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**DISTRICT IV**

January 22, 2014

To:

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Circuit Court Judge  
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You are hereby notified that the Court has entered the following opinion and order:

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2012AP1094

State of Wisconsin v. Earl DeWayne Phiffer (L.C. # 2002CF3370)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Earl Phiffer appeals an order denying a postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm.

Phiffer argues that the circuit court should have granted his postconviction request for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). This appears to be a claim made under

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

WIS. STAT. § 974.06. Phiffer previously filed a *pro se* motion under § 974.06 in 2006. A defendant may not pursue a second motion under that section without showing a sufficient reason why the current issues were not raised in the previous motion under that section. WIS. STAT. § 974.06(4); *State ex rel. Dismuke v. Kolb*, 149 Wis. 2d 270, 273-74, 441 N.W.2d 253 (Ct. App. 1989). Phiffer argues that this issue was not previously raised because his attorney in his first appeal, under WIS. STAT. RULE 809.30, was ineffective. However, Phiffer does not explain why he did not raise the issue in his own first motion under § 974.06. Ineffective assistance of counsel is not a convincing explanation because Phiffer did not have counsel then. Therefore, we conclude that the issue is barred by § 974.06(4).

The State asks that we issue an order imposing certain conditions on future appeals by Phiffer, and that we find this appeal frivolous under WIS. STAT. RULE 809.25(3). We deny those requests.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*