

Mr. Ivery apparently, I think, has indicated, or other witnesses have indicated, maybe it was Miss Thompson, that Ivery didn't regularly move in with her. But I think that she was intimate with him and that he spent many nights with her at that house.

The defendant, I think the discovery indicates, as some of the witnesses, was angry at Mr. Ivery for selling drugs in the presence of his children. I don't think, however, that that was the primary anger. Although, I think it is a commendable anxiety of Mr. Wilson's part.

He certainly never used drugs except for a brief experiment with marijuana. He was very upset about the drugs being sold out of his home. He was selling those drugs, apparently, outside the presence of Terri Thompson, but she knew about the drug activity that was going on there.

I think the greater anxiety on the part of Mr. Wilson was that relationship between Mr. Ivery and Miss Thompson. She was, I believe at the time, 34. This young man was about 19 years of

APP. F. 20

age.

And I don't want my comments to be misunderstood, because whatever Mr. Ivery did on those premises does not justify the end result that occurred here. I am merely stating these facts because I think everybody, including the defendant, has to be aware of the culture going on around this circumstance that led to the shooting.

It is also obvious from the discovery material that Mr. Ivery owned, possessed and at times carried weapons. There was an indication that a weapon's transaction between him, and I can't remember the gentleman's name who was in the house with him when he was shot, were engaged in a negotiation for the aquisition of additional firearms. And carrying and dealing with and possessing firearms tends historically to lead to the kinds of problems that we see in this case.

I also think that a certain amount of the blame, which is probably not the best term, but at least a certain amount of responsibility here goes to Mr. Wilson's family. I think it is obvious from the discovery that perhaps his mother and perhaps his sister, and I'm sure if they have thought back over it, would have contacted the

House of Correction to terminate the huber privileges of Mr. Wilson, given what apparently was his state of mind during the week or at least the five days preceding this entire matter. And that may have avoided Mr. Wilson's being out on the street as a huber prisoner.

Mr. Ivery exacerbated the situation as well by selling drugs out of the house, and further exacerbated that situation because I think it was apparent from discovery information that on the very Saturday preceding this matter when Mr. Ivery was telling Mr. Wilson that he was not selling drugs out of the house, a person came to the door and a transaction occurred right at that time. And while not in the presence of Mr. Wilson's children, one of the children was in the home at that time.

Now, I've already said, does any of this justify a killing? And the answer clearly is no. It's no, it's no and it's no. But these things contributed to it. Human beings become victims of emotions. And I believe that Mr. Wilson in this case became a victim of his emotions.

Emotions make victims of crimes. Murders are the total uncontrolled emotions. Of hate, anger, jealousy, greed, sex. Sometimes

religion, other wild ideas. But it is rather obvious here that there were two emotions at that moment working on Mr. Wilson.

One was the environment which he perceived the children to be in, namely a drug culture. And I'm not naive to believe the more compelling emotion had to do with the sexual emotion between Mr. Ivery and Miss Thompson. This court probably more than myself, I'm probably more than Miss Loebel, has lived through and has heard about or was involved in murders committed by a judge, murders committed by lawyers, by police officers, deputy sheriffs, businessmen, doctors, nurses, school teachers, professors, scientists, all the way down to the least educated and all the way up to the most educated. Underlying, there are always emotions.

This kind of conduct has occurred in both the least functioning families and probably in the best functioning families. My work with Mr. Wilson involving the second trial indicates that this defendant fits that profile, a profile of terrible driving anger over what was occurring.

I do want to comment on the matter that was expressed in the presentence report regarding a

for this court to determine based on the evidence, there's nothing inherently incredible about the evidence, so the defense motion to dismiss is denied. Now do you intend to offer witnesses and evidence, Mr. Goldstein?

MR. GOLDSTEIN: Yes, I do.

THE COURT: And who do you have that we can hopefully get through today?

MR. GOLDSTEIN: Well, Terri Thompson by agreement with Ms. Weber, we had to send her home. Her children were coming home from school out in the rain. I have Mr. Bost here today--

THE COURT: Okay.

MR. GOLDSTEIN: --I would be offering testimony by the defendant.

THE COURT: Okay.

MR. GOLDSTEIN: I am still looking at some matters as to whether I will call several of the detectives. I am told Detective Wong is now on vacation. I think he was subpoenaed, but I want to review tonight whether I want to use any impeachment as it relates to Carney.

THE COURT: Okay.

MR. GOLDSTEIN: And the same with Detective Ball as it relates to Carney.

THE COURT: Okay.

"APPENDIX G.24"

MR. GOLDSTEIN: But the defendant has informed me that he will be testifying.

