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**DISTRICT III**

September 18, 2018

To:

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

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2017AP786

State of Wisconsin v. Juan Roberto Nieto (L. C. No. 2004CF705)

Before Stark, P.J., Hruz and Seidl, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Juan Nieto, pro se, appeals an order denying his postconviction motion to cease the deduction of restitution payments from his prison income. Nieto challenges the validity of the restitution order on grounds it was entered without a hearing and the restitution amount was never incorporated into an amended judgment of conviction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

disposition. We conclude that Nieto's claims are procedurally barred under WIS. STAT. § 974.06(4) (2015-16)<sup>1</sup> and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and on this basis summarily affirm the order. See WIS. STAT. RULE 809.21.

In July 2004, the State charged Nieto, as party to a crime, with kidnapping, sexually assaulting, and attempting to kill Joan<sup>2</sup> by setting her on fire. Joan suffered serious injuries, including second- and third-degree burns to the majority of her body. After a jury trial, Nieto was convicted of the crimes charged and, on January 2, 2006, the circuit court sentenced Nieto to a total of seventy years' initial confinement and eighty years' extended supervision. The sentencing court also ordered Nieto to pay restitution to Joan in an amount to be determined due to her ongoing surgeries and treatments. The court noted at that time the "bills are \$500,000 and counting."

In March 2007, Nieto filed a postconviction motion alleging multiple trial errors. In June 2007, before the postconviction motion was heard, the Brown County Victim/Witness Assistance Program Coordinator sent a memorandum to the Department of Corrections (DOC), with a copy to Nieto's counsel, stating that the restitution amount was \$258,357.69. The record reflects no challenge to the restitution amount, and a restitution order for that amount was entered July 18, 2007. Nieto's postconviction motion was heard July 13, 2007, and was ultimately denied by order entered May 30, 2008. Nieto appealed that order in June 2008, but he did not raise any issue about the court-ordered restitution. This court affirmed the order denying Nieto's

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

<sup>2</sup> Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

postconviction motion. *See State v. Nieto*, No. 2008AP1560, unpublished slip op. (WI App May 27, 2009).

In November 2012, Nieto, by counsel, filed a second postconviction motion, this time seeking DNA testing of evidence. That motion was resolved by stipulation of the parties and the circuit court entered an order requiring DNA testing and analysis of the evidence. In 2016, Nieto, pro se, filed the underlying postconviction motion. This third postconviction motion sought to prevent the deduction of restitution payments from Nieto's prison income, claiming that because there was no court-ordered restitution on the judgment of conviction, the DOC lacked authority to deduct payments. The circuit court denied the motion, attaching the July 18, 2007 restitution order. This appeal follows.

We conclude that Nieto's various challenges to the restitution order are procedurally barred under WIS. STAT. § 974.06(4) and *Escalona-Naranjo*. In *Escalona-Naranjo*, our supreme court held that "a motion under [§] 974.06 could not be used to review issues which were or could have been litigated on direct appeal." *Escalona-Naranjo*, 185 Wis. 2d 168 at 172. The statute, however, does not preclude a defendant from raising "an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions." *Id.* at 184.

We determine the sufficiency of a defendant's reason for circumventing *Escalona-Naranjo*'s procedural bar by examining the "four corners" of the subject postconviction motion. *See State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Here, Nieto's motion offered no reason, much less a sufficient reason, for failing to raise his present claims in his

earlier postconviction motions or his first appeal. Nieto is therefore barred from raising them now.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*