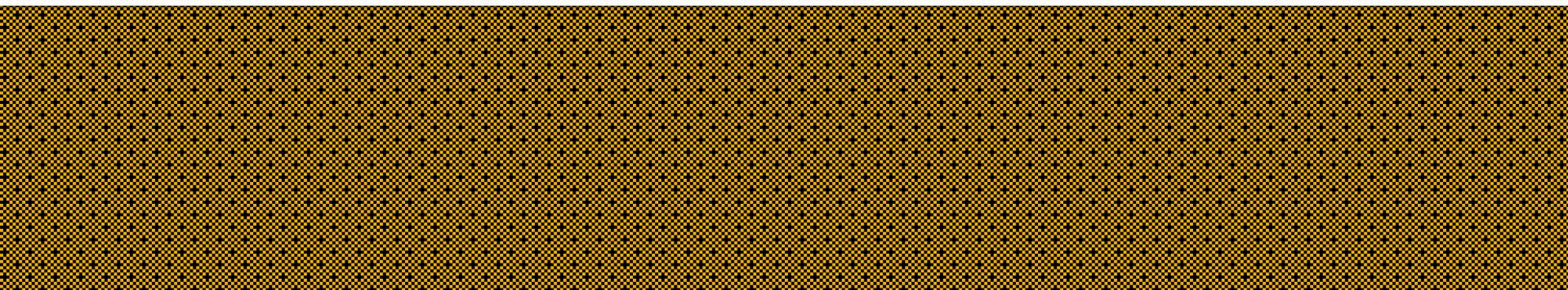


HOW TO HANDLE A NO MERIT APPEAL

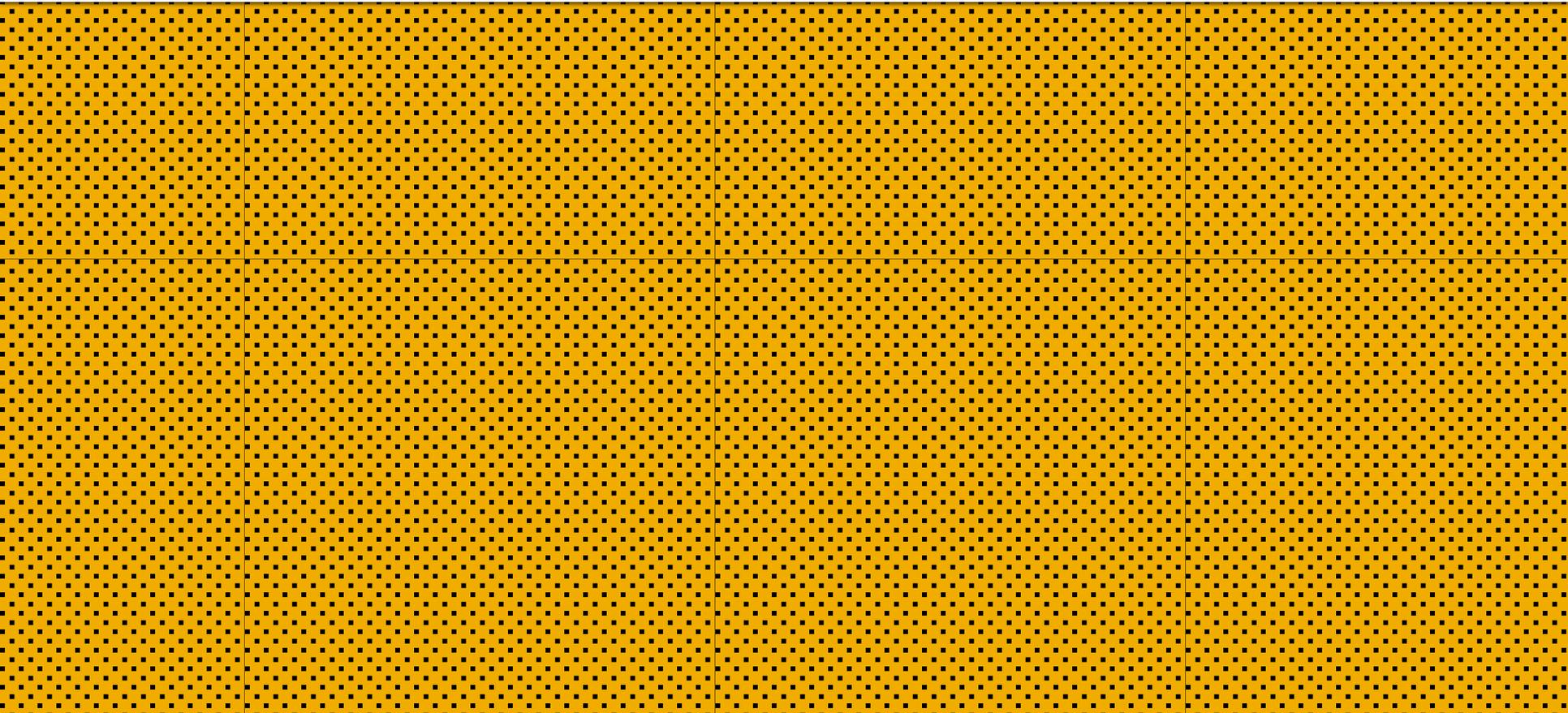
WHAT'S THE MERIT IN THAT?

