STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP152

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHASE M.A. BORUCH,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A REQUEST FOR WAIVER OF A TRANSCRIPT FEE ENTERED IN LINCOLN COUNTY CIRCUIT COURT, THE HONORABLE ROBERT R. RUSSELL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. MELE
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
melekl@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Following the circuit court's denial of his Wis. Stat. § 974.06 motion without an evidentiary hearing, Defendant-Appellant Chase M.A. Boruch requested waiver of the transcript fee to appeal. The circuit court denied his request after holding a *Girouard*[1] hearing. Did the court err?

The circuit court did not answer this question.

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be warranted to clarify the standard that applies to fee-waiver requests under Wis. Stat. § 814.29.

INTRODUCTION

In 2011, a jury convicted Boruch of murdering his mother for insurance benefits. Boruch pursued a direct appeal of his conviction, to no avail.

Proceeding pro se, Boruch then filed a Wis. Stat. § 974.06 motion. The circuit court denied it without an evidentiary hearing. Thereafter, Boruch requested a waiver of the transcript fee to appeal the court's decision on his § 974.06 motion. The court denied Boruch's request.

On appeal, Boruch contends that the circuit court erred in denying his fee-waiver request. Because Boruch's Wis. Stat. § 974.06 motion fails to state a claim upon which relief may be granted, the circuit court properly denied his fee-waiver request. This Court should therefore affirm.

---

[1] *State ex rel. Girouard v. Jackson Cty. Cir. Ct.*, 155 Wis. 2d 148, 454 N.W.2d 792 (1990).

STATEMENT OF THE CASE

The underlying charge and conviction

In November 2010, the State charged Boruch with first-degree intentional homicide for the death of his mother, Sally Pergolski. (R. 1:2.)

According to the complaint, on June 6, 2010, at 4:47 a.m., Boruch called 911 and said that he and his mother were riding in a vehicle that went into a lake. (R. 1:3.) He claimed that he got his mother out of the vehicle and placed her on the shore. (R. 1:3.) Boruch told the 911 dispatcher that he did not know whether his mother was breathing. (R. 1:3.) He said that CPR "was not working," so he headed to a road near the lake. (R. 1:3.) The 911 dispatcher told Boruch to continue CPR, but he did not. (R. 1:3.)

When Deputy VanderWyst arrived at the scene, he saw a truck "on the edge of the lake." (R. 1:3.) "The water inside the truck was just over the seat bottom on the passenger's side," and "well below the seat bottom on the driver's side." (R. 1:3.) He observed Pergolski lying face down on the shore. (R. 1:3.) When Deputy VanderWyst performed CPR, "water began spewing out of Pergolski's mouth and nose." (R. 1:3.)

At the hospital, Boruch told Deputy VanderWyst that he was taking his mother fishing that early morning. (R. 1:4.) He said that he started to feel nauseous during the drive, so he asked his mother to take over. (R. 1:4.) According to Boruch, they switched driving as they got closer to the lake. (R. 1:4.) He claimed that he fell asleep, and when he opened his eyes, he saw that they were going to crash into the water. (R. 1:4.) Boruch alleged that he eventually pulled his mother out of the truck and onto the shore. (R. 1:4.) By that point, he said, she was unresponsive. (R. 1:4.)

At trial, experts for the State and Boruch "agreed they could not conclusively determine how Pergolski died." (R.

163:7.) The State's expert, Dr. Corliss, believed "that Pergolski showed some characteristics of a drowning, but he refused to offer an opinion as to whether drowning contributed to her death." (R. 163:2.) Dr. Corliss also spotted three signs of "strangulation or a nonspecific compression," and evidence that Pergolski "experienced a hypoxic/ischemic injury" shortly before she died. (R. 163:2–3.) But he could not say that strangulation caused her death. (R. 163:3.) Nor could he blame the prescription drugs present in Pergolski's system. (R. 163:3.) On the other hand, Boruch's expert, Dr. Randall, "opined that Pergolski could have died from drowning, sudden cardiac arrest, or an overdose of tramadol." (R. 163:3.)

