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**OF WISCONSIN**

Case No. 2017AP0868

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CASEY M. FISHER,

Defendant-Appellant.

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ON APPEAL FROM AN ORDER DENYING A  
WIS. STAT. § 974.06 POSTCONVICTION MOTION  
ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE  
COUNTY, THE HONORABLE JEFFREY A. WAGNER,  
PRESIDING

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**BRIEF OF THE PLAINTIFF-RESPONDENT**

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## **ISSUE PRESENTED**

Did the circuit court err when it concluded that Casey Fisher's Wis. Stat. § 974.06 motion was procedurally barred?

The circuit court denied Fisher's Wis. Stat. § 974.06 motion on the grounds that the issue he raised in his motion could have been, but was not raised on direct appeal and no sufficient reason existed for Fisher's failure to raise it. This Court should affirm.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State does not request oral argument. The case does not meet the criteria for publication. This case involves the application of established principles of law to the facts presented.

## **INTRODUCTION**

Fisher appeals from the Milwaukee County Circuit Court's single order denying his Wis. Stat. § 974.06 postconviction motion and denying in part and granting in part his Wis. Stat. § 974.07 postconviction motion. Fisher's Wis. Stat. § 974.06 motion raised an ineffective assistance of trial counsel claim. He had filed a pro se postconviction motion and a direct appeal raising an ineffective assistance of trial counsel claim. The circuit court found he had not demonstrated a sufficient reason for his failure to raise his current claim so his motion was barred by Wis. Stat. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). He argues his current claim is stronger than the claims he raised on direct appeal, but since he represented himself then, he cannot rely on his own deficient performance to establish a sufficient reason.

## STATEMENT OF THE CASE

The State charged Casey M. Fisher with one count of first-degree intentional homicide while armed and one count of armed robbery in the shooting death of Yaser Mousa. (R. 3.) At trial, two witnesses testified that they heard Fisher say that he intended to rob Mousa's store and later heard Fisher admit shooting him. (R. 48:26–27; 49:32–34, 79–81.)

At the beginning of the afternoon trial session on April 13, 1994, defense counsel informed the court that he had subpoenaed three witnesses who were not present. (R. 49:3–4.) One of the witnesses was Adam Booker. (R. 49:4.) In a police report, Booker told police that while he was on his porch immediately after the shooting, a man ran past him and pointed a gun at him. (R. 49:143.) Police showed Booker a photo array containing Fisher's picture. (R. 49:143.) Booker said Fisher looked similar but bigger than the person who ran by him on the night of the shooting. (R. 49:143.) Booker also viewed a lineup containing Fisher but he was unable to make an identification. (R. 49:144.) Counsel requested a bench warrant for the witnesses. (R. 49:4.) The court issued body attachments for all three witnesses. (R. 49:5.)

After the State rested, defense counsel advised the court that police had not located the three defense witnesses. (R. 49:139–40, 142.) The defense and the State reached a stipulation and read into evidence the police report containing Adam Booker's statement. (R. 49:142–44.)

The jury found Fisher guilty of both counts. (R. 8; 9.) The court sentenced him to life in prison with a parole date of January 1, 2045, on the first-degree intentional homicide and twenty years consecutive on the armed robbery. (R. 13.)

Fisher filed a pro se postconviction motion. (R. 17.) The circuit court denied the motion without a hearing. (R. 18.) Fisher appealed pro se. (R. 22:1.) He raised two issues: (1) whether the trial court erroneously exercised its discretion

when it failed to grant a continuance to locate favorable defense witnesses; and (2) whether the trial court erroneously rejected his ineffective assistance of counsel claim based on his counsel's failure to obtain the appearance of the three witnesses and counsel's stipulation to the police report. (R. 22:2–3.) This Court rejected Fisher's claims and affirmed his judgment of conviction. (R. 22:4–7.) The Wisconsin Supreme Court denied his petition for review. (R. 23.)

Almost twenty years later, Fisher, now represented by the Wisconsin Innocence Project, filed two postconviction motions; one pursuant to Wis. Stat. § 974.07 (R. 27), and one pursuant to Wis. Stat. § 974.06 (R. 29). He raised two claims in his Wis. Stat. § 974.06 motion: ineffective assistance of trial counsel and a new trial in the interest of justice. (R. 29.) In both claims, Fisher argued that his counsel should have offered third-party perpetrator evidence. (R. 37:2.) The circuit court entered a single order denying Fisher's Wis. Stat. § 974.06 postconviction motion and granting in part and denying in part his Wis. Stat. § 974.07 motion.<sup>1</sup> (R. 37.) As relevant to Fisher's current appeal, the circuit court concluded that Fisher had had a direct appeal, had not raised his current ineffective assistance of counsel claim or his interest of justice claim, and had not demonstrated a sufficient reason for not doing so. (R. 37:3–4.) The court entered a separate order allowing DNA testing of two biological specimens. (R. 38.)

