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**DISTRICT I**

December 6, 2022

To:

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Rafeal Dashawn Newson 287339  
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Waupun, WI 53963-0351

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

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2020AP1041

State of Wisconsin v. Rafeal Dashawn Newson  
(L.C. # 2000CF4309)

Before Donald, P.J., Dugan and White, 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).**

Rafeal Dashawn Newson, *pro se*, appeals from orders of the circuit court that denied his motions for a new trial, sentence modification, and reconsideration. 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 (2019-20).<sup>1</sup> The orders are summarily affirmed.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In 1996, Newson was charged with one count of first-degree intentional homicide, as a party to a crime, for the shooting death of Terrance Maclin. A warrant was issued. In 2000, Newson was extradited from Arizona, where he was serving a sentence, to Wisconsin in order to answer the homicide charge. In March 2001, a jury convicted Newson as charged. The circuit court sentenced Newson to life imprisonment with parole eligibility beginning January 1, 2050.

Since his conviction, Newson has made at least six different attempts at postconviction relief, none of which have been successful.<sup>2</sup> He: (1) had a direct appeal in 2002; (2) filed a *pro se* motion under WIS. STAT. § 974.06 in 2004; (3) filed a second *pro se* § 974.06 motion in 2010; (4) petitioned this court for a writ of habeas corpus in 2011; (5) filed a third *pro se* § 974.06 motion in 2017; and (6) petitioned the circuit court for a writ of habeas corpus in 2019.

In March 2020, Newson filed the underlying *pro se* motion for a new trial. He alleged that: (1) the jury had not been appropriately instructed, because it had not been instructed on self-defense, adequate provocation, unnecessary defensive force, or defense of others; (2) the circuit court should have permitted Newson to introduce evidence of the victim's violent character and prior violent acts under *McMorris v. State*, 58 Wis. 2d 144, 150, 205 N.W.2d 559 (1973); and (3) there was insufficient evidence to support the conviction. In April 2020, Newson filed a supplemental motion for a new trial, asserting the medical examiner had committed perjury regarding whether there were drugs in Maclin's system on the date he was killed. On the

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<sup>2</sup> See *State v. Newson (Newson I)*, No. 2002AP959-CR, unpublished op. and order (WI App Sept. 22, 2003); *State v. Newson (Newson II)*, No. 2004AP2988, unpublished slip op. (WI App Sept. 20, 2005); *State v. Newson (Newson III)*, No. 2010AP2714, unpublished op. and order (WI App May 31, 2011); *State ex rel. Newson v. Circuit Court (Newson IV)*, No. 2011AP1569-W, unpublished op. and order (WI App July 27, 2012); *State v. Newson (Newson V)*, No. 2017AP551, unpublished slip op. (WI App Sept. 18, 2018); and *State ex rel. Newson v. Foster (Newson VI)*, No. 2019AP1464, unpublished op. and order (WI App May 4, 2021).

same day that he filed the supplement, Newson also filed a motion for sentence modification, seeking: (1) sentence credit under WIS. STAT. § 973.155 from the time of his arrest on the warrant in 1999 through the date of the motion and (2) a new sentencing hearing because Newson believed the circuit court had considered inappropriate factors at sentencing.

On April 20, 2020, the circuit court denied Newson's motion for a new trial. It stated that the motion was Newson's "*fourth* sec. 974.06 motion in this case" and that it was, therefore, procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). On May 4, 2020, the circuit court denied Newson's supplemental motion for a new trial and his requests for sentence credit and sentence modification. It explained that the claims in the supplemental motion were also barred by *Escalona*. It further explained that because Newson's sentence in this case was consecutive to his Arizona sentence, he was not entitled to dual credit under *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Any other modification arguments were barred by *Escalona*.

On May 1, 2020, Newson moved for reconsideration of the circuit court's April 20, 2020 order, claiming that the circuit court had erred in treating his motion for a new trial as a WIS. STAT. § 974.06 motion. Newson argued that § 974.06 permits only constitutional and jurisdictional issues to be raised, and his three claims of error were neither. The circuit court denied reconsideration in an order dated May 15, 2020, explaining that § 974.06 was the only available mechanism under which Newson could pursue relief so it concluded it had not erred in construing his motion. Newson appeals.

*Motions for a New Trial*

Newson’s first argument on appeal is that the circuit court erred when it construed his motion for a new trial and the supplement as a WIS. STAT. § 974.06 motion, particularly because that statute permits only constitutional or jurisdictional issues to be raised, and Newson’s claims of error—improper jury instructions, failure to use certain evidence, and sufficiency of the evidence—fit in neither category.

