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**DISTRICT I**

February 19, 2019

*To*:

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

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2018AP558 State of Wisconsin v. Jammie Lewis Yerks (L.C. # 2012CF4415)

Before Kessler, P.J., Brennan and Dugan, 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).**

Jammie Lewis Yerks, *pro se*, appeals an order denying his motion for postconviction relief brought under WIS. STAT. § 974.06 (2017-18).[1] The circuit court determined that his claims are procedurally barred. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

157 (1994). Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Kaleel Buchanan, then fourteen years old, shot and killed Dennis Smith, Jr., in 2012. The State charged Yerks with first-degree intentional homicide as a party to a crime, alleging that he had aided and abetted Buchanan.[2] A jury found Yerks guilty. He appealed with the assistance of counsel, challenging the sufficiency of the evidence. We rejected the claim, explaining that the evidence showed the following:

> Yerks was a father-figure to Buchanan, having been in a relationship with Buchanan's mother for about fifteen years. On the morning of Smith's shooting, Buchanan went to the home of brothers Isiah Jelks and Cornillius Hurt. Smith was outside the house with Jelks, Hurt, and others. Buchanan asked Smith about someone robbing Buchanan's brother. Smith pushed Buchanan, which upset Buchanan. Jelks and Hurt's sister, Quanette Poe, told Smith to stop picking on Buchanan. Smith responded by putting his hand on Poe's face and pushing her away, causing Smith and Hurt to get into a fight. Smith then made a phone call to obtain a gun. Buchanan attempted to call Yerks for a gun as well, but his call did not go through. Buchanan, who lived nearby, left and returned a short time later. Smith was [waving] a gun but had put it in his pants and was walking away. At that time, a car pulled up with Yerks in it and he gave Buchanan a gun. Buchanan shot Smith multiple times. Before either could be arrested, Yerks and Buchanan went to Buchanan's brother's home in Menasha.

***State v. Yerks***, No. 2014AP1918-CR, unpublished slip op. ¶7 (WI App Nov. 24, 2015) (footnote omitted). We concluded that the testimony and the reasonable inferences from the evidence supported the jury's verdict. *See* ***id.***, ¶12.

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[2] The charge initially included a dangerous-weapon penalty enhancer that the State subsequently withdrew.

Yerks, proceeding *pro se*, next filed a motion in February 2018, seeking postconviction relief pursuant to WIS. STAT. § 974.06. He alleged that he was denied a fair trial because he did not have the opportunity to confront a witness against him. The circuit court denied the motion without a hearing.

In March 2018, Yerks filed the postconviction motion underlying this appeal. Pursuant to WIS. STAT. § 974.06, he alleged that his trial counsel was ineffective for failing to subpoena witnesses, introduce evidence, request a mistrial, and voir dire jurors. He also alleged that he had newly discovered evidence that someone other than Yerks supplied the gun that Buchanan used to shoot Smith. In support of these claims, Yerks offered documents and affidavits dated and signed during the years 2014-2017. The circuit court concluded that the claims were barred, and Yerks appeals.

WISCONSIN STAT. § 974.06 permits an incarcerated inmate to raise constitutional claims after the time for a direct appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶¶52-53, 328 Wis. 2d 544, 787 N.W.2d 350. An allegation that defense counsel was ineffective raises a claim under the sixth and fourteenth amendments to the United States Constitution, *see* ***State v. Pitsch***, 124 Wis. 2d 628, 632-33, 369 N.W.2d 711 (1985), and an allegation of newly discovered evidence raises a claim under the Constitution's due process clause, *see* ***State v. Bembenek***, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987). Section 974.06 is therefore the mechanism available to Yerks for pursuit of his current claims. The opportunity to bring claims under § 974.06 is limited, however, because "[w]e need finality in our litigation." *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Therefore, a convicted defendant may not bring postconviction claims under § 974.06 if the defendant could have raised the claims in a previous postconviction

motion or on direct appeal unless the defendant states a "sufficient reason" for failing to raise the issues earlier. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

Whether a defendant offered the circuit court a sufficient reason to avoid the procedural bar imposed by ***Escalona-Naranjo*** and WIS. STAT. § 974.06 is a question of law that we review *de novo*. *See* ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920. We resolve the question by examining the four corners of the defendant's postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

Yerks asserted in his postconviction motion that he failed to raise his current claims previously due to the ineffective assistance of his postconviction counsel. In some circumstances, alleged ineffective assistance by a defendant's postconviction counsel can be a sufficient reason for permitting an additional postconviction motion under WIS. STAT. § 974.06. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996). Postconviction counsel's alleged ineffectiveness, however, does not permit a convicted person to file multiple successive postconviction motions. In this case, postconviction counsel's alleged ineffectiveness does not explain Yerks's own failure to present all of his claims in his first *pro se* motion. Therefore, Yerks's allegation that his postconviction counsel was ineffective is not a sufficient reason for permitting a second *pro se* attack on his conviction.

In this court, Yerks offers several additional reasons for failing to raise his most recent claims in his prior litigation. He asserts that the inmate who assisted him in preparing his first *pro se* motion did not advise him properly, his first *pro se* motion would have exceeded the length limitations imposed by Milwaukee County circuit court rules if he had included his current claims, he did not receive one of the documents supporting those claims until after he

filed the first *pro se* motion in circuit court,[3] and he is actually innocent. We will not consider these allegations because Yerks offers them for the first time in his appellate brief. We do not address matters presented for the first time on appeal.[4] *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838; *see also* ***Allen***, 274 Wis. 2d 568, ¶27.

Finally, Yerks argues that this court has discretionary authority to address his claims and grant him relief pursuant to WIS. STAT. § 752.35. This court has the power to reverse under § 752.35 "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See* ***id.*** Discretionary reversal is rarely granted, however. *See* ***State v. Kucharski***, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697. Our power is "reserved for exceptional cases." *See* ***id.*** This is not an exceptional case.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed. *See* 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*

[3] The document at issue—captioned in this matter and prepared for litigation—is dated as signed on November 17, 2017, three months before Yerks filed his first postconviction motion.

[4] We observe that Yerks included several documents in his appendix to support the new reasons he proposes as justification for serial litigation. These documents include a purported affidavit from another inmate, a letter addressed to the clerk of circuit court in reference to a case unrelated to Yerks's, and a letter addressed to an unidentified person and signed "nay." These documents are not in the record, and therefore we do not consider them. *See* ***State v. Riley***, 175 Wis. 2d 214, 220 & n.2, 498 N.W.2d 884 (Ct. App. 1993) ("We are bound by the record as it comes to us.").