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**DISTRICT I**

October 9, 2019

*To*:

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Milwaukee County Courthouse
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Milwaukee, WI 53233

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

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2018AP1803-CR State of Wisconsin v. Jealissa L. McKinney-Williams
(L.C. # 2017CF1132)

Before Brash, P.J., Kessler and Dugan, JJ.

**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).**

Jealissa L. McKinney-Williams appeals a judgment of conviction and an order denying postconviction relief. She alleges that her trial counsel was ineffective for failing to advise her about her right to judicial substitution and for failing to assist her in exercising that right. 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 (2017-18).[1] We affirm.

The State filed a criminal complaint charging McKinney-Williams with the felony offense of physically abusing a child and the misdemeanor offense of obstructing an officer. A court commissioner presided at her initial appearance, where an attorney from the State Public Defender's Office represented her for purposes of that hearing only. After the clerk announced the identity of the assigned judge, the court commissioner granted the defense motion to reserve McKinney-Williams's right to seek judicial substitution until after McKinney-Williams had an opportunity to discuss that right with the successor attorney who would be appointed to represent her throughout the proceedings.

In due course, successor trial counsel from the private bar was appointed to represent McKinney-Williams. Successor trial counsel did not seek judicial substitution. McKinney-Williams entered pleas of not guilty to the original charges and to an additional count of physical abuse of a child that the State charged in an amended information. The three counts proceeded to trial before the circuit court originally assigned to hear the case. The jury acquitted McKinney-Williams of one count of physically abusing a child and convicted her of the other two counts. The circuit court imposed an aggregate five-year term of imprisonment bifurcated as two years of initial confinement and three years of extended supervision.[2]

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The Honorable Jeffrey A. Kremers presided over the trial and sentencing and entered the judgment of conviction in this matter.

McKinney-Williams filed a postconviction motion alleging that her successor trial counsel was ineffective for failing to advise her regarding her right to judicial substitution and for failing to file a substitution request. The circuit court denied the motion without a hearing.[3] The circuit court assumed without deciding that successor trial counsel's performance was deficient but rejected McKinney-Williams's claim that prejudice must be presumed. The circuit court determined that McKinney-Williams failed to show any actual prejudice from the alleged deficiencies and therefore rejected her claim. She appeals.

A defendant who files a timely request for judicial substitution under WIS. STAT. § 971.20 has the right to a substitution of judge and need not provide a reason for the request.[4] *See* ***State v. Harrison***, 2015 WI 5, ¶39, 360 Wis. 2d 246, 858 N.W.2d 372. McKinney-Williams's successor trial counsel never made a request for judicial substitution and, according to McKinney-Williams, never advised her about the right that § 971.20 confers. McKinney-Williams contends that her successor trial counsel therefore was ineffective.

To prevail on a claim of ineffective assistance of counsel, a defendant must make a two-prong showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

[3] Following Judge Kremers's retirement, the Honorable Mary M. Kuhnmuench presided over the postconviction proceedings and entered the order denying postconviction relief.

[4] Although WIS. STAT. § 971.20(4) normally requires the defendant to seek judicial substitution before arraignment, the State does not dispute that the assistant state public defender's action at the initial appearance in this case preserved McKinney-Williams's right to seek substitution until successor counsel was appointed. *See* ***State v. Zimbal***, 2017 WI 59, ¶¶39-40, 53, 375 Wis. 2d 643, 896 N.W.2d 327.

Amendment." *See* ***State v. Damaske***, 212 Wis. 2d 169, 198, 567 N.W.2d 905 (Ct. App. 1997) (citation omitted). To demonstrate prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. The ***Strickland*** prejudice prong focuses on whether counsel's alleged deficiencies "render[] the result of the trial unreliable or the proceeding fundamentally unfair." ***Damaske***, 212 Wis. 2d at 198 (citation omitted).

Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, we need not address the other. *See* ***Damaske***, 212 Wis. 2d at 198.

The circuit court concluded that McKinney-Williams failed to make a showing of prejudice in her postconviction motion. In this court, McKinney-Williams argues that her trial counsel's allegedly deficient performance in failing to advise her about and to seek judicial substitution establishes ineffective assistance of counsel "without showing that counsel's error prejudiced the trial and sentencing." Her position "is that she was presumptively prejudiced by her trial counsel's failure." We disagree.

