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DISTRICT I

April 2, 2026

To:

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

2024AP1778 State of Wisconsin v. Joshua T. Howard (L.C. # 2000CF5239)

Before White, C.J., Colón, P.J., and Donald, 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).

Joshua T. Howard appeals from an order denying a motion for postconviction relief that he filed pursuant to WIS. STAT. § 974.06 (2023-24)[1] and from the striking of his Motion for Reconstruction Hearing pursuant to Milwaukee County Circuit Court Rule 4.17B. 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. We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

Background

In October 2000, Howard was charged with nineteen crimes stemming from a six-week period in 1999 during which he and his friend, Matthew Steffes, had sexual intercourse with two juvenile girls and caused them to commit acts of prostitution. In June 2001, after a consolidated trial, a jury found Howard guilty of a number of counts of second-degree sexual assault of a child under WIS. STAT. § 948.02(2) (1999-2000), first-degree sexual assault of a child under WIS. STAT. § 948.02(1) (1999-2000), child enticement under WIS. STAT. § 948.07(2) (1999-2000), and soliciting a child for prostitution under WIS. STAT. § 948.08 (1999-2000). Prior to sentencing, Howard moved the court for a new trial based on a claim of extraneous information getting to the jury. The circuit court held multiple days of hearings on the issue, including taking testimony from every juror, and denied the motion. Howard appealed and on April 13, 2004, this court affirmed the judgment of conviction and the circuit court's denial of his motion for a new trial. *See* ***State v. Howard***, No. 2003AP1540-CR, unpublished slip op. (WI App Apr. 13, 2004).

In July 2004, Steffes filed a motion with the circuit court seeking to vacate four of his six solicitation counts on the basis that they were multiplicitous. In July 2005, the court granted Steffes' motion and vacated four of his solicitation convictions as multiplicitous. In January 2006, Steffes filed a postconviction motion alleging, *inter alia*, that the evidence was insufficient to support the six counts of child enticement under WIS. STAT. § 948.07(2). The circuit court denied the motion and on appeal, this court affirmed. *See* ***State v. Steffes***, No. 2006AP1633, unpublished slip op. ¶1 (WI App June 19, 2007). In that 2007 unpublished opinion, we acknowledged that the jury instruction was inaccurate as to the intent element, but concluded that Steffes had waived the argument by stipulating to the use of the instruction. ***Id.***, ¶12. We further concluded that Steffes' trial counsel was not ineffective for stipulating to the instruction because

the outcome would have been the same: conviction based on overwhelming evidence. ***Id.***, ¶14. Because the State did not appeal the circuit court's determination with respect to multiplicity, this court did not consider that issue.

More than 19 years after the conclusion of his direct appeal, on October 25, 2023, Howard filed multiple motions, including a motion for a reconstruction hearing based on his earlier allegations of juror misconduct. The circuit court returned those materials to him, informing him that all of his requests for relief needed to be brought in one 20-page motion pursuant to Milwaukee County Circuit Court Rule 4.17B. Howard then moved to file an oversized brief, which the circuit court denied.

On January 8, 2024, more than 22 years after his conviction and nearly 20 years after his direct appeal concluded, Howard filed the instant 20-page pro se motion for postconviction relief pursuant to WIS. STAT. § 974.06, seeking an order "vacating all multiplicitous counts and count three." He argued that he was convicted of multiple counts under WIS. STAT. §§ 948.07(2) and 948.08 for the same offense in violation of the double jeopardy clause and that, because four of Steffes' solicitation convictions were vacated as multiplicitous, the law of the case doctrine required vacating four of Howard's § 948.08 convictions. Howard further claimed that trial counsel was ineffective for failing to: (1) object to the multiplicitous counts before trial; (2) object to the jury being erroneously instructed on the intent element of enticement; and (3) object to the unanimity instruction and jury form for count three. He also asserted that appellate counsel was ineffective for failing to raise his double jeopardy claims and trial counsel's ineffectiveness. Lastly, Howard argued that he had two "sufficient reasons" for not raising his new claims on direct review, such that they are not barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994): (1) he was unaware of the legal basis for the

double jeopardy claims until the 2005 and 2007 rulings in Steffes' case; and (2) appellate counsel's ineffectiveness.

Howard also filed another motion for a reconstruction hearing relating to the jury misconduct. Because the combined page length of the two motions exceeded Milwaukee County Circuit Court Rule 4.17B's 20-page limit, the circuit court struck Howard's motion for a reconstruction hearing and instructed him:

> If the defendant wishes to raise a claim for reconstruction, he may file an amended [WIS. STAT.] § 974.06 motion that does not exceed 20 pages in length. The defendant must include a letter confirming that his amended motion incorporates all issues he intends to raise under § 974.06, because successive attempts to raise new issues or to file amended pleadings will not be entertained.

