STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP922

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY SHANNON,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN
RACINE COUNTY CIRCUIT COURT,
THE HONORABLE FAYE M. FLANCHER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs of the parties should adequately address the issues presented.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Terry Shannon ("Terry") with one count of first-degree intentional homicide and one count of discharge of a firearm from a vehicle, both as party to a crime, for his role in the drive-by shooting of Benny Smith ("Benny"). (1.) The State accused Terry of driving while his brother, Antonio Shannon ("Tony"), opened fire on Benny as Benny sat in a car with three other men. (1:1-2.) A shoot-out ensued between the cars' occupants. (*Id.*)

Prior to trial, Terry and his brother were permitted to withdraw guilty pleas to second-degree reckless homicide. (106:64.) The State then tried the brothers jointly. (96-103.) The Shannons had two principal theories of defense. The first was that Benny was fatally shot by one of the other men in Benny's car. (103:87.) The other was that the Shannons acted in self-defense. (103:88-90.)

The jury returned verdicts of guilty on all charges. (103:162-164.)

After taking a direct appeal, Terry filed a *pro se* § 974.06 motion (49) and, by counsel, a motion for new trial (62). For the first time, Terry claimed that the trial court erred by failing to give an unrequested jury instruction on the lesser-included offense of second-degree intentional homicide and imperfect self defense. (49:3-7.) Terry further alleged that his trial counsel was ineffective for not requesting the jury instruction and that

his postconviction counsel was ineffective for not raising the ineffective assistance of trial counsel claim on direct review. (49; 62.)

The trial court held an evidentiary hearing. (106.) Based on the testimony of trial and postconviction counsel, the trial court determined that neither was ineffective. (106:82.) The court issued a written decision and order denying the § 974.06 motion. (63.)

Terry appeals. (65.)

Additional relevant facts will be presented where relevant in the argument below.

ARGUMENT

I. Terry's claims of trial court error and ineffective assistance of trial counsel are procedurally barred because he failed to prove a sufficient reason why he did not raise the claims on direct appeal.

A. Applicable law and standard of review.

Wisconsin Statute § 974.06(4) requires a defendant to raise all grounds for postconviction relief in his or her original, supplemental, or amended motion or appeal. Successive postconviction motions and appeals are procedurally barred unless a defendant can show a sufficient reason why the newly alleged errors were not raised previously. *See* Wis. Stat. § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel in the initial postconviction proceeding may constitute a "sufficient reason" for not having previously raised a claim of ineffective assistance of trial counsel. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996).

To demonstrate that ineffective assistance of postconviction counsel provides a "sufficient reason," the defendant must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis. 2d 259, 635 N.W.2d 838. This requires the defendant to show that his newly raised issues are "clearly stronger" than the issues raised previously.

> "When a claim of ineffective assistance of [postconviction] counsel is based on failure to raise viable issues, the [trial] court must examine the trial record to determine whether [postconviction] counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."

State v. Starks, 2013 WI 69, ¶ 57, 349 Wis. 2d 274, 833 N.W.2d 146 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)) (second alteration in *Starks*); *accord State v. Romero-Georgana*, 2014 WI 83, ¶¶ 45-46, 360 Wis. 2d 522, 849 N.W.2d 668.

Where the defendant fails to prove that postconviction counsel's performance was constitutionally deficient, the motion fails to establish a "sufficient reason" for not raising the issues previously, and the motion will be deemed procedurally barred under Wis. Stat. § 974.06. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 36; *see also State v. Balliette*, 2011 WI 79, ¶¶ 62-67, 336 Wis. 2d 358, 805 N.W.2d 334.

On appeal, the reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. The reviewing court determines de novo whether, under those

facts, the defendant has proven deficient performance and prejudice. *Koller*, 248 Wis. 2d 259, ¶ 10.

B. Claim of trial court error is procedurally barred because Terry cannot show a "sufficient reason" for failing to raise it on direct review.

Terry claims that the trial court erred by failing to give Wis. JI-Criminal 1014 (2003), the jury instruction on imperfect self defense and second-degree intentional homicide as a lesser included offense. Terry's Br. 6-17. Terry's claim is procedurally barred under Wis. Stat. § 974.06(4) and *Escalona-Naranjo* because he cannot show a sufficient reason for not raising the claim on direct review.

Terry did not object at the time of trial to the jury instructions in his case. (102:221-232.) "Failure to object at the [jury instruction] conference constitutes a waiver of any error in the proposed instructions . . . ." Wis. Stat. § 805.13(3); *accord State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267. Because Terry did not timely object, Terry forfeited the ability to assert on appeal any claim that the trial court erred when it did not use Wis. JI-Criminal 1014 (2003) in his case. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727.

