STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2010AP425

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAMELL E. STARKS,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, UPHOLDING 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

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent State of Wisconsin ("the State") submits that this case warrants both oral argument and publication, because this court granted the petition for review.

ARGUMENT

I. STARKS' UNTIMELY DNA SURCHARGE MOTION DOES NOT "COUNT" AS A PRIOR MOTION UNDER WIS. STAT. § 974.06(4) FOR PURPOSES OF THE *ESCALONA-NARANJO* PROCEDURAL BAR; BUT A TIMELY MOTION WOULD COUNT.

A. Under *Nickel*, an untimely DNA surcharge motion does not "count" as a prior motion under Wis. Stat. § 974.06.

Starks' untimely motion to vacate the DNA surcharge under *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, does not—and should not—"count" as a prior motion for purposes of Wis. Stat. § 974.06(4) and the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

State v. Nickel, 2010 WI App 161, 330 Wis. 2d 750, 794 N.W.2d 765, holds that, when a defendant moves to vacate a DNA surcharge under *Cherry* and Wis. Stat. § 973.046(1g), the defendant seeks sentence modification. *Nickel*, 330 Wis. 2d 750, ¶¶5-6. Accordingly, a *Cherry* motion must be brought within the time limits for a sentence modification motion under Wis. Stat. § 973.19, or within the time limits for a direct appeal under Wis. Stat. §§ 809.30 and 974.02. *Nickel*, 330 Wis. 2d 750, ¶5.

Nickel also recognizes that postconviction motions under Wis. Stat. § 974.06 are limited to constitutional and jurisdictional challenges, and cannot be used to challenge a sentence based on an erroneous exercise of discretion. *Id.* ¶7. Thus, a timely DNA surcharge motion challenging the court's sentencing discretion may not be brought as a Wis. Stat. § 974.06 motion. *Id.* ¶¶5-7.

The logical extension of the *Nickel* rationale, therefore, is that an untimely DNA surcharge motion cannot "count" as a prior Wis. Stat. § 974.06 motion for purposes of the *Escalona-Naranjo* procedural bar, because a DNA surcharge motion is not cognizable as a Wis. Stat. § 974.06 motion, and can only be brought under Wis. Stat. § 973.19 or under Wis. Stat. § 809.30. Stated differently, a motion that cannot even be brought under Wis. Stat. § 974.06 necessarily cannot be a prior motion under Wis. Stat. § 974.06.

The court of appeals in *State v. Jose Matamoros*[1] implicitly adopted *Nickel* when it held the defendant's first postconviction motion—an untimely DNA surcharge motion—did not "count" as a postconviction motion under Wis. Stat. § 974.06(4). *Matamoros*, slip op. at ¶¶3-7.

Under *Nickel* and *Matamoros*, therefore, Starks' untimely DNA surcharge motion does not "count" as a prior postconviction motion under Wis. Stat. § 974.06(4); and this court should reconcile the *Starks per curiam* decision with the court of appeals' published decision in *Nickel*.

Contrary to Starks' contention, however, *Starks* does not need to be reconciled with *Matamoros*; nor will *Starks* apply to "all sorts of motions," causing "sweeping" effects or substantial litigation (Starks' brief at 12-13, 17-18). Both *Starks* and *Matamoros* are non-citable, un-authored, *per curiam* decisions; and neither decision will substantially influence *Escalona-Naranjo* jurisprudence. *See* Wis. Stat. § 809.23(3)(b).[2]

[1]Appeal No. 2009AP2982 (Ct. App., Dist. I, Dec. 21, 2010).

[2]Moreover, contrary to Starks' contention that the *Starks* decision would force all motions to be brought at the same time or else be barred (Starks' brief at 17-18), motions which are not "available" under Wis. Stat. § 974.06 will not be barred.

B. A timely direct appeal or sentence modification claim raising a DNA surcharge claim would bar a subsequent Wis. Stat. § 974.06 motion raising constitutional issues, absent a "sufficient reason."

Contrary to Starks' contentions (Starks' brief at 9-17), a timely *Cherry* claim is a postconviction motion, and would serve to trigger the *Escalona-Naranjo* procedural bar for any later Wis. Stat. § 974.06 motions raising constitutional claims, absent a "sufficient reason."

1. A timely direct appeal under Wis. Stat. § 809.30 (or Wis. Stat. § 809.32) raising a DNA surcharge claim would bar a subsequent Wis. Stat. § 974.06 motion.

For example, if the defendant timely raises a *Cherry* claim in his direct appeal under Wis. Stat. §§ 809.30 and 974.02, or in a no-merit appeal under Wis. Stat. § 809.32, then the defendant would be precluded under Wis. Stat. § 974.06 and *Escalona-Naranjo* from raising any later constitutional claims, absent a "sufficient reason" for his failure to do so during his direct or no-merit appeal, because constitutional claims can be raised in a direct or no-merit appeal. *State v. (Aaron) Allen*, 2010 WI 89, ¶¶40-41, 328 Wis. 2d 1, 786 N.W.2d 124 (no-merit appeal qualifies as previous motion under Wis. Stat. § 974.06, in same way as direct appeal).

Thus, insofar as Starks argues that the *Escalona-Naranjo* procedural bar under Wis. Stat. § 974.06 "cannot be applied" to a *Cherry* motion, because a *Cherry* motion "must be brought" under Wis. Stat. § 973.19 (Starks' brief at 11), Starks is incorrect.

A defendant can raise a *Cherry* claim in a timely direct appeal. *Nickel*, 330 Wis. 2d 750, ¶5. But if the defendant does so, the *Escalona-Naranjo* procedural bar would apply to any future motions raising constitutional claims, absent a "sufficient reason" for the defendant's failure to raise those claims in his direct appeal, because a direct appeal clearly "counts" as a prior motion. *State v. Lo*, 2003 WI 107, ¶¶42-44, 264 Wis. 2d 1, 665 N.W.2d 756 (prior motions include Wis. Stat. § 974.06 motions and direct appeals).[3]

> 2. A timely sentence modification motion under Wis. Stat. § 973.19 raising a DNA surcharge claim would bar a subsequent Wis. Stat. § 974.06 motion.

Moreover, insofar as Starks argues that a timely *Cherry* motion under Wis. Stat. § 973.19 does not bar a later constitutional claim under Wis. Stat. § 974.06, or cannot trigger the "sufficient reason" requirement (Starks' brief at 14-17), the State again disagrees.

The sentence modification statute is clear that if a defendant timely files a motion under Wis. Stat. § 973.19(1)(a), the defendant waives his right to file a direct appeal under Wis. Stat. § 809.30, thereby limiting the potential issues on appeal to sentence modification. *See* Wis. Stat. § 973.19(5); *State v. Walker*, 2006 WI 82, ¶29, 292 Wis. 2d 326, 716 N.W.2d 498.

Accordingly, under the plain language of Wis. Stat. § 974.06(4), a timely *Cherry* motion under Wis. Stat.

[3]The direct appeal proceedings barred the successive motions in the *per curiam* cases that Starks cites (A-Ap. 252-260). It was not because the defendants had filed DNA surcharge motions under Wis. Stat. § 973.19, as Starks claims (Starks' brief at 12 n.5).

§ 973.19(1)(a) would serve as a prior motion barring any future Wis. Stat. § 974.06 motions, absent a "sufficient reason," because a Wis. Stat. § 973.19 motion waives any other future issues on appeal. *See* Wis. Stat. § 974.06(4) (any ground finally adjudicated or not so raised, or "*knowingly, voluntarily, and intelligently waived*," may not be basis of subsequent postconviction motion, absent "sufficient reason").

In other words, by filing a sentence modification motion under Wis. Stat. § 973.19, the defendant chooses to waive any other issues on appeal. *See* Wis. Stat. § 973.19(5). Thus, under the plain language of Wis. Stat. § 974.06(4), he is barred from raising any future constitutional claims, absent a "sufficient reason," because those constitutional claims would have been "knowingly, voluntarily, and intelligently waived" when the defendant filed his Wis. Stat. § 973.19 motion. *See* Wis. Stat. § 974.06(4).