Howard did not file an amended § 974.06 motion.

The circuit court denied Howard's WIS. STAT. § 974.06 motion on the grounds that it was barred by ***Escalona-Naranjo*** because Howard did not set forth a "sufficient reason" for not raising his claims on direct appeal or in a WIS. STAT. § 974.02 motion, and because Howard failed to plead sufficient facts to show that his new issues are "clearly stronger" than the claims raised on direct appeal. The circuit court did not address the arguments presented in Howard's motion for a reconstruction hearing because it had stricken the motion from the record.

On appeal, Howard contends that the circuit court misapplied Rule 4.17B in striking his motion for a reconstruction hearing and erred in finding that his WIS. STAT. § 974.06 claims are barred by ***Escalona-Naranjo***. We conclude that Howard forfeited his Rule 4.17B claim by not presenting it to the circuit court and that his remaining claims are barred by ***Escalona-Naranjo***. Therefore, we affirm.

I. Rule 4.17B Claim

Milwaukee County Circuit Court Rule 4.17B limits WIS. STAT. § 974.06 motions to 20 pages in length. MILWAUKEE CNTY. CIR. CT. R. 4.17B. Howard claims the circuit court misapplied the rule when it struck his Motion for Reconstruction Hearing for exceeding the 20-page limit when combined with his § 974.06 motion, and that he is somehow entitled to a hearing on a stricken motion. The State argues that this claim is forfeited because Howard had ample opportunity to raise it with the circuit court over the course of filing motions from October 2023 through January 2024 but did not. We agree with the State and conclude that Howard has forfeited this issue.

"[W]hether a defendant adequately preserved or forfeited his right to appellate review of a particular claim [is reviewed] de novo." ***State v. Klapps***, 2021 WI App 5, ¶15, 395 Wis. 2d 743, 954 N.W.2d 38. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727; *see also* ***Townsend v. Massey***, 2011 WI App 160, ¶¶25-26, 338 Wis. 2d 114, 808 N.W.2d 155 (explaining that parties cannot "blindside" the circuit court by making arguments for the first time on appeal).

Here, Howard was repeatedly told that Rule 4.17B required him to raise all of his legal issues in a single motion that does not exceed 20 pages: first by the circuit court clerk in October 2023 and again by the circuit court itself in February 2024 when it gave Howard yet another chance to correct his error and comply with the rule. Howard had multiple opportunities to argue to the circuit court that it misinterpreted Rule 4.17B or that he was entitled to a reconstruction

hearing on some other basis. He did not. Therefore, he forfeited this issue and cannot raise it now.

II. WIS. STAT. § 974.06 Motion: Double Jeopardy Claims

Howard argues that he was convicted of multiple counts under WIS. STAT. §§ 948.07(2) and 948.08 for the same offense in violation of the double jeopardy clause and that, because four of Steffes' § 948.08 convictions were vacated as multiplicitous, the law of the case doctrine requires vacating four of Howard's § 948.08 convictions. The State argues that Howard's double jeopardy claims are barred by WIS. STAT. § 974.06(4) and ***Escalona-Naranjo*** because they could have been raised on direct appeal or in a WIS. STAT. § 974.02 motion to the circuit court and Howard did not plead a "sufficient reason" for failing to do so. ***Escalona-Naranjo***, 185 Wis. 2d at 181, 185. We agree with the State and conclude that Howard's double jeopardy claims are procedurally barred.

We review the circuit court's decision denying Howard's motion without a hearing under a mixed standard of review. ***State v. John Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We determine de novo "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." ***Id.*** "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.*** The circuit court's decision to deny an insufficiently pleaded motion is reviewed "under the deferential erroneous exercise of discretion standard." ***Id.***

Howard describes his first double jeopardy claim as one of "double description," arguing that his enticement convictions under WIS. STAT. § 948.07(2) are constitutionally barred by his solicitation convictions under WIS. STAT. § 948.08 because enticement is a lesser included

offense of solicitation. In order to argue, as he must, that the two crimes have identical elements, he asserted that this court created a "modified" intent element for enticement in Steffes' 2007 appeal and that he can import that "modified" element into his own case under the "law of the case" doctrine. But the "law of the case" doctrine does not apply to a decision issued in a different case, so this argument fails before even reaching an ***Escalona-Naranjo*** analysis because Howard cannot establish that the two crimes have identical elements. *See* ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (stating that the law of the case doctrine "is rooted in the concept that courts should generally follow earlier orders *in the same case*") (emphasis added) (quoting ***Ridgeway v. Montana High School Ass'n***, 858 F.2d 579, 587 (9th Cir. 1988)).

