

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 10, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2004AP2192**

**Cir. Ct. No. 2004CV5611**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN EX REL.  
MICHAEL FUERST,**

**PETITIONER-APPELLANT,**

**v.**

**DAREN M. SWENSON, WARDEN,  
PRAIRIE CORRECTIONAL FACILITY,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DANIEL A. NOONAN, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Michael Fuerst appeals from an order dismissing his petition for a writ of habeas corpus. The issue is whether Fuerst's petition is barred pursuant to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). We conclude that Fuerst's failure to pursue a direct appeal,

predicated partially on postconviction counsel's alleged ineffectiveness, constitutes a sufficient reason to reinstate the full complement of his postconviction rights pursuant to WIS. STAT. RULE 809.30(2) (2003-04).<sup>1</sup> Therefore, we reverse and remand for further proceedings.

¶2 Fuerst pled guilty to first-degree sexual assault of a child as a habitual criminal, contrary to WIS. STAT. §§ 948.02(1) and 939.62 (1999-2000). The trial court imposed a forty-year sentence.<sup>2</sup>

¶3 Appointed postconviction counsel challenged the trial court's restitution order pursuant to WIS. STAT. RULE 809.30(2)(h) (1999-2000), but did not appeal from the underlying judgment or from the postconviction order. Fuerst then filed a *pro se* postconviction motion seeking to obtain a copy of his presentence investigation report. The trial court summarily denied the motion, ruling that Fuerst waived this issue by failing to raise it in his original postconviction motion. Three and one-half years later, Fuerst filed a third postconviction motion. This time he sought to withdraw his guilty plea and to compel the enforcement of his original plea-bargain; he also alleged ineffective assistance of trial counsel. The trial court summarily denied that motion on its

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> This sexual assault occurred in November of 1999, prior to Truth-In-Sentencing, which applies to offenses committed after December 31, 1999. 1997 Wis. Act 283. Consequently, the trial court imposed an indeterminate sentence.

merits and on the basis of *Escalona-Naranjo*.<sup>3</sup> Fuerst did not appeal from either order.

¶4 Fuerst then petitioned for a writ of habeas corpus, contending that his postconviction counsel was ineffective for filing a frivolous postconviction motion and then abandoning him without pursuing a direct appeal. The trial court dismissed the petition as procedurally barred, principally because the issue had been previously decided in the denial of Fuerst's third postconviction motion.

¶5 In deciding Fuerst's third postconviction motion, however, the trial court essentially rejected an ineffective assistance of postconviction counsel claim for failing to seek to enforce the parties' plea-bargain incident to its rejection of that same claim against trial counsel. This issue is different from the issue of postconviction counsel's claimed ineffectiveness for failing to pursue a direct appeal.

¶6 The trial court also denied Fuerst's petition for his failure to previously raise all of his ineffective assistance claims. Whether the procedural bar of *Escalona-Naranjo* applies to a postconviction claim is a question of law entitled to de novo review. See *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Fuerst should have raised these issues previously. Fuerst was entitled to a direct appeal however, even if appointed counsel determined that a no-merit appeal, pursuant to *Anders v. California*, 386 U.S. 738

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<sup>3</sup> *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), requires a postconviction movant to raise all grounds for postconviction relief in his or her original, supplemental or amended postconviction motion or on direct appeal, unless in a successive postconviction motion, he or she alleges a sufficient reason for failing to previously raise those issues.

(1967), was the best available option for appellate review. *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 603-07, 516 N.W.2d 362 (1994).

¶7 We are not critical of the trial court, which dismissed Fuerst's habeas corpus petition, nor are we evaluating appointed counsel's representation in Fuerst's first postconviction motion or her presumed determination not to pursue a direct appeal. We do, however, conclude that Fuerst's substantiated allegation, that he never obtained a direct appeal from his judgment of conviction, constitutes a sufficient reason to warrant reinstatement of his postconviction and appellate rights pursuant to WIS. STAT. RULE 809.30(2)(b).

¶8 We consequently direct Fuerst to file a notice of intent to pursue postconviction relief, pursuant to WIS. STAT. RULE 809.30(2)(b), with the Milwaukee County Circuit Court within thirty days of this order. In that notice, Fuerst should indicate that he seeks representation by the state public defender pursuant to RULE 809.30(2)(b)5.<sup>4</sup> At that juncture, the state public defender will either appoint or decline to appoint counsel. In the former circumstance, appointed counsel will proceed accordingly. In the latter circumstance, if Fuerst proceeds *pro se*, he should request the relief he seeks from the trial court.

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>4</sup> Fuerst's appointed postconviction counsel who filed the first postconviction motion is an assistant state public defender. Assuming Fuerst is eligible for and seeks public representation, the state public defender should consequently appoint counsel from the private bar.