STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2010AP000425

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAMELL E. STARKS,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE KEVIN E. MARTENS, PRESIDING

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

TRICIA J. BUSHNELL
Bar No. 1080889

LINDSEY E. SMITH
Bar No. 1079795

CAITLIN PLUMMER
Bar No. 1090090

MICHAEL BOSHARDY
R. WARREN BECK
JOSHUA JARRETT
Law Students

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-1002

Attorneys for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES PRESENTED

I. Does Starks's motion to vacate a DNA surcharge count as a prior motion for purposes of the successive motion bar under Wis. Stat. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994)?

In opposing Starks's petition for review, the State conceded that a DNA surcharge motion does not count as a prior motion under § 974.06(4) and ***Escalona-Naranjo***.

The circuit court did not address this issue, but the court of appeals held that the motion to vacate a DNA surcharge counted as a prior motion.

II. What are the pleading standards for determining whether a defendant's allegations of ineffective assistance of postconviction counsel for failing to allege ineffective assistance of trial counsel that satisfy the "sufficient reason" requirement of § 974.06(4)?

In granting review, this Court requested the parties address this question, which was not previously addressed. In agreement with the lower courts, Starks maintains that a defendant need only satisfy the standard set forth in ***State v. Balliette***, 2011 WI 79, 336 Wis.2d 358, 805 N.W.2d 334. That is, a defendant is entitled to an evidentiary hearing and simultaneously establishes a sufficient reason for the purpose of overcoming the procedural bar set forth in § 974.06(4).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Consistent with this Court's practice, oral argument and publication are warranted.

STATEMENT OF CASE AND FACTS

Procedural History

This appeal arises out of a conviction for first-degree reckless homicide and felon in possession of a firearm. Tramell Starks was convicted on December 11, 2006 after a jury trial. (57.) He was sentenced to a total of 36 years in prison and 19 years extended supervision. (*Id.*) After Starks's conviction, counsel filed a notice of appeal. (64.) No postconviction motions were filed on direct review. In his direct appeal, Starks alleged four claims through appointed counsel, all of which were different than the issues in the present appeal. (108:2.) The court rejected each of these claims and this Court denied Starks's petition for review. (110.)

Nine months later, on December 17, 2009, now acting pro se, Starks attempted to file his first postconviction motion pursuant to Wis. Stat. § 974.06. (121.) The circuit court dismissed this motion on January 4, 2010 for not complying with the local rule regarding page limits. (122.)

Two days later, on January 6, 2010, Starks filed a pro se motion to vacate a DNA surcharge, which the court denied the same day as untimely. (123;124.)

Less than two weeks later, Starks re-filed his now corrected § 974.06 motion on January 19, 2010. (125;A-APP101.) This motion alleged that his postconviction counsel was ineffective for failing to raise six claims of ineffective assistance of trial counsel. (125;A-APP102.) None of these claims were previously raised on direct appeal.

The circuit court denied Starks's § 974.06 motion on the merits without a hearing. (126.) The circuit court addressed the claims as pleaded by Starks and concluded that he had "not set forth a viable claim for relief with regard to trial counsel's performance." (126:6.) Therefore, the court did

"not find that postconviction counsel was ineffective for failing to raise such claims." (*Id.*)

Starks appealed and the court of appeals affirmed the circuit court's denial, but adopted different reasoning. *See* ***State v. Starks***, No. 2010AP425, 2011 WL 2314951 (Wis. Ct. App. June 14, 2011) (unpublished opinion). The court found that the entire motion was procedurally barred by § 974.06(4) and this Court's holding in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994), because Starks had not offered a sufficient reason for why the issues were not raised in his motion to vacate the DNA surcharge. ***Id.*** The court stated that while ineffective assistance of counsel could constitute a sufficient reason for why the claims were not raised on direct appeal, it did "not explain why the issues in the current § 974.06 motion were not raised at the time of Starks's previous pro se motion." ***Id.***

Starks petitioned this Court for review, again pro se. The State argued against review, but conceded that the court of appeals' analysis was incorrect, because a motion for discretionary relief from the DNA surcharge cannot constitute a prior motion under § 974.06(4), as interpreted by ***Escalona-Naranjo***. (A-APP248.)

This Court granted the petition for review.

The Crime

Starks's conviction arose out of a shooting in Milwaukee. (2:1.) On March 31, 2005, a neighbor called 911 after hearing gunshots from Lee Weddle's home. (2:1.) Police arrived to find Weddle bleeding on the kitchen floor. (2:1.) Medical personnel was called to the scene, but Weddle died a short time later. (2:1.)

Police canvassed the neighborhood and spoke with a witness who reported hearing gunshots and observed several men fleeing Weddle's house. (85:35.) The men entered two cars and drove away. (85:35.)

Within a few weeks, police received an anonymous tip that reported Starks was the shooter and named several men who were allegedly present at the time of the shooting, including Wayne Rogers. (2:2.) About four months later, officers arrested Rogers for a drug offense and questioned him about Weddle's death. (2:3.) Though he admitted to being in the house during the shooting, he told authorities he was asleep and did not know who fired the shots. (2:3.)

Police continued to question Rogers. After providing several different versions of events, Rogers stated that it was Starks who shot Weddle. (2:3.) He told police that several others were present at the house that morning, including Devin Ward, Carvius Williams, Antwon Nellum, Stephen Seward, and Mario Mills. (2:3.)

Eight months after Weddle's death, Starks was arrested and charged with first-degree intentional homicide and felon in possession of a firearm. (2.) At trial, the State argued that Starks fought with Weddle, retrieved a gun from Mills and then shot Weddle three times. (86:28-35.) The State relied on the testimony of several of the men present during the shooting, including Rogers, Williams and Ward. (28:1-3.)

Rogers claimed that Starks and Weddle got into a fist fight and at one point Weddle ripped out a clump of Starks's hair. (2:3;86:31.) He also claimed that Mills then handed Starks a gun which Starks used to shoot Weddle several times. (2:3;86:34-35.) Despite saying that Weddle was his best friend, Rogers admitted that he fled the scene and never returned to check on Weddle. (86:37,49.)

Williams and Ward also described the fight at the home prior to the shooting. (89:67-70;84:20-21.) Williams testified that he saw the shooting and ran from the home. (89:72.) Ward testified that he heard shots, but did not see who shot Weddle because he left prior to the shooting. (84:23.)

The State also relied on the testimony of Starks's cousin, Trenton Gray. Gray testified that Starks made incriminating statements after the shooting. (88:52,56-57.) Gray claimed Starks made these statements on two separate occasions: once during a cell phone conversation and another time in-person at a relative's funeral. *Id.*

At the time of trial, the federal government was prosecuting Rogers, Williams, and Gray for their involvement in drug activity. (86:15;89:51-52;88:44.) Ward was on state probation for a previous drug conviction. (84:38-39.) Each of the men admitted he hoped to receive a more lenient sentence as result of his testimony. (86:14-15;84:38-39;88:45;89:51-52.) In fact, Ward admitted that the only reason he agreed to testify was because he was on probation and the State was "hanging prison over [his] head." (84:39.)

