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COURT OF APPEALS
DISTRICT I

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP551

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAFEAL D. NEWSON,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING NEWSON'S THIRD
WIS. STAT. § 974.06 POSTCONVICTION MOTION,
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE JEFFREY CONEN,
PRESIDING

**PLAINTIFF-RESPONDENT'S BRIEF AND
SUPPLEMENTAL APPENDIX**

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ISSUE PRESENTED

The State reframes the issues.¹

Under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), any claim not raised in the defendant's initial postconviction motion is procedurally barred unless there is a sufficient reason why he or she did not raise it previously. Before bringing the Wis. Stat. § 974.06 motion that is the subject of this appeal, Rafeal Newson filed a direct appeal from his conviction, two prior section 974.06 motions, and a petition for a writ of habeas corpus. Are Newson's claims procedurally barred because he failed to show in his third section 974.06 motion that he had a sufficient reason for failing to raise his claims sooner?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be appropriate if this Court interprets the phrase "in custody under a sentence of a court" as used Wis. Stat. § 974.06(1). That is, did the circuit court have the authority to review Newson's section 974.06 motions that he filed

¹ Newson raises the substantive questions first, saving the question of whether he is procedurally barred until last. The State believes that the question of whether the claims that Newson raised in his third Wis. Stat. § 974.06 motion were procedurally barred is dispositive of this Court's resolution of this appeal. The State asks this Court for leave to file a supplemental brief discussing the merits of Newson's claim should it determine that Newson's third postconviction motion was not procedurally bared. See *State v. Tillman*, 2005 WI App 71, ¶ 13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574.

while still serving an Arizona sentence and before he started serving his consecutively imposed Wisconsin sentence?

INTRODUCTION

In 1996, the State charged Newson with first-degree intentional homicide for the death of Terrance Maclin. A court commissioner found probable cause on the complaint and issued a warrant for Newson's arrest. Newson was apprehended in Arizona several years later. After he was convicted and sentenced to prison for crimes committed in Arizona, he returned to Wisconsin under the Interstate Agreement on Detainers (IAD).² In 2001, a jury found Newson guilty of first-degree intentional homicide and the circuit court imposed a life sentence. Newson appealed his conviction and this Court affirmed.

In 2004, Newson filed his first section 974.06 motion alleging in part the ineffectiveness of his postconviction counsel. The circuit court issued a decision and order addressing the merits of Newson's claims and denying his motion. This Court affirmed the circuit court's decision.

In 2010, Newson filed his second section 974.06 motion. This time, he alleged that defects with respect to the filing of the complaint resulted in his unlawful return to Wisconsin under the IAD. As a result of these defects in the initiation of proceedings against him, Newson contended the circuit court lacked jurisdiction over him and his conviction was invalid. Further, his prior counsel were ineffective for failing to challenge the alleged defects in the initiation of the

² A detainer in this context refers to a detainer under the Interstate Agreement on Detainers (IAD) as adopted by Wis. Stat. § 976.05. The IAD governs the transfer of inmates serving prison sentences in one state to another state for the purpose of criminal prosecution on untried charges. Wis. Stat. § 976.05(1).

proceedings against him. The circuit court determined that Newson's second section 974.06 motion was procedurally barred. Newson appealed, but at his request, this Court dismissed his appeal.

In 2011, Newson petitioned this Court for a writ of habeas corpus, challenging the circuit court's jurisdiction over him. Newson's claims were similar to the claims that he raised in his second section 974.06 motion. This Court applied *Escalona-Naranjo* and denied his petition. To the extent that Newson was asserting a claim that his prior appellate counsel was ineffective, this Court also rejected that claim because it lacked merit.

In 2016, after Newson began serving his Wisconsin sentence, he filed his third section 974.06 motion. As with the second motion and his habeas petition, Newson again asserted that his prior counsel were failing to challenge the alleged defects in the initiation of proceedings against him that deprived the circuit court of jurisdiction over his case. The circuit court determined that his motion was procedurally barred under *Escalona-Naranjo*. It specifically rejected Newson's argument that the circuit court lacked the authority to decide his prior section 974.06 motions because he was in custody under his Arizona sentence and not his consecutively imposed Wisconsin sentence when the circuit court decided his prior motions.

This Court should decline to address the merits of Newson's appeal on the ground that his claims are procedurally barred under section 974.06(4) and *Escalona-Naranjo*. Newson previously raised the issues that he now raises and he should be precluded from raising them again. Even if he had not raised them in his second section 974.06 motion or his habeas petition, his claims would still be barred because he has not provided a sufficient reason for failing to raise them in his first appeal or his first section 974.06 motion. This Court should also reject Newson's

argument that the circuit court did not have the authority to decide his prior section 974.06 motions challenging his Wisconsin conviction before he started serving it.

