STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2010AP425

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAMELL E. STARKS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, THE HONORABLE WILLIAM W. BRASH, PRESIDING, AND AN ORDER DENYING POSTCONVICTION MOTION FOR RELIEF, THE HONORABLE KEVIN E. MARTENS, PRESIDING, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

Page

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2010AP425

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAMELL E. STARKS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, THE HONORABLE WILLIAM W. BRASH, PRESIDING, AND AN ORDER DENYING POSTCONVICTION MOTION FOR RELIEF, THE HONORABLE KEVIN E. MARTENS, PRESIDING, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent State of Wisconsin ("the State") agrees with defendant-appellant Tramell E. Starks ("Starks") that neither oral argument nor publication is warranted. The briefs filed by the parties will adequately develop the facts and legal arguments necessary for

decision, and this case may be resolved by applying well-established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF FACTS

The State submits the following supplemental facts which Starks has either omitted entirely from his brief or which warrant emphasis because they are material to the disposition of this appeal. In the interest of brevity and clarity, however, any additional relevant facts not set forth here will be set forth in the State's Argument. *See* Wis. Stat. § 809.19(3)(a)2. (respondent may choose to exercise its option not to present a full statement of facts).

Trial Proceedings

On December 11, 2006, after a six-day jury trial, Starks was found guilty of one count of first-degree reckless homicide and one count of felon in possession of a firearm (44; 45).[1] On the homicide charge, Starks was sentenced to 31 years of initial confinement, followed by 14 years of extended supervision; and on the firearms charge, Starks was sentenced to five years of initial confinement followed by five years of extended supervision, to be imposed consecutively to the homicide sentence (117 [A-Ap. 148-149]).

At trial, Starks was represented by Attorney Michael Steinle, who filed numerous pretrial motions on Starks' behalf, including several motions *in limine* related to the following:

- to exclude other acts evidence related to Antwan Nellum, Carvius Williams, Dion Anderson, and

[1]Although Starks was originally charged with first-degree intentional homicide as a party to a crime (2:1-5 [A-Ap. 143-147]), the jury found Starks guilty of the lesser-included offense of first-degree reckless homicide but without the party-to-a-crime status (117 [A-Ap. 148-149]).

Wayne Rogers (23 [R-Ap. 101-102]; 27:1-2 [A-Ap. 120-121]);

- to sever the trials of Starks and his co-defendant, Mario Mills, on the ground that Mills' statement incriminated Starks, such that the admission of Mills' statement at a joint trial of Starks and Mills would deprive Starks of his constitutional right to confrontation because Mills could not be cross-examined on the statement if he (Mills) invoked his constitutional right to silence (29:1-2 [R-Ap. 103-104]; 30 [R-Ap. 105-106]); and
- to compel the State to produce exculpatory evidence, including the name of "Junebug" (34:1-2 [R-Ap. 107-108]).

These motions were extensively litigated by Starks' attorney, as well as Mills' attorney, at pre-trial motion hearings (74; 75; 76; 77; 78) and during sidebars at trial, as will be more fully discussed further below in the State's Argument.

Starks' Direct Appeal: Case No. 2008AP790-CR

After sentencing, Attorney Robert Kagen was appointed to represent Starks in the postconviction proceedings (58 [R-Ap. 109]). In lieu of filing a postconviction motion, however, Attorney Kagen instead initiated direct appeal proceedings under Wis. Stat. § 809.30 (64 [R-Ap. 110-111]).

In an unpublished decision dated December 23, 2008, this court affirmed Starks' conviction, and rejected all of Starks' claims on appeal (108 [R-Ap. 112-126]). *See State v. Tramell E. Starks*, Appeal No. 2008AP790-CR (Ct. App., Dist. I, Dec. 23, 2008). As will be more fully discussed below in the State's Argument, this court considered and rejected Starks' claims on appeal related to:

- alleged errors in the jury instructions for the lesser-included offense (108:5-8 [R-Ap. 116-119]), *see Starks*, slip op. at ¶¶ 9-17;
- alleged violations of the witness sequestration order (108:8-11 [R-Ap. 119-122]), *see Starks*, slip op. at ¶¶ 18-22;
- alleged discovery violations related to requests for exculpatory material related to "Junebug" (108:11-13 [R-Ap. 122-124]), *see Starks*, slip op. at ¶¶ 23-29; and
- sufficiency of the evidence (108:14-15 [R-Ap. 125-126]), *see Starks*, slip op. at ¶¶ 30-31.