It follows that Terry cannot show that his counsel on direct review was ineffective for failing to raise the claim of trial court error. *State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel does not perform deficiently by failing to raise meritless claims.) On this ground alone, Terry cannot establish a "sufficient reason" to overcome the

procedural bar under Wis. Stat. § 974.06(4) and *Escalona-Naranjo*.[1]

Although Terry asserts his jury instructions claim through the rubric of ineffective assistance of trial counsel, Terry's Br. 17-18, that claim also fails on procedural grounds. Like his claim of trial court error, Terry's trial counsel ineffectiveness claim is barred by *Escalona-Naranjo*. *See infra* at 5-14.

C. Trial counsel ineffectiveness claim is procedurally barred because Terry did not prove a sufficient reason for not previously raising the claim.

Terry attempted to overcome the procedural bar of Wis. Stat. § 974.06(4) and *Escalona-Naranjo* by showing that his postconviction counsel on direct review was ineffective for failing to raise a claim of ineffective assistance of trial counsel. (106:14-34.) The trial court denied the motion on the ground that neither trial nor postconviction counsel rendered ineffective assistance. (106:82.)

This court should affirm. As a threshold matter, the doctrine of estoppel bars relief on Terry's newly raised claim because he is asserting a position contrary to his position at the time of trial. In any event, Terry failed to show that trial counsel was ineffective. As a result, postconviction counsel was not ineffective and Terry's claim is barred for lack of a

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[1] If this Court does not reject Terry's claims of trial court error on procedural grounds, the State respectfully requests leave to file a supplemental brief on the merits. *Cf. State v. Tillman*, 2005 WI App 71, ¶ 13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574 (approving practice of limiting briefing to procedural issue of whether claims are barred under Wis. Stat. § 974.06(4) and requesting permission to file a supplemental brief is procedural issue is deemed nondispositive).

"sufficient reason" for failing to previously raise his trial counsel ineffectiveness claim. *Escalona-Naranjo*, 185 Wis. 2d at 185-86.

1. Because Terry's ineffective assistance of trial counsel claim is barred by estoppel, postconviction counsel was not ineffective for failing to raise it on direct review.

As the record makes clear, Terry's trial counsel, Attorney John Birdsall, consulted regularly with Terry during trial. (106:67-69.) Among other things, Terry and Attorney Birdsall discussed whether to seek a verdict of complete exoneration rather than possible conviction of the lesser-included offense of second-degree intentional homicide. (106:43, 61; 102:232.) Terry discussed the subject not only among Tony and both defense attorneys, but also with Attorney Birdsall alone. (102:232.) Terry does not dispute that he agreed to the "all or nothing" approach that defense counsel took in this case. (106:61.)

Terry's own "all or nothing" approach precludes him from arguing a contrary position now—namely, that Attorney Birdsall was deficient for failing to pursue imperfect self defense and possible conviction of second-degree intentional homicide. *State v. English-Lancaster*, 2002 WI App 74, ¶¶ 18-19, 252 Wis. 2d 388, 642 N.W.2d 627 (judicial estoppel is equitable rule applied at discretion of court to prevent party from adopting inconsistent positions in legal proceedings). Terry should be judicially estopped from pursuing ineffective assistance of trial counsel because he is now taking a position that is completely inconsistent with his position at trial. This kind of "fast and loose" game-playing is exactly what judicial estoppel is intended to prevent. *Id.* ¶ 18 (purpose of judicial estoppel is to preserve integrity of the judicial system). *State v. McCready*, 2000 WI App 68, ¶ 1, 234 Wis. 2d 110, 608 N.W.2d 762 (applying judicial estoppel); *State v. Edmunds*, 229 Wis. 2d

67, 85 n.3, 598 N.W.2d 290 (Ct. App. 1999) (explaining judicial estoppel).

Based on judicial estoppel, it cannot be said that postconviction counsel was ineffective for failing to raise Terry's proffered trial counsel ineffectiveness claim. To prove deficient performance, Terry needed to show that postconviction counsel ignored a claim that is "clearly stronger" than the claims that she raised on direct review. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 36. Because estoppel bars Terry's trial counsel ineffectiveness claim, he cannot demonstrate that the claim is "clearly stronger" than those that postconviction counsel pursued on direct review. Although the trial court did not reject Terry's motion on this ground, it easily could have. *See Milton v. Washburn Cnty.*, 2011 WI App 48, ¶ 8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 ("if a circuit court reaches the right result for the wrong reason, we will nevertheless affirm"). This Court can and should affirm the trial court's decision on this ground alone.

