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**DISTRICT II**

April 5, 2023

To:

Hon. Peter L. Grimm  
Circuit Court Judge  
Electronic Notice

Ramona Geib  
Clerk of Circuit Court  
Fond du Lac County Courthouse  
Electronic Notice

Abigail Potts  
Electronic Notice

Fairly W. Earls, #369129  
Jackson Correctional Inst.  
P.O. Box 233  
Black River Falls, WI 54615-0233

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

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2022AP1261

State of Wisconsin v. Fairly W. Earls (L.C. #2005CF419)

Before Gundrum, P.J., Neubauer and Grogan, 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).**

Fairly W. Earls, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2021-22)<sup>1</sup> postconviction motion. He claims the circuit court erred when it concluded his claim was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). 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. We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In August 2012, a jury found Earls guilty of ten counts of felony bail jumping contrary to WIS. STAT. § 946.49(1)(b). The State charged Earls with the bail-jumping counts when Earls violated conditions of his bond on a charge of first-degree sexual assault of a child. After a jury convicted him on all ten bail-jumping counts, Earls appealed his convictions. On his direct appeal, he claimed that he received ineffective assistance of counsel, that there was insufficient evidence to support his convictions, that the circuit court erred in denying his subpoena request, a violation of double jeopardy, and that the circuit court failed to give him proper notice of penalties he faced if he violated bond conditions. In November 2014, we rejected all of his contentions and affirmed his convictions. *State v. Earls*, No. 2014AP4-CR, unpublished op. and order (WI App Nov. 19, 2014).

In January 2022, Earls filed the WIS. STAT. § 974.06 motion underlying this appeal. He sought sentence modification, alleging that a change in the law constituted a new factor. He asserted that the imposition of consecutive sentences for his bail-jumping convictions violated double jeopardy. The circuit court summarily rejected Earls' claim, concluding that Earls previously raised this claim in his direct appeal and is therefore procedurally barred from raising the same claim again. Earls appeals.

“Whether a WIS. STAT. § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law subject to de novo review.” *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668. Whether a claim is procedurally barred because it was previously litigated presents a question of law that this court decides de novo. See *State ex rel. Washington v. State*, 2012 WI App 74, ¶27, 343 Wis. 2d 434, 819 N.W.2d 305. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*,

163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); *see also State v. Crockett*, 2001 WI App 235, ¶15, 248 Wis. 2d 120, 635 N.W.2d 673.

Earls' claim is procedurally barred. He previously raised a double jeopardy argument in his direct appeal. We rejected his claim in our 2014 decision, and his attempt to repackage his double jeopardy argument by claiming the 2015 Seventh Circuit case, *Boyd v. Boughton*, 798 F.3d 490 (7th Cir. 2015), changed the law fails.

WISCONSIN STAT. § 974.06(4) prohibits Earls from filing subsequent motions on issues “finally adjudicated or not so raised,” unless there is a “sufficient reason” justifying the subsequent motion. Here, the circuit court found that Earls' motion raised “the same issues that have previously been addressed” and that he “has not presented any ‘sufficient reason’” to avoid the procedural bar. The circuit court explained that Earls' reliance on the *Boyd* case does not satisfy the “sufficient reason” requirement because *Boyd* is not *new* law. It explained that *Boyd* did not change double jeopardy law, but instead relied on “prior precedent” “in existence” at the time of Earls' sentence and direct appeal. *Boyd* simply applied the longstanding double jeopardy analysis set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). The circuit court also noted that *Boyd* “stands in complete opposition to [Earls'] position, because *Boyd* stands for the premise that one can be prosecuted for both a bail jumping offense and separate criminal conduct that gives rise to the bail jumping conviction, and this does not violate double jeopardy.”

We agree with the circuit court. Earls' WIS. STAT. § 974.06 motion is procedurally barred because he already made a double jeopardy claim in his direct appeal, and he fails to provide a sufficient reason to avoid the *Escalona-Naranjo* bar. As *Escalona-Naranjo* held:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

*Escalona-Naranjo*, 185 Wis. 2d at 185. Because Earls raised a double jeopardy claim in his direct appeal, he is barred from attempting to repackage the same argument by rephrasing the issue. See *Witkowski*, 163 Wis. 2d at 990.

We also reject Earls' assertion that the *Boyd* case constitutes a new factor warranting sentence modification. As explained, *Boyd* did not change double jeopardy law. *Boyd* actually rejected the legal argument Earls makes. He has failed to show the existence of a new factor. See *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828.

Therefore,

IT IS ORDERED that the order of the circuit court 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*