THE COURT: Okay. One thing that I would like to do at this juncture is, so that I don't forget, is I need to have a colloquy with you regarding this, Mr. Wilson. In a criminal case, the state bears the burden of proof. That burden of proof is beyond a reasonable doubt. A defendant in a criminal case does not have to prove his innocence. A defendant does not have to offer any evidence. In fact, defendant doesn't have to do anything. The whole burden of proof at all times remains on the state.

Now, in a criminal case, a lawyer can make many of the decisions for the client. Whether to call certain witnesses, whether to and to what extent to cross examine witnesses. There are, however, certain decisions that are really personal to a defendant. For example, whether a defendant will or will not have a jury trial. That is a right personal to the defendant. The lawyer might think it should be a jury waiver and a court trial, but it's the defendant who makes the ultimate decision whether he or she wants a jury trial or not.

Another right that is personal to the defendant is the defendant's right to remain silent, and a defendant's right to and not to testify in his or her own behalf at a trial. Do you understand that?

DEFENDANT: Yes.

THE COURT: Now in this particular case, your lawyer has indicated to me that you've made the decision that you want to testify at this trial. Is that correct?

DEFENDANT: Possible, yes.

MR. GOLDSTEIN: Let me -- let me make a record here of what I have discussed yesterday and today. The defendant's statement as given to the police was not made a part of the state's case.

THE COURT: Right.

MR. GOLDSTEIN: As it was in the first trial. I have therefore told the defendant that that statement is not a part of the record and that it cannot go into the record on behalf of the defendant unless he testifies.

THE COURT: That is true. And the reason for that is this. The reason why the state, if they have a statement from a defendant, can put, for example, a police officer on the stand and testify about what that statement is, is because you are a party opponent to the state, and under our rules of evidence, your statement is not hearsay such that the state can put it in. However, you can't call an officer to testify as to what you said because you are not an opponent to yourself. So under the rules of evidence, the state can put in a statement attributable to a defendant by a police officer, but a defendant cannot.

So in other words, if you want your statement to come before the jury, the only way you can do it is if you testify.

In this case, the state has chosen not to put in your statement so it's not before the jury right now, and you can't call a police officer to do that under 908.01 sub (4) because your statement through a police officer from your perspective is hearsay. So...

MS. LOEBEL: Your Honor, while Mr. Goldstein and Mr. Wilson are consulting, I'm going to surrender back to the court the remaining exhibits from the first trial that have not yet been used during the course of this trial. Detective Phillips had been keeping custody of them. However, he is gone for the day so I'll give them back to the court's care.

THE COURT: Just so you know, Mr. Wilson, you don't have to make that decision now.

MR. GOLDSTEIN: That's what I was just going to say, Judge. Because he's discussing matters with me that it would be better if I were in the back with him or someplace.

THE COURT: Oh sure. Just so you know, before you make a decision to testify or not to testify, we have to finish this colloquy outside the presence of the jury. So just so you understand, you have the right to testify as

well as the right not to testify. And you understand that.

DEFENDANT: Yes.

THE COURT: And you understand that the state has the burden of proving your guilt, you do not have to prove your innocence.

DEFENDANT: Yes.

THE COURT: And do you understand this right to testify or not to testify in the final analysis is personal to you.

DEFENDANT: Yes.

THE COURT: And you understand sometimes a lawyer might say, "testify," or a lawyer might say, "don't testify," but in the final analysis, it's not what the lawyer thinks, it's what you decide. Do you understand that?

DEFENDANT: Yes.

THE COURT: And do you further understand that the decision you make should be one that you make freely, voluntarily, intelligently, and understandingly, after you've thought about whether you want to testify or not and after you've discussed it with your lawyer who is your legal counsel. Do you understand that?

DEFENDANT: Yes.

THE COURT: Okay. So you don't have to make a decision now. But I just want you to be aware of these

things, it's something you should discuss with your lawyer, and before you rest or before -- without calling your client, or before you call your client, we do have to have this colloquy outside the presence of the jury. Is that understood, Mr. Goldstein?

MR. GOLDSTEIN: Oh, yes.

THE COURT: Okay. Then who do you want to call yet this afternoon?

MR. GOLDSTEIN: I have Mr. Bost here that we can start with.

THE COURT: Sure. Okay, then we'll bring the jury out. I'll ask you if you intend to offer any evidence. You can say "yes" and call Mr. Bost, and my notes do reveal that he did testify at the first trial, and he did testify that he did have a prior conviction --

MS. LOEBEL: Two, I believe.

THE COURT: Yeah, I think it was two, let me just check my notes.