Starks's Postconviction Pleading

In his § 974.06 motion, Starks alleged ineffective assistance of postconviction counsel for failing to allege ineffective assistance of trial counsel. Starks maintained that trial counsel was ineffective for failing to: (1) call Mario Mills as a witness; (2) investigate or call Dion Anderson; (3) investigate Willie R. Gill ("Junebug"); and, (4) investigate or call Mary McCallum and Stanley Daniels as witnesses. (125;A-APP102.)[1]

Specifically, Starks argued that trial counsel failed to call Mario Mills to testify at trial. (125:A-APP119.) Mills was present at the time of the shooting and was originally Starks's co-defendant to the charges before pleading no contest. (2.) Starks alleged that Mills would have presented an eyewitness account of the shooting that differed from the State's witnesses. (125:A-APP119.) In support of his allegations, Starks attached an affidavit from Mario Mills stating he never saw Starks shoot anyone and that Rogers was "the only

[1] Starks initially raised additional claims in his postconviction motion. He raises only four here.

individual to have a weapon at the time of this incident." (125:A-APP190.)

Starks also alleged that trial counsel failed to interview and bring to the jury's attention testimony from Dion Anderson, a witness for the State who was not called at trial. (125:A-APP116.) Despite a sequestration order by the circuit court, two of the state's witnesses, Trenton Gray and Wayne Rogers, were transported to the courthouse together. (*Id.*) Though Starks's trial counsel moved for a mistrial due to violation of the order, he failed to seek testimony from Dion Anderson, who was in the same transport van. (*Id.*) Starks's alleged in his motion that "[h]ad counsel investigated or interviewed Anderson, he would have discovered that the witnesses influenced each other [sic] testimony. Anderson could have been called as a witness to testify as to the substance of the conversation between himself, Gray, and Rogers." (*Id.*) Attached to Starks's motion was a letter from Anderson, stating that he was in the transport van with Rogers and Gray and that he "[knows] how they put everything together to get my cousin, 'Tramell Starks' for a [] murder he didn't do." (125:A-APP181.)

Starks also alleged that counsel failed to obtain and investigate the phone records of Willie R. Gill, also known as "Junebug", which would have undermined the credibility of Trenton Gray. (125:A-APP114.) At trial, Gray testified that Starks made incriminating statements to him regarding the death of Weddle over Gill's phone. (88:52-53,77;125:A-APP114.) Starks alleged trial counsel failed to investigate or attempt to contact Gill to determine the veracity of Gray's statements. (125:A-APP114-15.) In his § 974.06 motion, Starks stated that, "[i]f counsel had investigated, counsel could have obtained Junebug's phone records for March 31, 2005 and compared his outgoing calls to Gray's incoming calls around the time alleged by Gray. This would have proven that Gray's assertions were completely false and this would have bolstered the credibility of the Defendant."

(125:A-APP115.) Starks also alleged counsel was ineffective for failing to produce Gill as a "pivotal witness," (125:A-APP114), who would have testified that he never gave Gray his phone to call Starks. Starks attached Gray's phone records showing Gill's number to his § 974.06 motion. (125:A-APP156-58.)

Finally, Starks alleged that counsel failed to investigate or call two witnesses, Mary McCullum and Stanley Daniels, to impeach Trenton Gray. (125:A-APP117.) Gray testified that he spoke with Starks at a funeral where Starks made incriminating statements about the shooting. (125:A-APP117;88:56.) Both Mary McCullum and Stanley Daniels signed affidavits stating that they were present at the funeral and that they never saw Starks speaking with Gray. (125;A-APP199-200.) Had trial counsel investigated these witnesses, their testimony could have been presented to undermine the credibility of Gray.

The circuit court denied Starks's motion without a hearing on the basis that the motion did not sufficiently allege a constitutional violation. (126.) The court of appeals affirmed on the alternative basis that the motion was procedurally barred under ***Escalona-Naranjo***.

ARGUMENT

At its core, this case asks the Court to logically interpret statutory language and uphold precedent. First, the court of appeals' decision is incorrect because it misconstrued § 974.06(4) by contradicting its plain language and conflating it with a separate chapter of the criminal code. Second, Starks provided a sufficient reason to overcome the subsection (4) procedural bar by adequately pleading that his postconviction counsel was ineffective for failing to challenge his trial counsel's ineffectiveness. This Court should overturn the court of appeals' decision and remand this case for an evidentiary hearing.

I. STARKS'S UNTIMELY *CHERRY* MOTION DOES NOT COUNT AS A PRIOR MOTION FOR PURPOSES OF § 974.06(4), AS INTERPRETED BY *ESCALONA-NARANJO.*

The court of appeals fundamentally misinterpreted § 974.06(4) when it found that a motion to vacate a $250 DNA surcharge (a "*Cherry* motion")[2] procedurally barred an entirely unrelated § 974.06 motion asserting constitutional claims. The court's ruling violates the language of the statute and prior holdings of this Court.

In ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 185, 517, N.W.2d 157 (1994), this Court interpreted the statutory language of § 974.06(4) to limit postconviction litigants to one opportunity to raise constitutional claims, unless there is sufficient reason for not raising them in a prior motion in which they "could have been raised." Subsection (4) reads in its entirety:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

The ***Escalona-Naranjo*** Court determined that the words "original, supplemental, or amended motion"

[2] Hereinafter, this type of motion will be termed a "*Cherry* motion." *See* ***State v. Cherry***, 2008 WI App 80, ¶9, 312 Wis.2d 203, 752 N.W.2d 393 (finding that with limited exceptions, § 973.046 contemplates that sentencing courts will exercise discretion when deciding whether to impose a DNA surcharge as part of a sentence).

encompass both direct appeal[3] and prior § 974.06 motions. ***Id.*** at 181. Therefore, if a constitutional claim was not raised on direct appeal or a previous § 974.06 motion, the movant must offer a "sufficient reason" for why it was not.

This case requires the Court to decide whether, even though a constitutional claim cannot be brought in a *Cherry* motion, that type of motion also triggers the sufficient reason requirement of § 974.06(4). This is a question of statutory construction, "which this court decides independently and without deference to the reasoning of the lower courts." *See* ***Escalona-Naranjo,*** at 176.

A. The court of appeals' interpretation of § 974.06 fails as a matter of statutory construction.

The question before this court is simple: Did the legislature intend to include *Cherry* motions in its definition of "original, supplemental, or amended motion?" The beginning and ending point of that inquiry is the statutory language. While many decisions of this court have interpreted that language, most notably ***Escalona-Naranjo***, the procedural bar of § 974.06(4) is not a judicially created doctrine. It is the judiciary's role to interpret it, but the terms of the statute can only be amended or expanded by the legislature. However, the court of appeals decision in ***Starks*** does more than interpret—it fundamentally and erroneously alters the meaning of the statute in an unsupported and unreasonable way.