The State "presented compelling circumstantial evidence of motive and opportunity." (R. 163:8.) This included Boruch's former girlfriend's testimony "that Boruch for years had been planning to take out life insurance on Pergolski just before she died." (R. 163:8.) In fact, Boruch "made numerous insurance inquiries" in the months preceding Pergolski's death. (R. 163:8.) For example, he and his mother applied for a $250,000 term life policy with Farmer's Insurance. (R. 163:8.) Farmers agents "testified that Boruch appeared to be driving the transaction and insisted on obtaining an accident policy rider even though he was told that Pergolski would not qualify." (R. 163:8.) And in "May, American General Life issued Pergolski a $500,000 accident policy, naming Boruch as the beneficiary." (R. 163:8.) Boruch also applied for a $300,000 accidental death policy on his mother's behalf from Fidelity Life, and he "purchased an accident-only policy through Life Quotes, which the president of that company deemed to be a 'very rare' request." (R. 163:8.) Moreover, "the day before Pergolski's death, [Boruch] added Pergolski to his auto policy and increased the benefit limits." (R. 163:8.)

Boruch testified at trial, offering a different story than what he told police. He claimed that Pergolski was "complicit in the insurance purchases because she was planning to die

soon and wanted her son to benefit." (R. 163:8.) He therefore "tried to stage the accident scene and lied to investigators." (R. 163:9.) What really happened, Boruch explained, was that he found his mother unresponsive at her home, lying on the living room floor. (R. 163:9.) He then "found a piece of meat lodged in her throat, pulled it out, and tried unsuccessfully to resuscitate her." (R. 163:9.) Since he was "on a large amount of opiates" and thought that his mother was dead, he took her to the lake to stage the accident scene for insurance benefits. (R. 163:9.)

The jury did not believe Boruch. It found him guilty of first-degree intentional homicide. (R. 163:4.) The circuit court sentenced him to life imprisonment without the possibility of extended supervision. (R. 140:1.)

Boruch's direct appeal

With the assistance of counsel, Boruch pursued a direct appeal of his conviction. (R. 163.) He argued that "the trial court erred when, in response to a jury request during deliberations, it provided the State's autopsy and toxicology reports without also providing the report" of Dr. Randall. (R. 163:1–2.) The circuit court reasoned that sending Dr. Randall's report to the jury might have led to improper use, because Dr. Randall opined that Pergolski could have died from several conditions, whereas the State's autopsy report offered no conclusions as to the cause of death. (R. 163:3–5.)

This Court affirmed Boruch's conviction, reasoning that the circuit court properly exercised its discretion in refusing to send the jury Dr. Randall's report. (R. 163:5–7.) This Court further reasoned that even if the circuit court erred, the error was harmless given the "overwhelming evidence of" Boruch's guilt. (R. 163:9.)

Boruch's Wis. Stat. § 974.06 motion

On September 29, 2015, Boruch, proceeding pro se, filed a 301-page Wis. Stat. § 974.06 motion, including attachments.

(R. 171; 179; 180.) Generally, he claimed that his trial counsel was ineffective in multiple ways. (R. 171:8–37; 210:4–5.) Boruch also alleged errors "separate and distinct" from ineffective assistance of trial counsel. (R. 171:37–60; 210:6.)

Specifically, regarding Boruch's ineffective assistance claims, he alleged that his trial counsel was ineffective for (1) failing to call an "exculpatory witness," (2) failing to request a mistrial due to an "impermissibly prejudicial and incurable" remark, (3) making a "sexist comment" while cross-examining one of the State's witnesses, (4) failing to introduce evidence to undermine some of the State's exhibits, (5) failing to "timely object to a sleeping juror," (6) failing to challenge the standard jury instruction on reasonable doubt, (7) failing to "specifically attack" police's seizure of a letter from Boruch's counsel, (8) failing to support Boruch's trial testimony that he made changes to his auto insurance to comply with recent changes to Wisconsin law, and (9) failing to ask the experts at trial if smoking cigarettes can cause hypoxia. (R. 171:8–37; 210:4–5.)