MR. GOLDSTEIN: I believe it was two. It had to do with possession and I think resisting or obstructing if I recall, but I can look.

THE COURT: Well the same ruling that I -- I entered for the first trial remains at this trial. He may be asked if he's ever been convicted. Truthful answer would be yes. He can be asked the number of times. If the

this phase has a couple of components.

After I have concluded my introductory remarks, I have nine questions that I'm going to address to the 27 of you who are seated in these chairs that face the south wall. And when I'm done having you answer these questions, I'm going to give the lawyers an opportunity to ask you questions.

Now I want you to know there are seven of you who are seated behind the lawyer's tables. Right now you are extra jurors, because the jury is going to be selected from the 27 people in the chairs facing the south wall. To save time, the seven of you seated behind the lawyer's tables, you don't have to raise your hand and respond to any of my questions or the lawyer's questions. But please pay attention to them, because if during this process I excuse one of the first 27, I'll send that person back to Jury Assembly and I'm going to call upon Juror No. 28 to come forward and fill in that chair, and then we'll bring you up to speed. You'll answer my questions and any of the questions the lawyers have asked up until that point. So please pay attention, but to save time the seven of you behind the lawyers, all you have to do right now is listen, but you don't have to raise your hand and respond to any of these questions.

"APPENDIX H. 30"

There are no right or wrong answers. There are only candid, truthful answers, and I'm satisfied that each and every one of you gave those types of answers. From my perspective any one of the 27 of you would make a great juror. But the fact remains, we're not going to impanel 27 and then hone it down to twelve, we are only going to select 13, and then at the end before deliberations one of those jurors will be removed by lot and the remaining twelve will be the jury who deliberates in this case.

So for the next several minutes, the lawyers are going to be exercising their peremptory challenges.

Now for the seven of you seated behind the lawyers, you may be thinking to yourself, why was I even here? We didn't get a chance to say even one word in this courtroom. But I want you to know that the reason we had the seven of you is oftentimes during this process jurors are excused during the voir dire process for various reasons. I've had situations where a potential juror knew one of the witnesses and said you know, judge, I really should be excused from serving on this case because I know that person. I've had jurors who were related to the lawyers. We've had jurors who perhaps maybe knew someone who was a victim

of a particular type of crime, where they themselves were the victim of a particular type of crime and they just didn't feel that they could be fair and impartial. And so we always have extra jurors because if that happens, we can continue the process.

I hope you can appreciate the fact that if we only had 27 people and had I excused someone and didn't have anybody extra, what we would have to have done is stopped, come to a grinding halt, called Jury Assembly, asked them to select another person, get that person selected, walk that person up here, bring that person up to speed before we could continue. And then if we had to excuse someone else, we'd have to stop again, make the phone call, wait, get the person here, bring that person up to speed before we could continue, and it could take forever.

So we always have extra people. There are times when as it turned out we don't need any extra people. We already had circumstances where we have gone through five, ten, sometimes even fifteen extra jurors. As it turned out, in this case we didn't have to excuse anyone. But I do want you to know, the seven of you seated behind the lawyers, that you do have our gratitude, because had we needed you, we could have continued to move this case along.

Actually while we're waiting, I have a question for Juror 28. Can I use an H stamp? Is that worth 33 cents?

JUROR NO. 28: It is good.

THE COURT: Okay. I will now call out the name -- not the names, the numbers of the 13 of you who have been selected to serve as the jury in this case. If I call out your number, please stand up.

Juror No. 2, Juror No. 3, Juror No. 7, Juror No. 8, Juror No. 10, Juror No. 13, Juror No. 15, Juror No. 19, Juror No. 20, Juror No. 22, Juror No. 24, Juror No. 25, Juror No. 26.

Please remain standing. You 13 have been selected to serve as the jury in this case.

Now if your name was not called out, which means you are still sitting, please vacate your chair, take your belongings, go take a seat back in the gallery, but don't leave the courtroom just yet. And the seven of you behind the lawyers, you can also take a seat in the gallery, but please don't leave just yet. And the six of you outside the jury box, you can fill in any seat you want in the jury box. You are not wedded to a chair. You can sit anywhere in the jury box. And if you're in the jury box, you can be seated.

Okay, I want to make sure we have the right people in the jury box and the right people in the gallery before I excuse anyone. This time if I call out your number, respond by saying here.

Juror No. 2.

JUROR NO. 2: Here.

THE COURT: Juror No. 3.

JUROR NO. 3: Here.

THE COURT: Juror No. 7.

JUROR NO. 7: Here.

THE COURT: Juror No. 8.

JUROR NO. 8: Here.

THE COURT: Juror No. 10.

JUROR NO. 10: Here.

