NO-MERIT APPEALS: *A Staff Attorney's Perspective*

I. THE STAFF ATTORNEY'S ROLE.

A. No-merit appeals are on the rise and comprise just under one quarter of the court's WIS. STAT. RULE 809.30/32 direct appeal caseload. As staff attorneys, we review the entire record, the no-merit report and defendant's response and any supplemental no-merit reports. We screen the case and make recommendations to the court. *See* WIS. CT. APP. IOP VI (2011-12).

B. Court of Appeals Internal Operating Procedures: VI (11):

NO MERIT REPORTS. If a no merit report is submitted without the certification required by Wis. Stat. Rule s. 809.32 (1) (c), the clerk's office shall not accept the report for filing. The clerk's office shall inform the attorney of the omission and request the submission of an amended no merit report. If an amended no merit report is not filed within the time set of the clerk, the matter will be submitted to the staff attorney office for further action.

A staff attorney reviews the no merit report, the defendant's response, if one is filed by the defendant, the supplemental no merit report, if any, and the case record. The staff attorney submits to the appropriate judge or panel an independent recommendation as to whether the no merit report should be accepted, held in abeyance pending further action, or rejected. If the staff attorney recommends to accept the no merit report and if the judge or panel accepts the recommendation, the staff attorney will draft a proposed per curiam opinion or summary order affirming the matters appealed from and relieving the attorney of further responsibility on appeal. If the staff attorney recommends that the no merit report be held in abeyance pending further action or that the report be rejected, the staff attorney will draft the appropriate proposed order to implement the recommendation. The proposed opinion or order is circulated to the deciding judge or panel for consideration and approval. No merit reports are only accepted upon a unanimous vote of the deciding judges.

If a defendant files a response to a no merit report, and the attorney does not file a supplemental no merit report under Wis. Stat. Rule s. 809.32 (1) (f), the court may order the attorney to do so, if appropriate under the facts of the case and necessary to the court's disposition of the appeal.

II. DETERMINING WHETHER A NO-MERIT APPEAL IS APPROPRIATE IN A GIVEN CASE.

A. Only where you are an attorney appointed under WIS. STAT. RULE 809.30(2)(e), or chapter 977. In other words, an SPD appointment in a direct appeal commenced pursuant to WIS. STAT. RULE 809.30. *See* RULE 809.32(1)(a). No-merit reports are also an option if the attorney is court appointed, rather than SPD appointed. *See* ***State v. Brown***, 2009 WI App 169, 322 Wis. 2d 183, 776 N.W.2d 269 (per curiam).

B. If after consultation with your client, you conclude that "a direct appeal would be frivolous and without any arguable merit within the meaning of ***Anders v. California***, 386 U.S. 738 (1967), and the person requests that a no-merit report be filed or declines to have the attorney close the file without further representation by the attorney [.]" WIS. STAT. RULE 809.32 (1)(a).

C. Consultation contemplates the "counseling and notification" requirements under WIS. STAT. RULE 809.32(1)(b). Counseling means that you have **discussed** with your client all potential issues identified by you **and your client**, and why these issues lack merit. *See* RULE 809.32 (1)(b)1. Notification means that you have informed the client of his or her three options: (1) the filing of a no-merit report, (2) the closing of the file without an appeal and with the client's consent, or (3) the closing of the file so that the client may proceed pro se or with retained counsel. If your client does not make an election, **the default position is the filing of a no-merit report**. If your client agrees to close the case without action, it is best to get this in writing.

D. Frivolous and without arguable merit:

- In a no-merit appeal, the question is whether the potential arguments would be wholly frivolous; the standard means that the issue is so lacking a basis in fact or law that it would be unethical for counsel to make the argument. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436-38 (1988). The test is not whether the attorney expects the argument to prevail.

- This means that there are **no** arguably meritorious issues, *not* just that the issues your client seeks to raise lack arguable merit. RULE 809.32 does not authorize a "partial" no-merit appeal. *See* RULE 809.32 (1)(a); ***State ex rel. Ford v. Holm***, 2006 WI App 176, ¶¶11-12, 296 Wis. 2d 119, 722 N.W.2d 609.

III. DEADLINES AND FILING REQUIREMENTS.

A. Pursuant to WIS. STAT. RULE 809.32(2), the deadline for filing the no-merit notice of appeal **and** the statement on transcript **and** the no-merit report is 180 days after service of the court record or final transcript requested, or 60 days after entry of the order determining a postconviction motion, whichever is later. Keep in mind that it is generally easier for the court to review a no-merit report which provides citation to a record index prepared by the clerk of circuit court. Therefore, though not mandatory, consider filing the no-merit notice of appeal and statement on transcript in advance of the deadline to allow the circuit court clerk to prepare a record index for citation purposes.