SUPPLEMENTAL STATEMENT OF THE CASE

In a complaint dated December 6, 1996, the State charged Newson with first-degree intentional homicide as a party to a crime in connection with Terrance Maclin's death. An assistant district attorney approved the complaint for filing. (R. 1:3.) On the same day, a court commissioner³ issued a felony warrant and authorization for extradition. (R. 3:1.) The warrant indicated that a copy of the complaint was attached to the warrant and that the commissioner found probable cause to believe that Newson committed first-degree intentional homicide. In addition, the warrant also included an authorization for extradition and a warrant number. (3:1.)

Newson made his initial appearance on August 29, 2000. (R. 92:1.) The commissioner found probable cause on the complaint and set the matter for a preliminary hearing. (R. 92:2–4.) Newson was still serving his Arizona prison sentence. (R. 92:3–4.)

On September 8, 2000, Newson waived his right to a preliminary hearing. (R. 93:2.) The State filed an information. (R. 5; 93:3.) Newson entered a not guilty plea. (R. 93:3.)

At a November 28, 2000 final pretrial, the parties informed the circuit court⁴ of the case's status, which had been scheduled for trial on December 19, 2000. (R. 94:3.)

³ The court commissioner's signature is illegible.

⁴ The record reflects that the Hon. Kitty K. Brennan presided at several pretrial hearings. (R. 94; 95; 96; 97; 98; 99.)

Trial counsel told the circuit court that Newson's case was "a detainer case, that, apparently has to be resolved by December 26." (R. 94:3.)

At a final pretrial on December 6, 2000, trial counsel asked to withdraw based on communication issues. (R. 95:3.) During the discussions, trial counsel noted that this was a detainer case which requires the case to be tried within 120 days from a voluntary transfer. (R. 95:2.) The parties agreed that if the case was not tried within 120 days that it could be dismissed with prejudice. (R. 95:3–4.) But trial counsel also noted that Newson could waive those time limits under the case law. (R. 95:4–5.) The prosecutor objected to Newson's change of counsel in part because dismissal with prejudice is the remedy for an inexcusable failure to try a case within the IAD's time limits. (R. 95:6–7.)

The circuit court denied Newson's motion for a change of counsel and to adjourn the trial. (R. 95:6, 14.) It noted that the warrant was issued on December 6, 1996 and that the warrant was returned on August 28, 2000. (R. 95:7.) It determined that "the detainer was lodged. The 120 day [sic] runs on December 26th." (R. 95:6–7.)

In a letter dated December 7, 2000, Newson criticized his trial counsel's handling of his case. (R. 6:1–3.) He also noted his objection to the circuit court's denial of his counsel's motion to withdraw and "motion to continue." (R. 6:3.)

On December 15, 2000, the circuit court considered Newson's request for a change of counsel and a continuance. (R. 96:2–3.) The circuit court granted Newson's request for a change of counsel and continued the case. (R. 96:14.) The circuit court also addressed the detainer time limits. Based on Newson's "actions and conduct with his lawyer . . . he has, by conduct, waived the hundred-and-twenty-day trial requirement of 976.05(4)(c)." (R. 96:15.) The circuit court

found “good cause” and granted a “necessary and reasonable continuance.” (R. 96:16.) The circuit court noted that Newson had requested a continuance in his motion and Newson agreed on the record with the continuance. (R. 96:16–17.)

On January 5, 2001, Newson appeared with new trial counsel. (R. 97.) On March 5, 2001, the circuit court noted that the parties were ready to proceed for trial and conducted a hearing on Newson’s motion to suppress statements. (R. 99:7–8.) The circuit court denied Newson’s motion. (R. 99:35–37.)

On March 6, 2001, the matter proceeded to trial.⁵ (R. 100:1.) On March 8, 2001, the jury returned a guilty verdict on the charge of first-degree intentional homicide. (R. 25:1.) The circuit court sentenced Newson to a life term and set an eligibility date for release of January 1, 2050. (R. 28.)

Newson’s first appeal. Newson filed a notice of appeal. (R. 38:1.) On appeal, Newson argued that the circuit court improperly admitted three hearsay statements as statement against a witness’s societal interest and his right to confrontation. (R. 41:1.) This Court upheld the circuit court’s determination that the unavailable witness’s statements were admissible as statements against interest and did not violate his confrontation rights. (R. 41:4–8.) This Court denied Newson’s direct appeal and summarily affirmed his conviction. (R. 41:1.)

Newson’s first Wis. Stat. § 974.06 motion. On July 9, 2004, Newson filed a motion under section 974.06. (R. 48.) Newson raised a variety of claims related to the circuit court’s denial of his motion to suppress statements and the

⁵ The Hon. John J. Dimotto presided over the trial. (R. 100.)

effectiveness of his trial counsel and appellate counsel. (R. 48:2–21.)