As for his remaining claims, Boruch alleged: (1) it was "reversible error" for the circuit court not to hold a hearing on Boruch's sleeping-juror claim, (2) one of the jurors was biased against him, (3) the circuit court improperly instructed the jury on reasonable doubt, (4) the circuit court's definition of reasonable doubt invaded the province of the jury, (5) police's seizure of a letter from Boruch's counsel constituted "governmental interference" that required the court to vacate his judgment of conviction and dismiss the case with prejudice or alternatively, to order a new trial, (6) the circuit court "gave . . . a faulty jury instruction" when it refused to provide the jury with Dr. Randall's report during deliberations, (7) police's seizure of exhibits 84, 85, and 86 was unconstitutional, (8) Wis. Stat. § 908.045(2) is unconstitutional or alternatively, the circuit court erred in admitting the testimony of one of the State's witnesses, and

(9) the circuit court erred in admitting "lake maps" into evidence. (R. 171:37–60; 210:6.)

In his Wis. Stat. § 974.06 motion, Boruch also offered a "sufficient reason" why he did not raise the above claims sooner: ineffective assistance of postconviction/appellate counsel. (R. 171:60–71; 210:7.) He alleged that his Wis. Stat. § 974.06 claims are "clearly stronger" than the claim that appellate counsel raised on direct appeal. (R. 171:63–71.)

In addition to his Wis. Stat. § 974.06 motion and attachments, Boruch filed a 17-page "Brief in Support of Chase Boruch's Constitutional Challenge," along with 67 pages of attachments (R. 182; 183); a "Sleeping Addendum," with a corresponding affidavit (R. 184; 185); and a 17-page "Reasonable Doubt Addendum," along with 75 pages of attachments (R. 186; 187). He also filed a "Motion for Post-Conviction Discovery" related to the claims that he raised in his Wis. Stat. § 974.06 motion. (R. 176.) In addition, Boruch moved for a new trial "to the extent that a motion for a new trial must precede a Wis. Stat. § 974.06 motion," and "to the extent that any of the issues/claims raised" in his § 974.06 motion "are not appropriately raised pursuant to a Wis. Stat. § 974.06 motion." (R. 178:2.)[2]

The State objected to Boruch's Wis. Stat. § 974.06 motion by written response. (R. 208.) The State argued that the record conclusively showed that Boruch was not entitled to relief, as he failed to show a "sufficient reason" for failing to bring his current claims sooner. (R. 208:8.)

Boruch then filed a 168-page reply to the State's response, including attachments. (R. 222; 223.) He once again offered the ineffective assistance of postconviction/appellate counsel as the "sufficient reason" why he did not bring his

[2] Boruch filed an amended version of his motion for a new trial on April 11, 2016. (R. 204.)

present claims sooner. (R. 222:18–86.) He also proposed new "sufficient reasons" for not previously bringing some of his claims: "governmental interference" (R. 222:44, 47, 59), and a "discovery violation" (R. 222:61, 72).[3] Boruch also filed a motion alleging a discovery violation (R. 224), and a "Motion For Court-Appointment of Expert" (R. 225).

In a written order dated May 3, 2017, the circuit court denied Boruch's "post-conviction motion and all other motions and requests associated with it," reasoning that the record conclusively showed that Boruch was not entitled to relief. (R. 247.)

Boruch's fee-waiver request

Boruch sought waiver of the transcript fee to appeal the circuit court's May 3, 2017 decision. (R. 244; 263.) The court denied Boruch's request in a written order dated September 19, 2017. (R. 267.)

Boruch then asked this Court to waive the transcript fee. (R. 270.) This Court denied Boruch's request, informing

---

[3] When Boruch filed his reply, he requested leave to file an amended Wis. Stat. § 974.06 motion. (R. 221:3–4.) The circuit court granted Boruch's request. (R. 229.) While documents in the appellate record indicate that Boruch filed a "meaty" amended Wis. Stat. § 974.06 motion adding new claims (R. 230:1; 231; 233; 235), the amended motion itself does not appear to be a part of the appellate record. This Court's review is limited to the appellate record in this case. *State v. Aderhold*, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979). It was Boruch's responsibility to ensure that his amended motion was a part of the appellate record if he wished this Court to consider it. *State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774. Boruch has already moved to supplement the record once in this matter, which this Court granted. (R. 345.) This matter was also remanded to the circuit court to supplement the record with the *Girouard* hearing transcript. (R. 324.) The State opposes any further supplementation of the appellate record.

him that he needed to appeal the circuit court's decision. (R. 271.)