1. The court of appeals' ruling contradicts the plain language of § 974.06(4).

In matters of statutory construction, this Court "begins with the language of the statute." ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis.2d 211, 612 N.W.2d 659. "If the

[3]"Direct appeal" is meant to encompass filings pursuant to § 809.30, § 974.02, and the no-merit procedure described in § 809.32. *See* ***State v. Allen***, 2010 WI 89, ¶92, 328 Wis.2d 1, 786 N.W.2d 124.

meaning of the statute is plain, [the court] ordinarily stop[s] the inquiry." ***Id.*** Statutes should be interpreted in order to give them their "full, proper, and intended effect" and to "avoid absurd or unreasonable results." ***State ex rel. Kalal v. Circuit Court for Dane County (In re Criminal Complaint)***, 2004 WI 58, ¶¶44, 46, 271 Wis.2d 633, 681 N.W.2d 110. Here, the court of appeals' interpretation of § 974.06(4) contradicts the plain language of statute and would lead to absurd results.

The first sentence of subsection (4) states: "All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion." Wis. Stat. § 974.06(4). Under any logical reading of that sentence, "original, supplemental or amended motion[s]" can *only* include motions in which one is permitted to raise the "grounds for relief available to a person under this section." Any other reading would require litigants to do the impossible: raise claims in motions in which they are not permitted to raise them.

Starks's *Cherry* motion simply could not constitute a prior motion under § 974.06 because he could not have properly raised his *Cherry* claim (discretionary relief from the DNA surcharge) under § 974.06. Nor could he have raised his constitutional ineffective assistance of counsel claims in his *Cherry* motion under § 973.19, the statutory sentence modification procedure that serves as the basis for such a motion.[4] It is well settled that the *only* grounds for relief available under § 974.06 are constitutional and jurisdictional

---

[4] Wis. Stat. § 973.19—"Motion to modify sentence"—states, in part:

> (1)(a) A person sentenced to imprisonment or the intensive sanctions program or ordered to pay a fine who has not requested the preparation of transcripts under s. 809.30(2) may, within 90 days after the sentence or order is entered, move the court to modify the sentence or the amount of the fine.
>
> (b) A person who has requested transcripts under s. 809.30(2) may move for modification of a sentence or fine under s. 809.30(2)(h).

challenges. Wis. Stat. § 974.06(1); ***Peterson v. State***, 54 Wis.2d 370, 381, 195 N.W.2d 837 (1972). It is also clear that a *Cherry* motion brought under § 973.19 seeks a sentence modification and challenges the sentencing court's discretion; it is not a vehicle to raise constitutional or jurisdictional challenges like those available under § 974.06. ***State v. Nickel***, 2010 WI App 161, ¶5, 330 Wis.2d 750, 794 N.W.2d 765; *see also* ***Smith v. State***, 85 Wis.2d 650, 661, 271 N.W.2d 20 (1978) ("The question of abuse of discretion in sentencing cannot be raised under sec. 974.06, Stats., when a sentence is within the statutory maximum or otherwise within the statutory power of the court. The proper remedy is a motion for modification of sentence.").

The court of appeals specifically addressed the difference between § 974.06 and § 973.19 in ***Nickel***. There, Nickel filed a *Cherry* motion six years after his conviction. ***Nickel***, at ¶1. The court noted that under § 973.19, a defendant may seek a sentence modification on those grounds within 90 days after his sentencing, or during the time for direct appeal as set forth in § 809.30. ***Id.*** at ¶5. Nickel's time for filing a direct appeal had lapsed 20 days after sentencing when he failed to file a notice of intent to pursue postconviction relief. ***Id.*** Thus, the court found that no procedural vehicle existed for Nickel to challenge the surcharge. ***Id.*** at ¶7. The court explained that, although § 974.06 contains no time limits, "it cannot be used to challenge a sentence based on an erroneous exercise of discretion." ***Id.***

Thus, the law surrounding *Cherry* claims is clear: a litigant *cannot* raise constitutional challenges in a *Cherry* motion, which must be brought under § 973.19. Accordingly, the procedural bar of § 974.06(4) cannot be applied to a *Cherry* motion: If the words "original, supplemental or amended motion" encompassed a *Cherry* motion filed under § 973.19, then subsection (4) demands that defendants raise

constitutional issues in a motion where the law forbids them from doing so.

Indeed, the court of appeals (the same panel that decided ***Starks***) implicitly recognized that *Cherry* motions do not trigger § 974.06(4). In ***State v. Matamoros,*** No. 2009AP2982, 2010 WL 5158230, ¶3 (Wis. Ct. App. Dec. 21, 2010)(unpublished), the court found that the defendant's *Cherry* motion, did not procedurally bar his subsequent § 974.06 motion. ***Id.*** at ¶7, n.3. Between the time Matamoros filed those two motions, he filed a motion to reconsider the denial of his *Cherry* motion, in which he also raised a *constitutional* challenge to the DNA surcharge. ***Id.*** at ¶3. The court found this motion *did* implicate § 974.06(4) because it raised a constitutional issue. ***Id.*** at ¶7. The court explicitly rejected the contrary reasoning of the postconviction court:

> The postconviction court seems to have relied on Matamoros's December 24, 2008 "Motion to Quash DNA Surcharges" to invoke the procedural bar of *State v. Escalona–Naranjo,* 185 Wis.2d 168, 517 N.W.2d 157 (1994). As set forth above, we conclude that it was Matamoros's February 26, 2009 "Motion for Reconsideration" setting forth constitutional arguments that brought *Escalona* into play.

Id. at ¶7, n.3.

Accordingly, ***Matamoros*** stands for the principle that a *Cherry* motion does not trigger the procedural bar of § 974.06(4).[5] Apparently, the court in ***Starks*** found that the procedural bar was implicated simply because a prior motion was filed, without any examination of the motion itself and what type of claims could be or were raised within it. The

[5] Starks recognizes that other decisions from the court of appeals make the same mistake as ***Starks*** and incorrectly find a § 973.19 motion to bar subsequent constitutional claims. *See* ***State v. Moseby***, No. 2010AP2675, 2012 WL 130328 (Wis. Ct. App. Jan. 18, 2012) (unpublished); ***State v. Lane,*** No. 2011AP577, 2011 WL 6156958, (Wis. Ct. App. Dec. 13, 2011) (unpublished); ***State v. Hamilton***, No. 2010AP2822-CR, 2011 WL 4445633 (Wis. Ct. App. Sept. 27 2011) (unpublished).

court of appeals instead offered a new approach, reasoning that "the issues could have been raised *at the same time* as the motion to vacate the DNA surcharge." ***Starks,*** at ¶6 (emphasis added). However, subsection (4) merely requires a litigant to raise his grounds for relief "in" the first motion he is permitted to raise constitutional claims. Nowhere in the statute does § 974.06(4) require a litigant to raise constitutional claims *at the same time* as *any* other unrelated motion. If that is what the legislature wanted to require, it could have done so. The court of appeals' decision rewrites § 974.06 and contradicts its own rulings in ***Nickel*** and ***Matamoros***.

The point is confirmed by an examination of this Court's prior rulings, which make clear that: (1) absent a sufficient reason a litigant is barred from raising claims in a § 974.06 motion if he *could have raised* them in a prior motion, and (2) as a logical corollary, *only* direct appeals and prior § 974.06 motions trigger the procedural bar. *See, e.g.,* ***Escalona-Naranjo,*** at 185 ("We simply apply the plain language of subsection (4) which requires a sufficient reason to raise *a constitutional issue* in a sec. 974.06 motion that *could have been raised on direct appeal or in a sec. 974.02 motion*") (emphasis added); ***State v. Lo***, 2003 WI 107, ¶32, 264 Wis.2d 1, 665 N.W.2d 756 (stating ***Escalona-Naranjo*** "interpreted an 'original, supplemental, or amended motion' to encompass both a § 974.06 motion and the direct appeal"); ***id.*** at ¶44 ("claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason"). The court of appeals decision is an overextension of ***Escalona-Naranjo*** and its progeny, which actually state that a sufficient reason is necessary when an issue is not raised on direct appeal or a prior § 974.06 motion—not *any* prior motion.