On October 7, 2004, the circuit court⁶ filed a decision and order denying Newson’s postconviction motion. (R. 52:1.) The circuit court applied the standard under *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), to its review of Newson’s claims regarding his postconviction counsel’s effectiveness. (R. 52:1–2.) Based on its review of the record, the circuit court determined that Newson’s postconviction counsel was not ineffective. (R. 52:1.) It rejected Newson’s argument that the circuit court erred when it denied Newson’s motion to suppress his statements. (R. 52:3–5.) The circuit court also determined that Newson’s trial counsel was not ineffective for failing to call alibi witnesses, to actively pursue pretrial motions, or to communicate with him. (R. 52:6–8.) It rejected Newson’s argument that his appellate counsel was ineffective for failing to raise the issue of self-representation (R. 52:10–12); for failing to argue that the circuit court committed instructional error as it related to certain exhibits provided to the jury (R. 52:12–14); for failing to challenge the circuit court’s decision to force his brother to testify against him (R. 52:14–15); and for failing to allege that trial counsel was ineffective for failing to object to the prosecutor’s closing argument (R. 52:9–10).

Newson appealed. (R. 53.) Newson asserted that the circuit court erred when it failed to conduct an evidentiary hearing with respect to each claim, including:

- (1) his claim that his confession should have been suppressed;
- (2) trial counsel’s failure to call alibi witnesses, failure to actively pursue pretrial

⁶ The Hon. Elsa Lamelas decided this postconviction motion. (R. 52:15.)

motions/discovery and failure to communicate; (3) the prosecutor's mischaracterization of evidence during the closing argument; (4) the trial court's denial of his motion requesting self-representation; (5) the trial court's decision allowing Newson's confession, but not Bridges's statements, to go into the jury room during deliberations; and (6) the trial court's decision to require a State's witness to testify.

(R. 56:3.) This Court analyzed each claim and determined that the record demonstrated that Newson was not entitled to an evidentiary hearing. (R. 56:10.) This Court affirmed the circuit court's denial of his postconviction claims. (R. 56:1–2.)

Newson's second section 974.06 motion. On September 7, 2010, Newson filed a pro se postconviction motion. (R. 61:1.) Newson challenged the circuit court's jurisdiction over his criminal prosecution. (R. 61:1.) He alleged that his rights were violated under the IAD. (R. 60:2.) He contended that the warrant and complaint that the State filed alleging jurisdiction were fraudulent. (R. 60:3.) Newson claimed that the criminal complaint had not been filed with the circuit court when an Arizona court ordered his extradition. (R. 60:6.) He also asserted that the complaint had not been signed by a judge or commissioner as required by law. (R. 60:7.) Newson contended that the circuit court made an "attempted cover-up finding of probable cause." (R. 60:10.) Newson also argued that the attorney who appeared at his initial appearance should have argued that his case should have been dismissed. (R. 60:11.) Newson asserted that the "illegible and illegal signature of the phantom court commissioner on the felony arrest warrant" proved fraud. (R. 60:12.) Finally, he argued that his trial counsel was ineffective for failing to enforce his sovereign rights. (R. 60:13.)

On September 10, 2010, the circuit court⁷ issued a decision and order denying Newson's motion. The circuit court determined that Newson's claim was procedurally barred under *Escalona-Naranjo* because Newson could have raised his claim in his previous postconviction litigation. (R. 62:1.)

On September 30, 2010, Newson moved for reconsideration of the circuit court's denial of his postconviction motion. (R. 63:1.) The circuit court denied Newson's motion for reconsideration. (R. 72.)

Newson filed his notice of appeal. (R. 67.) Newson subsequently moved to dismiss his appeal. This Court dismissed his appeal in an order dated May 31, 2011. (R. 73.)

Newson's postconviction discovery motions. On May 28, 2011, while his appeal of the circuit court's denial of his second section 974.06 motion was pending, Newson moved this Court for postconviction discovery. (R. 71:1–4.) Newson was seeking information that would identify the person who signed his felony arrest warrant. (R. 71:5.) This Court denied his postconviction motion for discovery because a postconviction motion for discovery should be directed to the circuit court. (R. 71:3.)

On March 28, 2011, Newson moved for postconviction discovery in the circuit court. (R. 71:1–2.) In a decision and order, the circuit court characterized Newson's discovery motion as a request for "information about the identity of the court commissioner or judge who signed the felony arrest warrant in 1996 so that he can challenge his arrest." (R. 72.) The circuit court denied the motion. "Even if the defendant's case was not pending in the Court of Appeals, this court

⁷ The Hon. Kevin E. Martens decided this postconviction motion. (R. 62.)

would not entertain his current motion for postconviction discovery. A challenge to his arrest would be barred by *Escalona, supra.*” (R. 72.) Newson apparently did not appeal the circuit court’s denial of his postconviction discovery motion.