Amelia Bizzaro & Matthew Pinix



HISTORY

NO MERIT PROCEDURE FROM 1967 TO TODAY



ANDERS V. CALIFORNIA

The no merit procedure is born



“We are here concerned with the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent’s appeal.”

386 U.S. 738, 739 (1967)

Background

The law in 1967



- No universal protocol for disposing of no merit cases
- Each state could do it differently
- Anders' attorney simply filed a letter:
 - Anders' appeal would have no merit &
 - Anders wanted to file his a *pro se* brief
- This procedure passed muster in California (and other states), but SCOTUS wouldn't have it

SCOTUS to Appointed Attorneys:

Indigent Defendants Deserve Better

The no merit procedure “will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.” 386 U.S. at 745



In other words: SCOTUS can't trust appointed attorneys to do as good a job as a paid lawyer, if left to their own devices.

There need be additional scrutiny of their conclusions to ensure fairness and equality.

Dissent Finds Folly

Court appointed attorneys are just as good

“The quixotic requirement imposed by the Court can be explained, I think, only upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted.

That is an assumption to which I cannot subscribe. I cannot believe that lawyers appointed to represent indigents are so likely to be lacking in diligence, competence, or professional honesty.”

The *Anders* Rule

(sound familiar?)

- Court appointed counsel
- Must conclude that case is “wholly frivolous”
- File brief to the court “referring to anything in the record that might arguably support the appeal”
- Provide client with brief so can respond
- Court then undertakes independent review of record to ascertain whether counsel is correct

386 U.S. at 744.

WISCONSIN AND ANDERS

The early days



- Only 1 appellate court: Wisconsin Supreme Court
- Intermediate appellate court would not arrive until 1977
- Supreme Court handled no merit appeals
 - You can find some published no merit opinions from those days

Original No Merit Procedure

Detailed in *Cleghorn v. State* (1972)

- Similar to the no merit procedure we have today
 - Court demanded fair evaluation of the record and a search for meritorious arguments
 - Attorney prepared NMR and sent to client
 - Client could respond to issues in NMR and add new ones
 - Supreme court would conduct independent evaluation
- After attorney allowed to withdraw, client could continue the case alone
- WI Supreme Court adopted summary decision of merits in response to *Anders*

Early Commentary on *Anders*

More from *Cleghorn v. State* (1972)

- Counsel's NMR must state to the court the evidence in favor of an appeal as well as the possibility of a decision sustaining the conviction.
- There is no distinction between the phrases: “wholly frivolous” and “without merit”
 - “We fail to see any distinction [between the phrases], and there should be none, between 'wholly frivolous' and 'without merit.' When applied to an appeal, any possible distinction could only be based upon a degree of possibility of reversal.”