This appeal follows. (R. 39.)

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<sup>1</sup> Fisher correctly filed separate motions seeking different relief based on authority derived from separate statutes. The State believes that the better practice for circuit courts is to provide separate orders for Fisher's two motions. However, this Court has appellate jurisdiction in this case as the single order disposes of Fisher's entire Wis. Stat. § 974.06 motion.

## STANDARD OF REVIEW

Whether a defendant's appeal is procedurally barred is a question of law that this Court reviews de novo. *State ex rel. Washington v. State*, 2012 WI App 74, ¶ 27, 343 Wis. 2d 434, 819 N.W.2d 305.

## ARGUMENT

### **Fisher's Wis. Stat. § 974.06 motion is barred for want of a sufficient reason.**

Fisher's case can be resolved on procedural grounds without reaching the merits of his claims. If the court disagrees and desires argument on the merits of Fisher's claims, the State will, upon request, supply the court with a supplemental brief addressing the merits. *See State v. Tillman*, 2005 WI App 71, ¶ 13 n.4, 281 Wis. 2d 157, 696 N.W.2d 574.

The Wisconsin Supreme Court has repeatedly held that a defendant in a criminal case must raise all claims then available in the direct appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994); *State v. Lo*, 2003 WI 107, 264 Wis. 2d 1, 665 N.W.2d 756; *State v. Romero-Georgana*, 2014 WI 83, ¶¶ 31–32, 360 Wis. 2d 522, 849 N.W.2d 668. Constitutional claims may be brought pursuant to Wis. Stat. § 974.06 after the time for an appeal has passed. Wis. Stat. § 974.06(1). But, Wis. Stat. § 974.06(4)<sup>2</sup> bars successive

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<sup>2</sup> Wisconsin Stat. § 974.06(4) provides:

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



postconviction litigation absent a “sufficient reason” for not raising on direct appeal or in an earlier motion the issues advanced in a later postconviction motion. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 74.

Fisher filed a pro se Wis. Stat. § 974.02 postconviction motion that raised ineffective assistance of counsel. His pro se direct appeal argued his ineffective assistance of counsel claim. *State v. Fisher*, No. 1996AP1081, 1997 WL 104342 (Wis. Ct. App. Mar. 11, 1997) (unpublished) (R. 22:2.) Without a sufficient reason, a defendant may not bring a claim in a section 974.06 motion if that claim could have been raised in a previously filed section 974.02 motion or on direct appeal. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 74. By providing that a claim “may not be the basis” of relief “unless the court finds” a sufficient reason for failure to raise a claim on direct appeal, the Legislature has made a the finding of a sufficient reason a statutory prerequisite to obtaining relief pursuant to Wis. Stat. § 974.06. Wis. Stat. § 974.06(4).

Fisher bases his current claims on police reports. One report discloses that upon arrival at the scene of Mousa’s shooting, an unknown male who did not give his name told police the shooter(s) ran towards a drug house. (R. 28:11.) Another unidentified person told the unknown male that a person known as “little rob” was involved. (R. 28:11.) Police proceeded to the drug house where they found three men, one of whom wore a t-shirt that had a possible blood stain on the right shoulder area.<sup>3</sup> The three men were taken into custody. (R. 28:11–12.) None of the men were charged in connection with Mousa’s shooting.

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relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

<sup>3</sup> The blood stained t-shirt is one of the items for which the circuit court ordered testing. (R. 38:1.)

The current ineffective assistance claim and the interest of justice claim could have been raised in Fisher's earlier postconviction motion. During postconviction proceedings, a defendant must choose between being represented by the State Public Defender, proceeding pro se, or securing private representation. *State v. Evans*, 2004 WI 84, ¶ 30, 273 Wis. 2d 192, 682 N.W.2d 784; *State v. Redmond*, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996). A letter from an Assistant State Public Defender establishes that Fisher "decided to look over the case file [himself], and file any motions or appeal on [his] own." (R. 34:9–10.)

