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**DISTRICT I**

November 4, 2025

To:

Hon. Ellen R. Brostrom  
Circuit Court Judge  
Electronic Notice

Michael J. Conway  
Electronic Notice

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

Scott Fitzgerald Ferguson Jr. 517373  
Green Bay Correctional Inst.  
P.O. Box 19033  
Green Bay, WI 54307-9033

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

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2023AP2291

State of Wisconsin v. Scott Fitzgerald Ferguson, Jr.  
(L.C. # 2015CF4240)

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).**

Scott Fitzgerald Ferguson Jr., pro se, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2023-24)<sup>1</sup> postconviction motion without a hearing. 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. The order is summarily affirmed.

In February 2017, a jury convicted Ferguson on one count of first-degree intentional homicide by use of a dangerous weapon and four counts of unlawfully possessing a firearm by a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2023-24 version.

person previously adjudicated delinquent. On appeal, Ferguson argued that there was insufficient evidence to convict him on three of the firearm charges and that his right to confrontation was violated by the admission of a photograph at trial. We rejected those arguments and affirmed. *See State v. Ferguson*, No. 2018AP1651-CR, unpublished slip op. (WI App Aug. 20, 2019).

In October 2020, Ferguson filed a pro se WIS. STAT. § 974.06 postconviction motion. He argued that postconviction counsel had been ineffective for failing to challenge trial counsel's performance and that trial counsel was ineffective for failing to move to sever the homicide charge from the four firearm charges. The circuit court denied the motion, finding that Ferguson's allegations were conclusory and that there was not a reasonable probability that the trial court would have required severance, so Ferguson had failed to show that trial counsel actually was ineffective. Ferguson appealed. We affirmed. *See State v. Ferguson*, No. 2020AP2161, unpublished op. and order (WI App Jan. 19, 2022).

In September 2022, Ferguson filed another pro se WIS. STAT. § 974.06 postconviction motion. He alleged "ineffective assistance of counsels, trial and appellate counsel, prosecutorial misconduct, and DNA evidence does not link defendant to the homicide, nor four counts of possession of a firearm by adjudicated delinquent." The circuit court denied the motion as procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Ferguson appeals.

On appeal, Ferguson contends that trial counsel was ineffective for failing to file any motion to dismiss; failing to file a motion to suppress the "illegal evidences," specifically, three firearms that Ferguson says were unrelated to the homicide; and "failing to investigate the whole

discovery.” Ferguson also contends that “appellate/postconviction counsel were also ineffective” for failing to raise stronger issues; “failing to do a full investigation into the appeal discovery”; and “failing to file an appeal motions [sic] on the prosecutorial misconduct,” which Ferguson says consisted of “false testimony” and “false evidences [sic].” He further asserts that these issues are not procedurally barred because “these issues are in direct violation” of his federal and state constitutional rights.

Absent a sufficient reason, a defendant may not bring claims in a WIS. STAT. § 974.06 motion if the claims could have been raised in a prior motion or direct appeal. *Escalona*, 185 Wis. 2d at 185; *State v. Romero-Georgana*, 2014 WI 83, ¶34, 360 Wis. 2d 522, 849 N.W.2d 668. Constitutional issues are not exempt from application of this bar. *Escalona*, 185 Wis. 2d at 181-82. Certain claims, like claims of ineffective assistance of trial counsel, must be preserved for appeal by a postconviction motion. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). Thus, ineffective assistance of postconviction counsel for failing to preserve a claim may sometimes constitute a sufficient reason for not raising that claim in an earlier proceeding. *Id.* at 682. In his briefs, Ferguson does appear to be arguing that postconviction counsel<sup>2</sup> failed to preserve certain ineffective assistance claims against trial counsel.

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<sup>2</sup> Throughout his documents, Ferguson repeatedly criticizes the performance of trial and appellate counsel; the State generously construes his arguments to be against postconviction counsel instead, because an appellate attorney is not ineffective for failing to raise issues not appropriately preserved by postconviction counsel. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (Ct. App. 1996). While postconviction counsel and appellate counsel are frequently the same person, see *State ex rel. Warren v. Meisner*, 2020 WI 55, ¶35, 392 Wis. 2d 1, 944 N.W.2d 588, the performance of appellate counsel must be directly challenged in the court of appeals, not the circuit court. See *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992).

However, even if we assume that ineffective assistance of postconviction counsel explains why the issues in the current motion were not raised in the original postconviction proceedings and the first appeal, that ineffectiveness does not explain why the issues were not raised in Ferguson’s first pro se WIS. STAT. § 974.06 motion in 2020. We therefore conclude the current § 974.06 motion is barred by *Escalona*.<sup>3</sup> The circuit court did not err in denying the motion without a hearing.

Upon the foregoing, therefore,

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.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*

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<sup>3</sup> To the extent that any of Ferguson’s claims in his 2022 motion overlap with issues from the original appeal, such as a claim of insufficient evidence to support the verdict, those issues are also barred by *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991). “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *Id.* at 990.