Starks' petition for review was later denied by the Wisconsin Supreme Court (110).

Starks' First Pro Se Postconviction Motion

After this court decided Starks' direct appeal, Starks filed a *pro se* motion to discharge his appellate counsel, Attorney Kagen, on the ground that he wished to file further submissions himself—namely, a motion for reconsideration of this court's decision in Starks' direct appeal in Case No. 2008AP790-CR (113 [R-Ap. 127-130]).

In an order dated January 5, 2009, this court warned Starks of the risks of proceeding *pro se*, and ordered Starks to file a submission specifically demonstrating that he understood the risks and consequences of proceeding *pro se*, as well as the likelihood that successor counsel would not be appointed (*id*.).

In an order dated January 16, 2009, this court noted that Starks had filed his letter submission indicating that he understood and agreed to the risks of proceeding *pro s*e, and that the public defender's office had filed a report indicating that it would not appoint new counsel if Starks' motion was granted (114 [R-Ap. 131-132]). Accordingly, this court granted Starks' motion to proceed *pro se*,

accepted his *pro se* motion for reconsideration for filing, and relieved Attorney Kagen of any further representation of Starks (*id.*).

Starks' *pro se* motion for reconsideration is not contained in the appellate record of this case; but in an order dated January 20, 2009, this court granted the part of Starks' motion which asked to correct a clerical error in the judgment of conviction to delete his party-to-a-crime status, but this court denied the remainder of Starks' motion on the ground that "nothing in the balance of the motion warrants further reconsideration" (115 [R-Ap. 133]).

Accordingly, this court ordered that "the motion to reconsider the description of Starks's status as party to the crime of first-degree reckless homicide is granted. The motion to reconsider is otherwise denied" (*id.*).[2]

Starks' Second Pro Se Postconviction Motion

On January 6, 2010, Starks filed his second *pro se* postconviction motion, this time alleging that the circuit court erroneously exercised its sentencing discretion by imposing a DNA surcharge without properly setting forth its reasons (123).

On January 6, 2010, the circuit court denied Starks' motion on the ground that it was untimely under Wis. Stat. § 809.30, because the time for direct appeal of Starks' sentence had passed (124 [R-Ap. 134]).

Starks' Third Pro Se Postconviction Motion

Starks filed his third *pro se* postconviction motion on January 19, 2010, this time pursuant to Wis. Stat.

[2]*See also* (117 [A-Ap. 148-149]) (corrected judgment of conviction, without party-to-a-crime designation).

§ 974.06 (125).[3] These are the proceedings at issue in this appeal.

On February 1, 2010, the circuit court denied Starks' postconviction motion without an evidentiary hearing on the grounds that Starks' counsel's allegedly deficient performance did not prejudice Starks in any way, and also that Starks' allegations were completely conclusory and did not entitle him to relief (126 [A-Ap. 101-106]).

Starks now appeals the circuit court's February 1, 2010 order denying his motion for postconviction relief based on alleged ineffective assistance of counsel (127).

ARGUMENT

I. THE CLAIMS IN STARKS' THIRD POSTCONVICTION MOTION ARE PROCEDURALLY BARRED BY ISSUE PRECLUSION.

Starks makes a multitude of claims in his third postconviction motion, but as the State will discuss below, all of these claims are procedurally barred, because they have been previously litigated and lost, thereby barring the claims under issue preclusion.