Howard's second double jeopardy claim seeks to vacate four of his six WIS. STAT. § 948.08 solicitation convictions under the theory that the crime was charged in an improper "unit of prosecution." Howard asserted that only one solicitation charge per victim could be brought because the offense is continuous in nature, such that dividing it into multiple charges by timeframe is prohibited. He again invoked the law of the case doctrine, this time related to the 2005 circuit court decision vacating four of Steffes' six solicitation charges for being multiplicitous. Howard argued that pursuant to the law of the case, four of his own solicitation charges must also be vacated. But the law of the case doctrine does not apply to circuit court decisions, *see* ***Stuart***, 262 Wis. 2d 620, ¶23 ("[A] decision on a legal issue *by an appellate court* establishes the law of the case[.]" (emphasis added)), and as already explained, the doctrine only applies to rulings made in the same case.

Moreover, his "double description" and "unit of prosecution" claims both fail because he did not plead a sufficient reason for failing to raise them on direct appeal or in a WIS. STAT.

§ 974.02 motion. Howard asserted two reasons for not raising his claims earlier. First, he argued that he was not aware of the basis for his "double description" or "unit of prosecution" claims until the 2007 and 2005 events in Steffes' case, both of which were after Howard's own appeal concluded. But ignorance of the law is not a sufficient reason. *See **State v. Jensen***, 2004 WI App 89, ¶30, 272 Wis. 2d 707, 681 N.W.2d 230 ("Ignorance of the law is no defense."). We also agree with the circuit court that Howard's reliance on ***State v. Aaron Allen***, 2010 WI 89, ¶44, 328 Wis. 2d 1, 786 N.W.2d 124, and ***State v. Howard***, 211 Wis. 2d 269, 288, 564 N.W.2d 753 (1997), *overruled on other grounds in **State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765, is misplaced. Those cases did not hold that ignorance of the legal basis for the claim constitutes a "sufficient reason" under ***Escalona-Naranjo***. Instead, ignorance is sufficient only when the claim arises from a supreme court decision making a new rule of substantive law, which is not what happened in Steffes' appeal. ***Aaron Allen***, 328 Wis. 2d 1, ¶44 (explaining ***Howard*** and holding that the defendant must point to a "change in law").

Second, Howard argued that the ineffectiveness of his "appellate counsel," Robert Meyeroff, constitutes a sufficient reason for failing to raise his double jeopardy claims. As a preliminary matter, Howard mischaracterized his attorneys. He stated that William Marquis, his trial counsel, was also his postconviction counsel because he filed a post-verdict motion in July 2001 and represented Howard at related hearings, but that is inaccurate because Howard had not yet been sentenced. *See* WIS. STAT. RULE 809.30(2)(a) (indicating that a trial counsel's representation continues through sentencing and the filing of a notice of intent to pursue postconviction relief). Howard was sentenced on April 25, 2002, and Marquis filed a notice of intent to seek postconviction relief on his behalf on May 15, 2002, wherein he requested "that the state public defender appoint counsel for purposes of postconviction relief." In July 2002,

Attorney Meyeroff was appointed to represent Howard, and he acted as both postconviction and appellate counsel. *See* ***State ex rel. Warren v. Meisner***, 2020 WI 55, ¶¶23, 39, 45, 392 Wis. 2d 1, 944 N.W.2d 588 (discussing that "postconviction counsel" is the attorney after sentencing but before a notice of appeal is filed; "appellate counsel" is the attorney in the appellate courts after filing a notice of appeal; they can be the same person). To the extent that Howard is making an ineffective assistance of appellate counsel argument (i.e., that his appellate counsel failed to present additional preserved issues on appeal), that claim was properly denied as brought in the wrong forum. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992) (holding that ineffective assistance of appellate counsel claims must be brought through a habeas corpus petition filed with the appellate court).

In contrast, a claim that postconviction counsel was ineffective can be brought as part of a WIS. STAT. § 974.06 claim and can provide a sufficient reason for overcoming ***Escalona-Naranjo***'s procedural bar. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. To state an ineffective assistance claim, Howard must demonstrate that his counsel's performance was deficient and that the deficient performance was prejudicial. ***Id.***, ¶39 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). Part of showing deficiency is demonstrating that the new claims are "clearly stronger than the claims postconviction counsel actually brought." ***Romero-Georgana***, 360 Wis. 2d 522, ¶4. To satisfy the "clearly stronger" requirement, Howard must allege "sufficient material facts—*e.g.,* who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he seeks." ***John Allen***, 274 Wis. 2d 568, ¶2. Conclusory allegations are insufficient. ***Id.***, ¶12. "In sum, defendants must allege sufficient facts in their § 974.06 motions so that reviewing courts do not grant frivolous hearings." ***Romero-Georgana***, 360 Wis. 2d 522, ¶64.