This clear and obvious error in the court of appeals' analysis is further highlighted by the State's position in its

response to Starks's petition for review that a *Cherry* motion does not implicate the procedural bar of subsection (4). Notably, the State appears to have arrived at its conclusion on similar reasoning as Starks:

> [U]nder *Nickel*, Starks' previous DNA motion cannot, and does not, preclude Starks' current Wis. Stat. § 974.06 motion, because Starks' DNA motion . . . is not cognizable as a Wis. Stat. § 974.06 motion standing alone. *See, e.g., Nickel*, 330 Wis.2d 750, ¶¶ 5-7. The rationale to the contrary in the *Starks per curium* opinion was, therefore, incorrect. *See Starks per curium*, slip op., at ¶¶ 5-7.

(A-APP239.)

Under the plain language of the statute, and the prior rulings of this court, a *Cherry* motion simply cannot trigger the "sufficient reason" requirement of subsection (4) because it is not a direct appeal or a § 974.06 motion.

2. The structure of the criminal code makes clear that a Cherry motion is not a prior motion for the purposes of § 974.06(4).

Chapters 973 (governing *Cherry* motions) and 974 (governing constitutional claims) address different errors, provide different remedies, and contain unique internal procedures and requirements. The court of appeals obscures that line in this case, and erroneously implicates one within the other. Statutory language is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes." ***State ex rel. Kalal***, at ¶46. Thus, chapter 974 must be interpreted in light of the fact that there is an entirely separate chapter governing *Cherry* claims and other sentencing errors, with no indication that the two relate to one another.

The legislature could have provided only one vehicle for securing relief after a conviction, but it did not. Moreover,

when the legislature wanted to provide broadly applicable rules to the criminal procedure code, it did so explicitly. Chapter 967—entitled "Criminal Procedure – General Provisions"—describes a number of generally applicable concepts. Notably, these "general provisions" do not include any prohibitions against filing separate motions under different chapters.

Further, § 974.06 provides an avenue of relief for constitutional violations and such claims can be brought "at any time." Wis. Stat. § 974.06(2). Indicative of the level of significance afforded to a sentencing error, as opposed to a constitutional violation, a *Cherry* motion cannot be brought at any time, but rather must be brought within 90 days of sentencing. Wis. Stat. § 973.19(1)(a). The two avenues are different in kind and gravity.

In ***State v. Henley***, 2010 WI 97, 328 Wis.2d 544, 787 N.W.2d 350, this Court noted the significance of the legislature outlining particular avenues of relief. For example, the court stated:

> Henley should not be looking to the civil statutes for guidance regarding his postconviction options. The legislature has already created § 974.02 and § 974.06, which, by their terms, provide the primary statutory means of postconviction relief for criminal defendants. . . . Chapter 974 of the Wisconsin Statutes is entitled, "Criminal Procedure – Appeals, New Trials, and Writs of Error." Thus, although civil procedural mechanisms exist, the legislature has specifically created a separate chapter governing criminal procedure.

Id. at ¶¶44-45.

The issue here is of the same character: Chapter 974 was created to govern a particular type of claim, and the court of appeals should not be looking to chapter 973 in its analysis of a motion filed under § 974.06. Chapter 973 (entitled "sentencing") governs an entirely different part of the criminal process. Motions filed under chapter 973 are not

"postconviction" motions in the sense that chapter 974 motions are, nor are they in that same sense "postconviction" motions barring successive petitions as envisioned by § 974.06(4). *See* ***Escalona-Naranjo***, at 185.

A careful analysis of § 974.02, entitled "[a]ppeals and postconviction relief in criminal cases," also makes clear that only chapter 974 motions and those governed by § 809.30 are postconviction motions in terms of ***Escalona-Naranjo***:

> A motion for postconviction relief other than under s. 974.06 or 974.07(2) by the defendant in a criminal case shall be made in the time and manner provided in s. 809.30. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04(3) and 809.30.

Wis. Stat. § 974.02(1). The ***Henley*** court quoted this same passage and stated, "[t]he language here is exclusive and unequivocal. With the exception of motions under § 974.06 . . . or under § 974.07(2) . . . a motion for postconviction relief by a criminal defendant 'shall be' governed by § (Rule) 809.30." ***Henley***, at ¶47. Consistent with this reasoning, because a motion filed under chapter 973 is not a § 974.06 motion, a § 974.07 motion, or governed by § 809.30, it must be something other than a "motion for postconviction relief."

In fact, ***Escalona-Naranjo*** and its progeny make clear that *only* direct appeals and prior § 974.06 motions trigger the procedural bar. *See supra* section I(A)(1). Undersigned counsel can find no instance where this Court has invoked the procedural bar of § 974.06 on the basis of anything other than a direct appeal or prior § 974.06 motion. It is fundamentally illogical to state that a *Cherry* motion cannot be brought under chapter 974, but then treat it as a prior motion under § 974.06. Neither the structure of the criminal procedure code nor the holdings of this Court provide any support for the

court of appeals' expansive definition of motions that trigger the procedural bar of § 974.06(4) .

B. The court of appeals' ruling complicates what is otherwise an effective mechanism for promoting finality.

The court of appeals' analysis is unsupported by either the statute or precedent of this Court, but also makes little sense as a matter of policy. This case can and should be decided on the statutory grounds above; this Court has explicitly stated, "[j]udicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language." ***Kalal***, at ¶44. Even so, Starks argues the court of appeals opinion creates an unduly complicated rule, while only marginally advancing the goal of finality.

If the ***Starks*** rule stands, it presumably could apply to all sorts of motions. The ***Starks*** decision paid no heed to the substance or basis of the underlying motion, so there is no reason it could not also apply to any other motion filed by a defendant after the conclusion of direct review. If that is the case, the effects of the decision will be sweeping. There is simply no policy justification for such a drastic change.

This Court has articulated a clear and sensible rule: if a claim could have been raised on direct appeal or in a prior § 974.06 motion, that claim cannot be raised in a subsequent § 974.06 motion, absent a sufficient reason. That rule is easy to understand and simple for courts to apply.

Additionally, in some circumstances, it benefits everyone if a chapter 973 motion is filed before a § 974.06 motion raising constitutional challenges to the judgment. For example, assume a defendant files a motion for sentence credit under § 973.155, which, if granted, would mean immediate release from custody. If the motion were granted,

the defendant might not even be able to file a § 974.06 motion because he might no longer be in custody. *See* Wis. Stat. § 974.06(1). This allows the matter to be resolved swiftly and easily, and the deciding court need only expend limited resources to decide the narrow issue of sentence credit. If the ***Starks*** rule stands, however, defendants will be forced to file a variety of unrelated motions on the same day—motions that include *every* possible claim addressing *any* possible error under *any* chapter of the criminal code. Courts, defendants, and the State alike, will be forced to wade through a procedural labyrinth to arrive at what may ultimately be the same conclusion.