THERE'S A NEW RULE IN TOWN



WISC institutes no merit report rule (1973)

- The original Wis. Stat. § 809.32 has endured
 - It's language went unchanged until 2001
 - The original language remains in the current rule
- WI rule goes further than *Anders*
 - Requires attorney to indicate why identified issues have no merit

WIS. NO MERIT PROCEDURE CHALLENGED

State ex rel. McCoy v. Wisconsin Ct. App. (1987)



Q: Is the requirement that counsel discuss why issues lack merit unconstitutional?

A: No. Counsel can still act as the *Anders* advocate.

... Oh, and by the way, it'll really help the Court of Appeals (section is significant administrative aid)

WISC reiterates the same line as *Anders*:

“[T]he Wisconsin procedure assures the reviewing court that an indigent defendant is receiving exactly that type and level of assistance that a paying client would be receiving under similar circumstances.”

*Dissent: Abrahamson says its unconstitutional

WIS. NO MERIT PROCEDURE CHALLENGED

State ex rel. McCoy v. Wisconsin Ct. App. (1987)



Important Points from *McCoy*

Discussion rule requires:

- Statement of reasons why no merit
 1. Brief summary of case or statutory authority OR
 2. Synopsis of facts which compel reaching same result

Does not require protracted argument in favor of the conclusion

Purpose is to “provide court with ‘notice’ that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.”

PERIOD OF SAMENESS

No merit appeals in the intermediate court



- After 1977, Wis. Ct. App. handles no merit appeals
- 1977-1993 – nothing of significance in the procedure
- Interesting fact: the court initially reports its no merit decisions
 - Number of such decisions explodes post 1977

THE GAME CHANGER

State ex rel. Flores v. State (1994)



Background

- Flores' appointed appellate counsel closed the file on his appeal without filing a no merit report
 - Counsel's office (Wis. SPD) had sent Flores an introductory letter in which the no merit process was discussed and his right to a no merit report set forth
- Flores subsequently filed a collateral attack, challenging his appointed counsel's effectiveness
 - He claimed counsel never advised him of his right to no merit report, and thus deprived him of right to an appeal

THE GAME CHANGER

State ex rel. Flores v. State (1994)



Holding

Counsel was not ineffective in light of the mailing that advised her client of the NMR procedure. Flores did not rebut the presumption that he had received that letter.

“We conclude that a criminal defendant is properly informed of the rights to appeal and the No Merit report option if the defendant knows that by disagreeing with counsel's conclusion of no merit counsel may be compelled to file a No Merit report.”

“It does not matter how or in what manner the defendant is so informed. The exact manner in which this information is conveyed may well depend upon the circumstances and is best left to the professional judgment of counsel.”

183 Wis. 2d 587, 610

THE GAME CHANGER

State ex rel. Flores v. State (1994)



Important points

1. Defendant must be informed of NMR option when it becomes relevant to exercising appellate rights
2. To be fully informed, the defendant must know of the option to disagree with counsel and compel a NMR
3. Defendant's obligations to trigger NMR procedure
 - a. Must waive (viz. knowingly relinquish) right to appeal
 - b. Must activate NMR requirement by
 - i. Actually disagreeing &
 - ii. Expressing desire to appeal
 - c. It is incumbent upon defendant to actually express disagreement

THE GAME CHANGER

State ex rel. Flores v. State (1994)



Important points (cont'd)

4. How can counsel satisfy his/her obligation?
 - a. The manner of informing the defendant of the NMR right does not matter
 - b. It can be done in writing or orally
 - c. Need only be done once
 - d. Can be done as early as initial mailing

809.32 REDUX

Supreme court rewrites the NMR Rule



Changes (2001-02):