Boruch appealed the circuit court's decision denying his request for a fee waiver, and then moved for summary disposition. (R. 280.)[4] This Court summarily reversed because the circuit court did not make "the findings required under *Girouard*." (R. 280:2.) Per *Girouard*, this Court instructed the circuit court to determine whether (1) Boruch was indigent, and (2) there was arguable merit to appealing the court's decision denying Boruch's Wis. Stat. § 974.06 motion. (R. 280:2.)

The circuit court held a *Girouard* hearing. (R. 328.) It found Boruch indigent. (R. 328:18–19.) But the court decided that there was no arguable merit to appealing its denial of Boruch's Wis. Stat. § 974.06 motion, reasoning that Boruch had "not stated a claim, defense or appeal upon which relief [could] be granted." (R. 328:20–21.) The court also stated, "[T]his Court has already found and ordered that the motions, files and records of the action conclusively show that Mr. Boruch is entitled to no relief. . . . therefore, this Court has already found that Mr. Boruch's claims for relief are not arguably meritorious as required by" *Girouard*. (R. 328:21.)

Boruch appeals.

STANDARD OF REVIEW

For the reasons discussed below, this case boils down to whether Boruch's Wis. Stat. § 974.06 motion states a claim for relief. "Whether a claim for relief exists is a question of law that" this Court decides de novo. *State ex rel. Luedtke v.*

---

[4] This Court stayed Boruch's appeal of the circuit court's decision denying his Wis. Stat. § 974.06 motion (case number 2017AP1441) pending resolution of this case. (R. 288:3.)

Bertrand, 220 Wis. 2d 574, 579, 583 N.W.2d 858 (Ct. App. 1998), *superseded on other grounds by statute*.

ARGUMENT

Boruch is not entitled to a fee waiver because his Wis. Stat. § 974.06 motion fails to state a claim upon which relief may be granted.

Boruch seeks waiver of the transcript fee to appeal the circuit court's decision denying his Wis. Stat. § 974.06 motion. (Boruch's Br. 12.) The circuit court properly denied Boruch's request because his § 974.06 motion fails to state a claim upon which relief may be granted. Therefore, this Court should affirm.

A. Relevant law

1. A defendant seeking a fee waiver must show by affidavit that (1) he is indigent, and (2) his proposed action states a claim upon which relief may be granted.

To obtain a fee waiver, a defendant must first establish indigency. Wis. Stat. § 814.29(1)(a).[5] Here, the parties agree that Boruch is indigent. So the relevant law in this appeal is

---

[5] Wisconsin Stat. § 814.29(1)(a) states, in relevant part:

> . . . [A]ny person may commence, prosecute or defend any action or special proceeding in any court, or any writ of error or appeal therein, without being required to give security for costs or to pay any service or fee, upon order of the court based on a finding that because of poverty the person is unable to pay the costs of the action or special proceeding, or any writ of error or appeal therein, or to give security for those costs.

the requirement that the action underlying Boruch's fee-waiver request states a claim upon which relief may be granted.

Wisconsin Stat. § 814.29(1)(b) requires the person seeking the fee waiver to "file in the court an affidavit in the form prescribed by the judicial conference, setting forth briefly the nature of the cause, defense or appeal and facts demonstrating his or her poverty." "The court may deny the request for an order if the court finds that the affidavit states no claim, defense or appeal upon which the court may grant relief." Wis. Stat. § 814.29(1)(c).