THE COURT: Juror No. 13.

JUROR NO. 13: Here.

THE COURT: Juror No. 15.

JUROR NO. 15: Here.

THE COURT: Juror No. 19.

JUROR NO. 19: Here.

THE COURT: Juror No. 20.

JUROR NO. 20: Here.

THE COURT: Juror No. 22.

JUROR NO. 22: Here.

THE COURT: Juror No. 24.

JUROR NO. 24: Here.

THE COURT: Juror No. 25.

JUROR NO. 25: Here.

THE COURT: Juror No. 26.

JUROR NO. 26: Here.

THE COURT: Okay. To those of you who are seated in the gallery getting ready to leave, I want to thank you very much for the service that you rendered us over the last two plus hours or so. And I want you to know that I understand that when you answer the call of your community to serve as a juror, that it can be frustrating and it can be disappointing. I know that sometimes it seems like you wait forever in Jury Assembly to have your name called out. Then they finally called out your name for this case, they had you stand on one of those numbers on the floor, got you lined up, brought you up here. Many of you got to answer questions. Seven of you didn't even get a chance to say a word. And then low and behold, even though you answered the questions as candidly and truthfully as you could, and even though you were ready to do that but didn't get the opportunity, you didn't get selected.

While it may be frustrating and it may be disappointing, I want you to know that your presence

1997 Wis. L. Rev. 207

Wisconsin Law Review
1997

Note

STATE v. ESCALONA- NARANJO: A LIMITATION ON CRIMINAL APPEALS IN WISCONSIN?

Heather M. Hunt [a]

It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. [1]

I. Introduction

In State v. Escalona-Naranjo, [2] the Wisconsin Supreme Court decided that searching for the needle in the haystack of post-conviction motions filed under section 974.06 was not worth the effort. [3] In its decision, the court held that any issues not raised by a defendant in the direct appeal of a criminal case are waived unless the defendant asserts a "sufficient reason" for not previously raising the issues. [4] By limiting the number of criminal appeals a court will consider for each defendant to one, Escalona-Naranjo appears to decrease the amount of time courts will spend deciding criminal appeals. However, closer examination reveals that courts may spend more time deciding appeals while, at the same time, decreasing the amount of protection afforded to defendants' constitutional rights. Courts of appeal have routinely invoked Escalona-Naranjo when deciding the merits of a defendant's case. [5] Because the courts are willing to invoke Escalona-Naranjo, it is important to understand the appellate process, the decision, and its implications.

*208 This Note examines the court's reasoning in Escalona-Naranjo and explores possible implications. Part II examines the process involved in appealing a conviction, Wisconsin precedent, and the trend in other jurisdictions. Part III discusses Escalona-Naranjo and analyzes its reasoning based on the purpose of section 974.06 and the court's prior treatment of post-conviction motions. Part IV suggests three implications of the decision. First, defendants will raise more claims of ineffective assistance of counsel. Second, appellate attorneys will have to make more difficult decisions about which issues to appeal and when to file other post-conviction motions, such as jail credit motions. [6] Third, by limiting the number of appeals a defendant can file to one, the majority promoted finality over ensuring reliable, fair convictions.

II. Background

Escalona-Naranjo addresses the availability of post-conviction relief for criminal defendants. In order to understand the decision, it is necessary to understand the three Wisconsin statutory provisions regarding the appellate process. Sections 974.02 and 809.30 constitute what is commonly referred to as a "direct appeal." [7] Section 974.06 is the third statutory provision governing the appellate process in Wisconsin and was the specific provision at issue in Escalona-Naranjo. The language of section 974.06 was the focus of the court's inquiry, and the court relied on the history of that provision in reaching its decision. Therefore, an examination of the origins of section 974.06 and its interpretation helps in understanding Escalona-Naranjo. Before this decision, post-conviction relief in Wisconsin consisted primarily of a "direct appeal" and a section 974.06 motion.

A. Direct Appeal

"APPENDIX I. 36"

***211** In June of 1967, the Criminal Rules Committee of the Judicial Council received a letter from Chief Justice Myron L. Gordon of the **Wisconsin** Supreme Court.[21] In that letter, the Chief Justice wrote that the justices of the **Wisconsin** Supreme Court were "upset over the amount of time required to handle habeas corpus matters" and wanted to see the trial courts handle those matters.[22] Based on that letter, the Criminal Rules Committee of the Judicial Council began discussing the establishment of a uniform post-conviction remedy.[23]