While true that Wis. Stat. § 973.19 creates an expedited process for seeking sentence modification, Starks is incorrect that a Wis. Stat. § 973.19 motion is not a postconviction motion (Starks' brief at 14-16). *Walker*, 292 Wis. 2d 326, ¶28 (Wis. Stat. § 973.19 is expeditious route to decide defendant's postconviction motion where defendant's only claim relates to severity of sentence). The mere fact that Wis. Stat. § 973.19 is contained in Chapter 973, the sentencing chapter, does not mean that those motions are not postconviction motions. *See* Wis. Stat. §§ 973.18 and 973.19 (governing postconviction motion procedure vis-à-vis sentencing issues).

Moreover, Starks ignores the two subsections under which defendants can move for sentence modification—Wis. Stat. § 973.19(1)(a) and Wis. Stat. § 973.19(1)(b)—both of which constitute postconviction motions. *Walker*, 292 Wis. 2d 326, ¶¶28-30 (both methods require defendant to file postconviction motion in circuit court before filing appeal).

First, a sentence modification motion under Wis. Stat. § 973.19(1)(a) is clearly a postconviction motion; but it is independent of Wis. Stat. § 809.30, and comes with consequences for the defendant—one of which is the defendant waives his right to file a "full blown" appeal under Wis. Stat. § 809.30. *Walker*, 292 Wis. 2d 326, ¶29; *State v. Scaccio*, 2000 WI App 265, ¶5, 240 Wis. 2d 95, 622 N.W.2d 449 (defendant proceeding under Wis. Stat. § 973.19(1)(a) forfeits opportunity to challenge other issues).

Second, a sentence modification motion under Wis. Stat. § 973.19(1)(b) is also a postconviction motion; but it requires the defendant to request transcripts, in which case the motion is governed by Wis. Stat. § 809.30, but the defendant is still limited to raising sentence modification, and any other issues are waived. *Walker*, 292 Wis. 2d 326, ¶¶28-30; *Scaccio*, 240 Wis. 2d 95, ¶5.[4]

Accordingly, under either subsection, a sentence modification motion under Wis. Stat. § 973.19(1) "counts" as a prior postconviction motion for purposes of Wis. Stat. § 974.06 and the *Escalona-Naranjo* procedural bar. By choosing to waive his right to a "full blown" appeal and only pursue sentence modification as a postconviction issue, a defendant also waives his right to pursue any future constitutional claims under Wis. Stat. § 974.06, absent a "sufficient reason."[5]

[4]Starks is, therefore, incorrect (Starks' brief at 16) that a motion filed under Chapter 973 can never be governed by Wis. Stat. § 809.30.

[5]This court, however, does not necessarily need to decide whether a timely *Cherry* motion under Wis. Stat. § 973.19 "counts" as a prior motion, because Starks' case involves a direct appeal under Wis. Stat. § 809.30, not a sentence modification motion.

II. STARKS' CURRENT WIS. STAT. § 974.06 POSTCONVICTION MOTION IS BARRED UNDER *ESCALONA-NARANJO*, BECAUSE STARKS' POSTCONVICTION PLEADINGS FAIL TO STATE WITH PARTICULARITY A "SUFFICIENT REASON" WHY HIS CURRENT CLAIMS WERE NOT BROUGHT DURING HIS DIRECT APPEAL.

This court's decision in *State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, sets forth the proper pleading standards for what defendants must show to be entitled to an evidentiary hearing on their Wis. Stat. § 974.06 postconviction motions alleging ineffective assistance of postconviction counsel. The State, however, disagrees with Starks as to what those pleading standards are.

A. The plain language of Wis. Stat. § 974.06(4) requires defendants to allege with specificity in their pleadings that the claims they wanted raised were different than the claims actually litigated on appeal.

Starks first argues he should not be required to prove his claims are different than the ones he previously raised (Starks' brief at 19-20 & n.6); nor be required to compare his current claims to his earlier claims (*id.* at 27), because such requirements are "unnecessary and unachievable," increasing the "burden placed upon a

defendant and a reviewing court," "just because we can" (*id.* at 19-20 & n.6).[6]

The law is clear, however, that it is the defendant's burden to prove he is entitled to an evidentiary hearing under Wis. Stat. § 974.06. *Balliette*, 336 Wis. 2d 358, ¶18 (citing *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996)); *(Aaron) Allen*, 328 Wis. 2d 1, ¶83 (defendant has burden of proof).

At a minimum, any motion—whether made pre-trial or postconviction—must state with particularity the factual and legal grounds for the motion, and must provide a good faith argument that the relevant law entitles the defendant to relief. *State v. (John) Allen*, 2004 WI 106, ¶10, 274 Wis. 2d 568, 682 N.W.2d 433.

Therefore, in order to make a good faith argument that Wis. Stat. § 974.06(4) entitles him to relief, the defendant must allege with particularity in his pleadings that the claims he wanted raised were different than the claims which were actually litigated on appeal, because the plain language of the statute prohibits any grounds already raised from being re-raised without a "sufficient reason." *See* Wis. Stat. § 974.06(4).

In relevant part, Wis. Stat. § 974.06(4) states: "Any ground *finally adjudicated* … 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," absent a "sufficient reason." *See* Wis. Stat. § 974.06(4).

[6]Starks also contends such allegations are "equally unnecessary," because it is "clear" from his pleadings that "these issues have not been previously addressed" (Starks' brief at 19 n.6). *See also id.* at 2 (alleging "[n]one of these [current] claims were previously raised on direct appeal"). The State will address these arguments in Section II(D).

Under the plain language of the statute, then, if a claim was "finally adjudicated" previously, the defendant may not raise the issue again in his Wis. Stat. § 974.06 motion, absent a "sufficient reason" for doing so. *See* Wis. Stat. § 974.06(4); *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (matter once litigated may not be re-litigated in subsequent postconviction proceeding, no matter how artfully defendant rephrases issue).

Thus, contrary to Starks' argument that this comparison-of-claims requirement is unnecessary, serves no purpose, or imposes a burden on defendants for no reason, the defendant's burden of showing his claims have not already been litigated is a requirement because the plain language of the statute requires it. *See* Wis. Stat. § 974.06(4).

This court has also so held. *Lo*, 264 Wis. 2d 1, ¶40 ("ground finally adjudicated" cannot be subject of Wis. Stat. § 974.06 motion; motion cannot be used to raise issues disposed of by previous appeal); *(Aaron) Allen*, 328 Wis. 2d 1, ¶59 (motions "'finally adjudicated'" in original proceeding are barred just as much as motions "'not so raised'").

Moreover, the comparison-of-claims requirement set forth under the plain language of Wis. Stat. § 974.06(4) comports with *Escalona-Naranjo's* "strong" policy favoring finality, whereby the pleading and proof burdens have shifted to the defendant, in order "to minimize time-consuming postconviction hearings unless there is a clearly articulated justification for them." *Balliette*, 336 Wis. 2d 358, ¶¶53, 58.[7]

[7]Indeed, even aside from Wis. Stat. § 974.06, defendants are prohibited under issue preclusion from re-litigating issues actually decided previously. *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995).

Therefore, in order for the defendant to have a clearly articulated justification for an evidentiary hearing under Wis. Stat. § 974.06(4), the defendant must either plead with specificity that his claims were not previously litigated; or else plead with specificity a sufficient reason why he should be able to re-litigate those same issues that have already been "finally adjudicated." *See* Wis. Stat. § 974.06(4).

Insofar as Starks argues the comparison-of-claims requirement "serves no purpose," because it is easy to discern "by simply reviewing the nature of the claims" that "either [the claims] are in fact new or they are not" (Starks' brief at 20 n.6), then it should not be overly burdensome for defendants to allege with particularity in their pleadings that the claims have not been previously litigated.

But in the situation where the defendant's claims may be similar to claims previously raised, it behooves the defendant to show with particularity that he is not simply re-phrasing, re-theorizing, or re-packaging matters that were previously raised; if he does not, he risks preclusion of his claims. *Witkowski*, 163 Wis. 2d at 990. *See also (Aaron) Allen*, 328 Wis. 2d 1, ¶79 (where defendant's postconviction motion simply resurrects prior arguments, the factual bases of which were specifically rejected, postconviction claim will be rejected).