Even without the additional burdens imposed by the court of appeals, Starks and others like him still have to provide a sufficient reason for not raising claims during direct appeal or a prior § 974.06 motion. That rule accomplishes the goal of finality, presents a significant barrier to substantive review of claims after conviction and direct appeal, and ensures that the postconviction process will not continue indefinitely. ***Starks*** only bars *additional* claims in the rare case where a court finds a sufficient reason exists for failure to raise something on direct appeal or a prior § 974.06 motion, but that none exists for failing to raise something in a different type of motion in which the constitutional claims could not have been raised. Presumably, that category of cases is quite small.

II. STARKS'S INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL CLAIM WAS PROPERLY PLEADED TO SATISFY *ESCALONA-NARANJO'S* SUFFICIENT REASON REQUIREMENT.

Just as Starks's *Cherry* motion does not implicate ***Escalona-Naranjo*** and procedurally bar his subsequent § 974.06 motion, ***Escalona-Naranjo*** does not bar Starks from raising new claims where he has pleaded a sufficient reason for not raising them earlier. In his § 974.06 motion, Starks

sufficiently pleaded that his postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel as outlined by this Court in ***State v. Balliette***, 2011 WI 79, 336 Wis.2d 358, 805 N.W.2d 334, and offered it as a sufficient reason why his underlying claims had not been raised earlier. In ***Balliette***, this Court held that a defendant is entitled to an evidentiary hearing on an ineffective assistance of postconviction counsel claim if his pleading "allege[s] facts which, if true, would entitle him to a new trial." ***Id.*** at ¶61. In alleging these facts, a defendant must answer the five "w's" and one "h" set forth in ***State v. Allen***: the who, what, where, when, why and how. 2004 WI 106, ¶23, 274 Wis.2d 568, 682 N.W.2d 433.

Here, the trial court erred when it concluded that Starks had "not set forth a viable claim for relief with regard to trial counsel's performance" and thus could not find postconviction counsel ineffective. (126:A-APP212.) Indeed, Starks sufficiently pleaded his underlying claims, and established a sufficient reason to overcome the ***Escalona-Naranjo*** procedural bar—namely, that postconviction counsel's ineffectiveness in failing to raise meritorious ineffective assistance of trial counsel claims prevented Starks from raising them on direct appeal.

In its opposition to Starks's petition for review, the State argues that in order for Starks to establish a "sufficient reason," (i.e. to establish ineffective assistance of postconviction counsel) he must also allege and establish why "his current claims (the claims of ineffective assistance of trial counsel that he wants raised) are clearly stronger than the claims that his postconviction counsel *actually* raised on direct appeal." (A-APP242.)[6] Such a requirement is both

[6] The State also argued that Starks must explain "why his current claims (i.e. his claims of ineffective assistance of trial counsel) are different than the claims his postconviction counsel *actually* litigated—and lost—on direct appeal." (A-APP243.) Such an allegation is equally unnecessary, as it is clear from the pleadings describing the claims and relevant material facts that these issues have not been previously addressed.

unnecessary and unachievable, and serves only to increase the burden placed upon a defendant and a reviewing court. Because Starks met the ***Balliette*** standard in his § 974.06 motion, this Court should find postconviction counsel's failure to raise these claims constitutes a "sufficient reason" and remand this case for an evidentiary hearing.

A. A claim of ineffective assistance of postconviction counsel satisfies the "sufficient reason" requirement under *Escalona-Naranjo* provided a defendant meets the pleading standard set forth in *Balliette*.

Wisconsin courts have consistently held that ineffective assistance of postconviction counsel can constitute a "sufficient reason" for failing to raise a claim in earlier postconviction proceedings and can thus overcome the procedural bar of § 974.06(4), as interpreted in ***Escalona-Naranjo***. *See, e.g.*, ***Balliette***, at ¶¶ 39-59 (examining pleading standard to obtain evidentiary hearing in ineffective assistance of postconviction counsel cases); ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 682, 556 N.W.2d 136 (Wis. App. 1996) ("It may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on

---

Requiring a defendant to assert explicitly that the new claims are *different* serves no purpose, because the defendant's say-so cannot possibly be of consequence; either they are in fact new or they are not, and that can be determined by simply reviewing the nature of the claims. To require a defendant to affirmatively state that the claims are different would be to impose a burden just because we can.

The State's argument is also alarming, as it would permit the court to bar a defendant from raising claims protecting additional rights simply because it touched on similar subject matter. For example, the State argues that Starks is precluded from raising his claims of ineffective assistance of counsel related to evidence that was not presented at trial because he first challenged the sufficiency of the evidence on appeal. Such a rule not only prohibits Starks from enforcing his Sixth Amendment rights to effective postconviction and trial counsel, but also means that a defendant would be barred from bringing *any* claim related to the evidence that was or should have been presented if he first challenged the sufficiency of the evidence on appeal.

direct appeal was not."). Thus, if postconviction counsel was ineffective on direct review, that ineffectiveness can serve as a sufficient reason to explain why claims were not litigated previously, thereby permitting a defendant to raise those claims through § 974.06. ***Rothering***, at 130. As with any allegation of ineffective assistance, the movant must show that counsel's performance was (1) deficient and (2) resulted in prejudice. ***Strickland v. Washington***, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

In ***Rothering***, the court of appeals found that § 974.06 is the appropriate vehicle for challenging the performance of postconviction counsel. ***Rothering***, at 130. This is particularly true because a § 974.06 motion represents the first time a defendant can assert his constitutional right to effective postconviction counsel on direct review; the claim is not reviewable until after postconviction counsel finishes her representation and the defendant's direct appeal is complete. Starks's motion was a ***Rothering*** motion, alleging that postconviction counsel was ineffective for failing to raise issues of trial counsel's ineffectiveness.

In determining whether an ineffective assistance of postconviction counsel claim is sufficiently pleaded, a court must first examine the underlying claim that postconviction counsel failed to bring. *See* ***Balliette***, at ¶67 (To establish sufficient reason and receive a hearing, defendant's "motion was required to make the case of [the postconviction attorney's] deficient performance."); *see also* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369 ("To establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial.")(citing ***State v. Sanchez***, 201 Wis.2d 219, 232-36, 548 N.W.2d 69 (1996)). This analysis is required to determine if the failure to raise an issue is properly pleaded; if the claim has merit, a defendant is entitled to a hearing, and has simultaneously established a "sufficient reason."

Indeed, lower courts currently address the sufficient reason requirement in precisely this manner. *See, e.g.*, ***State v. Taylor***, No. 03-3239, 2005 WL 147024 (Wis. Ct. App. Jan. 25, 2005) (unpublished) ("In order to determine whether an ineffective assistance claim constitutes 'sufficient reason', we must examine whether Taylor satisfies his burden of alleging facts which, if true, would prove that counsel was both deficient and that the deficiency prejudiced the outcome of this case."). A review of post-***Escalona-Naranjo*** cases involving ineffective assistance of postconviction counsel is instructive: Of approximately 163 ***Rothering*** cases heard by the court of appeals and Supreme Court in the past 5 years, approximately 126 applied the ***Balliette*** standard in determining whether a sufficient reason exists. *See* A-APP267-80, List of unpublished cases. Only one defendant obtained relief from the court of appeals. *See* ***State v. Newson***, No. 2006AP965, 2007 WL 755005 (Wis. Ct. App. Mar. 13, 2007) (unpublished opinion) (sufficiently pleaded claim that postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel established a "sufficient reason" and entitled defendant to evidentiary hearing on the merits).