Newson’s petition for a writ of habeas corpus. On April 28, 2011, Newson asked this Court to construe his appeal as a writ of habeas corpus or a *Knight* petition. (R. 75:1.) Newson petitioned this Court for a writ of habeas corpus in Case No. 2011AP1569-W. (R. 77:1.)⁸ In an order dated July 27, 2012, this Court denied Newson’s petition for a writ of habeas corpus. (R. 77:1–2.) This Court stated that Newson’s “fundamental complaint is that the circuit court lacked personal and subject matter jurisdiction over him.” (R. 77:1.) This Court questioned why Newson did not raise this prior challenge in prior proceedings.

Newson does not explain why his jurisdictional challenge was not or could not have been addressed by his first Wis. Stat. § 974.06 motion. He also does not explain why his challenge could not have been addressed in the appeal of his

⁸ This Court’s orders denying Newson’s habeas petition and motion for reconsideration of the habeas petition are included in the record in this case (R. 76; 77), but neither Newson’s pleadings nor the State’s response in the habeas action is part of the record. This Court should take judicial notice of the records related to Newson’s habeas petition. Wisconsin Stat. § 902.01(6) permits taking judicial notice at any stage of a proceeding. *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667. “Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same.” *Johnson v. Mielke*, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970). For convenience, the State includes Newson’s habeas petition without attachments from case number 2011AP1569W in the appendix to its brief.

second § 974.06 motion, which actually had raised a jurisdictional issue . . . Newson therefore fails to establish the inadequacy, ineffectiveness, or unavailability of alternative remedies.

(R. 77:3–4 (footnote omitted).) The Court denied Newson’s petition for a writ of habeas corpus. (R. 77:4.)

To the extent that Newson’s writ petition could be construed as a *Knight*⁹ petition, this Court denied that petition as well. It explained:

Newson’s petition also alleges ineffective assistance “of all counsels,” including multiple trial level attorneys and both postconviction and appellate counsel, for not identifying and raising the jurisdiction and related challenges. Were we to reach the substance of Newson’s complaints, we would conclude that they lack merit. As a result, none of the attorneys were ineffective for failing to pursue the issues: it is “well-established that an attorney’s failure to pursue a meritless motion does not constitute deficient performance.”

(R. 77:4 n.2 (citation omitted).) Newson subsequently moved this Court for reconsideration. This Court denied his motion. (R. 76.)

Newson’s third section 974.06 motion. On February 6, 2017, Newson filed a third *pro se* section 974.06 motion. (R. 84.) He alleged that his original postconviction counsel was ineffective and that his current claims were clearly stronger than the claims that prior postconviction counsel raised. (R. 84:2.) Newson asserted that his prior counsel were ineffective for failing to pursue a challenge to the circuit court’s jurisdiction and detainer in the IAD case. (R. 84:3.)

⁹ *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992).

In a decision and order dated March 7, 2017, the circuit court¹⁰ denied Newson's section 974.06 motion. (R. 85:2.) Newson argued that his two prior section 974.06 motions should not be counted against him under section 974.06(4) and *Escalona-Naranjo* because he was imprisoned in Arizona and, therefore, was not a prisoner in custody under a sentence of a court. (R. 85:1.) The circuit court rejected Newson's argument and determined that Newson was a prisoner in custody when he filed his prior section 974.06 motions. (R. 85:1.) Further, it also determined that Newson previously challenged the circuit court's jurisdiction over him in his second section 974.06 and that Newson was procedurally barred from raising these claims under *Escalona-Naranjo*. (R. 85:2.)

Newson appealed. (R. 89.)

STANDARD OF REVIEW.

Newson's appeal concerns the circuit court's denial of Wis. Stat. § 974.06 motion. Whether Newson's postconviction motion was procedurally barred under *Escalona-Naranjo* and Wis. Stat. § 974.06(4) presents a legal question that this Court independently reviews. *State v. Tillman*, 2005 WI App 71, ¶ 14, 281 N.W.2d 157, 696 N.W.2d 574. Whether Newson's motion raises sufficient facts to entitle him to an evidentiary hearing presents a legal question that this Court independently reviews. *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668. The circuit court could deny Newson's postconviction motion without an evidentiary hearing if his motion failed to raise facts sufficient to entitle him to relief, presented only conclusory

¹⁰ The Hon. Jeffrey A. Conen decided Newson's third postconviction motion under section 974.06. (R. 85:2.)

allegations, or if the record conclusively demonstrated that Newson was not entitled to relief. *Id.*

ARGUMENT

The circuit court properly denied Newson’s third section 974.06 motion without a hearing because it was procedurally barred.

Newson’s central claim on appeal is that his prior counsel were ineffective for failing to raise jurisdictional challenges to the alleged defects in the initiation of proceedings against him and his return to Wisconsin under IAD. (Newson’s Br. 9–22.) The circuit court properly determined that these claims were procedurally barred under *Escalona-Naranjo*.

Alternative grounds support the circuit court’s determination. First, the record demonstrates that Newson should be procedurally barred from raising these claims because he previously raised them in his second 974.06 motion and in his habeas petition in this Court. Second, Newson’s latest claims were procedurally barred because he failed to raise them on direct appeal or in his prior section 974.06 motions or habeas petition.