Fisher had the case file. (R. 34:10.) The circuit court found that the police reports were part of the discovery. (R. 37:4.) Fisher's postconviction motion refers to a police incident report. (R. 17:4.) Thus, Fisher's motion itself corroborates that he had access to and considered the police reports of the investigation of Mousa's slaying. The claim he now advances was available to him when he filed his postconviction motion and prosecuted his pro se direct appeal. He is the "attorney" who failed to raise these two available claims.

A defendant who elects to represent himself cannot thereafter complain that the quality of his own representation amounted to ineffective assistance of counsel. *United States v. Moya-Gomez*, 860 F.2d 706, 741 (7th Cir. 1988) (citing *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975)); see also *United States ex rel. Smith v. Pavich*, 568 F.2d 33, 38 (7th Cir. 1978). For this same reason, Fisher's reliance on *Romero-Georgana's* stronger claim test for ineffective postconviction counsel claims is misplaced. As a prisoner moving for relief under Wis. Stat. § 974.06, Fisher is obliged by Wis. Stat. § 974.06(4) to raise "[a]ll grounds for relief available to [him] . . . in his . . . motion." See *Lo*, 264 Wis. 2d 1, ¶ 18 (The subsection was "designed to compel a prisoner to raise all questions available to him in one motion.")

Fisher now argues that he could not have included his claims because he was unaware of them at the time of his direct appeal. (Fisher’s Br. 30–32.) But as argued, this was not true. Fisher had the police reports that are the basis of his current claim. If, by this argument, he means that he lacked the legal acumen to recognize these claims, his argument fails. His lack of legal knowledge is not a sufficient reason for failure to raise an issue. *See State v. Jensen*, 2004 WI App 89, ¶ 30, 272 Wis. 2d 707, 729, 681 N.W.2d 230 (“Ignorance of the law is no defense”); *see also Waushara Cty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (holding pro se appellants to same procedural requirements as licensed attorneys, and noting that “[t]he right to self-representation is not a license not to comply with relevant rules of procedural and substantive law” (citation omitted)); *Putnam v. Time Warner Cable of SE Wis. Ltd. P’ship*, 2002 WI 108, ¶ 13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626.

Fisher attempts to support his claim that his lack of awareness of the factual basis constitutes a sufficient reason by relying on *State v. Allen*, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124. (Fisher’s Br. 31.) That argument also fails. Fisher reads far more into that decision than the decision allows. He claims that the *Allen* court recognized lack of awareness of the factual basis of a claim as a sufficient reason, but the court did no such thing. The court recognized Allen’s argument. *Id.* ¶ 43. The court then rejected Allen’s legal argument by distinguishing the case on which he relied. *Id.* ¶ 44. It also rejected his factual argument because Allen “failed to demonstrate that he was unaware of the factual bases for his claims.” *Id.* ¶ 45. The court did so on three grounds. *Id.* ¶¶ 46–52. First, Allen failed to allege he was unaware of the factual basis. *Id.* ¶ 46. Second, Allen did not allege any facts outside the record that, if proved, would have provided a sufficient reason. *Id.* ¶ 47. And third, the record demonstrated that Allen was aware (or should have been

aware) of the factual basis for his claims. *Id.* ¶¶ 48–52. The court’s analysis is more in the nature of assuming without deciding that an unknown factual basis can be a sufficient reason and rejecting Allen’s claim because he failed to adequately establish his lack of awareness in that case.

One thing *Allen* does establish is that a defendant must allege facts to establish any sufficient reason in his or her motion. Fisher’s motion, like Allen’s, fails to allege he was unaware of the factual basis; his motion fails to allege any reason at all. (R. 29.) Perhaps he planned to prove a reason at a hearing. But if so, he ignores *State v. Balliette*, 2011 WI 79, ¶ 68, 336 Wis. 2d 358, 805 N.W.2d 334, which holds “[t]he evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance.”

The circuit court did not find a sufficient reason for Fisher’s failure to raise his two claims in his direct appeal. He has not satisfied one of the statutory prerequisites for obtaining relief. This Court should affirm the circuit court’s denial of his Wis. Stat. § 974.06 postconviction motion.

## CONCLUSION

For the reasons given above, this Court should affirm the circuit court's denial of Fisher's Wis. Stat. § 974.06 postconviction motion.

Dated at Madison, Wisconsin, this 17th day of November, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 2,418 words.

Dated this 17th day of November, 2017.

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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 17th day of November, 2017.

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