In this regard, the lower courts have appropriately determined that where a defendant has sufficiently pleaded the underlying claims that postconviction counsel failed to bring, he has also sufficiently pleaded a meritorious claim of ineffective assistance of postconviction counsel and satisfied the "sufficient reason" requirement; in cases where a defendant did not satisfy the requirements necessary to entitle him to a hearing, the court has similarly found that the "sufficient reason" requirement had not been met. *Id.*

This Court should affirm this standard and find that a pleading entitling a defendant to an evidentiary hearing on a claim of ineffective assistance of postconviction counsel simultaneously satisfies the sufficient reason requirement.

B. The State's proposed alternative is unduly taxing on defendants and courts and was previously rejected by this Court.

The State argues that to meet the ***Balliette*** standard with respect to his ineffective assistance of postconviction counsel claim, Starks must also establish why "his current claims . . . are clearly stronger than the claims that his postconviction counsel *actually* raised on direct appeal." (A-APP242.) This Court previously heard and rejected this alternative method in ***Balliette***. There, the State argued that defendants should be required to provide "an offer of proof that the additional issues postconviction counsel did not raise on direct review were both obvious and clearly stronger than the issues counsel did raise." (A-APP248.) This Court did not adopt that standard, however, and instead reaffirmed the appropriateness of the ***Allen*** standard in cases involving claims of ineffective assistance of postconviction counsel. ***Balliette***, 2011 WI at ¶¶57-59 (requiring a defendant plead specific material facts and non-conclusory allegations in order to obtain an evidentiary hearing).

This Court should again reject the State's additional burden as it remains unnecessary and unachievable. Requiring a defendant to plead that his new claim has a greater chance of winning than any claims previously raised unnecessarily requires a defendant to prove at the pleading stage that his claim is a winning claim, rather than just a meritorious one. Moreover, the additional requirement would make a procedural threshold question—whether a defendant has pleaded a "sufficient reason" for purposes of ***Escalona-Naranjo***—more onerous than the pleading standard to obtain an evidentiary hearing on the merits. Instead of alleging facts, which if true, entitle him to relief, a defendant must also *prove* the strength of the claim in relation to other claims—a decision should ultimately be reserved for the court after an evidentiary hearing. It also requires a defendant to allege something that is clear on its face—that the defendant

believes the claim to be a winning one, better than the ones previously raised, and thus now entitle him to relief. As a result, the State's proposed standard unfairly increases the burden on defendants and the work of trial courts as a preliminary matter.

Similarly, a heightened threshold requirement is particularly unnecessary when the question of whether or not a claim constitutes a sufficient reason is inherently linked with the question of whether the claim has merit. In these cases, like here, it is clear that if the defendant's underlying claims (ineffective assistance of trial counsel) are ultimately victorious, he would have established his sufficient reason (ineffective assistance of postconviction counsel). In other words, if a court finds the claims are meritless on their face or insufficiently pleaded to establish whether or not the claim would potentially have merit, then a sufficient reason has not been established. *See* A-APP267-80.

Moreover, requiring a defendant to plead something more than his claim of ineffective assistance of postconviction counsel would place a burden on a defendant that is nearly impossible to meet. Defendants and courts cannot know the entirety of claims counsel considered during their representation, nor can they know why or how counsel evaluated those claims without an evidentiary hearing. That is precisely the point of an evidentiary hearing. In ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-909 (Wis. App. 1979), for example, the court of appeals found that an evidentiary hearing was required to prove ineffective assistance of trial counsel. The court noted:

> [W]here a counsel's conduct at trial is questioned, it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged. We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result

> of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case.

Machner, at 804.

Although ***Machner*** addressed ineffective assistance of trial counsel claims, the same concerns apply in the postconviction context. Without information from an evidentiary hearing, it is impractical and often impossible (if counsel refuses to speak with the defendant or successor counsel, for example) for a defendant to allege in a ***Rothering*** motion *why* his attorney made particular choices in weighing one claim over another. The most a defendant can do in some cases is speculate why counsel may have pursued a particular claims. But the defendant's subjective impressions of why counsel may have failed to undertake any given action are not relevant to a claim of ineffectiveness. Instead, the inquiry centers around the reasonableness of counsel's conduct in light of the facts of the case and at the time the conduct was undertaken, *see* ***State v. Pitsch***, 124 Wis.2d 628, 636, 369 N.W.2d 711 (Wis. 1985), such facts simply cannot be known without a hearing.

In the postconviction context, such an inquiry is particularly necessary as a defendant does not have a right to insist on the litigation of particular meritorious issues on appeal and counsel's reasoning will most certainly involve facts not on the record. *See* ***State v. Evans***, 2004 WI 84, ¶31, 273 Wis.2d 192, 682 N.W.2d 784, *overruled on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900 (Stating that if "the defendant merely disagrees with counsel as to which issues will be raised, he has the choice of terminating counsel's representation and proceeding pro se or proceeding with counsel and later seeking relief on the grounds of ineffective assistance of appellate counsel."). Indeed, postconviction counsel decides which issues have merit and, of those issues,

which to raise for review. It is thus unreasonable to expect that a defendant allege why postconviction counsel did not raise particular issues on direct appeal or which of the claims that could have been raised were strongest in order to satisfy the sufficient reasoning requirement. To do so would require defendants and courts alike to speculate as to what transpired.

Similarly, a defendant cannot be expected to show whether new claims will ultimately be victorious, that the claims are more meritorious than any or all other claims, or what additional claims counsel considered but did not raise without additional testimony from postconviction counsel herself. In evaluating whether a new claim is stronger than previous claims raised, a defendant cannot make such a showing without reaching the merits. To make that determination as a threshold matter would require that either 1) a defendant plead information that can only be obtained from an evidentiary hearing or 2) trial courts grant evidentiary hearings for the sufficient reason requirement alone. The first is clearly impossible and the second equally unnecessary.

C. The United States Supreme Court has held that a defendant can overcome procedural bars based upon ineffective assistance of counsel where he has pleaded facts entitling him to an evidentiary hearing.

In the federal context, the United States Supreme Court has similarly held that ineffective assistance of postconviction counsel can overcome procedural barriers to filing a federal habeas claim. In the federal system, a state prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. *See* ***Coleman v. Thompson***, 501 U.S. 722, 750, 111 S. Ct. 2546 (1991). The Supreme Court recently held in ***Martinez v. Ryan*** that inadequate assistance of counsel at initial-review collateral proceedings, such as postconviction pleadings on direct review, may establish cause for a prisoner's procedural default in raising a claim of

ineffective assistance of trial counsel. 132 S. Ct. 1309 (2012). In so holding, the Court noted:

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. *The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of* ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

Id. at 1318 (emphasis added). The Supreme Court further held that the requisite pleading standard to show cause and prejudice is a merits standard. The Court stated:

> To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Miller–El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Id. at 1318. Notably, the Court did not require a defendant to prove his claim is a winning one, nor did it require the defendant to compare it with other claims. Instead, the Court relied on precisely the same standard set forth in ***Balliette***—requiring the defendant sufficiently plead facts, which if true, entitle him to relief under ***Strickland***.