[3]In the motion, Starks asserted that it was the first Wis. Stat. § 974.06 "Post-Conviction Motion of any kind" (125:6). The State notes, however, that on December 17, 2009, Starks did actually file another *pro se* postconviction motion pursuant to Wis. Stat. § 974.06 (121). Presumably, that motion contained many of the same claims that Starks raises now; but on January 4, 2010, the circuit court dismissed Starks' postconviction motion on the ground that it did not comply with the local rules of the court (122). Accordingly, the State does not include the previous Wis. Stat. § 974.06 motion in its argument that Starks is procedurally barred at this time.

A. Relevant legal principles and standard of review.

1. Issue preclusion.

Issue preclusion, formerly known as collateral estoppel, limits the relitigation of issues that have been actually decided in a previous case. *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 683 N.W.2d 485. *See also State v. Sorenson*, 2001 WI App 251, ¶ 11, 248 Wis. 2d 237, 635 N.W.2d 787, *aff'd*, 2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354 (citing *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995)) (issue preclusion prohibits relitigation of issues conclusively decided in a prior action). An issue on which relitigation may be foreclosed may be one of evidentiary fact, of ultimate fact, or of law; and the burden is on the party asserting issue preclusion to establish that it should be applied. *Miller*, 274 Wis. 2d 471, ¶ 19.

The goals of issue preclusion include judicial efficiency and protection against repetitious litigation; but these goals are balanced against the right to fully litigate claims. *Sorenson*, 248 Wis. 2d 237, ¶ 12. Formalistic requirements for the application of issue preclusion, therefore, have given way to "a looser, equities-based interpretation of the doctrine." *Id.* Thus, where there has been a previous judgment on an issue, the court in the subsequent prosecution must examine the record of the prior proceeding—the pleadings, the evidence, the charge, and other relevant matters—and then determine what the previous decision was grounded upon. *State v. Nommensen*, 2007 WI App 224, ¶ 20, 305 Wis. 2d 695, 741 N.W.2d 481.

In sum, the question of fact or law that is sought to be precluded must have actually been litigated previously, and must have been necessary to the judgment in the previous action. *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687-89, 495 N.W.2d 327 (1993). *See also State v.*

Witkowski, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (citation omitted) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue").

2. Standard of review.

The threshold issue of whether there is identity of issues in a case requires a comparison of the issues decided and the issues sought to be foreclosed, taking into account the roles of the facts and issues in the respective actions. *Miller*, 274 Wis. 2d 471, ¶ 20. Therefore, the question of identity of issues is a question of law, reviewed *de novo* on appeal, because it involves the application of a legal standard to undisputed facts. *Id.*

B. All of Starks' ineffective assistance of counsel claims are barred by issue preclusion, because this court has already decided the substance of Starks' claims against Starks in his direct appeal.

Starks cannot now bring any of his current claims, because all of the claims have already been decided against Starks in his direct appeal.[4] Although Starks attempts to frame his current claims in a different light, under the guise of ineffective assistance of counsel, the record is clear that Starks has already litigated and lost the substance of his current claims during his direct appeal, thereby precluding Starks from bringing these claims now.

[4]To the extent that Starks raises new issues that were not previously litigated, however, the State submits that Starks' current claims are also procedurally barred under the procedural rule of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), prohibiting unjustified serial litigation, as will be discussed below in Section II.

See Witkowski, 163 Wis. 2d at 990 (a matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue); *Miller*, 274 Wis. 2d 471, ¶ 19 (issue preclusion, formerly known as collateral estoppel, limits the relitigation of issues that have been actually decided in a previous case).

1. Counsel's failure to object to Williams' testimony about shooting below the waist.

Starks' first claim on appeal is that his trial counsel's failure to object to Carvius Williams' testimony—that Starks wanted to shoot Weddle below the waist—constituted ineffective assistance of counsel (Starks' brief at 7-10), because the statement contravened the motion *in limine* at trial excluding such testimony (*id.* at 24-28). Starks similarly argues that his counsel was ineffective for failing to request a mistrial, cross-examine the witness, and request cautionary instructions with respect to Williams' statement (*id.* at 28-31).[5]

Starks' claim must fail, because Starks has already litigated and lost this issue, both in the trial court (77:36-37; 91:40-51), in the context of motions *in limine*, and in the court of appeals (108:5-8 [R-Ap. 116-119]), *see Starks*, slip op. at ¶¶ 9-17, in the context of the issue of lesser-included jury instructions. Accordingly, Starks cannot now re-raise this claim, because it is precluded under issue preclusion. *Miller*, 274 Wis. 2d 471, ¶ 19.

