



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT I

September 5, 2025

To:

Hon. Mark A. Sanders
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

John Blimling
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

Atty. Kelsey Loshaw
State Public Defenders Office Appellate
Division
17 S Fairchild St 3rd FL
PO Box 7862
Madison WI 53707-7862

Andrea Taylor Cornwall
Asst. State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI. 53202

Lamont L. Rodgers 676999
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

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

2024AP241-CRNM	State of Wisconsin v. Lamont L. Rodgers (L.C. # 2020CF415)
2024AP242-CRNM	State of Wisconsin v. Lamont L. Rodgers (L.C. # 2020CF1270)

Before White, C.J., Colón, P.J., and Geenen, J.

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).

Lamont L. Rodgers, by Attorney Leonard D. Kachinsky, is pursuing consolidated appeals from judgments of conviction and a postconviction order under the procedures set forth in

Anders v. California, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2023-24).¹ Attorney Kachinsky filed a no-merit report and a supplemental no-merit report asserting that any potential claim for relief would lack arguable merit. *See* RULE 809.32(1). Upon review of the records and reports, however, we conclude that Rodgers could pursue an arguably meritorious claim for resentencing. Accordingly, we reject the no-merit report, dismiss these appeals without prejudice, and extend the time for Rodgers to file a postconviction motion or a notice of appeal on the merits.

The State took Rodgers into custody on January 21, 2020. In case No. 2020CF415, which underlies appeal No. 2024AP241-CRNM, the State charged Rogers with armed robbery as a party to the crime. In case No. 2020CF365, which is not before us, the State charged him with second-degree reckless homicide and reckless injury. While Rogers was in custody awaiting disposition of those two pending cases, the State charged Rodgers in a third case, No. 2020CF1270, which underlies appeal No. 2024AP242-CRNM. The complaint in the latter case alleged that on March 20, 2020, he committed assault by a prisoner in violation of WIS. STAT. § 946.43(2m)(a),² by expelling a bodily substance with intent that the substance come into contact with a corrections officer at the facility where Rodgers was confined. As relevant here, any sentence for a violation of § 946.43(2m)(a) must be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she committed the crime. *See* § 946.43(2m)(b). At Rodgers’s sentencing, however, the circuit court ordered Rodgers to serve his sentence for assault by prisoner in case

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

² We cite the current version of WIS. STAT. § 946.43, which is the same today as it was in 2020.

No. 2020CF1270 concurrently with his sentence in case No. 2020CF365 and consecutive only to his sentence in case No. 2020CF415.

Appellate counsel acknowledges in the no-merit report that the circuit court imposed a concurrent sentence “despite the mandatory consecutive requirement.” Appellate counsel nonetheless concludes: “any argument that the sentences were an erroneous exercise of discretion would be frivolous and without arguable merit.” A circuit court, however, “erroneously exercises its discretion if it makes an error of law.” *State v. Tucker*, 2003 WI 12, ¶10, 259 Wis. 2d 484, 657 N.W.2d 374. Thus, if the circuit court imposed a sentence prohibited by statute, then a claim that the circuit court erroneously exercised its sentencing discretion would not be frivolous.

The normal remedy for an illegal sentence is resentencing. *State v. Upchurch*, 101 Wis. 2d 329, 336, 305 N.W.2d 57 (1981). Moreover, in circumstances where resentencing on one count may disrupt the original sentencing intent because consecutive sentences are involved, the defendant may seek resentencing on all counts. *See State v. Church*, 2003 WI 74, ¶¶20-21, 262 Wis. 2d 678, 665 N.W.2d 141. Accordingly, we conclude that Rodgers could pursue an arguably meritorious claim for resentencing in both of the cases currently on appeal.

We have considered Attorney Kachinsky’s assertions in the supplemental no-merit report that Rodgers “wanted a resentencing only if it would apply in both cases,” and that Rodgers had concerns that pursuit of resentencing entailed a risk of a more onerous aggregate sentence. We conclude that this risk assessment does not assist us in determining whether Rodgers has an arguably meritorious sentencing claim.

The question in a no-merit proceeding is whether further postconviction proceedings would be wholly frivolous, not whether they present a risk. *See Anders*, 386 U.S. at 744. Risk and merit are separate matters:

[T]here are many possible reasons why a defendant may wish to forego any appeal which are unrelated to the specific avenues of appeal available. For instance, a criminal defendant may wish to forgo an appeal even when there is arguable merit rather than to be exposed to the possibility of a greater penalty on resentencing or the resurrection of dismissed charges should the appeal succeed.

State ex rel. Flores v. State, 183 Wis. 2d 587, 607, 516 N.W.2d 362 (1994).

It appears that the possibilities recognized in *Flores* may describe the situation here: Rodgers may perceive the arguably meritorious sentencing claim available to him as exposing him to an unacceptable risk. Rodgers is not required to take that risk. If Rodgers concludes for strategic, personal, or practical reasons that he does not want to pursue an issue having arguable merit, he need not do so. *See id.* This court, however, will not entertain the fiction that he does not have an arguably meritorious claim to pursue.³ We cannot fulfill our obligations by affirming an illegal sentence as a proper exercise of discretion. We must be faithful to the law. SCR 60:04(1)(b).

In sum, Wisconsin's no-merit procedure requires appointed counsel to demonstrate in a no-merit report that each potential issue for appeal lacks arguable merit. WIS. STAT. RULE 809.32(1). Appellate counsel has not done that here. To the contrary, the report reflects that further proceedings would not be wholly frivolous. When a no-merit report reflects that

³ We also observe that Rodgers cannot entirely insulate himself from review of his sentences by not pursuing his potential claim now. An illegal sentence may be corrected at any time. *State v. Borst*, 181 Wis. 2d 118, 122, 510 N.W.2d 739 (Ct. App. 1993).

nonfrivolous issues exist, this court should not accept that no-merit report. *See McCoy v. Court of Appeals*, 486 U.S. 429, 444 (1988). Therefore, we reject the no-merit report and dismiss these consolidated appeals without prejudice.

IT IS ORDERED that the no-merit report is rejected and these appeals are dismissed without prejudice.

IT IS FURTHER ORDERED that these matters are referred to the Office of the State Public Defender to consider appointment of new counsel for Rodgers, any such appointment to be made within 45 days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Rodgers or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Rodgers to file a postconviction motion under WIS. STAT. RULE 809.30 is extended until 60 days after the date on which this court receives notice from the State Public Defender's office advising either that it has appointed new counsel for Rodgers or that new counsel will not be appointed.

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

Samuel A. Christensen
Clerk of Court of Appeals