The United States Supreme Court also noted that a merits standard is appropriate for policy reasons as it "ought not [] put a significant strain on state resources. When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.,* it does not have any merit or that it is wholly without factual support, or that the

attorney in the initial-review collateral proceeding did not perform below constitutional standards." ***Martinez***, at 1319. In this way, a merits standard still provides judicial efficiency as a reviewing court may still deny improperly pleaded claims without a full-merits review.

In addition to efficiency concerns, the Supreme Court also noted that permitting ineffective assistance of direct review counsel claims to establish cause to overcome a procedural default further promotes fairness, noting:

> [A]n attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims.

Id. at 1312. This concern is particularly true in Wisconsin, where direct review includes the ability to raise postconviction claims, thus creating a constitutional right to effective assistance of counsel at the postconviction level: Because Starks is entitled to counsel in those proceedings, he is entitled to effective assistance of counsel and a corresponding remedy to enforce that right. *See* Wis. Const. Art. I, Sec. 9. ("Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character. . . ."); ***Marbury v. Madison***, 5 U.S. 137, 147 (1803)("[E]very right, when withheld, must have a remedy"). Requiring a defendant to allege facts he cannot possibly know (how claims were weighted by postconviction counsel) in order to substantiate that right in a § 974.06 proceeding would effectively mean a defendant would never be entitled to relief, no matter how egregious postconviction counsel's error.

Like the courts below, this Court should find that a defendant need only sufficiently plead his underlying claims of ineffective assistance of postconviction counsel to warrant

an evidentiary hearing and simultaneously establish a sufficient reason for the purpose of overcoming the procedural bar set forth in ***Escalona-Naranjo.*** Because Starks met this standard in his § 974.06 motion, this Court should remand for an evidentiary hearing.

D. Starks has sufficiently pleaded his claims of ineffective assistance of postconviction counsel and has shown "sufficient reason" why these claims should be heard in his current § 974.06 motion.

As discussed in detail above, the pleading standard to establish a "sufficient reason" should be no more than is required to plead the underlying claim, coupled with the allegation that the failure to raise it was deficient performance. The trial court incorrectly denied Starks an evidentiary hearing on his ineffective assistance of postconviction counsel claims because it found that he had not met the pleading standard with regards to his ineffective assistance of trial counsel claims. (126:6.) The court of appeals did not address this issue because it found the motion was procedurally barred. ***Starks***, at ¶6.

This Court decides whether a defendant's postconviction motion alleges sufficient facts to entitle him to a hearing for relief under a mixed standard of review. ***State v. Love***, 2005 WI 116, ¶26, 284 Wis.2d 111, 700 N.W.2d 62. Whether the motion on its faces alleges sufficient material facts that, if true, entitle the defendant to relief is a question of law reviewed de novo. ***Id.*** If the motion alleges such facts, the circuit court must hold an evidentiary hearing. ***Id.*** A circuit court's discretionary decisions are reviewed under the deferential erroneous exercise of discretion standard. ***Id.***

To sufficiently plead ineffective assistance of counsel a defendant must allege facts that, if true, establish (1) that counsel's performance was deficient and (2) that the deficient performance was prejudicial to the movant. ***Strickland***, at

691-92. In order to prove prejudice the defendant must show "that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." ***Id.*** at 669. As discussed at length above, the standard for proving ineffective assistance of postconviction counsel is no different and contains no additional pleading requirements.

In applying this analysis to Starks's postconviction motion, it is clear that he alleges sufficient material facts to warrant an evidentiary hearing on his claim of ineffective assistance of counsel. Starks has alleged that trial counsel was ineffective for failing to: call Mario Mills to testify; call Dion Anderson as a defense witness; investigate Willie R. Gill and his phone records; and, call Mary McCullum and Stanley Daniels as impeachment witnesses. (125:A-APP102.) Starks appropriately pleaded each of these issues with sufficient material facts to entitle him to an evidentiary hearing and establish a sufficient reason for purposes of subsection (4).

1. Mario Mills

In his postconviction motion, Starks alleged that Mills was interviewed by trial counsel but never called to testify, and that "Mills testimony would have provided the defense with an eyewitness account contrary to the testimony of the State's witnesses." (125:A-APP119.) He attached a sworn statement from Mills, which showed that Mills was present at the scene but (1) did not witness Starks shoot the victim and (2) that Rogers was the only one in the house with a gun. (125:A-APP190.)

Mills's testimony at a hearing could prove that trial counsel was aware of the exculpatory evidence that entirely undermined the reliability of the State's witness and presented an alternate story for the jury, but that counsel failed to utilize it. While the defense attempted to attack the credibility of the State's case—it did not present an alternate

theory of what happened. Had the jury been faced with two conflicting stories, especially when the majority of the State's witnesses were under federal investigation, there is a reasonable probability they could not have found evidence of guilt beyond a reasonable doubt. Therefore, Starks has pled facts sufficiently to show deficient performance and prejudice. *See generally*, ***Malone v. Walls***, 538 F.3d 744, 762 (7th Cir. 2008) (finding defendant was entitled to a hearing on his ineffective assistance of counsel claim when the State's case rested largely on eyewitness testimony and the defense failed to call another eyewitness who would offer a contradicting version of events).

The trial court found that Starks's allegations about what Mills would have testified to were entirely speculative. (126:5.) This is incorrect for two reasons: (1) Starks attached an affidavit from Mills explaining what he would testify to, and (2) an evidentiary hearing is the only proper place to determine what a witness would have testified to. The trial court also said that Mills's statements had "no indicia of reliability in light of the other evidence presented by the State and the fact that Mills was a very close friend of the defendant." (126:5.) This was error. The point of Mills's testimony would be to contradict "the other evidence presented by the state," so it is a circular argument to use that as a basis for undermining the credibility of Mills. Moreover, the court's assertion that a witness cannot be credible if they are friends with the defendant goes too far. It is not unusual that a friend—who by nature of that relationship spends time with the defendant—would have valuable testimony to offer and should not be discounted on that basis alone. These kinds of credibility determinations should be made only after live testimony at a hearing.

2. Dion Anderson

In his postconviction motion, Starks alleges that trial counsel was ineffective for failing to investigate or call Dion Anderson as a witness. (125:A-APP116.) Starks alleges that

Anderson was in the transport van with two of the state's key witnesses—Trenton Gray and Wayne Rogers—in violation of a sequestration order. (125:A-APP116-17.) According to Starks, had Anderson been called as a witness, he would have testified to the substance of the witnesses' conversation in the van and that the witnesses influenced each other's testimony. *Id.* Starks attached an affidavit from Anderson stating he could testify to the conversation between Gray and Rogers and "how they put everything together" to pin the crime on Starks. (125:A-APP181.) Anderson also asserts he was pressured by the prosecutor not to testify for Starks. (125:A-APP195.)