The comparison-of-claims requirement is not an unduly difficult burden imposed for no reason; it is a required burden the legislature has imposed on defendants who file Wis. Stat. § 974.06 motions. It is also a necessary burden this court requires from defendants in order to go forward with time-consuming Wis. Stat. § 974.06 motion hearings. *(John) Allen*, 274 Wis. 2d 568, ¶10; *Balliette*, 336 Wis. 2d 358, ¶¶53, 58.

B. *Balliette* requires defendants in Starks' procedural posture to allege in their pleadings how or why the claims they wanted raised were "clearly stronger" than the claims postconviction counsel actually raised on direct appeal.

Starks argues he should not have to prove the claims he wanted raised are clearly stronger than the ones his postconviction counsel actually raised on direct appeal (Starks' brief at 20-29), nor should he have to prove the claim is a "winning one" (*id.* at 27), because his only burden is showing the claims he wanted raised have "merit," which Starks concludes is synonymous with a "sufficient reason" under *Escalona-Naranjo* (*id.* at 21).

As discussed below, however, *Balliette* requires more of defendants in Starks' procedural posture. When a defendant has already had a direct appeal and wants to raise a Wis. Stat. § 974.06 motion alleging ineffective assistance of postconviction counsel based on counsel's failure to raise the issue of ineffective assistance of trial counsel, a defendant must show, with particularity, how and why his current claims were "clearly stronger" than the claims actually raised by postconviction counsel—or at least that the not-raised claims were "obvious and very strong." *Balliette*, 336 Wis. 2d 358, ¶69.

1. The evolution of state cases through *Balliette* demonstrates the "clearly stronger" or "obvious and very strong" standard is required for defendants in Starks' procedural posture.

As this court is aware, the legislature passed Wis. Stat. § 974.06, in part, to eliminate the abuses of state *habeas corpus*. *Lo*, 264 Wis. 2d 1, ¶¶16-20. Another objective was to provide one uniform remedy for defendants to attack their convictions or sentences; but only for limited jurisdictional and constitutional claims, and only after defendants had exhausted their direct remedies. *Id.* ¶¶21-25.

Thereafter, however, defendants began raising issues in Wis. Stat. § 974.06 motions that could have been raised on direct appeal, without showing a "sufficient reason," thereby thwarting the goal of finality in criminal cases and causing years of unnecessary litigation. *Id.* ¶¶27-28, 38-46. Accordingly, in *Escalona-Naranjo*, this court imposed the burden on defendants to show a "sufficient reason" for any failure to consolidate claims in an earlier proceeding, as is required by Wis. Stat. § 974.06(4), in order to further the mutually-related concerns of finality and vindicating justice via a simplified postconviction remedy without compromising fairness. *Id.* ¶¶29-32, 42-46.

Later, in *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), the court of appeals determined that, if postconviction counsel was ineffective for failing to raise an issue that could have been raised on direct appeal, it may constitute a "sufficient reason" for the defendant's failure to raise the issue earlier, and might overcome the *Escalona-Naranjo* procedural bar.

Consequently, post-*Rothering*, the courts have seen an increasing number of appeals from the denial of Wis. Stat. § 974.06 motions, especially those brought by *pro se* inmates baldly asserting ineffective assistance of postconviction counsel for failure to raise claims of ineffective assistance of trial counsel. *Lo*, 264 Wis. 2d 1, ¶50. *See also (John) Allen*, 274 Wis. 2d 568, ¶15 ("many defendants" continue to file insufficient, conclusory postconviction motions).

This court has emphasized that considerations of finality are significant and compelling in the criminal context, such that the sufficiency standards for pleading a postconviction motion are more demanding—and require more of defendants—than the pleading standards for defendants who have not yet been convicted and are pleading pre-trial motions. *(John) Allen*, 274 Wis. 2d 568, ¶11; *Lo*, 264 Wis. 2d 1, ¶75; *Balliette*, 336 Wis. 2d 358, ¶53.

Moreover, defendants who have already had direct (or no-merit) appeals are not similarly situated to defendants who have not had direct appeals. *Lo*, 264 Wis. 2d 1, ¶44 n.11 (defendant who did not pursue direct appeal permitted to raise Wis. Stat. § 974.06 motion raising constitutional issue without showing sufficient reason); *(Aaron) Allen*, 328 Wis. 2d 1, ¶40 (same); *Balliette*, 336 Wis. 2d 358, ¶36 (same).

Therefore, contrary to Starks' contention that *Balliette* "rejected this alternative method" (Starks' brief at 23), the evolution of this court's cases—up until and including *Balliette*—makes clear that defendants like Starks who have had direct appeals, and now seek relief under Wis. Stat. § 974.06, are subject to the most demanding of all the pleading standards, and are required to allege—with particularity—<u>why</u> an issue which could have been raised on direct appeal was not. *Balliette*, 336 Wis. 2d 358, ¶¶62-63; *Lo*, 264 Wis. 2d 1, ¶41 (defendant cannot "consciously skip grounds for relief on direct appeal" and raise them in postconviction motion).

As a practical matter, however, in order to meet the "sufficient reason" showing in the context of a *Rothering* claim, defendants necessarily must allege—with particularity—how and why the claims they wanted raised were clearly stronger than the claims postconviction counsel actually raised; because this is the only way to meet the burden of pleading that postconviction counsel's claim selection was deficient and that actual prejudice existed from postconviction counsel's failure to raise those issues. *Balliette*, 336 Wis. 2d 358, ¶¶62-70.

As this court explained in *Balliette*, the "sufficient reason" standard requires more than the defendant's mere assertion that his postconviction counsel was ineffective for failing to challenge trial counsel's acts and omissions on direct appeal. *Id.* ¶¶62-63. Rather, the viability of a Wis. Stat. § 974.06 claim is entirely dependent on the defendant's showing that his postconviction counsel was constitutionally ineffective. *Id.* (defendant must allege both objectively unreasonable deficient performance of postconviction counsel, and prejudice because of postconviction counsel's failures).

Postconviction counsel, however, is not required to raise all issues of arguable merit; and counsel has the duty to decide which issues to appeal. *Jones v. Barnes*, 463 U.S. 745, 749-51 (1983).[8] Furthermore, an issue of arguable merit is not synonymous with actual merit. *(Aaron) Allen*, 328 Wis. 2d 1, ¶67 (issue of arguable merit is merely non-frivolous issue).

Therefore, it is possible that postconviction counsel could fail to raise an issue of arguable merit without prejudicing the defendant, if the issue of arguable merit ultimately would have failed. *Id.* Moreover, the existence of an arguably meritorious issue does not provide a sufficient reason for waiting many years to raise an issue that could have been raised earlier. *Id.* ¶73.

[8]Starks concedes that postconviction claim selection is counsel's prerogative (Starks' brief at 25-26).

Accordingly, the defendant must do more than just identify an issue of "merit" or "arguable merit" in order to overcome the *Escalona-Naranjo* "sufficient reason" procedural bar when the defendant is alleging ineffective assistance of postconviction counsel for failure to raise trial counsel's alleged ineffectiveness. The defendant must do something more.

The standards have been stated various ways—perhaps because it is difficult to formulate a test that encompasses all kinds of ineffective assistance of counsel claims. *See Balliette*, 336 Wis. 2d 358, ¶¶88-92 (Bradley, J., dissenting). Nevertheless, this court's cases make clear the defendant must allege something more than just an issue with arguable merit in order to be entitled to an evidentiary hearing on the alleged "sufficient reason" of postconviction counsel's failure to raise issues. *Balliette*, 336 Wis. 2d 358, ¶67.