The Criminal Rules Committee utilized the federal habeas corpus statute as a guide for the post-conviction procedure. However, apparently in an effort to establish finality, the committee adopted section 8 of the Uniform Post-Conviction Procedure Act (UPCPA) and codified that section in subsection (4) of the post-conviction statute.[24] On November 25, 1969, the Governor signed into law the Act establishing section 974.06 of the **Wisconsin** Statutes.[25] Section 974.06(1) provides that:

> After the time for appeal or postconviction remedy provided in [section] 974.02 has expired, a prisoner . . . 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.[26]

This remedy was "designed to replace habeas corpus as the primary method in which a defendant can attack his conviction after the time for appeal has expired."[27] Motions brought under section 974.06 are filed in the trial court.[28] Defendants can only raise constitutional issues, jurisdictional issues,[29] or "laws of this **state**."[30]

***212** The specific portion of the post-conviction relief statute at issue in **Escalona-Naranjo** was subsection (4) which provides that:

> 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.[31]

As previously discussed, subsection (4) was adopted from section 8 of the UPCPA.[32] The general purpose of section 974.06 is to ensure that defendants have their constitutional claims heard after the time for direct appeal has expired.[33] However, subsection (4), by its language, appears to limit that broad purpose by establishing a waiver provision for grounds which were not raised in an "original, supplemental or amended motion" and for which the defendant lacks a "sufficient reason" for failing to raise them earlier in the appellate process.[34]

Before **Escalona-Naranjo**, case law established that a defendant could bring a 974.06 motion even if the defendant had previously filed a direct appeal.[35] The courts read subsection (4) to mean that a defendant could not file successive

App. I. 38

one remaining issue if he was raising an ineffective assistance of counsel claim. [59] However, Justice Hansen opined that he did not believe trial or appellate counsel was ineffective because they knew about the remaining issue but apparently strategically decided to exclude the issue because it did not increase Bergenthal's chances of winning on appeal. [60]

3.klimas v. state [61]

In 1979, the **Wisconsin** Court of Appeals held that a defendant did not "knowingly, voluntarily and intelligently" waive his right to raise a constitutional issue in a 974.06 motion by failing to raise it in his direct appeal; therefore, the trial court had to consider his section 974.06 motion. [62] Klimas appealed his conviction by challenging his sentence, and the **Wisconsin** Supreme Court affirmed his conviction. [63] Klimas then filed a 974.06 post-conviction motion alleging that the trial court denied him due process because it refused to allow psychiatric testimony, and refused to submit a manslaughter instruction. [64] After Klimas' direct appeal, the **Wisconsin** Supreme Court decided the case of Schimmel v. **State**. [65] The Schimmel case held that the exclusion of psychiatric testimony and the jury instruction **stating** that a defendant is presumed to have intended the natural and probable consequences of his acts unconstitutionally relieves the **state** of its burden of proving intent beyond a reasonable doubt. [66]

While ultimately denying Klimas relief based on the merits of his case, the court of appeals addressed the exclusion of the psychiatric testimony. [67] The court first decided that the issue was a constitutional one, and that under the language of section 974.06, the court should address the issue. [68]

The **state**, however, asserted that Klimas waived the right to raise the exclusion of psychiatric testimony by failing to address it in his direct ***216** appeal. The court thus had to decide whether Klimas waived that issue. [69] In holding that he had not waived the right to raise that issue, the court relied in part on Bergenthal's conclusion that constitutional issues must be considered in post-conviction relief proceedings, even if they could have been raised on direct appeal. [70] The court also noted that Klimas established a sufficient reason for not previously raising his issue because Klimas could not foresee that the **Wisconsin** Supreme Court would overrule the law as it existed at the time of his direct appeal. [71] Therefore, the court found that Klimas had not waived the right to raise the issue concerning psychiatric testimony. [72] The court then proceeded to analyze the merits of Klimas' argument and, ultimately, denied Klimas relief.

The court's partial reliance on the sufficient reason language in section 974.06(4) may have indicated the future interpretation of that statute. However, the court of appeals did not rely on that reasoning in subsequent cases, and in effect, backed away from the proposition that a defendant had to raise all of his or her issues in a direct appeal unless the defendant established a sufficient reason. [73]

III.State v. Escalona-Naranjo [74]

In **State** v. **Escalona-Naranjo**, the **Wisconsin** Supreme Court held that a defendant waives an issue not raised in his or her direct appeal unless the defendant establishes a sufficient reason for not previously raising the issue. [75] That decision marked a substantial change from precedent which required a defendant to establish a sufficient reason only when bringing a second or third 974.06 motion, not when bringing the first 974.06 motion.