1. Specifies that the no-merit procedure applies only to direct appeals
2. NMR should be filed only when the defendant requests NMR or does not consent to closing file
3. New counseling and notification requirements
4. New certification rule
5. New transcript and record service rule
6. Supplemental NMR procedure
7. Makes procedure applicable to more than just criminal cases

NO MERIT MEANS NO MERIT

No right to partial no merit report



NMR to be used only when case is wholly frivolous

Client may strategically choose not to pursue meritorious issues

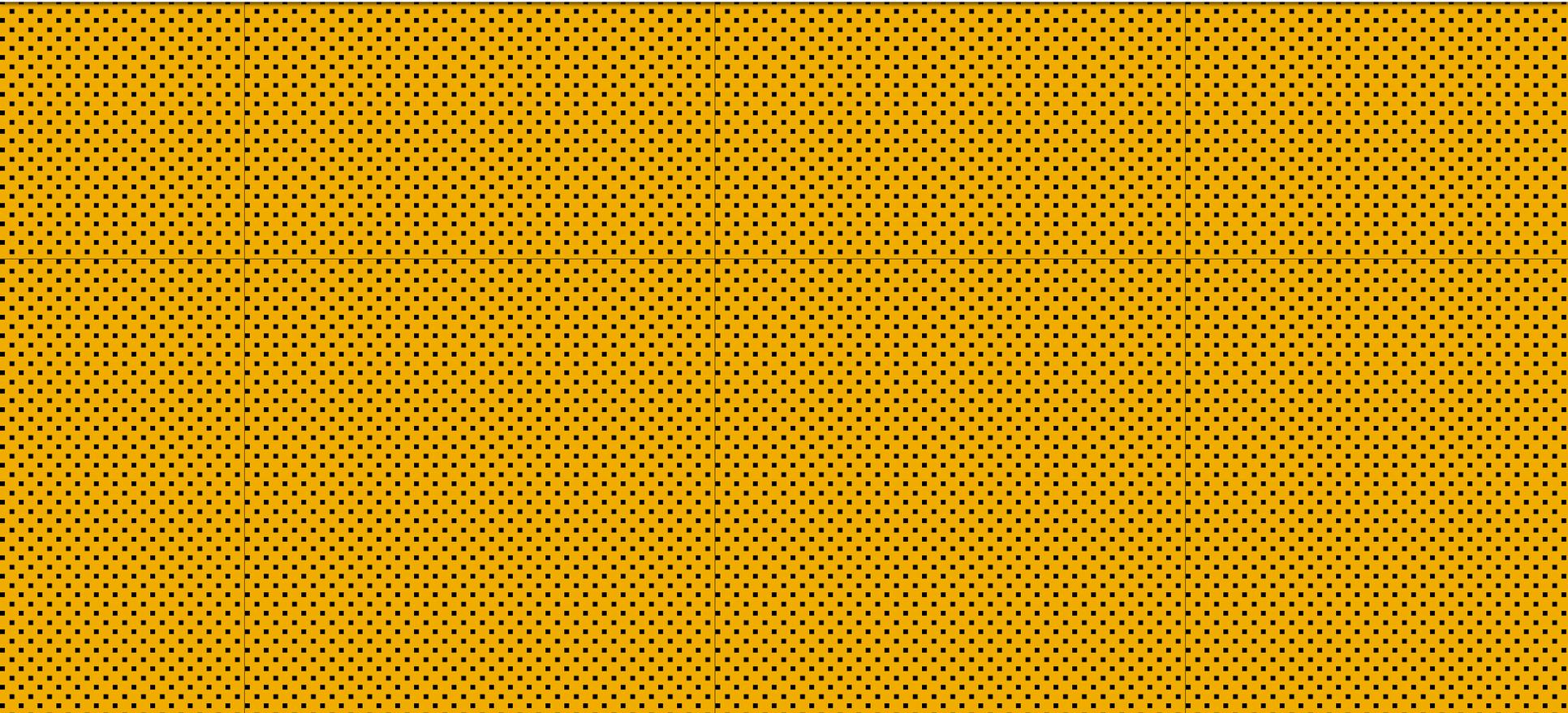
However, so doing eliminates the NMR option

Counsel is not ineffective for not filing partial no merit report

State ex rel Ford v. Holm, 2006 WI App 176, 296 Wis. 2d 119, 722 N.W.2d 609

THE NO MERIT PROCESS

STEP BY STEP



FILING THE NOTICE OF INTENT

WIS. STAT. (RULE) 809.30(2)(B)

Who files?