For example, in the no-merit context, this court has held the defendant must do more than identify an arguably meritorious issue his no-merit counsel and the court of appeals did not address. *(Aaron) Allen*, 328 Wis. 2d 1, ¶83. Rather, to satisfy the "sufficient reason" standard, the defendant must allege something to undermine confidence in the court of appeals' no-merit decision, "perhaps by identifying an issue of such obvious merit that it was an error by the court not to discuss it." *Id.*

Similarly, in the merit-appeal context, this court has held the defendant's Wis. Stat. § 974.06 motion should allege issues that were "obvious and very strong" such that postconviction counsel's "failure to raise them cannot be explained or justified." *Balliette*, 336 Wis. 2d 358, ¶69. To do so, however, the defendant must allege <u>why</u> postconviction counsel's claim selection was deficient, and <u>how</u> he intends to establish deficient performance, if given the chance at an evidentiary hearing. *Id.* ¶¶65-68.

Further, the defendant must also allege that postconviction counsel's claim selection was unreasonable, and actually had an adverse effect on him—that is, why and how he was prejudiced by postconviction counsel's claim selection. *Id.* ¶¶24-28 (presumption of effective assistance applies to postconviction counsel and trial counsel).

Thus, under *Balliette*, to successfully plead ineffective assistance of postconviction counsel and/or show a "sufficient reason," the motion must do more than point to issues that postconviction counsel did not raise. *Id.* ¶67. The motion must show that failing to raise those issues fell below an objective standard of reasonableness—or show how and why the not-raised issues were "obvious and very strong," such that postconviction counsel's failure to raise them cannot be explained or justified. *Id.* ¶69.

Balliette further holds that such a motion "cries out" for supporting facts—without which the defendant is not entitled to an evidentiary hearing—because an ineffective assistance claim is a legal conclusion that is qualitatively different than, for example, an allegation that the defendant did not understand something. *Id.* ¶56. Thus, *Balliette* instructs that the defendant's showing of ineffective assistance of postconviction counsel must contain specific allegations of fact supporting the defendant's claim that he is entitled to an evidentiary hearing. *Id.* ¶¶68-69 (evidentiary hearing is not fishing expedition to discover ineffective assistance; it is forum to prove ineffective assistance).

As discussed further below, the federal *habeas corpus* cases under 28 U.S.C. § 2254 have adopted the clearly stronger (or significant and obvious) standard for alleging ineffective assistance of postconviction counsel. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

Balliette, in turn, has adopted *Smith v. Robbins'* "clearly stronger" standard for alleging ineffective assistance of postconviction counsel. *Balliette*, 336 Wis. 2d 358, ¶28. Moreover, at least one Wisconsin Court of Appeals' authored opinion has explicitly adopted *Smith v. Robbins'* "clearly stronger" standard. *See State v. Amonoo*, Case No. 2011AP566 (Ct. App., Dist. I, Jan. 24, 2012) (R-Ap. 101-113), slip op. at ¶22 (defendant failed to show his additional issues were "clearly stronger" than those actually pursued on direct appeal).[9]

Whether the standard is articulated as "clearly stronger" or "obvious and very strong" or "significant and obvious," the clear theme running through this court's cases is that postconviction motions must include facts allowing the reviewing court to meaningfully assess the defendant's claims. *(John) Allen*, 274 Wis. 2d 568, ¶¶21-23; *Balliette*, 336 Wis. 2d 358, ¶79. This showing requires allegations of exactly how and why postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel based on trial counsel's alleged errors.

Without such specificity, the defendant necessarily cannot meet his burden in showing a "sufficient reason" under *Escalona-Naranjo*, because otherwise it will not be clear why postconviction counsel's claim selection was deficient and/or why postconviction counsel's claim selection actually prejudiced the defendant.

[9]Besides *Balliette*, *Amonoo* is the only citable (*i.e.*, authored) opinion the State has found using the "clearly stronger" standard (R-Ap. 101-113). To the State's knowledge, all other cases using the standard are *per curiam* opinions.

2. The federal *habeas* cases support the State's view that the "clearly stronger" standard is required for pleading a "sufficient reason."

Although not precisely analogous because of their distinct procedural posture, the federal *habeas* cases nevertheless support the State's view that the defendant must show his postconviction counsel failed to raise claims that were "clearly stronger" than the claims actually raised. *Gray*, 800 F.2d at 646.

For example, the Seventh Circuit has adopted *Gray* in holding the not-raised issues must be "clearly stronger" than the raised issues in order for the defendant to overcome the presumption of effective assistance of postconviction counsel and be entitled to an evidentiary hearing. *See, e.g.*, *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996); *Lee v. Davis*, 328 F.3d 896, 900-01 (7th Cir. 2003); *Martin v. Evans*, 384 F.3d 848, 851-52 (7th Cir. 2004); *Sanders v. Cotton*, 398 F.3d 572, 585 (7th Cir. 2005); *Smith v. Gaetz*, 565 F.3d 346, 352 (7th Cir. 2009).

That the cases require the "clearly stronger" standard is not surprising, because that standard naturally and logically flows from the proposition that postconviction counsel is not required to raise all issues on appeal. *See, e.g.*, *Howard v. Gramley*, 225 F.3d 784, 790-91 (7th Cir. 2000); *Winters v. Miller*, 274 F.3d 1161, 1167 (7th Cir. 2001); *Whitehead v. Cowan*, 263 F.3d 708, 731-32 (7th Cir. 2001).

Starks argues that *Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309, 1318 (2012), shows that only a "merits standard" is required to receive a hearing on claims of ineffective assistance of postconviction counsel; because the Court did not require the *Martinez* defendant to prove his claim was a "winning one" (Starks' brief at 26-29).

Martinez, however, does not so hold for defendants in Starks' procedural posture. Indeed, *Martinez* expressly rejected Starks' contention that a merits-based standard applies to a collateral review after a defendant has already had a direct appeal to raise his ineffective assistance of counsel claims. *Martinez*, 132 S. Ct. at 1319-20.

In *Martinez*, the Court discussed how Arizona—unlike Wisconsin—does not permit defendants to raise ineffective assistance of trial counsel on direct appeal; under Arizona's appellate structure, the first time the claim can be raised is during an "initial-review" collateral proceeding. *Id.* at 1313. The defendant therefore argued he had "cause" to excuse his procedural default on federal *habeas*, because his postconviction counsel had failed to raise ineffective assistance of trial counsel in the "initial-review" collateral proceeding. *Id.* at 1313-14.

The Court agreed, but only because the "initial-review collateral proceedings" in Arizona constituted the defendant's "'one and only appeal'" as to an ineffective assistance of trial counsel claim, and was the first opportunity to raise the claim. *Id.* at 1315. By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, Arizona could not later assert procedural default in federal *habeas* proceedings. *Id.* at 1318-19.

In so holding, however, the Court distinguished Arizona's "initial-review" collateral proceedings with other collateral proceedings where the defendant has already had the opportunity to have his claims addressed by a court, such as an appellate court on direct review. *Id.* at 1316-17 ("initial-review collateral proceeding" was akin to direct appeal as to claim of trial counsel's ineffectiveness; defendant had not yet had benefit of counsel or court opinion addressing claim).

Thus, the Court explicitly rejected the use of this limited "equitable rule" for defendants in Starks'

procedural posture—and held that collateral cases on direct review from a state court remained "unaffected" by the Court's ruling. *Id.* at 1320 (limited holding does not concern attorney errors in successive collateral proceedings or extend beyond first occasion state allows prisoner to raise claim of trial counsel's ineffectiveness).

Accordingly, *Martinez's* merit standard has no application to defendants in Starks' procedural posture—or in Wisconsin's appellate system, wherein defendants have the right on direct appeal to raise ineffective assistance of trial counsel claims.

C. This court should require the "clearly stronger" or "obvious and strong" standard as a matter of policy.

1. The "clearly stronger" standard is not unduly onerous, even for *pro se* defendants.

Starks argues that requiring defendants to assert the not-raised claims are "clearly stronger" is unduly onerous, especially for *pro se* defendants, requiring them to prove up the claims on the merits in the pleadings, rather than just allege them (Starks' brief at 23-26). Starks further asserts that such a showing would involve facts not on the record, or subjective or speculative impressions of why counsel did something or failed to do something, thereby requiring him to "plead information that can only be obtained from an evidentiary hearing" (*id.* at 25-26).

