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MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT IV**

September 3, 2020

To:

Hon. William E. Hanrahan  
Circuit Court Judge  
Dane County Courthouse  
215 S. Hamilton St., Rm. 4103  
Madison, WI 53703

Lanny B. Glinberg  
Asst. District Attorney  
Rm. 3000  
215 S. Hamilton St.  
Madison, WI 53703

Carlo Esqueda  
Clerk of Circuit Court  
Dane County Courthouse  
215 S. Hamilton St., Rm. 1000  
Madison, WI 53703

Courtney Kay Lanz  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707

Tomas D. Cuesta 137594  
Stanley Correctional Inst.  
100 Corrections Dr.  
Stanley, WI 54768

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

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2019AP1503-CR

State of Wisconsin v. Tomas D. Cuesta (L.C. # 2000CF1226)

Before Fitzpatrick, P.J., Kloppenburg, and Graham, 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).**

Tomas Cuesta, pro se, appeals a circuit court order denying his postconviction motion seeking to challenge deductions from his inmate account. 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 (2017-18).<sup>1</sup> We summarily affirm.

Cuesta is serving a sentence for his conviction of multiple felonies in 2001. The sentencing court ordered him to pay restitution totaling \$7,995.90. In 2016, the Department of Corrections (the department) issued policies and procedures that set the default withholding from inmate accounts for restitution at fifty percent until restitution is paid in full. Cuesta filed a motion challenging the increase in the rate of deduction from his inmate account. The circuit court construed the motion as a challenge to the department's authority to deduct court-ordered obligations from his account, and denied the motion.

Cuesta appealed and, in a decision issued on May 7, 2018, this court affirmed the decision of the circuit court on the basis that Cuesta had failed to follow the proper procedure for seeking relief. *See State v. Cuesta*, No. 2016AP2430, unpublished op. and order (WI App May 7, 2018). Citing *State v. Williams*, 2018 WI App 20, ¶¶4-5, 380 Wis. 2d 440, 909 N.W.2d 177, we explained that an inmate's remedy for allegedly improper disbursement of inmate funds is certiorari review, which requires that the inmate first exhaust his administrative remedies. Because Cuesta had filed a motion before the circuit court that sentenced him, rather than filing a petition for certiorari review, we concluded that the circuit court lacked competency to address the issue.

This appeal arises from another motion filed by Cuesta with the postconviction court on July 22, 2019, entitled "Motion for Relief Under WIS. STAT. § 973.20(13)(c), § 973.20(13)(a)

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

and § 973.20(13)(c)1-4.” Cuesta argued that the department’s change in the rate of collection of restitution from his inmate account was implemented without notice or a hearing, in violation of § 973.20(13), and that the change was a new sentencing factor overlooked by all parties. The circuit court denied the motion, and Cuesta appealed.

On appeal, Cuesta renews his challenge to the rate at which the department is collecting restitution from his account. He asserts that he exhausted his administrative remedies, and has attached copies of inmate complaints to his reply brief to support that assertion. However, the inmate complaints do not appear in the record and, therefore, are outside the scope of our review on appeal. See *Kushman v. State ex rel. Panzer*, 240 Wis. 134, 140, 2 N.W.2d 862, 865 (1942) (stating that “[w]e can only consider the record upon which the circuit judge made his decision”).

The State counters that, even if Cuesta did exhaust his administrative remedies as he alleges, the postconviction court lacked competency to decide his motion. We agree, and we affirm on that basis. In our May 7, 2018 opinion disposing of Cuesta’s prior appeal, we stated:

As we recently explained in ... *Williams*, [380 Wis. 2d 440, ¶2,] ... “[i]t has long been the law that restitution may be disbursed from an inmate’s prison account.” Accordingly, we held that a circuit court “lacks the competency to address an allegedly improper disbursement of funds by the [department].” *Id.*, ¶4. Instead, an inmate’s remedy is certiorari review, which requires that the inmate first exhaust his administrative remedies. *Id.*, ¶5.

Here, Cuesta again filed a motion in the postconviction court in his criminal case, rather than filing a petition for writ of certiorari, which is a civil matter.<sup>2</sup> Under *Williams*, the circuit

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<sup>2</sup> Cuesta asserts in his reply brief that a petition for writ of certiorari was received by the clerk of the circuit court in March 2019. There is nothing in the record to support this assertion and, moreover, we generally will not consider arguments raised for the first time in a reply brief. See *Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

court lacked competency to act on Cuesta's motion. "Once an inmate is sentenced to prison, he or she is under the control of the executive branch and must address his or her objections to the internal operating procedures of the DOC through the ICRS," the administrative review system, and then certiorari. *Williams*, 380 Wis. 2d 440. ¶¶1,4. Because the postconviction court lacked competency to proceed over the matter, it properly denied Cuesta's motion.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

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*