In order to seek postconviction relief, a defendant must have a procedural mechanism by which to do so. The primary mechanism by which to seek postconviction relief from the judgment of conviction in a criminal case is found in WIS. STAT. § 974.02(1) and WIS. STAT. RULE 809.30, which provide the basic framework for a direct appeal as a matter of right. After the time for a direct appeal under § 974.02 and RULE 809.30 has expired, a defendant claiming constitutional or jurisdictional infirmities “may move the court which imposed the sentence to vacate, set aside or correct the sentence.” *See* WIS. STAT. § 974.06(1).

There are a limited number of other mechanisms for seeking postconviction relief. For instance, a defendant who seeks to challenge only his sentence following conviction can move for sentence modification within ninety days of sentencing.<sup>3</sup> *See* WIS. STAT. § 973.19(1)(a). A defendant who seeks sentence modification based on a new factor may move the court for relief at any time, *see State v. Noll*, 2002 WI App 273, ¶¶11-12, 258 Wis. 2d 573, 653 N.W.2d

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<sup>3</sup> In doing so, however, the defendant waives the right to take an appeal under the WIS. STAT. RULE 809.30 process. *See* WIS. STAT. § 973.19(5).

895, as may a defendant seeking a new trial based on newly discovered evidence, *see State v. Vollbrecht*, 2012 WI App 90, ¶17 n.14, 344 Wis. 2d 69, 820 N.W.2d 443.

Here, Newson’s motions did not identify the procedural mechanism by which he should be allowed to seek a new trial. Accordingly, the circuit court had to construe Newson’s motion as something procedurally appropriate.<sup>4</sup> We note that, at the very least, a challenge to the sufficiency of the evidence can be raised in a WIS. STAT. § 974.06 motion. *See State v. Miller*, 2009 WI App 111, ¶25 320 Wis. 2d 724, 772 N.W.2d 188.

On appeal, Newson appears to argue that review of his motions is available under WIS. STAT. RULE 809.30(2)(h), which provides that a postconviction motion does not need to be filed before a notice of appeal when the ground for seeking relief is sufficiency of the evidence. However, RULE 809.30(2)(h) is an exception to the general rule that “postconviction motions [are] necessary to preserve challenges for appeal as a matter of right.” *See State v. Hayes*, 2004 WI 80, ¶29, 273 Wis. 2d 1, 681 N.W.2d 203. It is not a separate procedural mechanism available for collateral challenges outside a RULE 809.30 appeal.

Newson also argues that the circuit court, upon recognizing he had no constitutional or jurisdictional claims, should have construed his motion as a petition for a writ of habeas corpus. However, Newson did not ask the circuit court, even on reconsideration, to treat his motion as a

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<sup>4</sup> To the extent Newson is also arguing that he is entitled to review because the no-merit process was not followed in his case, *see, e.g., State v. Tillman*, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574, we note that the no-merit process was not applicable here. Appellate counsel did not conclude there were no issues of arguable merit to be pursued; instead, counsel identified and litigated an arguably meritorious issue regarding the admission of certain hearsay statements. *See Newson I*, No. 2002AP959-CR.

habeas petition. Moreover, the motion itself is not in the proper form for a habeas petition, lacking both verification and the required content. *See* WIS. STAT. § 782.04.

We are, therefore, unpersuaded that the circuit court erred when it treated Newson’s motion and supplemental motion for a new trial as a WIS. STAT. § 974.06 postconviction motion.

### *Denial Without a Hearing*

Newson next asserts that the circuit court erred when it denied his motions without a hearing. He asserts that “with ‘voluminous exhibits in support of the motions,’ showing affidavit, transcripts, court records, etc., with cohesive allegations in the pleading, strongly raising factual disputes ... a decision could not be rendered without a fact-finding hearing[.]”

A hearing on a postconviction motion is required only when the movant alleges sufficient material facts that, if true, would entitle the defendant to relief. *See State v. Sulla*, 2016 WI 46, ¶26, 369 Wis. 2d 225, 880 N.W.2d 659. The circuit court has the discretion to deny “even a properly pled motion ... without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief.” *See id.*, ¶30. “[A]ny claim that could have been raised on direct appeal or in a previous WIS. STAT. § 974.06 ... postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason.”<sup>5</sup> *State v. Lo*, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756 (footnote omitted); *see also Escalona*, 185 Wis. 2d at 184-85.

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<sup>5</sup> A similar procedural bar applies to petitions for a writ of habeas corpus.

(continued)

Here, the circuit court denied Newson’s motion without a hearing because he failed to allege sufficient material facts that establish a sufficient reason for not raising his claims in one of his prior WIS. STAT. § 974.06 motions or writ petitions. Moreover, while Newson contends that defects in his extradition from Arizona deprived the circuit court of subject matter jurisdiction over his original charge and conviction, the jurisdictional issue has been raised and rejected in Newson’s 2010 postconviction motion, his 2011 writ petition to this court, his 2017 postconviction motion, and his 2019 writ petition to the circuit court. Thus, the record establishes Newson is not entitled to relief on that issue. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 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.”).

We discern no erroneous exercise of discretion in the circuit court’s decision to deny Newson’s motions without a hearing.