Starks is correct that his attorney attempted to have Williams' statement excluded during pre-trial motions *in limine* (23 [R-Ap. 101-102]; 27:1-2 [A-Ap. 120-121]); 74:3-10). Starks is incorrect, however, that the statement

[5]Williams' statement can be found in his testimony at (89:76).

was actually excluded: the circuit court actually ruled that the statement was admissible (77:36-37).

Given the court's ruling admitting the statement, Attorney Steinle then decided to take a different tactic, strategically trying to use the statement to Starks' advantage: at the jury instructions conference, Attorney Steinle opposed the State's request for a jury instruction on the lesser-included-offense of first-degree reckless homicide, arguing that Williams' statement at trial undermined the State's theory of intentional homicide, thereby giving the jury a basis for acquittal (91:40-51). In the alternative, however, Attorney Steinle argued that if the court was going to give any lesser-included jury instructions, it should also give an instruction on second-degree reckless homicide (*id.*). The circuit court rejected Starks' argument, and only gave the State's requested lesser-included instruction of first-degree reckless homicide (92:2-4).

On direct appeal, this court affirmed the jury instructions, and held that the circuit court did not err by failing to give the second-degree reckless homicide instruction based on Williams' statement at trial (108:5-8 [R-Ap. 116-119]). *See Starks*, slip op. at ¶¶ 9-17. In particular, this court held that Williams' statement did not show that Starks believed he had some regard for Weddle's life, but rather, simply showed that Starks only had regard for his own life (108:6-8 [R-Ap. 117-119]). *See Starks*, slip op. at ¶¶ 13-17.

Thus, Starks cannot now argue that his counsel was ineffective for failing to raise this issue. His counsel did actually raise the issue—first, in the context of motions *in limine*; and then, when those motions failed, he later raised the issue in the context of the lesser-included jury instructions, which he also lost. Nevertheless, Attorney Steinle's attempt to use Williams' statement as a ground for Starks' possible acquittal was a deliberate and reasonable trial strategy which could have benefitted Starks, had it been successful. The fact that Attorney

Steinle's trial strategy was unsuccessful, however, does not mean that he was ineffective. *See, e.g., State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd by* 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436 (trial counsel not ineffective simply because reasonable trial strategy was unsuccessful). *See also State v. Chu*, 2002 WI App 98, ¶ 52, 253 Wis. 2d 666, 643 N.W.2d 878 (counsel's valid strategic decisions virtually unchallengeable on appeal).

It is clear that Starks actually litigated and lost this issue, both at trial and on direct appeal. Starks cannot now say that his attorney was ineffective for failing to raise the issue; and this claim is precluded under issue preclusion. *See Miller*, 274 Wis. 2d 471, ¶ 19.

2. Counsel's alleged lack of investigation of "Junebug."

Starks' next claim on appeal is that his counsel was ineffective for failing to investigate "Junebug" and his phone records (Starks' brief at 10-13), which Starks claims was prejudicial because he could have impeached Gray's credibility with that information at trial (*id.* at 32-35). This claim, too, was already litigated and decided against Starks in his direct appeal, in the context of Starks' claims related to alleged discovery violations (108:11-13 [R-Ap. 122-124]), *see Starks*, slip op. at ¶¶ 23-29; and his claims related to sufficiency of the evidence (108:14-15 [R-Ap. 125-126]), *see Starks*, slip op. at ¶¶ 30-31.