*217 A. Facts

In February 1986, a jury convicted Barbaro **Escalona-Naranjo** of two counts of possession of controlled substances with intent to deliver. [76] After being sentenced in September 1986, **Escalona-Naranjo** filed a timely notice of intent to pursue post-conviction relief. [77] In December 1986, his counsel filed a direct appeal requesting a new trial, competency redetermination, and resentencing. [78] The trial court denied **Escalona-Naranjo's** motion in July 1987, and the court of appeals affirmed the trial court's decision. [79]

APP. I. 40

By significantly departing from precedent, the court in **Escalona-Naranjo** limited a defendant's appellate rights. While the court asserted that it interpreted the purpose of section 974.06 and relied on precedent, its decision raises five difficulties. First, the interpretation of section 974.06 does not necessarily follow from the work of the drafting committee. Second, the court left open the distinct possibility that it may expand its definition of post-conviction relief to include other motions. Third, the court substantially departed from precedent without adequate justification. Fourth, the court did not establish any guidelines for lower courts about what constitutes a sufficient reason. Fifth, contrary to the majority's assertion, the court did abandon some of its responsibility to protect federal constitutional rights.

1.interpretation of the statute

First, the language of subsection (4) does not specifically **state** that a defendant must establish a sufficient reason for not raising an issue in a direct appeal. If the legislature or the Criminal Rules Committee of the Judicial Council intended to bar a defendant from raising issues not raised on direct appeal, absent a sufficient reason, the statute could have clearly **stated** that. Other **state** legislatures clearly delineate that a defendant is barred from raising issues in a later post-conviction motion that he or she could have raised on direct appeal. For example, Wyoming's post-conviction statute **states**:

> ***220** A claim under this act is procedurally barred and no court has jurisdiction to decide the claim if the claim: (i) Could have been raised but was not raised in a direct appeal from the proceeding which resulted in the petitioner's conviction; (ii) Was not raised in the original or an amendment to the original petition under this act. [102]

Wisconsin's legislature did not specify that the "motion" referred to in section 974.06(4) constituted a direct appeal, and the legislature could have done so if they intended to limit criminal appeals in that manner.

The legislature's failure to change the statute after its subsequent interpretation by the courts [103] may lead to speculation that the legislature agreed with the **Wisconsin** Supreme Court's interpretation. However, the legislature's inaction may be the result of a lack of knowledge or a lack of public interest concerning the statute's interpretation. Therefore, the meaning of the legislative inaction is ambiguous at best.

2. definition of post-conviction relief

The majority in **Escalona-Naranjo** interpreted "post-conviction" to encompass direct appeals as well as 974.06 motions. However, the court did not limit its definition of "post-conviction" relief to only include direct appeals. The court may expand its interpretation of subsection (4) to include other motions. For example, jail credit motions [104] may also constitute "post-conviction" relief according to the majority's broad interpretation of the statute's purpose. Because the court did not clearly define post-conviction relief, defendants and appellate attorneys are left to wonder whether other motions they routinely file may prevent a defendant from raising more substantive issues later. [105]

3. departure from precedent

Third, as described above, the court's interpretation changed the law from the way the courts had interpreted the statute for twenty years. While the legislature's failure to define "motion" required the court to look to other sources for guidance in interpreting that language, the court could simply have followed precedent. [106]

***221** Contrary to the majority's implicit statement in **Escalona-Naranjo**, under prior case law, prisoners could not perpetually seek relief under section 974.06. [107] Defendants could only raise constitutional or jurisdictional issues. [108] This limited the

APP. I. 42

D. Other Jurisdictions

Prior to **Escalona-Naranjo**, appellate defense attorneys generally considered direct appeal and a 974.06 motion as two distinct routes through which a defendant could obtain relief. While **Escalona-Naranjo** marked a significant departure from that precedent, other jurisdictions have had an Escalona-type of waiver for quite some time.

In at least thirteen other **states**, absent some sufficient reason, a defendant waives the right to bring up new issues in a post-conviction motion if they were not raised on direct appeal or at trial. [125] Similar to ***224 Wisconsin**, ten **states** have post-conviction procedures which follow the UPCPA. [126] Of those ten **states**, Idaho, Iowa, Minnesota, Oklahoma, and South Carolina have interpreted the clause, "[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion," [127] to apply to direct appeals and post-conviction motions.

In its **Escalona-Naranjo** brief, the **state** raised the argument that other jurisdictions require defendants to raise all their issues in their direct appeal, [128] but notably, the court did not mention that persuasive authority in its decision. [129] However, based on the number of **states** which adhere to the rule enunciated in **Escalona-Naranjo**, it seems likely that persuasive authority influenced the court.