A. General legal principles.

After the time has expired for a defendant to pursue postconviction relief or an appeal under Wis. Stat. § 974.02, a prisoner may seek postconviction relief under Wis. Stat. § 974.06. The scope of relief available under Wis. Stat. § 974.06 is limited to review of jurisdictional or constitutional matters, errors that go directly to guilt, and to sentences that were imposed in violation of the law. *Id.* The supreme court has explained that section 974.06 is limited “to matters of jurisdiction or of constitutional dimensions. The motion must not be used to raise issues disposed of by a

previous appeal.” *State v. Henley*, 2010 WI 97, ¶ 52, 328 Wis. 2d 544, 787 N.W.2d 350.

Successive postconviction motions and appeals are procedurally barred unless a defendant can show a sufficient reason why the newly alleged errors were not previously raised. Wis. Stat. § 974.06(4). This section requires a defendant to “raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion” unless the defendant demonstrates a sufficient reason for failing to previously raise the issue. *Escalona-Naranjo*, 185 Wis. 2d at 185. Thus, section 974.06(4) generally forecloses a defendant’s attempt to resurrect previously litigated claims. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). An attempt “to rephrase or re-theorize” a previously-litigated challenge is procedurally barred. *State ex rel. Washington v. State*, 2012 WI App 74, ¶¶ 27, 30, 343 Wis. 2d 434, 819 N.W.2d 305.

To overcome *Escalona-Naranjo*’s procedural bar, a defendant must allege a “sufficient reason” in the postconviction motion itself. *State v. Allen*, 2010 WI 89, ¶ 91, 328 Wis. 2d 1, 786 N.W.2d 124. A claim of ineffective assistance of postconviction counsel may provide a sufficient reason to overcome the *Escalona-Naranjo* bar if the defendant can show that the claims alleged in a section 974.06 motion are “clearly stronger” than those that counsel raised postconviction or on direct appeal. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 36, 46–47. The defendant bears the burden of showing that “a particular nonfrivolous issue was *clearly stronger* than issues that counsel did present.” *Romero-Georgana*, 360 Wis. 2d 522, ¶ 45 (citation omitted). The purpose of the clearly stronger standard is to allow a court “to compare the arguments now proposed against the

arguments previously made.” *Id.* ¶ 46. A court should reject a *Rothering* claim that fails to allege, with particularity, how and why the claims the defendant wanted raised are “clearly stronger” than the claims postconviction counsel actually raised. *See State v. Balliette*, 2011 WI 79, ¶ 69, 336 Wis. 2d 358, 805 N.W.2d 334.

B. Newson previously litigated these claims and they are barred under *Witkowski*.

Newson’s third section 974.06 motion was procedurally barred because he previously raised the same claims in his second section 974.06 motion and in his habeas petition.

In 2010, Newson filed his second section 974.06 motion alleging a jurisdictional defect in his criminal prosecution. (R. 61.) In his accompanying memorandum, Newson described the procedures that resulted in the initiation of criminal charges against him and his return to Wisconsin under the IAD. (R. 60:2.) Newson alleged that the circuit court’s jurisdiction was based on “fraudulent documents.” (R. 60:3.) He specifically asserted that complaint had not yet been filed against him when an Arizona court ordered his return to Wisconsin. Because the complaint had not been filed, the writ used to secure his return was faulty. (R. 60:6.) Newson also contended that the complaint was faulty because it was not signed by a court commissioner or a judge. (R. 60:7.) Newson further alleges that the commissioner did not independently determine that probable cause existed on the complaint. (R. 60:8–9.) Newson asserted that the court commissioner should have dismissed the complaint at the initial hearing because he made a probable cause determination “off fraudulent judicial documents. This is a subject-matter jurisdictional defect.” (R. 60:10.)

Based on these alleged defects in the procedures used to initiate proceedings against him, Newson alleged in his second section 974.06 motion that prior counsel was

ineffective for failing to challenge the circuit court's jurisdiction. (R. 60:11–14.) Newson's motion included the criminal complaint, arrest warrant, and other documentation related to the IAD proceedings before the Arizona court. (R. 60:15–28.)

The circuit court characterized Newson's claim that his counsel were ineffective for failing to challenge the court's jurisdiction based on a defective complaint. Applying *Escalona-Naranjo*, the circuit court determined Newson's motion was procedurally barred because he "could have and should have raised" them in his prior section 974.06 motion. (R. 62:1.)

Undeterred, Newson moved for reconsideration, filing a six page pleading that included numerous attachments. (R. 63.) He asserted that the circuit court erred when it determined that the second postconviction motion was procedurally barred. Newson contended that the ineffectiveness of prior counsel constituted a sufficient reason for failing to raise the claim earlier. (R. 63:1.) Newson rehashed his claims of a jurisdictional defect based on the initiation of the proceedings in his case, violation of the IAD, and the ineffectiveness of his counsel. (R. 63:2–5.)