At trial, Attorney Steinle made clear that, despite the fact that both parties mounted investigations to find out "Junebug's" true identity before trial (82:3), neither the prosecutor nor the defense knew "Junebug's" true identity until Gray testified about "Junebug" (aka Ray Gill) at trial (89:22-23). When Gray testified at trial about "Junebug's" true identity, however, Attorney Steinle made a motion for mistrial at a sidebar, arguing that the

prosecution should have disclosed his identity sooner, which the circuit court took under advisement (89:20-45). Thereafter, the circuit court denied Starks' motion for mistrial based on the "Junebug" issue, because the information was not in the exclusive control of the prosecution (90:69-74).

On direct appeal, this court affirmed the circuit court's ruling, holding that the State's failure to turn over any "Junebug" information was not a discovery violation, because that information was not in the exclusive possession of the State (108:11-13 [R-Ap. 122-124]), *see Starks*, slip op. at ¶¶ 23-29.[6] Importantly, this court also held that, based on the overwhelming evidence against Starks, any trial witness inconsistencies which might have existed did not undermine the jury verdict (108:14-15 [R-Ap. 125-126]), *see Starks*, slip op. at ¶¶ 30-31.

Thus, Starks cannot now say that his counsel was ineffective for failing to investigate "Junebug's" true identity and potential statements, which may or may not have impeached Gray's trial testimony, because Starks has already litigated and lost his sufficiency of the evidence claim. Stated differently, the fact that Starks has already lost his sufficiency of the evidence claim on direct appeal now precludes him from raising any claims related to witness impeachment, because this court has already held that any witness inconsistencies that might have existed at trial would not have changed the result of the trial, given the overwhelming evidence against Starks, including eyewitness testimony that Starks shot the victim multiple times and left him to die (108:14-15 [R-Ap. 125-126]), *see Starks*, slip op. at ¶¶ 30-31.

In an attempt to resuscitate this claim and re-litigate it, Starks attempts to frame the issue as an ineffective assistance of counsel claim; but again, the

[6]This court, however, did not reach the issue of whether the "Junebug" information was exculpatory, because it found that the information was not in the exclusive control of the State (108:11 [R-Ap. 122]), *see Starks*, slip op. at ¶ 23.

record makes clear that Starks has already litigated and lost any claims related to witness impeachment, because he has already litigated and lost his sufficiency of the evidence claim, thereby precluding any witness impeachment claims at this time. *See Miller*, 274 Wis. 2d 471, ¶ 19. *See also Witkowski*, 163 Wis. 2d at 990 (a matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue).

3. Counsel's failure to call McCullum and Daniels as trial witnesses.

Starks next argues that his counsel was ineffective for failing to call McCullum and Daniels as defense witnesses at trial (Starks' brief at 13-15), because they allegedly would have opposed Gray's claim that he (Gray) and Starks communicated on the day in question (*id.* at 36-38).

Again, however, Starks has already litigated and lost this claim, precluding him from re-raising it again now. As just discussed, this court held on direct appeal that Stark's claim that the trial witnesses were inconsistent did not undermine the jury verdict, and sufficient evidence still existed to uphold the jury verdict (108:14-15 [R-Ap. 125-126]), *see Starks*, slip op. at ¶¶ 30-31.

Accordingly, even if Attorney Steinle had called these witnesses to testify that Gray did not actually communicate with Starks on the day in question, the result of the trial would not have been different, because overwhelming eyewitness testimony still existed to convict Starks. Starks cannot now bring this ineffective assistance of counsel claim based on the lack of testimony from these witnesses, because he has already litigated and lost his sufficiency of the evidence claim. *See Miller*, 274 Wis. 2d 471, ¶ 19. *See also Witkowski*, 163 Wis. 2d at 990.

4. Counsel's alleged failure to investigate an alleged violation of the sequestration order.

Starks' next claim is that counsel's alleged failure to investigate the alleged violation of the sequestration order prejudiced him, because Anderson allegedly influenced Gray's and Rogers' testimony (Starks' brief at 15-18), and allegedly would have testified that Gray and Rogers conspired to get Starks wrongly convicted (*id.* at 38-41). Again, this claim was already litigated and lost on direct appeal, thereby precluding Starks from raising it now (108:8-11 [R-Ap. 119-122]), *see Starks*, slip op. at ¶¶ 18-23.