IV. Implications

While a number of other **states** have a rule similar to **Escalona-Naranjo**, approximately thirty-seven **states** do not. The **states** with a similar rule have decided cases on "arcane procedural issues," [130] such as ineffective assistance of counsel, [131] rather than straightforwardly responding to the merits of a defendant's claim. However, the implications of **Escalona-Naranjo** reach even further. The decision also creates problems regarding the role of appellate counsel. Appellate attorneys must make difficult decisions concerning which issues to appeal, and they must also consider the potential expansion of the decision to include other motions. Finally, society's interest in promoting finality must be balanced against its interest in ensuring that the process used to convict an individual is fair.

While it may be too early to determine the actual impact of **Escalona-Naranjo** on the appellate process, a reasonable assessment indicates that in one way or another, the courts will still be asked to adjudicate numerous criminal appeals and will still have to tediously sift ***225** through the cases to separate the truly deserving claim from the unreasonable one.

A. Ineffective Assistance of Counsel Claims

The court's purpose in seeking to reduce appellate litigation appears laudable. However, a closer examination of the decision's application reveals that it may create the opposite result. By limiting defendants' appellate rights, the court created an additional layer of litigation. After **Escalona-Naranjo**, if a defendant has a meritorious issue that was not raised in his or her original appeal, the individual must allege that appellate counsel was ineffective for not previously raising the issue. [132] If appellate counsel was ineffective, then the defendant is entitled to have his or her claim heard because it was not the defendant's fault for failing to raise the issue earlier--i.e., the defendant has shown a sufficient reason.

In **Wisconsin**, an individual claiming ineffective assistance of appellate counsel must file a habeas corpus petition in the court of appeals which heard the person's original appeal. [133] In **State** v. Knight, the **Wisconsin** Supreme Court **stated** that if evidence must be taken, the appellate court can designate a "referee" or refer the case to the trial court for those proceedings. [134]

In order for a defendant to prevail on an ineffective assistance of counsel claim, the defendant must produce evidence that appellate counsel was ineffective. In **State** v. Machner, [135] the court of appeals held that a court must hold a hearing to "preserve the testimony" of counsel as to why counsel conducted the case in a particular way. [136] That testimony allows the court deciding the ineffective assistance claim to make an informed decision about the prisoner's claim. [137] Therefore, a claim of ineffective

APP. I 44

C. Finality v. Fair Convictions

The scale which balances finality against fairness in the **Wisconsin** appellate process weighs in favor of finality. The appellate process must end at some point and although not all convictions are free of error, by limiting a defendant's appellate rights to one appeal, the process does not allow for mistakes. **Escalona-Naranjo** allows for a safeguard measure, ***230** in one sense, by holding that if a defendant establishes a "sufficient reason," an appellate court may consider the defendant's 974.06 motion. In addition, the low frequency with which defendants win 974.06 motions arguably renders those motions less necessary.

The **Wisconsin** Supreme Court's decision to decrease the availability of post-conviction relief parallels the decisions by the United **States** Supreme Court to decrease the availability of habeas corpus relief. Reducing the availability of post-conviction relief at both the **state** and federal levels leaves defendants with no avenue of relief.

Moreover, relying on a vague notion of "sufficient reason" to claim that a defendant will not be denied any constitutional rights, does not decrease the possibility of such a denial. The court's failure to establish even vague guidelines concerning the definitions of post-conviction relief and sufficient reason only adds to the uncertainty involved in seeking appellate relief. Now, lower courts are left with an even larger amount of discretion and control over the appellate process. Furthermore, while not all or even many prisoners would receive relief under a second appeal, a few may. While successful appeals are rare, when they do occur, the result is dramatic. Liberty is at issue in limiting the appellate rights of individuals convicted of a crime. Society has an interest in protecting the liberty of those individuals because it ensures the legitimacy of the criminal justice system. The desire to establish finality, at some point, must yield to fairness.

V.Conclusion

The **Wisconsin** Supreme Court's decision in **State** v. **Escalona-Naranjo** marked a significant departure from precedent concerning 974.06 motions by forcing a defendant to raise all issues in his or her direct appeal. The consistent application of this decision signifies its importance and the ease with which courts are willing to avoid deciding the merits of a defendant's claim. In an effort to establish finality, the court misinterpreted the purpose of section 974.06 and overruled precedent. The majority's reasoning raised some difficulties which it failed to address. Because the language of the statute is ambiguous, questions persist as to whether the court's interpretation of the statute was intended by the drafters. Additionally, by failing to define post-conviction and sufficient reason, the decision created more uncertainty. Finally, the court abdicated some of its responsibility to protect federal constitutional rights.