These facts, if true, prove that trial counsel failed to investigate a witness who would undermine the credibility of two key state witnesses. *See* ***State v. Thiel***, 2003 WI 111, ¶57, 264 Wis.2d 571, 665 N.W.2d 305 (finding trial counsel ineffective for failing to investigate the witnesses' credibility and accounts of events). If investigated, Anderson would have provided the defense with evidence that the State's witnesses colluded to create a consistent narrative against Starks. Had the jury heard Anderson's account of the conversation between Gray and Rogers—especially considering that these witnesses were under federal investigation—it is reasonably probable they would not have found evidence of guilt beyond a reasonable doubt. Indeed, Anderson's testimony is precisely what would solidify a reasonable doubt.

The trial court found that Starks's allegations about what Anderson would have testified to were unsupported and conclusory. (126:4.) The court's view was incorrect. Starks *does* offer an evidentiary basis for what he alleges Anderson would testify to at a hearing. Starks provided correspondence between Anderson and a private investigator, wherein Anderson explains that he would testify to how Gray and Rogers "put it together" to testify against Starks. (125:A-APP181.) The substance of "it" is precisely what Anderson

would explain at an evidentiary hearing. The trial court also mischaracterizes Starks's effort to get more information from Anderson about the substance of Gray and Rogers' conversation. The court writes that Starks's investigator "attempted to obtain information from Dion Anderson, but was unsuccessful in doing so." (126:4.) In fact, it was not that Anderson could not provide more information; but rather, the investigator was prevented from visiting Anderson in prison. (125:A-APP180.) Nonetheless, Starks has alleged sufficient facts, if taken as true, to warrant a hearing on this claim.

3. Willie R. Gill's phone records

Starks also alleges that trial counsel rendered ineffective assistance in failing to investigate or contact Willie R. Gill, ("Junebug"), even though he possessed Gray's phone records listing Gill's phone number. (125:A-APP114-15.) At trial, Trenton Gray testified that he called Starks on Gill's phone and listened to Starks make incriminating statements. (88:52,56-57,77.) Trial counsel made no effort to contact Gill or collect Gill's phone records to confirm whether these events took place. Had counsel contacted Gill or obtained Gill's phone records, he would have learned that Gray did not use Gill's phone and therefore could not have heard Starks make such a statement. (125:A-APP114.)

These facts, if true, prove that trial counsel failed to investigate and produce exculpatory evidence that was readily available. The court of appeals has previously concluded that trial counsel's failure to investigate facts readily available and use those facts at trial to undermine the credibility of a state's witness constitutes representation below an objective standard of reasonableness. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶25, 286 Wis.2d 721, 703 N.W.2d 694. Given the importance of Gray's testimony to the State's case, evidence directly contradicting the events he testified to would have raised a reasonable doubt for the jury. Had trial counsel provided evidence that the phone call Gray described never happened, there is a reasonable probability that Starks would not have

been convicted. A phone record demonstrating that he never used Gill's phone and lied on the stand would be significant to a jury.

The trial court found Starks's allegations about what the phone records would have shown were conclusory. (126:4.) Starks pled with specificity that Gill's phone number was available to trial counsel prior to Gray's testimony at trial, allowing trial counsel to investigate Gray's claims. (125:A-APP115.) Based upon Starks's allegations, an evidentiary hearing is warranted to determine what Gill would have stated at trial or what Gill's phone records would have shown.

4. Mary McCullum and Stanley Daniels

Starks also alleges that trial counsel provided ineffective assistance of counsel by not investigating and calling Mary McCullum and Stanley Daniels, who would contradict the testimony of Starks's cousin Trenton Gray. (125:A-APP117-118.) At trial, Gray testified that Starks spoke with him at a family funeral, where he gave inculpatory statements. (88:56-58.) McCullum and Daniels, relatives of both Starks and Gray, would have testified that Gray's testimony was untrue. (125:A-APP117.) Starks supported this claim with affidavits from both McCullum and Daniels, stating they also attended the funeral, that they were with Starks the whole time, and no such conversation took place. (125:A-APP199-200.)

McCullum and Daniels's testimony would have directly challenged Gray's testimony and further undermined any weight it was given by a jury because he was Starks's relative; a jury may have felt it was difficult for Gray to testify against his own cousin. McCallum and Daniels's testimony would have challenged that assumption as they are also relatives of both Gray and Starks.

These facts, if true, challenge the State's evidence at trial. Starks's counsel was deficient for disregarding and failing to call two witnesses who were willing and available to testify, and who would have contradicted the State's evidence, proving beneficial to the defense. (125:A-APP117-118); *see* ***Sullivan v. Fairman***, 819 F.2d 1382, 1389 (7th Cir. 1987) ("An attorney who fails to interview a readily available witness whose non-cumulative testimony may potentially aid the defense should not be allowed automatically to defend his omission simply by raising the shield of 'trial strategy and tactics.'").

The trial court found that Starks's allegations about what McCallum and Daniels would have testified to were speculative. (126:4-5.) Such a conclusion is error as Starks sufficiently pleaded material facts showing what testimony McCullum and Daniels would have provided to directly contradict a key state witness and attached affidavits supporting that allegation. An evidentiary hearing was thus the only proper forum to evaluate what McCallum and Daniels would have testified to.

5. Ineffective assistance of postconviction counsel

Because Starks sufficiently pleaded his claims of ineffective assistance of trial counsel to entitle him to a hearing on those claims, he has also subsequently established the merit of his ineffective assistance of postconviction counsel claim. In his § 974.06 motion, Starks stated that his postconviction counsel was "made aware of these errors through conversations with the Defendant, yet based his decision not to file Ineffective Assistance of Trial Counsel, not on the record in which competent counsel would have done, but Trial Counsel's reputation alone." (125:A-APP121.) He further stated had postconviction counsel raised the issues stated and argued in this motion, it is more likely than not that the case would have been set for further proceedings. (125:A-APP105.) Thus, Starks has alleged deficient performance and prejudice. To the extent counsel had a legitimate or strategic

reason for failing to raise any claim, that can only be discovered and proven through examination of postconviction counsel at a hearing. In addition, Starks has exceeded the pleading standard and in fact alleged *why* counsel failed to raise them—concern for the reputation of trial counsel. He could not then also be expected to argue counsel did not raise them because he did a poor job of selecting issues (i.e. allege that the present issues are better than the ones previously raised)—for he already offered one.

CONCLUSION

For all these reasons, this Court should reverse the trial and appellate courts and remand this case for an evidentiary hearing.

Dated this 4th day of October, 2012

Respectfully submitted,

TRICIA J. BUSHNELL
Bar No. 1080889

CAITLIN PLUMMER
Bar No. 1090090

LINDSEY E. SMITH
Bar No. 1079795

MICHAEL BOSHARDY
R. WARREN BECK
JOSHUA JARRETT
Law Students

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

Attorneys for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 10,922 words.

Tricia J. Bushnell

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 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.

Tricia J. Bushnell

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Tricia J. Bushnell

Tricia J. Bushnell

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix which complies with the requirements of s. 809.19(13). I further certify that this electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the Court and served on all opposing parties.

Tricia J. Bushnell

Tricia J. Bushnell