Starks concludes this burden is unreasonable and "clearly impossible" to meet, and would mean defendants "would never be entitled to relief, no matter how egregious postconviction counsel's error"—such that he should be entitled to an evidentiary hearing to find out

facts, particularly where postconviction counsel is uncooperative (*id.* at 26-28).

This court, however, has never required defendants to definitively prove up their claims in the pleadings in order to obtain relief. *Balliette*, 336 Wis. 2d 358, ¶61 (motion not required to contain proof necessary to show defendant was entitled to new trial; if it did, defendant would not need evidentiary hearing).

But this court has always required defendants to plead the material facts of their allegations with specificity in their postconviction motions, and has precluded the use of evidentiary hearings as tools for defendants to explore or discover the facts related to their claims. *Id.* ¶¶61, 68 (evidentiary hearing is not end in itself, nor is it fishing expedition to discover ineffective assistance; it is forum to prove ineffective assistance).

In other words, this court has never allowed defendants to rely upon evidentiary hearings to supplement or shore up their conclusory or inadequate pleadings. *Bentley*, 201 Wis. 2d at 313 (moving papers must allege facts supporting postconviction claims); *(John) Allen*, 274 Wis. 2d 568, ¶23 ("four corners" of motion must contain sufficient material objectivity described by five "w's" and one "h" test).

Requiring a defendant to allege specific facts in his pleadings, however, is not synonymous to requiring proof of the claim in the pleadings. *Balliette*, 336 Wis. 2d 358, ¶61. Nor is it impossible for defendants—even *pro se* defendants—to plead their facts and *Rothering* claims with particularity. *Id.* ¶57. As this court has recognized, defendants must often rely on facts outside of the record, but defendants must still plead those facts with specificity:

> *Bentley*-type allegations [of ineffective assistance of counsel] will often depend on facts outside the record. *To ask the court to examine facts outside the record in an evidentiary hearing requires a*

> *particularized motion with sufficient supporting facts to warrant the undertaking*.
>
> ….
>
> Consequently, the requisite specificity required for establishing … [ineffective assistance of counsel] mirrors the defendant's ultimate burden of proof.

Id. (emphasis added).

Even assuming more relaxed pleading standards exist for *pro se* defendants, the motion still needs to be particular enough to warrant the time-consuming undertaking of an evidentiary hearing, because *pro se* defendants still have the same ultimate burden of proof as represented defendants to prove up their claims of ineffective assistance of postconviction counsel at the evidentiary hearing. *Id.* ¶¶57-58.

Nevertheless, the "clearly stronger" standard is not particularly onerous: the *pro se* defendant already knows what claims he wanted raised; and it is not too much to ask for him to find out from his postconviction counsel why counsel did or did not raise various other claims. With this information, the *pro se* defendant can allege with specificity how the attorney responded, and can then describe how and why the defendant believes the claims he wanted raised were "clearly stronger" than the ones counsel actually raised.[10]

This court has recognized, for example, that a defendant should include allegations of off-the-record discussions with his counsel that might demonstrate a sufficient reason for not having brought the claim earlier.

[10]Contrary to Starks' contention (Starks' brief at 23-24), the motion is not always "clear on its face" why the defendant believes his claims are better than the ones actually raised, or how they are better, even though the court can reasonably assume that, by raising a *Rothering* claim, the defendant believes his claims are better.

(Aaron) Allen, 328 Wis. 2d 1, ¶87. *See also id.* ¶47 (defendants required to cite to facts outside record that, if proved, would provide sufficient reason for defendants' failure to raise issue earlier). *See also Amonoo*, slip op. at ¶23 (R-Ap. 112-113) (rejecting *Rothering* claim because defendant failed to provide affidavits or statements from postconviction counsel explaining decision to pursue one issue over others).

Further, even in Starks' hypothetical example where postconviction counsel is uncooperative (*see* Starks' brief at 25-26), the defendant could still allege in his pleadings, with specificity, how and when he tried to get the information; what facts showed that his counsel would not cooperate; or how or in what manner counsel was uncooperative—for example, by not responding to the defendant's letters, or not calling the defendant back.

Or, if the defendant's status as a prisoner is an impediment to his efforts to obtain information from his postconviction counsel because of practicality or finances, the defendant must still allege those specific facts in his pleadings—what he tried to do to get the information, what impediments existed to his efforts, why he was unable to complete his factual investigation into counsel's reasons, and so forth.

Thus, if the defendant does not know why his counsel did or did not do something, he is not required to speculate as to the reasons; but he is required to at least attempt to glean the information from his postconviction counsel. And if he cannot, the defendant must allege those supporting facts in his pleadings. At that juncture, if the defendant has adequately pleaded his inability to obtain the information, the circuit court could then, for example, order that the defendant or defendant's counsel submit more specific information regarding the motion, before deciding if an evidentiary hearing is warranted. *(John) Allen*, 274 Wis. 2d 568, ¶15.

In other words, the defendant is not stuck without any remedy, even if he truly believes he is unable to ascertain without a hearing why counsel did not raise various claims. Even without this information from postconviction counsel, the defendant can still allege in his pleadings, with particularity, how and why the claims he wanted raised were "obvious and strong," such that counsel should have raised them. *Balliette*, 336 Wis. 2d 358, ¶69.

In sum, this court's cases are clear that a *pro se* defendant is still expected to conduct some kind of factual investigation in an effort to determine why his postconviction counsel did not raise various claims. He cannot just baldly assert "ineffective assistance of postconviction counsel" without more. The defendant needs to make some kind of attempt—demonstrate some kind of effort—to marshal facts on his own behalf to support the legal allegations in his pleadings. *Balliette*, 336 Wis. 2d 358, ¶¶ 3, 48, 56-68; *(Aaron) Allen*, 328 Wis. 2d 1, ¶87. Without such factual allegations, the court cannot meaningfully assess the defendant's claims that his postconviction counsel was ineffective. *(John) Allen*, 274 Wis. 2d 568, ¶¶21-24.

This court's cases are similarly clear that the defendant must submit some kind of evidentiary support, such as affidavits, to support the factual allegations in his pleadings; he cannot rely on conclusory allegations alone. *Balliette*, 336 Wis. 2d 358, ¶79 (defendant's allegations were conclusory because motion failed to state who would be called as witness at evidentiary hearing and what testimony was likely to prove); *(John) Allen*, 274 Wis. 2d 568, ¶¶29-33 (conclusory allegations insufficient to support defendant's factual assertion that witnesses' documents actually existed; defendant must provide some reason to support existence of documents, and show that documents contain information defendant says they contain).

Exactly how the defendant must support his factual allegations in his pleadings is variable, because the required facts will necessarily depend on the nature of the defendant's underlying ineffective assistance claims. In general, however, *(John) Allen's* five "w's" and one "h" test contains the "blueprint" for the material factual objectivity required to meaningfully assess the defendant's claims. *Balliette*, 336 Wis. 2d 358, ¶¶58-59 (*(John) Allen* who, what, where, when, why, and how test is "practical and specific blueprint" for applying theoretical framework and policy favoring finality).

Both the court and the State are entitled to know what is expected to happen, and what the defendant intends to prove, at the evidentiary hearing. *Balliette*, 336 Wis. 2d 358, ¶68. In order to accomplish this, the defendant must plead his facts with particularity—facts which, if true, would entitle him to relief. *Id.* ¶¶69-70.

Particularly at Starks' procedural stage—postconviction and post-direct-appeal—the "strong policy" of finality is paramount, and defendants are required to do more than what Starks asserts. *Balliette*, 336 Wis. 2d 358, ¶58. *See also (Aaron) Allen*, 328 Wis. 2d 1, ¶90 (if defendant brings claims years after his appeal without any reason for not having raised them earlier, it "simply emphasizes the need to uphold this principle of finality"); *(John) Allen*, 274 Wis. 2d 568, ¶11 (given strong policy favoring finality, sufficiency standard for postconviction motion requires more from defendants).

2. The "clearly stronger" or "obvious and very strong" standard promotes the finality contemplated by *Escalona-Naranjo* but which, as of yet, has not been achieved.