At trial, Attorney Steinle made a motion for mistrial when it became apparent that Gray and Rogers had been transported together, but the circuit court found that the witnesses did not specifically discuss the case (90:5-8). Attorney Steinle renewed the motion for mistrial later in the trial (90:49-54), but the circuit court denied the motion, finding that there was no prejudice to Starks, even if the sequestration order had been violated (90:54-64).

On direct appeal, Starks litigated this claim anew, but this court found that, despite the inadvertent transport of Gray and Rogers together, the two witnesses did not talk about the substance of their testimony while in the transport van (108:8-11 [R-Ap. 119-122]), *see Starks*, slip op. at ¶¶ 18-22. Accordingly, this court found that Starks was not prejudiced in any way, and the denial of Starks' mistrial motion was proper. *Id.*

Starks cannot now claim that his counsel was ineffective for allegedly failing to investigate any role that Anderson may have had in Gray's and Rogers' alleged conspiracy to get him convicted, because Starks has already litigated and lost his claim that Gray and Rogers conspired to get him wrongly convicted. In other words, this court has already held that the substance of the case

was not discussed in the transport van—so Starks cannot now claim that Anderson somehow influenced Gray and Rogers. Accordingly, Starks' current claim is precluded by issue preclusion, because this court has already held that the outcome of the case was not influenced by Gray and Rogers being mistakenly transported together. *See Miller*, 274 Wis. 2d 471, ¶ 19. *See also Witkowski*, 163 Wis. 2d at 990.

5. Counsel's failure to call Mario Mills as a witness.

Finally, Starks claims that his counsel was ineffective for failing to call Mills, his co-defendant, as a witness at trial to corroborate Rogers' allegedly exculpatory testimony at trial (Starks' brief at 18-19). Starks argues that Mills would have testified that Rogers, not Starks, was the real shooter, and would have corroborated Rogers' testimony that Rogers was the one who always carried a gun (*id.* at 41-43). Like all of his claims, however, Starks has already litigated and lost this claim as well: this court found that sufficient evidence existed to convict Starks, notwithstanding any witness inconsistencies (108:14-15 [R-Ap. 125-126], *see Starks*, slip op. at ¶¶ 30-31.

As a preliminary matter, it should be noted that Starks' counsel cannot reasonably be faulted for failing to investigate or prepare Mills as a witness, because Attorney Steinle had very little, if any, time to do so. Mills, Starks' co-defendant, was originally set to have a joint trial with Starks, thereby precluding the admission of various witnesses' statements in the State's case-in-chief against Starks (74:21-23, 48-50). When Mills unexpectedly took a plea on the morning of Starks' trial, however, Attorney Steinle argued that Gray and Anderson (who each were going to present testimony regarding Mills) should be excluded as witnesses, because Attorney Steinle had not had time to adequately prepare for those witnesses'

testimony in the State's case-in-chief (77:14-26). The circuit court denied Starks' motion to exclude the witnesses, but gave Attorney Steinle more time to investigate (77:53-56). Nevertheless, both parties agreed that the trial should continue as planned (77:56-59).

Starks faults his counsel for failing to call Mills as a witness to testify that Rogers was the shooter and always carried the gun, but this court has already held that overwhelming evidence existed to put the gun in Starks' hand to shoot the victim, even if someone else—either Rogers or Mills—originally held the gun for Starks.