The implications of **Escalona-Naranjo** are far-reaching. Allowing courts to avoid deciding the merits of a defendant's claim only increases the likelihood that the court created an additional layer of litigation, in the guise of ineffective assistance of counsel. Furthermore, this decision ***231** creates uncertainty for appellate attorneys who are trying to protect their clients' interests while dealing with the ambiguous **state** of the law. Finally, because fairness must be taken into account, the courts will be left to deal with a number of exceptions, which will create their own legal morass. The question will then become whether the effort to establish finality actually accomplished its purpose.

On its face, **Escalona-Naranjo** appears laudable because it decreases the number of appeals a defendant may file, but further examination reveals numerous problems with the court's approach. While the court may believe that searching for a needle in the haystack is not worth its additional time, deciding not to search for the needle leaves those with truly meritorious claims in the haystack with no possibility of relief.

Footnotes

a B.S., University of **Wisconsin**-Eau Claire, 1993; J.D., University of **Wisconsin**, Class of **1997**. Thank you to Rick for his encouragement and humor. Thanks also to John Pray, a supervising attorney at the Frank J. Remington Center, for his comments on drafts of this Note. This Note is dedicated in memory of my first mentor, my father.

APP. I. 46

1 Donald P. Lay, The Writ of Habeas Corpus: A Complex Procedure for a Simple Process, 77 Minn. L. Rev. 1015, 1020 (1993) (quoting Justice Jackson's concurring opinion in Brown v. Allen, 344 U.S. 443, 536-37 (1953)).

2 185 **Wis.** 2d 168, 517 N.W.2d 157 (1994).

3 **Wis.** Stat. § 974.06 (1995-1996).

4 **Escalona-Naranjo**, 185 **Wis.** 2d at 185, 517 N.W.2d at 164.

5 See, e.g., **State** v. Hendrix, No. 95-2476-CR, 1996 WL 737305 (**Wis.** Ct. App. Dec. 27, 1996).

6 **Wis.** Stat. § 973.155 (1995-1996). In a jail credit motion, the defendant requests the court to deduct from his or her ultimate sentence the amount of time that he or she spent in jail from the point of arrest through sentencing. Jail credit motions are commonly thought of as motions which may be easily decided because the jail records indicate whether a defendant is entitled to relief.

7 **Wis.** Stat. § 974.02 (1995-1996). Section 974.02 refers to § 809.30 of the **Wisconsin** Statutes, which delineates the rules of appellate procedure in felony cases; therefore, in using the term "direct appeal," I am referring to a motion brought under both statutory sections.

8 See, e.g., **Wis.** Stat. § 809.30(1)(a) (1995-1996).

9 **Wis.** Stat. § 809.30(2)(b).

10 **Wis.** Stat. § 809.30(2)(a).

11 Susan R. Monkmeyer, Comment, The Decision to Appeal a Criminal Conviction: Bridging the Gap Between the Obligations of Trial and Appellate Counsel, 1986 **Wis.** L. Rev. 399, 416.

12 See id. at 409-10.

13 See **Wis.** Stat. § 809.30(2)(h).

14 See **Wis.** Stat. § 809.32 (1995-1996); Anders v. California, 386 U.S. 738 (1967). A no-merit brief explains to the court "anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit." **Wis.** Stat. § 809.32(1). If the court of appeals agrees that there is no merit to appealing the defendant's case, then the attorney is "relieve [[[[[d] ... of further responsibility in the case." **Wis.** Stat. § 809.32(3).

15 See **Wis.** Stat. § 809.32(1). A defendant may not wish to have his or her attorney file a no-merit brief with the court of appeals because the defendant does not agree with the attorney that the case has no merit, and the defendant does not wish to have that no-merit brief count against him or her in light of **Escalona-Naranjo**.

16 See **Wis.** Stat. § 809.30(2)(c)-(L).

17 Howard B. Eisenberg, Post-Conviction Remedies in the 1970's, 56 Marq. L. Rev. 69, 78 (1972).

18 See Minutes of Meeting of the Judicial Council 2 (June 16, 1967) [[[[[hereinafter Judicial Council, June 16, 1967] (on file with the **Wisconsin State Law** Library).

19 Act effective Aug. 1, 1978, ch. 187, § 131, 1977 **Wis. Laws** 821 cmt. (codified as amended at **Wis.** Stat. § 752 (1995-1996)); see also **Wis.** Stat. Ann. ch. 752 (West 1981) (Legislative Council Note) (**stating** that on April 5, 1977, voters approved an amendment to Article VII of the **Wisconsin** Constitution which mandated the creation of a court of appeals).

20 Judicial Council, June 16, 1967, supra note 18, at 2.

21 Id.

22 Id.

23 See id.

APP. I. 48