This Court has interpreted the fee waiver statute at issue in this case to mean that "if the proposed action states a claim and the individual seeking a fee waiver is indigent, then the court must accept the action for filing without payment of fees." *Luedtke*, 220 Wis. 2d at 578. "The fee waiver statute's standard for deciding whether a proposed action states a claim is the same standard that is applied when considering a motion to dismiss in an ordinary civil case for 'failure to state a claim upon which relief can be granted.'" *Id.* (citing Wis. Stat. § 802.06(2)(a)6.). "[A] complaint should be dismissed as legally insufficient 'only if it is quite clear that under no condition can a plaintiff recover.'" *Id.* (citation omitted). "This principle applies especially to *pro se* pleadings . . . because *pro se* complaints of prisoners must be construed liberally in determining whether stated facts give rise to a cause of action." *Id.*

When considering whether a claim for relief exists, "if the facts pleaded reveal an apparent right to recover under *any* legal theory, they are sufficient as a cause of action." *Luedtke*, 220 Wis. 2d at 579. "The facts pleaded must be taken as true, but legal conclusions need not be accepted." *Id.*

Notably, this Court in *Luedtke* interpreted Wis. Stat. § 814.29 following the Wisconsin Supreme Court's

amendment to the statute in 1993. *See State ex rel. Hansen v. Cir. Ct. for Dane Cty.*, 181 Wis. 2d 993, 997 n.5, 513 N.W. 2d 139 (Ct. App. 1994). Before that, the statute provided that a "person may prosecute an appeal without being required to pay any fee, upon the court's approval of an affidavit that, because of poverty, the person is unable to pay the costs of the appeal *and that the person believes that he or she is entitled to the redress sought*." *State ex rel. Girouard v. Cir. Ct. for Jackson Cty.*, 155 Wis. 2d 148, 157, 454 N.W.2d 792 (1990) (emphasis added). *See also* Wis. Stat. § 814.29(1) (1991–92).

As to the second requirement in the *prior* language of Wis. Stat. § 814.29(1)—that the person believes that he is entitled to the redress sought—this Court in *Girouard* characterized the relevant inquiry as whether the appealing indigent "has arguable reason to believe he is entitled to redress on the appeal," or whether the claim is "arguably meritorious," or whether "the person . . . present[s] a claim upon which relief can be granted." *Girouard*, 155 Wis. 2d at 151, 159 (citations omitted). So while the phrase "arguably meritorious" in *Girouard* appears to call for an assessment of whether the proposed action underlying the fee-waiver request properly states a claim for relief, it ultimately does not matter, as the current language of Wis. Stat. § 814.29(1)(c) requires as much. *Luedtke*, 220 Wis. 2d at 578.

Thus, while *Girouard* appears to be the controlling case setting forth the standard for analyzing fee-waiver requests under Wis. Stat. § 814.29 (R. 280), it is important to note that the language of the statute has changed since this Court's decision. *See Hansen*, 181 Wis. 2d at 997 n.5. Whether the supreme court's amendment to the statute altered the *Girouard* standard or not, the current test is (1) whether the person seeking a fee waiver is indigent, and (2) whether the proposed action states a claim upon which relief may be granted. *Luedtke*, 220 Wis. 2d at 578. And this test applies to criminal litigants seeking free transcripts on direct appeal,

see State v. Jacobus, 167 Wis. 2d 230, 234, 481 N.W.2d 642 (Ct. App. 1992) (indicating that the *Girouard* procedure applies to a criminal defendant's request for free transcripts to appeal), as well as litigants like Boruch, pursuing collateral relief under Wis. Stat. § 974.06. (R. 280:1–2.)

2. To properly state a claim for relief in a Wis. Stat. § 974.06 motion, a defendant must provide a "sufficient reason" for not bringing his current claims during his direct appeal.

Wisconsin Stat. § 974.06 allows collateral review of a defendant's conviction based on errors of jurisdictional or constitutional dimension. *See State v. Johnson*, 101 Wis. 2d 698, 702, 305 N.W.2d 188 (Ct. App. 1981). But the statute "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, "[w]ithout a sufficient reason, a movant may not bring a claim in a § 974.06 motion if it 'could have been raised in a previously filed sec. 974.02 motion and/or on direct appeal.'" *State v. Romero-Georgana*, 2014 WI 83, ¶ 34, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted). *See also* Wis. Stat. § 974.06(4).