The circuit court denied Newson's motion for reconsideration. (R. 72.) Newson filed a notice of appeal (R. 67), but subsequently voluntarily moved to withdraw his appeal. This Court granted his motion. (R. 73.) By voluntarily withdrawing his appeal, Newson forfeited his opportunity to have this Court decide whether the circuit court erred when it determined that the claims he raised in his 2010 postconviction were procedurally barred.

After voluntarily dismissing his appeal from his second section 974.06 motion, Newson petitioned this Court for a writ of habeas corpus in Case No. 2011AP1569-W. (R. 77:2.) Newson alleged that the State improperly initiated

proceedings against him. (R. 77:2; R-App. 102–109.) As a result, he contends that the State’s efforts to return him to Wisconsin violated the IAD. (R-App. 109–12.) In turn, Newson argued that his prior counsel were ineffective for failing to challenge the initiation of criminal proceedings against him or the IAD process. (R. 77:4 n. 2; R-App. 113–18.)

This Court denied the writ because Newson had failed to explain why he did not raise his claim in his first section 974.06 motion or “why his challenge could not have been addressed in the appeal of his second § 974.06 motion, which actually had raised a jurisdictional issue.” (R. 77:3.) Further, this Court also concluded that had it reached the substance of Newson’s claim that his prior counsel were ineffective for failing to raise the jurisdictional challenges, it would have “conclude[d] that they lack merit.” (R. 77:4 n.2.) Thus, to the extent that Newson’s petition raised a *Knight* claim, this Court denied it as well. (R. 77:4 n.2.)

On two separate occasions—in his second section 974.06 motion and in his petition for a writ of habeas corpus—Newson challenged the effectiveness of his prior counsel based on their failure to raise jurisdictional challenges to the complaint and his return to Wisconsin under the IAD. Because Newson has previously raised claims substantially related to the claims raised in his third section 974.06 motion, this Court should determine that his claims are procedurally barred under *Witkowski*.

C. Newson’s third section 974.06 motion failed to provide a sufficient reason for his failure to raise his claims in previous section 974.06 motions and is procedurally barred under *Escalona-Naranjo*.

The circuit court properly denied Newson’s third postconviction motion based on its determination that

Newson could have previously raised those claims. (R. 85:1–2.) Recognizing that *Escalona-Naranjo* created a procedural bar to the litigation of his current claims, Newson argues that *Escalona-Naranjo* does not apply and that he had a “sufficient reason” for not making his claim in his direct appeal or prior section 974.06 motions. (Newson’s Br. 23–27.) The circuit court rejected his arguments (R. 85) and so should this Court.

1. Newson did not articulate a legally sufficient reason for failing to raise his claims on direct appeal or in prior section 974.06 motions.

Newson contends that his lack of access to Wisconsin legal materials, including *Escalona-Naranjo*, while serving his Arizona sentence constitutes a sufficient reason for failing to raise his current claims in prior litigation. (Newson’s Br. 26, 28.) Because his prior pleadings demonstrate that he had access to Wisconsin legal resources, Newson has not demonstrated a sufficient reason for failing to previously raise his current claims.

In his second 974.06 motion, Newson cited the Wisconsin statutes and several Wisconsin decisions as well as federal case law to advance his substantive claims. (R. 60:8, 11.) Following the circuit court’s decision denying Newson’s second 974.06 motion (R. 62), Newson moved for reconsideration, challenging the circuit court’s reliance on *Escalona-Naranjo*. He noted that the procedural bar does not apply if he had a “‘sufficient reason/cause’ for not raising the issue earlier. *Escalona-Naranjo*, 184 Wis. 2d at 181–82.” (R. 63:1.) Citing *Rothering*, Newson observed that ineffective assistance of counsel may establish a sufficient reason for a failure to raise a claim in a prior motion. (R. 63:1.) Newson’s pleadings related to his second section 974.06 motion demonstrate that he had adequate access to Wisconsin legal resources to help him articulate the procedural and

substantive grounds to advance his claims. Further, his motion also demonstrated that he understood that he had to overcome section 974.06(4)'s "sufficient reason" requirement to advance new claims in a subsequent postconviction motion.

Newson's habeas petition in this Court also demonstrated that he had sufficient access to Wisconsin legal resources to help him advance his claims. His petition not only referenced Wisconsin statutes (R-App. 106–07, 115–17, 120–21), but cited Wisconsin case law as well. (R-App. 103–04, 106, 108, 117, 122.)

Even if Newson had lacked access to Wisconsin case law when he drafted his prior section 974.06 motions and habeas petition, the record demonstrates that he had access to adequate legal resources to help him identify and raise his claims. Newson relied heavily on federal case law to advance his arguments in both his second section 974.06 motion and motion for reconsideration. (R. 63:1–6.) To the extent that Newson's claims rested on violations of the U.S. Constitution or the IAD, federal case law would certainly provide precedent that Wisconsin courts would consider in reviewing his claims.