2. In any case, trial counsel was not ineffective for failing to request an instruction on second-degree intentional homicide and imperfect self-defense.

Even setting aside judicial estoppel, this Court should affirm the trial court's order denying Terry's motion. As the trial court found, Terry did not prove that Attorney Birdsall's strategic decision not to request a lesser included jury instruction on second-degree intentional homicide was deficient performance. (106:80.) Because there is no merit to Terry's trial counsel ineffectiveness claim, *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115 (failure to show either *Strickland* prong obviates need to address the other), postconviction counsel was not ineffective for failing to raise it. *Wheat*, 256 Wis. 2d 270, ¶ 14.

a. Perfect and imperfect self defense.

Perfect self defense is "a complete affirmative defense to a charge of first-degree intentional homicide." *State v. Head*, 2002 WI 99, ¶ 3, 255 Wis. 2d 194, 648 N.W.2d 413; *see* Wis. Stat. § 939.48.[2] Perfect self-defense in an intentional homicide case results in complete acquittal where (1) the defendant believed that an interference with his person involved the danger of imminent death or great bodily harm, (2) the defendant believed that it was necessary to use force which was intended or likely to cause death or great bodily harm to prevent or terminate that interference, and (3) the defendant's beliefs were reasonable. *Head*, 255 Wis. 2d 194, ¶ 66. The Wisconsin Supreme Court explained:

> Self-defense can be a complete affirmative defense to a variety of criminal charges, but the requirements for perfect self-defense are increased for an intentional homicide. Implicitly, the statute provides a perfect defense to a person charged with an intentional homicide when the person *reasonably* believed that an interference with her person involved the danger of imminent death or great bodily harm and *reasonably* believed that it was necessary to use force which was

[2] Wis. Stat. § 939.48(1) provides:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

> intended or likely to cause death or great bodily harm to prevent or terminate that interference.

Head, 255 Wis. 2d 194, ¶ 66.

Imperfect self-defense (unnecessary defensive force) does not result in complete acquittal. Imperfect self-defense mitigates the crime of first-degree intentional homicide to second-degree intentional homicide. *Head*, 255 Wis. 2d 194, ¶ 85; *see* Wis. Stat. §§ 940.01(2)(b) and 940.05(1)(a).[3] Imperfect self-defense results in conviction of second-degree intentional homicide if the defendant believed he was in imminent danger of death or great bodily harm and that the force used was necessary to defend himself. *Head*, 255 Wis. 2d 194, ¶ 5.

In contrast to perfect self defense, imperfect self defense "requires only *actual* beliefs even if they are unreasonable." *Head*, 255 Wis. 2d 194, ¶ 87.

> If a defendant had an *actual* but unreasonable belief that she was in imminent danger of death or great

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[3] Wis. Stat. § 940.01(2) provides:

> (2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> . . . .
>
> (b) *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

Wis. Stat. § 940.05(1)(a) provides that a person is guilty of second-degree intentional homicide in prosecutions under § 940.01 if "the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist as required by s. 940.01(3)."

> bodily harm and an *actual* but unreasonable belief that the force she used was necessary to defend herself, the defendant may prevail on imperfect self-defense, but not perfect self-defense, because perfect self-defense requires objective reasonableness.

Id. ¶ 90.

Both perfect and imperfect self-defense are affirmative defenses. *Head*, 255 Wis. 2d 194, ¶¶ 106-07. Once a defendant successfully raises an affirmative defense, the State is required to disprove the defense beyond a reasonable doubt. *Id.* ¶ 106.

b. Trial counsel was not deficient for declining to seek conviction of a lesser included offense as an alternative to complete acquittal based on perfect self defense.

At the *Machner*[4] hearing, Attorney Birdsall explained that he did not request an instruction on second-degree intentional homicide because, after talking with Terry about it, the most logical and reasonable strategy was "to go [with] straight-up self-defense:"

> to go from first degree to second degree intentional homicide would be kind of a ridiculous strategy in this case especially -- I mean, in my opinion for either one of the defendants, but particularly for Terry as the driver, especially since he already just walked away from a second degree reckless plea, which is significantly less than second degree intentional.
>
> So, you know, as far as my discussions with Terry about that subtle distinction between perfect and

[4] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> imperfect, frankly, I don't have a really great recollection about what those conversations would have been, but it would have been my strategy to go straight-up self-defense and I think -- I know I talked with Terry about that. I talked with Richard Hart about it. I know he talked to his client. It was the most logical, reasonable strategy to employ at this point given the withdrawal of the plea.

(106:41-42.)