McKinney-Williams's position runs afoul of the rule established in ***Damaske***. There, as here, the defendant did not seek timely judicial substitution and alleged that trial counsel therefore was ineffective. *See* ***id.***, 212 Wis. 2d at 197. The ***Damaske*** defendant failed, as did McKinney-Williams, to make a showing either that the assigned judge's handling of the case "rendered 'the proceeding fundamentally unfair,' or that [the assigned judge] was not impartial." *See* ***id.*** at 199 (citation omitted). Instead, the ***Damaske*** defendant, like McKinney-Williams,

argued for a ruling that, where trial counsel performed deficiently by failing to seek a timely substitution, counsel's performance is *per se* prejudicial. *See* ***id.*** at 199-200. We rejected the ***Damaske*** defendant's argument, explaining that courts have invoked a presumption of prejudice when confronting "difficulty in making a retrospective assessment of actual prejudice." *See* ***id.*** at 200. We then held that judicial substitution did not give rise to any such difficulty because "the focus is on 'fairness,' not results." *See* ***id.*** (citation omitted).

***Damaske*** states the law in Wisconsin. Indeed, subsequent to ***Damaske***, we rejected a defendant's suggestion that trial counsel was "*per se* ineffective when [counsel] did not advise [the defendant] of his right to a substitution of judge." *See* ***State v. Bohannon***, 2013 WI App 87, ¶25, 349 Wis. 2d 368, 835 N.W.2d 262. As we did in ***Damaske***, we explained that a defendant is required to show how counsel's performance was both deficient and prejudicial. *See* ***Bohannon***, 349 Wis. 2d 368, ¶25.

McKinney-Williams directs our attention to ***Harrison***, but that case does not support her position. The supreme court held in ***Harrison*** that "harmless error analysis does not apply ... when the circuit court erred by presiding over the defendant's trial [and] sentencing ... after the defendant filed a timely and proper WIS. STAT. § 971.20 substitution request." *See* ***Harrison***, 360 Wis. 2d 246, ¶94. McKinney-Williams suggests that, because denial of a timely substitution request cannot be deemed a harmless error, a defendant need not show actual prejudice where counsel performed deficiently by failing to make such a request.

McKinney-Williams's position is based on the faulty premise that harmless error and prejudice are equivalent. To the contrary, however, "harmless error and prejudice are different inquiries. A presumption of harm from an error to which counsel objected does not compel a

presumption of prejudice when counsel fails to object." *See* ***State v. Pinno***, 2014 WI 74, ¶91, 356 Wis. 2d 106, 850 N.W.2d 207. Accordingly, ***Harrison*** does not diminish the authority of ***Damaske*** and ***Bohannon***, which require a defendant to show prejudice to prove that trial counsel was ineffective for failing to pursue judicial substitution.

McKinley-Williams did not discuss ***Damaske*** or ***Bohannon*** at any point in these proceedings until she filed her reply brief. There, for the first time, she acknowledged the cases and argued that we should not apply them. In support of this position, she asserts that we rejected the defendant's arguments in ***Bohannon*** solely because they were conclusory. As to ***Damaske***, she asserts that the defendant "must not have raised" the arguments she makes here.

We do not normally consider arguments offered for the first time in a reply brief. *See* ***State v. Marquardt***, 2001 WI App 219, ¶39, 247 Wis. 2d 765, 635 N.W.2d 188. Moreover, were we to consider McKinney-Williams's belated contentions, they would not affect our conclusion. ***Damaske*** plainly holds that trial counsel's failure to pursue judicial substitution under WIS. STAT. § 971.20 is not presumptively prejudicial. *See* ***Damaske***, 212 Wis. 2d at 200-01. ***Bohannon*** confirms that when a defendant alleges trial counsel's ineffectiveness based on a failure to pursue judicial substitution, the defendant must prove both deficiency and resulting prejudice. *See* ***id.***, 349 Wis. 2d 368, ¶25. We are bound by ***Damaske*** and ***Bohannon*** regardless of any alleged flaws in the arguments underlying our decisions, and we are not free to disregard our own holdings. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Accordingly, we affirm.

IT IS ORDERED that the judgment and postconviction order are summarily affirmed.

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*