B. Pursuant to WIS. STAT. RULE 809.32(1)(c), the attorney must append a signed certification that he or she has complied with the client-counseling and client-notification requirements. The form of certification is provided in RULE 809.32(1)(c). Pursuant to RULE 809.32(1)(d), the attorney must file a statement with the court that service has been made upon the defendant. Also, **the attorney must serve a copy of the record and transcripts on the defendant within 5 days after receipt of a request** and "shall file a statement in the court of appeals that service has been made on the person."

C. An appendix is **not** required by the rules and if you do include an appendix, a certification is not required. Nevertheless, given that there is only one physical record, inclusion of a short appendix can facilitate easier review of the relevant issues and the staff attorney's communication with the court.

D. Prior to filing a no-merit notice of appeal, ensure the court record is complete. Verify that all transcripts are part of the record.

IV. WHAT TO COVER IN AN ORIGINAL NO-MERIT REPORT

A. Pursuant to WIS. STAT. Rule 809.32(1)(a), "[t]he no-merit report shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit." In conducting its independent review, the court seeks to ensure that there are truly no arguably meritorious issues. Unless you enumerate the issues considered but rejected, the court cannot know the extent of your record examination.

- A no-merit report must satisfy the discussion rule which requires a statement of reasons why the appeal lacks merit. ***State ex rel. McCoy v. Appeals Ct.***, 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987). The discussion might include a

brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. ***Id.*** More than a conclusory statement of the frivolity of the appeal is required. ***Id.*** at 100-01.

- It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. *See* ***State v. Allen***, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124.

- INCLUDE CITATIONS TO THE RECORD! And, if you filed your report prior to the record compilation and are not using record index cites, make it clear to which paper you are citing. The court needs to be able to discern how you arrived at your conclusions.

- Include all relevant standards of review.

B. Plea and sentencing cases

- At a minimum, the no-merit report should discuss the plea-taking ***and*** the sentencing procedures, even if your client does not particularly care about one or the other.

- As to the plea, discuss whether the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by Wis. Stat. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

- In order to bring a postconviction motion for plea withdrawal based on a defect in the plea colloquy, in addition to alleging a deficiency in the colloquy, the defendant must also be able to allege that he or she did not otherwise understand the information that should have been provided by the court. ***State v. Brown***, 2006 WI 100, ¶¶36-37, 293 Wis. 2d 594, 716 N.W.2d 906. Do not ignore plea colloquy deficiencies. If you are unable to allege that your client did not understand the missing information, you should state as much in the no-merit report. Your client will have a chance to respond if he or she disagrees with your characterization.

- Don't forget to discuss any suppression rulings.

- Commonly overlooked plea-taking and/or sentencing requirements include the deportation warnings, read-in offenses, certain offense elements such as PTAC liability and the definition of sexual contact, restitution, repeater enhancers, the DNA surcharge, sentence credit, failure of the court to make a finding of early-release program eligibility (especially where sentence is imposed but stayed in favor of probation) and errors on the judgment of conviction.

- The court would prefer too much rather than not enough analysis. If your client has expressed dissatisfaction with procedures discernible from the record (such as a perceived plea breach, pre-trial rulings, irregularities in the preliminary hearing, time limits violations, or bail determinations), consider discussing the client's issues, even if waived by the entry of a plea.

C. Jury Trials

- It is helpful if you discuss pre-trial motions, jury selection, evidentiary or other objections at trial, the defendant's decision whether or not to testify, jury instructions, sufficiency of the evidence, propriety of opening and closing arguments and sentencing. Again, if you do not mention an issue, the court cannot be certain it was considered and you are inviting an order for a supplemental no-merit report.
- Discussion of the sufficiency of the evidence should be supported by citation to the supporting facts.

D. Supplemental no-merit reports

- Pursuant to WIS. STAT. RULE 809.32(1)(f), upon the filing of a defendant's response to the no-merit report, "[i]f the attorney is aware of facts outside the record that rebut allegations made in the persons response, the attorney may file, within 30 days after receipt of the persons response, a supplemental no-merit report and an affidavit or affidavits, including matters outside the record." Again, you must file a statement that service of the supplemental report has been made on your client.
- Although the rules says you "may" file a supplemental report when your client files a response, the court's strong preference is for the filing of a supplemental no-merit report to any response. This is especially true where the defendant alleges the ineffective assistance of trial counsel, or brings up matters outside the record.
- If you do not intend to file a supplemental no-merit report, it is helpful if you notify the court by letter. This allows the clerk to immediately submit the no-merit appeal back to the court.