In most cases involving indigent defendants, trial counsel files NOI

Deadline?

20 days after date of sentencing or final adjudication

Where filed?

Circuit court in county of case origin

Extension?

Possible by motion to Court of Appeals

FILING THE NOTICE OF INTENT

WIS. STAT. (RULE) 809.30(2)(B)

Contents

1. Case name and number.
2. Date and type of order from which defendant seeks relief.
3. Name and address of defendant and his trial counsel.
4. Whether counsel was appointed. If so, if financial circumstances have changed.
5. Whether the defendant is seeking SPD appointed counsel for post-conviction relief.
6. If not requesting appointment of counsel, whether defendant seeks to represent himself or hire counsel and name and contact information for counsel.

AFTER NOI IS FILED

WIS. STAT. (RULE) 809.30(2)(C)

- Within 5 days, circuit court clerk's office sends:
 - NOI,
 - JOC (judgment of conviction), &
 - Judgment roll/court reporter list
- To either:
 - SPD Appellate Intake Office,
 - Privately retained counsel, or
 - Defendant
- Transcripts ordered by SPD in appointed cases
- Clerk sends court file to appointed counsel
- Court reporters send requested transcripts

Wis. Stat. (Rule) 809.30(2)(c)

REVIEWING CASE FOR ISSUES

A FEW SUGGESTIONS

- Make personal contact with client
- Ascertain client's reason for requesting appellate lawyer (viz., client's goal on appeal)
- Where appropriate, obtain trial counsel's file
 - Discovery
 - Notes
 - Letters to client
 - Etc.
- Don't take anything for granted
 - Courts and other attorneys make mistakes
 - Don't assume something was correct simply because court or counsel said it was
 - Investigate anything that you think may be an issue

REVIEWING CASE FOR ISSUES

A FEW (MORE) SUGGESTIONS

- Listen to your client
 - Client was present during trial proceedings; you were not (if appointed by SPD)
 - Client may not be able to articulate legal issues
 - But that's your job
 - “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued . . .” Wis. SCR 20:1.2

REVIEWING CASE FOR ISSUES

A FEW (MORE) SUGGESTIONS

- Consult available (free) resources
 - SPD Appellate Practice & Procedure handbook
 - wisspd.org/htm/ATPracGuides/App/handbook.pdf
 - On Point (SPD blog of criminal decisions)
 - www.wisconsinappeals.net
 - Materials from SPD training programs (archive back to 2005)
 - www.wisspd.org/htm/ATPracGuides/Training/ProgMaterials/
- Don't be afraid to ask
 - SPD appellate attorneys
 - Other colleagues

FINDING NO MERIT

How to litigate a no merit appeal

THERE'S NO MERIT

WHAT NOW?



- Deadline for no merit discussion
 - None under rules
 - Should be done within time for postconviction motion
- Required Advice: Issues
 - Counsel must discuss with client
 - all possible issues AND
 - their merit

THERE'S NO MERIT

WHAT NOW?



- Required Advice: Options
 - Close Case with No Action
 - Hire Private Counsel
 - Represent yourself
 - File a No Merit Report

THERE'S NO MERIT

WHAT NOW?