The trial court concluded that Attorney Birdsall did not perform deficiently by pursuing an "all or nothing" approach to the case. (106:80.) Finding Birdsall's testimony credible (106:81), the court decided that it would have been "foolish" to request a lesser included offense given the circumstances of this case:

> The defendants had previously plead [sic] to a second degree reckless homicide, withdrew their pleas, indicated that this was going to be a trial, as did the State.
>
> There was never an offer in this case, and it would be foolish to argue for a lesser included in this case that would dovetail with the second degree intentional homicide, which is a higher penalty than the second degree reckless homicide from which the defendant withdrew his plea. So that is nonsensical.
>
> So I thought it's credible what Mr. Birdsall testified to. He's an experienced attorney; he is experienced in these matters, and clearly, again we don't get to -- in order to ask for imperfect self-defense there has to be a lesser included asked for. That was not done here. That was done for a specific tactical reason as testified.

(106:75-76.) The trial court likewise found that postconviction counsel did not perform deficiently when, on direct review,

she declined to challenge trial counsel's performance. (106:82.) This Court should affirm.

Terry did not prove that Attorney Birdsall was ineffective for pursuing complete exoneration based on perfect self defense without alternatively pursuing a possible conviction of second-degree intentional homicide based on imperfect self defense. To prove deficient performance, Terry needed to show that Attorney Birdsall's challenged conduct was "objectively unreasonable." *State v. Oswald*, 2000 WI App 2, ¶ 63, 232 Wis. 2d 62, 606 N.W.2d 207. Terry needed to overcome the presumption that trial counsel made all significant decisions in the exercise of reasonable judgment. *Strickland*, 466 U.S. at 690.

Attorney Birdsall made a reasonable strategic choice not to pursue imperfect self defense and possible conviction of the lesser included offense of second-degree intentional homicide. The State's theory was that Terry, as the driver, was party to the crime of killing Benny in a drive-by shooting. (103:16-17.) The State argued that Tony shot first, prompting the occupants of the other car to return fire. (103:17-19.)

The defense sought to create reasonable doubt over whether Tony shot first. (103:86.) The defense argued that Tony shot back only after he was fired on by the occupants of Benny's car. (103:74.) As Attorney Hart argued in closing, the Shannons "have a right to defend themselves if someone starts shooting at them, and that's all they did. They defended themselves." (103:89-90.)

Implicit in Terry's theory of defense was that, because Tony came under fire first, he *reasonably* believed that he was in imminent danger and that shooting back was necessary to prevent death or great bodily harm to himself.

To present imperfect self defense in the alternative would have required the defense to take the inconsistent position that Tony's beliefs were *unreasonable*. Wis. JI-Criminal 1014 (2003). Defense counsel may reasonably choose to avoid taking alternative and inconsistent positions to avoid the risk that the jury might reject both. *Lee v. State*, 65 Wis. 2d 648, 654, 223 N.W.2d 455 (1974) (jury presented with contradictory defense may find merit in neither).

Trial counsel's performance is not deficient when trial counsel decides not to request a lesser-included instruction that would be inconsistent with the general theory of defense. *State v. Eckert*, 203 Wis. 2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996); *see also State v. Westmoreland*, 2008 WI App 15, ¶ 21, 307 Wis. 2d 429, 744 N.W.2d 919 (recognizing that while a lawyer may argue inconsistent defenses, "a lawyer is not ineffective for *not* arguing inconsistent theories"). Rather,

> [A] defendant does not receive ineffective assistance where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense.

Eckert, 203 Wis. 2d at 510.

Here, Attorney Birdsall consulted with Terry and Terry acquiesced in the decision to go for "all or nothing" in its defense against the charge of first-degree intentional homicide. (106:61.) Creating a reasonable doubt in any one juror about whether Tony acted in perfect self defense would have required a complete acquittal. Attorney Birdsall's decision not to pursue possible conviction of the lesser-included offense of second-degree intentional homicide constituted a reasonable

defense strategy. *State v. Koller*, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979).

In sum, Terry's Wis. Stat. § 974.06 motion is procedurally barred. There is no merit to Terry's ineffective assistance of trial counsel claim. Hence, the trial court correctly found that postconviction counsel was not ineffective for failing to raise the claim on direct review. (106:82.) Terry thus failed to establish a "sufficient reason" to overcome *Escalona-Naranjo's* procedural bar. This Court can and should affirm the trial court's decision on this procedural ground. *See Milton*, 332 Wis. 2d 319, ¶ 8 n.5.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the trial court's order denying Terry's Wis. Stat. § 974.06 motion.

Dated this 12th day of May, 2016.

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 3,622 words.

Dated this 12th day of May, 2016.

_____

SANDRA L. TARVER
Assistant Attorney General

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 12th day of May, 2016.

_____

SANDRA L. TARVER
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