Further, this court should reject Starks' contention that the "clearly stronger" burden of proof unfairly shifts the workload to defendants and the circuit court (Starks' brief at 24). This burden is rightly placed on the defendant, because it is the defendant's motion to prove. *Balliette*, 336 Wis. 2d 358, ¶18; *(Aaron) Allen*, 328 Wis. 2d 1, ¶83.

Moreover, insofar as the workload has shifted to circuit courts, that shift is proper and not problematic, because the circuit court is the most appropriate venue to assess the defendant's claims at this procedural juncture. *(John) Allen*, 274 Wis. 2d 568, ¶9 (circuit court in best position to evaluate record and pleadings; form independent judgment about those claims; and grant or deny evidentiary hearing in its discretion).

The trajectory of this court's cases, however, demonstrates that the burden of the workload has now unfairly shifted to the State and to the appellate courts, because defendants have failed to adequately plead their ineffective assistance of postconviction counsel claims in the trial courts. *Id.* ¶15 (despite "repetitive theme" of requiring specificity in postconviction motions, "many defendants continue to file insufficient postconviction motions"). *See also Lo*, 264 Wis. 2d 1, ¶¶ 99-108 (C.J. Abrahamson, dissenting) (*Escalona-Naranjo* still causes problems and practical difficulties, and has not promoted or accomplished finality, burdening both courts and State).

The plethora of cases in the court of appeals also demonstrates that defendants have not been held to task in

meeting their required burden of alleging their claims with particularity to meet the "sufficient reason" standard. As Chief Justice Abrahamson explained in her *Lo* dissent, defendants are still able to circumvent *Escalona-Naranjo*, and "serial litigation" is still allowed, because defendants "are getting review of their claims of trial court error despite *Escalona* through the circuitous and cumbersome route of claiming 'ineffective assistance of [postconviction] counsel.'" *Lo*, 264 Wis. 2d 1, ¶¶ 90, 106 (C.J. Abrahamson, dissenting). *See also id.* ¶50 (*Rothering* claims lead to circular analysis whereby court must address actual merits of claims in order to determine whether defendant should be procedurally barred from obtaining review of same issues).

Moreover. contrary to Starks' contention that *Escalona-Naranjo* is an "effective mechanism for promoting finality" or that the rule is "easy to understand and simple for the courts to apply" (Starks' brief at 17-18), post-*Lo* cases make clear that this finality has not yet been achieved, and litigation continues to arise. Indeed, Starks concedes (*id.* at 22) that the court of appeals has issued a plethora of *per curiam*, non-citable opinions; yet defendants still attempt to assert *Rothering* claims without meeting their required pleading burdens.

The overabundance of appellate cases, however, does not mean the burden on defendants in proving the "sufficient reason" is too great, as Starks insinuates (Starks' brief at 22-26). Rather, it simply means that it is the rare case alleging these so-called "cascading" claims in which there will actually be grounds for challenging postconviction counsel's effectiveness. *See Owens v. Boyd*, 235 F.3d 356, 358-59 (7th Cir. 2001) (characterizing ineffective assistance claim as "cascading" when defendant contends trial counsel was ineffective; appellate counsel was ineffective for not arguing that trial counsel had been ineffective; and public defender was ineffective for failing to seek discretionary review by

state's highest court on ground that both trial and appellate counsel had been ineffective).[11]

The presumption of effectiveness—both of postconviction counsel and trial counsel—means highly deferential scrutiny of both counsels' performance. Defendants should not be able to overcome the "sufficient reason" procedural hurdle for successive postconviction motions without providing adequate, specific allegations showing how and why the claims they wanted raised were "clearly stronger" than the claims postconviction counsel actually raised—or at least, that the not-raised claims were "obvious and very strong." *Balliette*, 336 Wis. 2d 358, ¶¶69, 78.

D. Under *Balliette*, the circuit court properly denied Starks' postconviction motion without an evidentiary hearing, because Starks' pleadings are inadequate and conclusory, and the record clearly shows Starks is not entitled to relief.

When assessing Starks' current postconviction motion[12] under *Balliette's* pleading burdens and standards,

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[11]*Newson* (A-Ap. 261-263) is one example of an adequately-pled motion, alleging trial counsel's failure to call an alibi witness.

[12]Starks' current postconviction motion filed on January 19, 2010 (125 [A-Ap. 101-123]) was denied on February 1, 2010 (126 [A-Ap. 207-212]). Starks previously filed a Wis. Stat. § 974.06 motion on December 17, 2009 (121); but the circuit court dismissed that motion for lack of compliance with local rules, with leave to re-file later (122 [R-Ap. 114]), such that the December 17, 2009 motion does not constitute a "prior motion" under these facts. Had the circuit court denied that motion on the merits, however, it would have constituted a prior motion subject to the *Escalona-Naranjo* procedural bar. *Hefty v. Strickhouser*, 2008 WI 96, ¶59, 312 Wis. 2d 530, 752 N.W.2d 820 (local rules may not supersede state statutes).

this court can easily conclude that Starks' motion is barred under *Escalona-Naranjo*, because it did not set forth, with particularity, a "sufficient reason" why Starks failed to raise his four current claims[13] during his direct appeal.

1. Mario Mills.

Starks' motion contends his postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel; because trial counsel failed to call Mills as a witness to "present[] the jury with the possibility of another shooter"—namely, Wayne Rogers (A-Ap. 118-119). In support, Starks proffers Mills' affidavit, alleging Mills never saw Starks shoot anyone, and Rogers was the only one with a weapon (A-Ap. 190).[14]

Starks' motion, however, fails to adequately state how or why postconviction counsel was deficient in not pursuing a claim of trial counsel's ineffectiveness, when Mills was Starks' co-defendant, set to have a joint trial with Starks, thereby precluding trial counsel from calling Mills as a witness at Starks' trial (74:21-23, 38-39). Mills unexpectedly took a plea on the morning of Starks' trial, but trial counsel did not have enough time at the eleventh-hour to interview Mills, or anyone whose testimony related to Mills' statements (74:5-10, 30-32; 76:56-59).

Starks' motion fails to explain why or how trial counsel was deficient by not calling Mills as a witness, in

[13]As Starks concedes (Starks' brief at 5), he has abandoned his other claims by failing to brief them. *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

[14]Starks also proffers a partial transcript of Mills' counsel's remarks at Mills' sentencing (A-Ap. 202-204); but counsel's remarks referenced Rogers' preliminary hearing testimony, not his trial testimony. Moreover, this claim about alleged inconsistencies in Rogers' testimony was already rejected in Starks' direct appeal (A-Ap. 154-155).

light of these circumstances precluding Mills' testimony until right before trial. *State v. Nielsen*, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325 (reasonableness of counsel's challenged conduct judged on facts and circumstances of case, viewed at time of counsel's conduct).

Even if this court assumes that trial counsel was deficient for failing to call Mills as a witness, however, Starks' motion fails to explain why or how this failure matters—that is, why or how Starks was prejudiced by postconviction counsel's decision not to pursue a claim of trial counsel's ineffectiveness.

In order to meet his burden of prejudice based on postconviction counsel's failure to litigate ineffective assistance of trial counsel, Starks must show that trial counsel's failure to call Mills undermined confidence in the outcome of the trial. *Balliette*, 336 Wis. 2d 358, ¶72. He must also show that Mills' testimony was material to the issues at hand. *(John) Allen*, 274 Wis. 2d 568, ¶22. Without those two showings, Starks was not prejudiced by trial counsel's failure, and Starks necessarily cannot show his postconviction counsel was ineffective for failing to pursue a claim of ineffective assistance of trial counsel.

Although Starks' motion asserts Mills would have testified he saw Rogers with a gun, and he did not see Starks shoot—"present[ing] the jury with the possibility of another shooter" (A-Ap. 118-119)—Starks fails to explain why or how Mills' testimony would have mattered, when two eyewitnesses, Wayne Rogers (86:34-37, 41, 91-92) and Carvius Williams (89:72-73, 123-124), both testified at trial that they witnessed Starks shoot the victim at close range; and they heard the victim beg Starks not to kill him.[15] The jury also heard that Starks fled the scene, even

[15]The two witnesses' unequivocal testimony also distinguishes Starks' case from *Malone v. Walls*, 538 F.3d 744, 759 (7th Cir. 2008), where one equivocal witness had identified the (footnote continued)

though the victim was still alive after the shooting (84:103-104).