In assessing whether Howard's allegations are adequate, we review only the allegations contained in his motion, and not any additional allegations that may be in his appellate brief. ***John Allen***, 274 Wis. 2d 568, ¶27. The standard of review of deficiency and prejudice is a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The trial court's findings of fact will not be overturned unless clearly erroneous. ***Id.*** "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***Id.*** at 128.

Howard's WIS. STAT. § 974.06 motion made the conclusory allegations that Attorney Meyeroff "overlooked" Howard's new claims, and that they are "clearly meritorious in comparison" to the jury misconduct claim Meyeroff brought on appeal. However, Howard's § 974.06 motion failed to conduct a meaningful comparative analysis to show that the new claims are "clearly stronger." Howard merely stated:

> To the degree that a comparison of the current issues to those previously raised is necessary, the clearly stronger hurdle is not very high given the deficiencies in the foundation of those arguments. For example, the defendant incorporates his Motion for a Reconstruction Hearing herein, where he details the fact that appellate counsel filed the direct appeal despite knowing that not all (12) jurors had been voir dired.

But Howard cannot rely on a motion that has been stricken and therefore fails to develop an argument as to the relative strength of the claims. Moreover, "[t]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not necessarily constitute deficient performance." ***State v. Balliette***, 2011 WI 79, ¶66, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). Meyeroff could have had good reasons for not bringing the claims Howard now raises. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶62.

Howard's motion assigned particular weight to the 2005 circuit court ruling in Steffes' case vacating four of Steffes' solicitation claims as multiplicitous, arguing it is conclusive proof

that his "unit of prosecution" claim meets the "clearly stronger" requirement. But, again, he did not allege sufficient material facts or conduct a meaningful analysis. Howard's WIS. STAT. § 974.06 motion did not provide details concerning the circuit court's reasoning for the 2005 decision dismissing those convictions against Steffes. Nor did he meaningfully analyze what the legislature intended as the "unit of prosecution" under WIS. STAT. § 948.08. Contrary to his assertion, whether an offense is continuous in nature is not the end of the inquiry. *See*, *e.g.*, ***State v. Carol M.D.***, 198 Wis. 2d 162, 170, 174, 542 N.W.2d 476 (Ct. App. 1995) (discussing that where an offense lacks gradations in punishment, legislature intends that a continuous offense may be charged as multiple separate offenses). Furthermore, this court has never concluded that Steffes' convictions were multiplicitous, or even addressed the issue, because the State did not appeal.

Howard's motion also does not speak to how he would prove his claims at an evidentiary hearing. Does he have any records of communications with Meyeroff? Who would testify on his behalf? Even if he identified witnesses, how could their testimony as to what occurred 15 or 20 years ago be reliable? As our supreme court observed, the timing of a WIS. STAT. § 974.06 motion can be an important consideration because delays can "wreak havoc." ***Aaron Allen***, 328 Wis. 2d 1, ¶73 (suggesting delays of just three and a half or seven years were disqualifying). Here, Howard filed his motion more than 22 years after his conviction and nearly 20 years after his direct appeal concluded. In sum, Howard did not sufficiently plead counsel's deficiency as to his double jeopardy claims and, therefore, they are barred by ***Escalona-Naranjo***.

III. WIS. STAT. § 974.06 Motion: Ineffective Assistance of Trial Counsel ("IATC") Claim

Howard claimed that his trial counsel was ineffective for failing to: (1) object to the multiplicitous counts before trial; (2) object to the jury being erroneously instructed on the intent

element of enticement; and (3) object to the unanimity instruction and jury form for count three. To get around ***Escalona-Naranjo***, Howard asserted that a WIS. STAT. § 974.06 motion was his first opportunity to make IATC claims because Attorney Marquis, his trial counsel, was also his postconviction counsel and could not file a WIS. STAT. § 974.02 motion raising his own ineffectiveness, and because Attorney Meyeroff did not "perform in a postconviction capacity." As we have already explained, this is a mischaracterization of his attorneys' roles. Meyeroff was postconviction counsel and could have raised the IATC issue in a § 974.02 motion. Indeed, Meyeroff in fact filed a postconviction motion seeking a new trial prior to filing Howard's appeal. Thus, Howard's only legally viable IATC claim is that Meyeroff was ineffective as postconviction counsel for failing to raise his current claims of IATC. As already set forth, Howard has not sufficiently alleged Meyeroff's deficient performance as postconviction counsel, thus his IATC claims are also barred by ***Escalona-Naranjo***.

Finally, the State requested that we certify this case to our supreme court to consider whether the defense of laches applies to WIS. STAT. § 974.06. As we are affirming the circuit court's decision on other grounds, we decline to do so.

For all the foregoing reasons,

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

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

Samuel A. Christensen
Clerk of Court of Appeals