As this court noted in affirming Starks' conviction on direct appeal, Starks retrieved the gun from Mills, and then shot seven times at the victim, with three shots striking him (108:2 [R-Ap. 113]), *see Starks*, slip op. at ¶ 2; and continued to shoot even after the victim had fallen to the ground, leaving him to bleed to death on the floor (108:7-8 [R-Ap. 118, 119]), *see Starks*, slip op. at ¶¶ 14, 16. As this court held, the evidence was clear that Starks was the one who retrieved the gun and shot the victim multiple times, leaving him to die (108:15 [R-Ap. 126]), *see Starks*, slip op. at ¶ 31. It does not matter who originally held the gun for Starks, and Starks cannot now raise this sufficiency of the evidence issue anew under the guise of ineffective assistance of counsel. *See Miller*, 274 Wis. 2d 471, ¶ 19. *See also Witkowski*, 163 Wis. 2d at 990 (a matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue).

II. THE CLAIMS IN STARKS' THIRD POSTCONVICTION MOTION ARE PROCEDURALLY BARRED UNDER *ESCALONA-NARANJO*.

To the extent that Starks has now raised any new issues or sub-issues that were not previously litigated in his direct appeal, however, those new claims are still

procedurally barred under the rule of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), prohibiting unjustified serial postconviction litigation.

As will be discussed below, Starks has failed to give a "sufficient" reason for his failure to raise these claims earlier in his direct appeal or in his various previous postconviction motions. Accordingly, the State submits that this court should not address the merits of any of Starks' new claims which were not previously litigated, but should instead affirm the order on the ground that Starks' third postconviction motion was not properly brought in the first instance.[7]

A. Relevant legal principles and standard of review.

Escalona-Naranjo stands for the proposition that "due process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error." *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Convicted defendants are not entitled to pursue an endless succession of postconviction remedies:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185.

---

[7]If this court disagrees, however, and wishes to address the merits of Starks' new claims, the State respectfully requests leave to file a supplemental brief addressing the merits of any claims that Starks did not previously litigate but now raises. *See State v. Tillman*, 2005 WI App 71, ¶ 13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574 (approving procedure of first addressing *Escalona-Naranjo* procedural bar, and then allowing State to file supplemental brief if this court decides to reach merits of claims).

Thus, pursuant to *Escalona-Naranjo*, where a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it. *Escalona-Naranjo*, 185 Wis. 2d at 185. *See also State v. Casteel,* 2001 WI App 188, ¶¶ 17-18, 247 Wis. 2d 451, 634 N.W.2d 338 (failure to raise claims on previous appeals renders claims untimely and thereby barred by *Escalona-Naranjo* and Wis. Stat. § 974.06(4)).

Whether a defendant is procedurally barred depends on the proper interpretation of Wis. Stat. § 974.06, which is a question of law that the appellate court reviews *de novo*. *State v. Allen*, 2010 WI 89, ¶ 15, __ Wis. 2d __, 786 N.W.2d 124.

B. To the extent that Starks has not previously litigated his current claims, Starks has not given a sufficient reason for his failure to raise those issues previously.

Starks argues that his current claims are not procedurally barred under *Escalona-Naranjo*, because his postconviction counsel was ineffective for failing to raise the issues of ineffective assistance of trial counsel on direct appeal (Starks' brief at 20-22). He further argues that the cumulative effect of trial counsel's errors was prejudicial (*id.* at 43-46).

Starks' claims must fail. As noted above, Attorney Robert Kagen was appointed to represent Starks in the postconviction proceedings (58 [R-Ap. 109]). In lieu of filing a postconviction motion, however, Attorney Kagen instead initiated direct appeal proceedings under Wis. Stat. § 809.30 (64 [R-Ap. 110]).

Accordingly, Attorney Kagen was Starks' appellate counsel, and thus, to the extent that Starks is arguing that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel, Starks has brought these claims in the wrong forum. *See State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (holding that a habeas petition in the court of appeals is the exclusive remedy for challenging the effectiveness of appellate counsel).

Perhaps more importantly, Starks neglects the fact that he himself discharged his appellate attorney, and decided to proceed *pro se* with his first postconviction motion (113 [R-Ap. 127-130]; 114 [R-Ap. 131-132]). The onus was, therefore, on Starks to raise any claims of ineffective assistance of trial counsel in Starks' first postconviction motion that he brought after his direct appeal. *See, e.g., Allen*, 2010 WI 89, ¶ 40 ("purpose behind Wis. Stat. § 974.06 is to avoid *successive* motions for relief by requiring a defendant to raise all grounds for relief in one motion) (emphasis in original).