Ineffective assistance of postconviction or appellate counsel may constitute a sufficient reason for not previously raising an issue. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). But a defendant cannot merely claim that postconviction or appellate counsel was ineffective—he must "make the case" of ineffective assistance, not just point to issues that were not raised on direct appeal. *See State v. Balliette*, 2011 WI 79, ¶ 67, 336 Wis. 2d 358, 805 N.W.2d 334. And he is required to do so within the four corners of his motion. *State v. Allen*, 2004 WI 106, ¶ 27, 274 Wis. 2d 568, 682 N.W.2d 433. *See also*

Romero-Georgana, 360 Wis. 2d 522, ¶ 64 ("We will not read into the § 974.06 motion allegations that are not within the four corners of the motion.").

"To prove deficiency, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Romero-Georgana*, 360 Wis. 2d 522, ¶ 40 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

Importantly, when a defendant in a Wis. Stat. § 974.06 motion alleges that his postconviction or appellate counsel was ineffective for failing to bring certain claims, he must demonstrate that his current claims are clearly stronger than the claims that postconviction or appellate counsel actually brought. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 4; *State v. Starks*, 2013 WI 69, ¶ 6, 349 Wis. 2d 274, 833 N.W.2d 146. This "clearly stronger" pleading standard is part of the deficient performance prong of the *Strickland* test. *Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 45, 58; *Starks*, 349 Wis. 2d 274, ¶ 60. The purpose of the clearly stronger standard is to allow a court "to compare the arguments now proposed against the arguments previously made." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 46. A court should reject a claim that fails to allege, with particularity, how and why the claims the defendant wanted raised are "clearly stronger" than the claims postconviction or appellate counsel actually raised. *See Balliette*, 336 Wis. 2d 358, ¶ 69.

To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not

enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

B. Boruch's Wis. Stat. § 974.06 motion is legally insufficient.[6]

Because "it is quite clear that under no condition can" Boruch obtain relief on his Wis. Stat. § 974.06 motion, he has failed to properly state a claim. *Luedtke*, 220 Wis. 2d at 578 (citation omitted). The circuit court therefore correctly denied his request for a fee waiver. *Id.*

Boruch pursued a direct appeal of his conviction with the assistance of counsel. (R. 163). The general rule is that he is barred from seeking relief under Wis. Stat. § 974.06. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 34. *See also* Wis. Stat. § 974.06(4). However, an exception exists: if Boruch can show a sufficient reason for failing to previously raise his current claims, he can bring them. *Id.* Thus, to properly state a claim for relief in this context, Boruch needed to show that he meets the exception to the general rule. *See Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 36–37. *See also Scott v. Savers Prop. and Cas. Ins. Co.*, 2003 WI 60, ¶¶ 3–4, 14–18, 262 Wis. 2d 127, 663 N.W.2d 715 (holding that the lower courts properly dismissed the complaint for failure to state a claim because, although the complaint alleged all the elements of a negligence claim,

---

[6] The State notes at the outset that Boruch did not comply with Wis. Stat. § 814.29(1)(b). He did not file the correct form for seeking a waiver of fees and costs at the circuit court. (R. 243; 244; 263; A-App. 103–05.) Instead, he filed a "Petition for Appointment of An Attorney, Affidavit of Indigency." (R. 243; A-App. 104.4.)

it failed to show an exception to the governmental immunity bar). Boruch did not meet his burden.

To decide whether Boruch's Wis. Stat. § 974.06 motion states a claim for relief, this Court confines its analysis to the four corners of his motion. *See Allen*, 274 Wis. 2d 568, ¶ 27; *Romero-Georgana*, 360 Wis. 2d 522, ¶ 64. As noted, Boruch's § 974.06 motion offered the ineffective assistance of postconviction/appellate counsel as the sufficient reason for not bringing his current claims sooner. (R. 171:60–71; 210:7.) He also alleged that his current claims are "clearly stronger" than the claim that appellate counsel raised on direct appeal. (R. 171:63–71.)

But Boruch makes a fatal omission: he did not make the case of postconviction/appellate counsel's ineffectiveness. Specifically, he made no effort to *demonstrate* that his current claims are clearly stronger than the claim that his appellate counsel raised. He needed to do so. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 62 (a defendant is required to "say why the claim he wanted raised was clearly stronger than the claims actually raised").