Finally, a comparison of his third section 974.06 motion with his second 974.06 motion and his habeas petition demonstrates that Newson's alleged lack of access to Wisconsin legal resources did not prevent him from adequately developing his claims in prior litigation. Newson's core claims remain the same across all of his pleadings: First, the complaint was not properly executed or filed, which resulted in a defect in the proceedings against him, including his return to Wisconsin under the IAD. Second, because the case against him was not lawfully initiated, the circuit court did not have jurisdiction over his case. Third, his prior counsel were all ineffective for failing to raise these objections in the proceedings against him.

Given the substance of these prior arguments, Newson's claimed lack of access to legal resources would not constitute a "sufficient reason" for failing to adequately develop his jurisdictional argument in his prior motions.

2. The circuit court was competent to decide his prior section 974.06 motions challenging his Wisconsin conviction when he was still serving his Arizona sentence.

Newson also argues that the procedural bar under section 974.06 should not apply because he was still serving an Arizona sentence and had not yet begun serving his consecutive Wisconsin sentence when he filed his previous section 974.06 motions. (Newson's Br. 28–29.) The circuit court rejected Newson's argument. (R. 85:1.) This Court should also reject this argument and decide that Newson was "in custody" for the purposes of filing a section 974.06 motion while still serving his Arizona sentence.

Section 974.06(1) specifies who may bring a motion: "a person in custody under sentence of a court . . ." To be sure, Wisconsin courts have interpreted the phrase "state court" to mean the sentencing court that imposed the sentence under attack. *See State v. Bell*, 122 Wis. 2d 427, 429, 362 N.W.2d 443 (Ct. App. 1984). But *Bell* and other cases address situations in which the person is barred from seeking relief after the person has completed the sentence. *Id.* at 429–30. Those cases have no application here, where Newson had not yet begun to serve the sentence for the conviction that he sought to challenge.

Newson's interpretation of the "person in custody under sentence of a court" language would lead to potentially absurd results. Newson's interpretation would prevent prisoners like him, who have not yet begun serving consecutively imposed Wisconsin sentences, from filing a

section 974.06 motion until they begin serving their Wisconsin sentences. A prisoner's out-of-state status should not deprive a prisoner of timely access to an otherwise legitimate procedural mechanism designed to allow legitimate constitutional or jurisdictional challenges to a conviction.

Here, the circuit court reasonably rejected Newson's argument based on the principle that consecutive sentences are treated as a single continuous sentence under Wis. Stat. § 302.11(3). (R. 85:1.) Newson asserts that this section does not apply to consecutive sentences imposed by courts in different states. (Newson's Br. 29.) Even if Newson were correct, the circuit court's decision to treat his Arizona sentence and Wisconsin sentence as a continuous sentence for determining whether Newson was "in custody" under section 974.06 was reasonable and consistent with federal habeas case law.

Because section 974.06 derives from federal habeas law, including 28 U.S.C. 2255, this Court may look to federal cases for guidance when it interprets section 974.06. *State v. Mentzel*, 218 Wis. 2d 734, 743, 581 N.W.2d 581 (Ct. App. 1998).

Under superseded law known as the prematurity doctrine, a prisoner could only use habeas corpus to attack "his current confinement, and not confinement that would be imposed in the future." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 488–89 (1973). But federal courts no longer apply this doctrine.

In *Peyton v. Rowe*, 391 U.S. 54 (1968), the Supreme Court overturned the prematurity doctrine, recognizing that its application created "an indefensible barrier to prompt adjudication of constitutional claims in federal court." *Id.* at 55. It reasoned that a "common understanding [of] 'custody' comprehends respondents' status for the entire duration of

their imprisonment.” *Id.* at 64. Based on this reasoning, the Supreme Court held that a state prisoner serving consecutive sentences is in custody under any one of them for purposes of seeking habeas release. *Id.* at 67. “Although *Peyton* involved consecutive prison sentences in the same state, the court soon extended the doctrine [in *Braden*] to situations where the consecutive sentences were to be served in different states.” *Gonce v. Redman*, 595 F. Supp. 916, 917 (E.D. Pa. 1984).