- Additional Advice
 - Raise every single thing that ever occurred to you in response
 - If don't respond, may be foreclosed from filing § 974.06 motion later
 - If file response, may be foreclosed from filing § 974.06 motion later
 - If close the case without action, will *not* be foreclosed from filing § 974.06 motion later

CLIENT ELECTS NO MERIT APPEAL

WHAT YOU DO

- File in Circuit Court (copy to ct. app.)
 - No Merit Notice of Appeal
 - 180 days after service of
 - Last transcript OR Court file, whichever was last
 - OR
 - 60 days after entry of order denying PCM
- File in Court of Appeals (copy to cir. ct.)
 - No Merit Statement on Transcript
 - No Merit Report
 - (Supplemental No Merit Report)

EXAMPLE NO MERIT NOA

STATE OF WISCONSIN : CIRCUIT COURT : SOME COUNTY
CRIMINAL DIVISION

STATE OF WISCONSIN,
Plaintiff,

-vs-

JOE CLIENT,
Defendant.

NO MERIT NOTICE OF APPEAL

Case No. 2012CF3456

To: John Barrett, Clerk
Milwaukee County Circuit Court
Criminal/Traffic Division
821 West State Street, Rm. 117
Milwaukee, Wisconsin 53233

John Chisholm, District Attorney
Milwaukee County Dist. Atty's Office
Safety Building, Rm. 405
821 West State Street
Milwaukee, Wisconsin 53233

Gregory M. Weber
Asst. Attorney General
Post Office Box 7857
Madison, Wisconsin 53707-7857

Diane Fremgen, Clerk
Wisconsin Court of Appeals
Post Office Box 1688
Madison, Wisconsin 53701-1688

Notice is hereby given that Joe Client appeals pursuant to Wisconsin Statutes (Rule) 809.32 to the Court of Appeals, District I, from the Judgment of Conviction, filed on November 7, 2013, in the circuit court for Some County, the Honorable Some Judge, presiding, wherein the court convicted Client of Some Crime, contrary to Wis. Stat. § 123.45(6), and sentenced him to a some year term of imprisonment, totaling some years of initial confinement and some years of extended supervision.

The final transcript was received by mail and postmarked September 1, 2013. Pursuant to Wisconsin Statutes Rule 809.32(2)(b), the no-merit report is due on or before February 28, 2014.

This not an appeal within Wisconsin Statutes Section 752.31(2).

This not an appeal to be given preference pursuant to statute.

Counsel has been appointed by the Office of the State Public Defender. A copy of the Order Appointing Counsel is attached hereto.

Dated this 7th day of November, 2013.

Respectfully submitted,

Some Attorney
State Bar No. 1234567
LAW OFFICE OF SOME ATTORNEY
321 Fake Street
Springfield, Wisconsin 12345
123-456-7890
some@attorneylawoffice.com
www.attorneylawoffice.com

Attorney for Joe Client

CLIENT ELECTS NO MERIT APPEAL

WHAT YOU DO

- Provide to client (upon request)
 - Court record
 - Transcripts
 - 5 days from receipt of request

NO MERIT CERTIFICATIONS AND STATEMENTS

- Certifications Required for Briefs
- Certify Required Advice was Given
- Statement that Transcripts were Sent
- Statement that No Merit Report was Served on Client

CLIENT FILES RESPONSE

Supplementing NMR



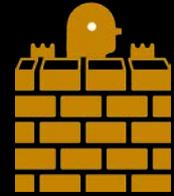
- Client's deadline for response
 - 30 days after service of the No Merit Report.
 - Clerk will send to counsel within 5 days
- Supplemental NMR
 - 30 days after receipt of the client's response
 - include an affidavit or affidavits of facts outside the record necessary to rebut client's response
 - Include Statement that service has been made. Must efile.

CONSEQUENCES

The Effect of a No Merit Appeal on a Client's Right to Collateral Attack

WIS. STAT. § 974.06

The mechanism of a collateral attack



- The method of a collateral attack
- A brief history of the procedural bar
 - Escalona-Naranjo
- Procedural default
 - No response or incomplete response means trouble for client in future