Boruch's motion alleged that postconviction/appellate counsel was ineffective for failing to raise his trial-counsel-ineffectiveness claims and his claims of "other trial prejudices/errors." (R. 171:62.) He then proceeded to examine his current claims in a "clearly stronger light," which was simply a summary of his current claims. (R. 171:63–71.) Boruch did not compare those claims to the merits of the claim that appellate counsel raised on direct appeal. (R. 171:63–71.) The closest that he came was by asserting that this Court labeled his direct-appeal claim, "unreasonable in the extreme" (R. 171:66, 69), but that is not accurate. This Court made that statement when considering whether the claimed error was harmless (R. 163:7–9), which was the *State's* burden to both raise and prove, *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. Regardless, this Court "will not assume

ineffective assistance from a conclusory assertion." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 62.

Moreover, Boruch's hollow assertion that his current claims are clearly stronger than the claim that appellate counsel raised is undermined by the fact that he revived his direct-appeal claim in his Wis. Stat. § 974.06 motion, albeit with some re-packaging. (R. 171:48 ("In Boruch's direct appeal . . . Boruch's attorney argued that the Trial Court's response to a jury note was an abuse of discretion and was fundamentally unfair. *Boruch hereby re-alleges and re-asserts the arguments of Appellate Counsel,* and asserts that the same demonstrates that the Trial Court gave a faulty jury instruction") (emphasis added).) By reasserting the issue that he now criticizes appellate counsel for bringing, Boruch has not overcome the "strong presumption" that postconviction/appellate counsel performed reasonably. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 40.

Further, "the clearly stronger standard may not be adequate when counsel has valid reasons for choosing one set of arguments over another. These reasons may include the preferences, even the directives, of the defendant." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 46. In this regard, Boruch has failed to provide facts or support for *why* postconviction/appellate counsel was ineffective for choosing the claim that she brought: "Did she act contrary to his directive? Did she fail to advise him" of his current claims? *Romero-Georgana*, 360 Wis. 2d 522, ¶ 60. As the United States Supreme Court long ago explained, "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691. Boruch did not articulate, however, when or how he attempted to raise his current claims with postconviction/appellate counsel, or what he did in aid of those claims. (R. 171:62–71, 83–84; 180:1–4.) Nor did he allege that postconviction/appellate counsel failed

to advise him of his current claims. (R. 171:62–71, 83–84; 180:1–4.) Boruch's motion thus does not undermine the presumption that postconviction/appellate counsel had good reasons for not pursuing his current claims. For example, Boruch could have told postconviction/appellate counsel to bring his direct-appeal claim after she advised him of his options, including his current claims. *See Romero-Georgana*, 360 Wis. 2d 522, ¶ 62.

Boruch's Wis. Stat. § 974.06 motion also failed to provide facts or support showing that any deficient performance on postconviction/appellate counsel's part caused him prejudice. "A proper allegation of prejudice" in this context would state that Boruch would have told postconviction/appellate counsel to pursue his current claims had she advised him that they were options. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 68. Boruch made no such allegation. (R. 171:62–71, 83–84; 180:1–4.)

The bottom line is that Boruch cannot pursue relief under Wis. Stat. § 974.06 unless he has a sufficient reason for not previously raising his current claims, and he failed to properly allege one. He cannot attempt to cure his pleading deficiencies through briefing. *Allen*, 274 Wis. 2d 568, ¶ 27. So Boruch's 168-page reply brief at the circuit court is not relevant to whether he properly stated a claim in his Wis. Stat. § 974.06 motion. But even if it was, he still made no effort to demonstrate that his current claims are clearly stronger than the claim that appellate counsel raised. (R. 222:18–86.) Once again, he did not compare his current claims to the claim that appellate counsel litigated. (R. 222:18–86.) And while he proposed new "sufficient reasons" to justify his failure to bring his current claims sooner, he offered no law to support them. (R. 222:44, 47, 59, 61, 72.) Moreover, Boruch's reply brief does not contain a proper allegation, per *Romero-Georgana*, 360 Wis. 2d 522, ¶ 68, that any deficient

performance on postconviction/appellate counsel's part caused him prejudice. (R. 222:18–86; 223:1–5.)