The Sixth Circuit extended *Peyton* and *Braden* to a situation very similar to Newson’s case that involved the imposition of consecutive sentences by different jurisdictions. In *Ward v. Knoblock*, 738 F.2d 134 (6th Cir. 1984), “a prisoner presently in state custody [sought] to attack his federal sentence which he has not yet served.” *Id.* at 135. A federal court had sentenced the prisoner to a prison sentence on a federal charge consecutive to sentences that the prisoner had received on Missouri charges. While still serving his Missouri sentence, the prisoner brought an action under 28 U.S.C. § 2255 challenging his federal sentence that had not yet commenced. A magistrate dismissed the prisoner’s petition because the prisoner was not “presently in custody pursuant to the sentence being attacked.” *Ward*, 738 F.2d at 137. The Sixth Circuit reversed the magistrate’s decision and concluded that *Peyton*’s interpretation of “in custody” extended to federal habeas actions under section 2255. It rejected the argument that section 2255 bared a prisoner from seeking relief under this section until “the prisoner is literally ‘in custody’ under the sentence attacked.” *Ward*, 738 F.2d at 139. Consistent with *Ward*, federal courts have agreed that section 2255 relief is available to a prisoner in state custody attacking a federal sentence scheduled to be served in the future. *See Ospina v. United States*, 386 F.3d 750, 752 (6th Cir. 2004) (collecting cases).

Because section 974.06 is based on 28 U.S.C. § 2255, this Court should similarly construe section 974.06(1)'s "in custody" requirement just as federal courts have interpreted the term "in custody" under federal habeas law. When a Wisconsin court has ordered a prisoner to serve a Wisconsin sentence consecutive to another jurisdiction's sentence, the Wisconsin prisoner is "in custody" while still serving the sentence in the other jurisdiction and may bring a section 974.06 motion before the prisoner has begun serving his or her Wisconsin sentence.

Here, Newson filed two section 974.06 motions before he had completed his Arizona sentence and began serving his consecutively imposed Wisconsin sentence. The circuit court decided each motion. (R. 52; 62.) This Court affirmed the circuit court's denial of his first section 974.06 motion. (R. 56.) And this Court granted Newson's motion to dismiss his appeal of the circuit court's dismissal of his prior second 974.06 motion. (R. 73.) At no time did the State, the circuit court, or this Court question Newson's right to bring his motions because he had not yet begun to serve his Wisconsin sentence. And by deciding Newson's claims, the circuit court and later this Court implicitly recognized that Newson had the right to bring his section 974.06 motion before he started serving his consecutively imposed Wisconsin sentence.

* * * * *

The record conclusively demonstrates that Newson failed to present a sufficient reason for failing to raise the claims that are now the subject of his third section 974.06 motion earlier. The record demonstrates that he had access to Wisconsin legal resources to allow him to adequately raise his claims while he was still serving his Arizona sentence. This Court should also reject Newson's assertion that his prior section 974.06 motions do not count against him because he was not in custody under a Wisconsin sentence when he filed them. A reasoned interpretation of section

974.06's "in custody" language does not require a prisoner to have actually commenced service of a consecutively imposed Wisconsin sentence in order to challenge it.

D. If this Court decides that Newson's claim is not procedurally barred, then the State asks for leave to file a supplemental brief on the merits.

The State's brief focuses solely on its argument that Newson's claims are not properly before the Court and that they are procedurally barred from review. Because the State regards the *Escalona-Naranjo* and section § 974.06 procedural bar as disposing of Newson's appeal, the State limits its briefing to the issue of whether Newson's claim is barred.

The State does not concede the merits of Newson's claims by focusing only on whether Newson's claims are procedurally barred.¹¹ Accordingly, should this Court hold that Newson's issues are not procedurally barred, then the State requests an opportunity to file a supplemental brief addressing the merits of his claims. This Court has previously approved this procedure. *See Tillman*, 281

¹¹ If it is directed to address the merits of Newson's claim, the State will demonstrate that the record does not support Newson's claim that the procedures used to initiate proceedings against him and return him to Wisconsin under the IAD were defective. But even if they were, any defects in the proceedings did not deprive the circuit court of subject matter or personal jurisdiction to try Newson for homicide. And, as this Court previously determined (R. 77:4 n.2), prior counsel could not be ineffective for failing to pursue claims that lacked merit. Finally, even if this Court were to disagree with the State on the merits, Newson is not entitled a dismissal of his case with prejudice. (Newson's Br. 30.) Rather, at best, he is entitled to a hearing in the circuit court on the merits of the claims that he raised in his third section 974.06 motion.

Wis. 2d 157, ¶ 13 n.4 (“[T]he State has limited its briefing to only the procedural bar issue, asking leave to file a supplemental brief addressing Tillman’s issues on the merits if we should hold that Tillman is not procedurally barred from raising his appellate claims. We approve this procedure in this case.”).

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm the circuit court’s decision denying Newson’s third postconviction motion for relief under section 974.06.

Dated this 10th day of May, 2018.

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 6,684 words.

DONALD V. LATORRACA
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 10th day of May, 2018.

DONALD V. LATORRACA
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Rafeal D. Newson
Case No. 2017AP0551

<u>Description of document</u>	<u>Page(s)</u>
Petition for Writ of Habeas Corpus filed July 11, 2011 in the Court of Appeals, Case No. 2011AP1569-W	101–126

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

DONALD V. LATORRACA
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Dated this 10th day of May, 2018.

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