Rogers further testified Starks grabbed the gun from Mills (86:33-34); and there was no doubt in his mind that Starks shot the victim (86:106). Williams testified Starks had frisked the victim before the fight, to see if the victim had a weapon (89:65); and that Starks held the gun in his right hand to do the shooting, although Williams had not seen where Starks got the gun (89:81).

The jury also heard evidence that Starks later confessed to Trenton Gray that he (Starks) thought he just murdered someone, after having grabbed Mills' firearm to shoot the victim (88:52-55). Starks had also previously told Gray that he (Starks) had obtained the street name, "Flash," because he was quick to "up his pistol" (88:59). Moreover, Starks was the only one with motive to kill the victim, having just been embarrassed by the victim during the fight in front of all of Starks' friends (84:18-21; 86:27-33; 89:62-70).

Starks argues now that Mills' testimony would have undermined Rogers' testimony identifying Starks as the shooter, because Mills would have testified that Rogers was the one with a gun (Starks' brief at 30-31). But Starks fails to explain why or how he was prejudiced without Mills' testimony, when Rogers himself testified that all the men had guns around because it was a "well-armed" drug house (86:95-96). Williams similarly testified (89:82). Moreover, in closing, trial counsel proposed the possibility of another shooter, given the physical evidence in the case (92:86-90).

But the jury obviously chose to believe that Starks—not Rogers—was the shooter; and Starks does not explain how Mills' testimony would have changed this conclusion, given the other testimony that:

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defendant as the shooter. Moreover, unlike *Malone*, Starks' counsel had a compelling reason why he did not call Mills. *Id.* at 762.

- no one else was shooting (86:106);
- no other guns were found in the house (84:91-92);
- the shots had all been fired from the same 9 mm semi-automatic pistol (84:84-85; 85:28-29); and
- Rogers described the gun Starks used to shoot the victim as a 9 mm (86:42).

In denying Starks' current postconviction motion, the circuit court found Starks' claim was "entirely speculative," and Mills' affidavit 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 [A-Ap. 211]).

Starks maintains that an evidentiary hearing is the only proper place to determine what Mills would have testified (Starks' brief at 31); but this court has always precluded the use of an evidentiary hearing to determine what the facts are. *Balliette*, 336 Wis. 2d 358, ¶¶61, 68 (evidentiary hearing is not end in itself or fishing expedition). Starks was required to allege his facts in his pleadings, and cannot use the evidentiary hearing to supplement or shore up his inadequate pleadings. *Bentley*, 201 Wis. 2d at 313.[16]

The record clearly demonstrates that Starks is not entitled to relief, and Starks' motion fails to state why or how his claim of ineffective assistance of trial counsel would have actually prevailed, had postconviction counsel raised it. *Balliette*, 336 Wis. 2d 358, ¶69 (motion only falls below objective standard of reasonableness when issues counsel failed to raise were "obvious and very strong," such that failure to raise them cannot be explained or justified).

[16]Starks also argues the circuit court should not have made a credibility determination about Mills without an evidentiary hearing (Starks' brief at 31); but the circuit court had adequate opportunity to assess Mills' demeanor and credibility during the pre-trial proceedings.

2. Dion Anderson.

Next, Starks' motion contends his postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel; because trial counsel failed to investigate and call Dion Anderson as a witness, who had information allegedly showing Rogers and Gray had influenced each others' trial testimony (A-Ap. 116-117).

Starks' motion, however, is barred because it fails to explain why Starks should be able to re-litigate this same issue that was already "finally adjudicated" in his direct appeal. *See* Wis. Stat. § 974.06(4); *Lo*, 264 Wis. 2d 1, ¶40; *(Aaron) Allen*, 328 Wis. 2d 1, ¶59. Although Starks tries to re-package this claim, he cannot re-litigate it now, because the factual basis of this claim was already litigated and lost in Starks' earlier mistrial claim. *(Aaron) Allen*, 328 Wis. 2d 1, ¶79.

At trial, when it became apparent Gray and Rogers had been transported together in violation of the sequestration order (88:89-92), trial counsel moved for a mistrial (90:5-7, 49-54); but the circuit court found as fact that the witnesses had not discussed the substance of their testimony while in the van (90:54-63). The circuit court therefore found no prejudice to Starks, even if the sequestration order had been violated (90:63-64). On direct appeal, the court of appeals upheld this ruling (A-Ap. 148-151).

Starks' motion fails to explain how and why his current ineffective assistance claim is anything other than an attempt to re-litigate the earlier mistrial claim regarding the same facts. *(Aaron) Allen*, 328 Wis. 2d 1, ¶79. Even on the merits, however, Starks' motion and evidentiary support fail to explain what Anderson would have testified at trial, how he knows it, and why it was relevant to Starks' defense. *(John) Allen*, 274 Wis. 2d 568, ¶30.

In support of his postconviction motion, Starks proffers correspondence from Anderson to Starks'

investigator stating he (Anderson) knows how Gray and Rogers "put everything together" to "get" Starks for "a bullshit murder he didn't do" (A-Ap. 181). Starks' evidentiary support, however, also shows that Starks' investigator was unable to obtain any information from Anderson (A-Ap. 182-183).[17]

Therefore, the circuit court properly found Starks' claim was "factually unsupported and conclusory" (126:4 [A-Ap. 210]). Accordingly, Starks has not met his burden in showing his postconviction counsel was deficient in his claim selection for failing to raise trial counsel's alleged ineffectiveness for failing to call Anderson as a witness. *Balliette*, 336 Wis. 2d 358, ¶¶62-70.

Starks argues now that his motion was sufficient, because Anderson would have testified about how Gray and Rogers put "'it'" together; and "[t]he substance of 'it' is precisely what Anderson would explain at an evidentiary hearing" (Starks' brief at 32-33). Starks, however, cannot use the evidentiary hearing to explain his pleadings or give factual support to his conclusory allegations. *Balliette*, 336 Wis. 2d 358, ¶¶61, 68. Rather, he must allege supporting facts in his motion, which, if true, would entitle him to a hearing. *Id.*

Because Starks has not provided <u>any</u> facts about Anderson—let alone any <u>material</u> facts—Starks' pleadings amount to nothing more than Starks' conclusory opinion that Anderson's testimony potentially could have contained information that may or may not have been relevant to his defense. *(John) Allen*, 274 Wis. 2d 568, ¶33. Such conclusory pleadings do not entitle Starks to an evidentiary hearing. *Id.* ¶34.

[17]Insofar as Starks contends the prosecutor pressured Anderson not to testify (Starks' brief at 32), this tortured reading of Anderson's letter (A-Ap. 194-195) makes no sense, because Anderson was supposed to be a prosecution witness (126:4 [A-Ap. 210]).

Nor do Starks' pleadings explain how or why Anderson's alleged testimony would have undermined the outcome of Starks' trial. *Balliette*, 336 Wis. 2d 358, ¶¶24-28 (for prejudice, defendant must show postconviction counsel's claim selection was unreasonable, and actually had adverse effect on defendant).

Starks asserts now that Anderson's testimony would have "solidif[ied] a reasonable doubt" (Starks' brief at 32); but Starks still does not explain how Anderson's testimony would have undermined Gray's credibility enough to create reasonable doubt, when the jury had already heard several substantial challenges to Rogers' and Gray's credibility—yet still chose to convict Starks.[18]

For example, the jury heard that Rogers (86:15-17, 43) and Gray (88:44, 49, 60) were both federal prisoners who hoped to receive reduced sentences in their drug cases in exchange for testifying against Starks. The jury also heard that Rogers gave three inconsistent statements to police before implicating Starks (86:70-79); and was planning to shoot Mills in retaliation for giving Starks the murder weapon which killed Rogers' best friend (86:113-118).[19] Even though Gray denied it, the jury also could have inferred that Gray had a reputation for intimidating witnesses (88:66-71), and wanted to accuse Starks in order to get himself out of jail (88:72-73).