Starks did not, however, bring these claims in his first *pro se* postconviction motion, and he offers no reason—let alone a "sufficient" reason—for his failure to do so. Moreover, this court has already held that "nothing in the balance of [Starks' first postconviction] motion warrants further reconsideration" (115 [R-Ap. 133]).

Further, Starks gives no reason—let alone a "sufficient" reason—for his failure to raise his current claims of ineffective assistance of trial counsel when he filed his second *pro se* postconviction motion (123; 124 [R-Ap. 134]).

Accordingly, it is clear that Starks cannot now raise these claims. *Escalona-Naranjo*, 185 Wis. 2d at 185 (where a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred absent a sufficient reason for failing to previously raise it).

Moreover, Starks has not given any reason why he believes that the issues he wants to raise now (in his third postconviction motion) are clearly stronger than the ones his appellate counsel actually raised on direct appeal. The law is clear that postconviction counsel does not have an obligation to pursue all arguably meritorious claims on appeal. *See*, *e.g.*, *Jones v. Barnes*, 463 U.S. 745, 749-51 (1983) (decisions regarding which issues to appeal must generally be left to counsel, and defendants have no constitutional right to compel appointed counsel to press non-frivolous points requested by the client if counsel, as a matter of professional judgment, decides not to press these points).

Thus, while it is possible for a defendant to raise an ineffective assistance claim based on postconviction counsel's failure to bring particular claims, it is difficult to demonstrate that counsel was incompetent. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome. *Id.* (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) with approval). When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the court must determine whether counsel failed to present "significant and obvious" issues on appeal. *Gray*, 800 F.2d at 646.

Therefore, for a defendant to meet his burden of showing a "sufficient reason" under *Escalona-Naranjo*, he must show that the ignored issues were clearly stronger than the issues actually raised, and that counsel failed to present significant and obvious issues. *Gray*, 800 F.2d at 646. *See also State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-83, 556 N.W.2d 136 (Ct. App. 1996) (defendant's claim of ineffective assistance of postconviction or appellate counsel can be a "sufficient reason" to overcome the procedural bar, but defendant must show that the issues not raised had merit). Starks has not met this burden, so his current claims are clearly

barred. *See Rothering*, 205 Wis. 2d at 681-83; *Escalona-Naranjo*, 185 Wis. 2d at 185.

In sum, this court should decline to engage in the kind of "circular analysis" that Starks requests, whereby—in considering whether to allow Starks to raise these issues under Wis. Stat. § 974.06 after failing to raise them on direct appeal and during his first two postconviction motions under Wis. Stat. § 974.06—this court would have to address the actual merits of Starks' newly raised issues in the context of Starks' ineffective assistance of trial counsel claims, in order to determine whether Starks should be procedurally barred from obtaining review of those very same issues. *State v. Lo*, 2003 WI 107, ¶ 50, 264 Wis. 2d 1, 665 N.W.2d 756. *See also State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶¶ 21-29, 314 Wis. 2d 112, 758 N.W.2d 806 (discussing the internal inconsistencies that have now arisen in postconviction procedure).

Accordingly, this court should affirm the circuit court's order denying Starks' third *pro se* postconviction motion without an evidentiary hearing. *See Rothering*, 205 Wis. 2d at 681-83; *Escalona-Naranjo*, 185 Wis. 2d at 185. *See also State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (if the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may summarily deny the motion).

CONCLUSION

For the reasons set forth, the State respectfully requests that this court affirm the judgment of conviction,

and the circuit court's February 1, 2010 order denying Starks' postconviction motion for relief.

Dated this 5th day of November, 2010.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,715 words.

Dated this 5th day of November, 2010.

_____

SARAH K. LAROSN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of November, 2010.

_____

SARAH K. LARSON
Assistant Attorney General