### *Discretionary Review*

Newson’s third argument on appeal is that this court should exercise its power of discretionary reversal under WIS. STAT. § 752.35 to reverse his conviction because “the real controversy of self-defense was not fully tried [and] because of the exclusions of lawful jury

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[I]n a postconviction setting, a petition for writ of *habeas corpus* will not be granted where (1) the petitioner asserts a claim that he or she could have raised during a prior appeal, but failed to do so, and offers no valid reason to excuse such failure, or (2) the petitioner asserts a claim that was previously litigated in a prior appeal or motion after verdict.

*State v. Pozo*, 2002 WI App 279, ¶9, 258 Wis. 2d 796, 654 N.W.2d 12 (citations omitted).

instructions and absence or admission of evidence pertaining to innocence, justice has miscarried and discretionary reversal is necessary to serve the ends of justice.”

WISCONSIN STAT. § 752.35 “does not permit us to go behind a [WIS. STAT. §] 974.06 order to reach the judgment of conviction.” *State v. Gilbert Allen*, 159 Wis. 2d 53, 56, 464 N.W.2d 426 (Ct. App. 1990). Moreover, “[w]e exercise our authority to reverse in the interest of justice ... sparingly and only in the most exceptional cases.” *State v. Schutte*, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. We are not persuaded this is such a case.

### *Sentence Modification and Credit*

Finally, Newson contends that the circuit court erroneously exercised its discretion in denying his motions for sentence modification “when it is apparent that the sentencing court considered improper factors at sentencing.” This issue is also subject to the *Escalona* procedural bar; the purported improprieties have been known since the date of sentencing and Newson offers no reason for his failure to raise this issue earlier.

In any event, the “improper factors” allegedly considered were Newson’s seven felony convictions in Arizona “that happen[ed] in 1999.” Newson does not claim that the information about the convictions themselves was inaccurate, but rather, that the circuit court could not lawfully consider them at sentencing because the convictions were entered after the homicide underlying this case. Newson, however, is incorrect.

A circuit court is entitled to “consider any and all relevant information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.” *See Sulla*, 369 Wis. 2d 225, ¶32. This means that the sentencing court can consider uncharged



offenses, unproven offenses, and offenses for which the defendant has been acquitted. *See id.* A sentencing court can also consider information on pending charges “because that information relates to the defendant’s character as shown by behavior patterns.” *See State v. Jackson*, 110 Wis. 2d 548, 552-53, 329 N.W.2d 182 (1983). Similarly, Newson’s convictions in Arizona, regardless of when entered, were a proper and relevant consideration at sentencing because they reflect his character and behavior. He is not entitled to resentencing on that ground.

Newson also contends that he is entitled to sentence credit from the time of his arrest in Arizona until the present date. Newson is again incorrect. First, the circuit court correctly noted that because Newson’s sentence in this case was consecutive to his Arizona sentence, he was not entitled to dual credit under *Boettcher*, 144 Wis. 2d at 87. More critically, however, individuals like Newson, who receive a sentence of life imprisonment where the circuit court has set the parole eligibility date, are not entitled to sentence credit; the public policy behind authorizing the sentencing court to set a parole eligibility date “would be frustrated by giving a defendant credit for presentence incarceration.” *See State v. Chapman*, 175 Wis. 2d 231, 246-48, 499 N.W.2d 222 (Ct. App. 1993). Accordingly, Newson has no valid claim for sentence credit in this matter.

#### *Sanctions for Repetitive Filings*

The State asks that we impose sanctions on Newson, consistent with *State v. Casteel*, 2001 WI App 188, ¶¶23-27, 247 Wis. 2d 451, 634 N.W.2d 338, based on his “repeated challenges to his conviction” because he has “abused the judicial process by repetitively litigating the same matters.” It further asks that we “caution Newson about the possibility of sanctions for bringing frivolous appeals in the future, including the imposition of costs, fees, and reasonable attorneys fees.”

We have issued Newson such a warning once already, particularly with respect to his jurisdictional complaints, in *State ex rel. Newson v. Foster (Newson VI)*, No. 2019AP1464, unpublished op. and order at 9-10 (WI App May 4, 2021). However, because *Newson VI* had not yet been issued when Newson filed the motions underlying this case, we decline to impose sanctions at this time.

We will, however, reiterate our previous admonition. Newson is on notice that we are prepared to impose appropriate sanctions should he persist in making repetitive allegations, regardless of whether they are presented as motions, petitions, or appeals. See *Casteel*, 247 Wis. 2d 451, ¶¶23-27; see also WIS. STAT. RULES 809.25(3), 809.83(2). We will not countenance expending scarce judicial resources in considering and reconsidering one individual's claims. Therefore,

IT IS ORDERED that the circuit court's orders are 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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*Sheila T. Reiff*  
*Clerk of Court of Appeals*