But the jury had already taken into account that even liars and crooks tell the truth once in a while (A-Ap. 155). The jury still chose to convict Starks, evidently believing Gray when he testified he did not discuss the case with Rogers in the van (88:90-92), and believing

[18]Indeed, trial counsel called all the State's witnesses liars during closing argument (92:70-81).

[19]Indeed, trial counsel alluded in closing argument that Rogers' motive for trying to shoot Mills was that Mills, not Starks, shot Rogers' best friend (92:68).

Rogers when he testified he wanted to do the right thing and come clean (86:43, 102).

Moreover, Rogers and Gray testified about completely different things at trial: Rogers (along with Williams) witnessed the murder; but Gray only testified about Starks' later admissions (A-Ap. 150-151). Starks fails to explain how he was prejudiced by trial counsel's failure to call Anderson to testify about Gray's and Rogers' alleged collusion to frame Starks, when the jury still heard Williams' testimony that he witnessed Starks committing the murder.

3. Willie Gill/"Junebug."

Next, Starks' motion asserts his postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel; because trial counsel failed to investigate "Junebug's" phone number, which was "crucial" to bolster Starks' defense that Gray was lying and Starks was telling the truth (A-Ap. 114-116). In support, Starks proffers a document allegedly showing all phone numbers in Gray's cell phone directory, including "Junebug's" number (A-Ap. 156-158).

Again, however, Starks' motion fails to explain why Starks should be able to re-litigate this same issue that was already "finally adjudicated" in his direct appeal. *See* Wis. Stat. § 974.06(4); *Lo*, 264 Wis. 2d 1, ¶40; *(Aaron) Allen*, 328 Wis. 2d 1, ¶59. Although Starks tries to re-package this claim, Starks raises the same underlying facts he raised in his previous mistrial claim; Starks cannot re-litigate it now. *(Aaron) Allen*, 328 Wis. 2d 1, ¶79.

Before trial, both the prosecutor and Starks' trial counsel mounted investigations into "Junebug" (82:3); but neither party knew "Junebug's" true identity until Gray unexpectedly testified about Gill at trial (89:22-23). Trial counsel moved for a mistrial, arguing the prosecution

should have disclosed "Junebug's" identity sooner, and the circuit court took the motion under advisement (89:20-45). The circuit court, however, ultimately denied the mistrial motion, because the defense had information linking "Junebug's" phone number to Gill, such that "Junebug's" identity was not under the exclusive control of the State (90:69-74). The court of appeals affirmed this ruling on direct appeal (A-Ap. 151-153).

Thus, Starks' motion must fail, because it fails to explain how and why his current ineffective assistance claim is anything other than an attempt to re-litigate his previous mistrial claim about "Junebug's" identity.

Even on the merits, however, Starks' motion fails to explain how trial counsel's unsuccessful investigation into "Junebug's" identity constituted deficient performance, because it fails to allege with particularity whether the phone records even existed; what they would have shown; and why they were relevant to Starks' defense. *(John) Allen*, 274 Wis. 2d 568, ¶30.

As the circuit court found in denying Starks' postconviction motion, "no phone records have been presented to establish the veracity of [Starks'] claim" (126:4 [A-Ap. 210]); nor was there even a record at trial of what Starks' cell phone number was (89:44-45). Thus, it was "questionable if it could be determined whether [Gill's] phone was used to call [Starks] without knowing what [Starks'] number was" (126:4 n.2 [A-Ap. 210]).

Nor does Starks's motion explain how or why trial counsel's failure to obtain phone records prejudiced Starks, or how the inclusion of the phone records would have undermined the outcome of his trial. *Balliette*, 336 Wis. 2d 358, ¶¶24-28.

Starks argues now that the phone records would have showed Gray was lying about using "Junebug's" phone" to call Starks, thereby leading the jury to conclude Gray was also lying about the two incriminating

statements Starks made later (Starks' brief at 33-34). But as discussed above, the jury already heard attacks on Gray's credibility, yet still chose to convict Starks.

As also discussed above, Gray did not actually witness the shooting (A-Ap. 150); but only testified about Starks' later admission to the murder during the cell phone call, and also Starks' later incriminating statements at the funeral about wanting to silence or murder Williams in retaliation for his cooperation with police (88:52-59). As the circuit court found in denying Starks' postconviction motion, "the court is not persuaded that an attack on Gray's credibility would have been reasonably probable to alter the outcome of the trial given the other witnesses presented by the State" (126:4 [A-Ap. 210])—namely, Rogers and Williams, who both testified that Starks shot the victim.

In sum, Starks has not provided any material facts about "Junebug's"—or his own—phone records; nor has he explained how his current claim differs from the "Junebug" issue previously litigated. Thus, Starks' pleadings amount to nothing more than Starks' opinion that the phone records could have contained information that may or may not have been relevant to Gray's credibility. *(John) Allen*, 274 Wis. 2d 568, ¶¶33-34. Consequently, Starks cannot meet his burden in showing that this claim was "obvious and very strong" such that postconviction counsel's failure to raise it was unjustified. *Balliette*, 336 Wis. 2d 358, ¶69.

4. Mary McCallum and Stanley Daniels.

Finally, Starks' motion contends his postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel; because trial counsel failed to investigate and call McCallum and Daniels as witnesses,

who allegedly had information showing Gray never talked to Starks at the funeral—which, in turn, would prove Gray was lying at trial about Starks' incriminating statements (A-Ap. 117-118). In support, Starks proffers the affidavits of McCallum and Daniels, both alleging they never saw Gray with Starks at the funeral (A-Ap. 199-200).

Again, however, even assuming that Starks' motion alleges sufficient facts as to what these two witnesses would have testified, the motion fails to explain how these witnesses could possibly know that Starks was never with Gray the entire day, such that trial counsel was deficient in not calling them as trial witnesses. *(John) Allen*, 274 Wis. 2d 568, ¶30. As the circuit court found, there was no "reasonable probability that the jury would have … believe[d] that both the defendant's grandmother and his father had their eyes on the defendant's every single movement on the day of the funeral" (126:5 n.4 [A-Ap. 211]).

Moreover, Starks' motion fails to allege how or why trial counsel's failure to call these witnesses prejudiced him in any way or undermined the outcome of his trial, given the overwhelming evidence against Starks. *Balliette*, 336 Wis. 2d 358, ¶¶24-28. As the circuit court found, "there is not a reasonable probability the outcome of the trial would have been any different given the testimony of eye witnesses [*sic*] who saw the defendant shoot the victim" (126:5 [A-Ap. 211]).

Starks argues now that these witnesses would have provided "beneficial" testimony to contradict the State's evidence (Starks' brief at 35); but this court should reject Starks' merit-based standard at this procedural posture. Postconviction and post-direct-appeal, the "strong policy" of finality is paramount, and the law requires that defendants assert much more than just that the testimony was beneficial. *Balliette*, 336 Wis. 2d 358, ¶¶53-58.

Finally, Starks has not provided any evidentiary support for his conclusory assertion that postconviction counsel wanted to protect trial counsel's reputation by not filing a *Rothering* claim; and this court should reject Starks' contention that an evidentiary hearing is the "only proper forum to evaluate" what his witnesses would have testified (Starks' brief at 35-36). *Balliette*, 336 Wis. 2d 358, ¶¶61, 68.

In sum, none of Starks' *Rothering* allegations in his postconviction motion meet his required pleading burdens under *Balliette* or *Escalona-Naranjo*. Not only has Starks already litigated some of these claims, but Starks has also failed to show a "sufficient reason" why he did not raise these claims earlier—having failed to show that the claims he wanted raised were "clearly stronger" than the claims his postconviction counsel actually raised on direct appeal.

Accordingly, Starks' current motion is procedurally barred under *Escalona-Naranjo* as a prohibited successive motion under Wis. Stat. § 974.06.

CONCLUSION

This court should affirm Starks' conviction and the circuit court's order denying Starks' current postconviction motion without an evidentiary hearing.

Dated this 21st day of November, 2012.

Respectfully submitted,

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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 10,975 words.

Dated this 21st day of November, 2012.

_____
SARAH K. LARSON
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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 21st day of November, 2012.

_____
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