For the above reasons, Boruch's Wis. Stat. § 974.06 motion fails to state a claim upon which relief may be granted.[7] The circuit court therefore properly denied his fee-waiver request. *See Luedtke*, 220 Wis. 2d at 578.

On appeal, Boruch argues that the circuit court "erred by using as the basis for denying [his] request for a fee waiver . . . the fact that [it] had already denied [his] Wis. Stat. § 974.06 motion." (Boruch's Br. 6.) He appears to contend that in resolving his fee-waiver request, the court was required to decide (1) whether he was indigent, and (2) whether his Wis. Stat. § 974.06 motion stated a claim upon which relief may be granted. (Boruch's Br. 7, 9, 12.) If he is, the State agrees that that is the relevant inquiry. *Luedtke*, 220 Wis. 2d at 578.

It is unclear if the circuit court applied the proper test in resolving Boruch's fee-waiver request. (R. 328:20–21.) But it does not matter because "[i]t is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute*. Despite seemingly identifying the relevant test, Boruch develops no argument on appeal as to whether his Wis. Stat. § 974.06 motion states a claim upon which relief may be granted. He only offers the conclusory assertion that "[a]ll of the claims raised by Boruch in his 974.06 Motion are legally cognizable." (Boruch's Br. 10.) This Court "may decline

---

[7] To the extent that Boruch's other postconviction motions are relevant to the analysis (R. 176; 178; 204; 224; 225), they also fail to state a claim upon which relief may be granted. Boruch needed a sufficient reason for not bringing them sooner. *See State v. Kletzien*, 2011 WI App 22, ¶¶ 11–13, 331 Wis. 2d 640, 794 N.W.2d 920; *State v. Henley*, 2010 WI 97, ¶ 63 n.25, 328 Wis. 2d 544, 787 N.W.2d 350. Thus, those motions fail to state a claim upon which relief may be granted for the reasons discussed above.

to review issues inadequately briefed." *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

On appeal, Boruch also claims that the State "conceded" that his Wis. Stat. § 974.06 motion properly states a claim for relief. (Boruch's Br. 10.) For support, he points to the *Girouard* hearing transcript, but his citations do not reflect any such concession. (Boruch's Br. 10.) Boruch also claims that the State conceded this issue at a non-evidentiary hearing on his Wis. Stat. § 974.06 motion (Boruch's Br. 10), but there is no record to support his assertion. And regardless, the issue whether Boruch's § 974.06 motion properly states a claim for relief did not arise until he requested a fee waiver. *See Luedtke*, 220 Wis. 2d at 578. The State has several options for opposing a § 974.06 motion, *see Allen*, 274 Wis. 2d 568, ¶ 9, so the State's position on Boruch's motion at the circuit court should not operate as a concession to the issue that this appeal presents.

Finally, had Boruch developed an argument as to whether his Wis. Stat. § 974.06 motion states a claim for relief, he might have contended that he did not need to meet the "clearly stronger" standard discussed above because he pursued no postconviction motions during his direct appeal. (R. 222:15, 85.) That is incorrect. *See Starks*, 349 Wis. 2d 274, ¶¶ 15, 56 (holding that where Starks filed no postconviction motions and only pursued a direct appeal at the court of appeals, he still was required to "establish why the unraised claims of ineffective assistance of trial counsel were 'clearly stronger' than the claims that appellate counsel raised on appeal").[8]

[8] For purposes of this appeal, the State assumes, without conceding, that Boruch properly raised his ineffective assistance of appellate counsel claim before the circuit court.

In sum, Boruch is not entitled to a waiver of the transcript fee to appeal the circuit court's denial of his Wis. Stat. § 974.06 motion.

CONCLUSION

This Court should affirm the circuit court's order denying Boruch's request for a fee waiver.

Dated this 7th day of May, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. MELE
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
melekl@doj.state.wi.us

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 5,898 words.

Dated this 7th day of May, 2019.

_____
KARA L. MELE
Assistant Attorney General

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 7th day of May, 2019.

_____
KARA L. MELE
Assistant Attorney General