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**DISTRICT I**

September 17, 2024

To:

Hon. Ellen R. Brostrom  
Circuit Court Judge  
Electronic Notice

John D. Flynn  
Electronic Notice

Anna Hodges  
Clerk of Circuit Court  
Milwaukee County Safety Building  
Electronic Notice

Richard Andrew Harvey, Jr.  
3141 S. 22nd Street  
Milwaukee, WI 53215

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

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2023AP642

State of Wisconsin v. Richard Andrew Harvey, Jr.  
(L.C. # 2015CF3733)

Before White, C.J., Geenen and Colón, 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).**

Richard Andrew Harvey, Jr., *pro se*, appeals an order of the circuit court denying his WIS. STAT. § 974.06 (2021-22)<sup>1</sup> motion seeking plea withdrawal. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 2017, Harvey pled no contest to one count of repeated sexual assault of the same child. Following his conviction, Harvey's postconviction counsel filed two motions—one for

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

sentencing credit and one to reconstruct the record. Harvey then filed at least six *pro se* postconviction motions. The most recent motion, which underlies this appeal, argues that Harvey was diagnosed with herpes in 2013, but that he “only recently found [] out” that herpes could be transferred by skin-to-skin transmission. Because the victim did not contract the virus, he reasons, it follows that he had no contact with her and is innocent. Harvey also argued that both trial and postconviction counsel were ineffective for failing to develop the issue and that he would not have pled no contest if trial counsel had properly investigated the issue.

The postconviction court denied the motion without a hearing, noting that Harvey failed to allege sufficient facts to constitute newly discovered evidence. The court also found that Harvey failed to demonstrate that he discussed the issue with either his trial or postconviction counsel and that he failed to explain why he did not raise this issue in any of his previous postconviction motions. In referencing a postconviction motion Harvey filed three years prior, the court also found that to the extent Harvey “[alleged] that the fact of his herpes diagnosis would have proved his innocence[,] [the issue] has already been raised and decided.” This appeal follows.

We agree with the postconviction court that Harvey’s claim is barred as having been previously litigated.<sup>2</sup> Whether a claim is procedurally barred because it was previously litigated presents a question of law that this court decides *de novo*. *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

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<sup>2</sup> The postconviction court denied Harvey’s WIS. STAT. § 974.06 motion for multiple reasons; however, we need not address the entirety of the court’s rationale because we conclude that Harvey’s motion is procedurally barred pursuant to *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991); *see also State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that we decide cases on the narrowest possible grounds).

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. This procedural bar applies if a defendant attempts to relitigate a claim that he raised in a previous postconviction motion, even if he did not raise the claim in a previous appeal. *See Crockett*, 248 Wis. 2d 120, ¶12.

In his brief to this court, Harvey contends that trial counsel was ineffective for failing to “investigate available key evidence in support of [his] defense” in the form of evidence pertaining to his herpes diagnosis. In turn, he argues that postconviction counsel was ineffective for failing to raise this claim of ineffective assistance of trial counsel.

Harvey’s WIS. STAT. § 974.06 motion is procedurally barred because he already litigated the issue underlying his ineffective assistance of counsel claims—that newly discovered evidence related to his herpes diagnosis merited plea withdrawal. Harvey’s first *pro se* postconviction motion alleged that his new medications to treat his herpes condition was newly discovered evidence, and that evidence that the victim did not contract herpes proved he had no contact with her. The postconviction court denied the motion for failing to meet the newly discovered evidence criteria. Harvey did not appeal that decision. In the motion underlying this appeal, Harvey again contends that evidence related to his diagnosis demonstrates his innocence. This time, he states that he only recently learned that herpes can be transmitted by skin-to-skin contact. It follows, according to Harvey, that he could not have had contact with the victim because she did not contract the virus. While Harvey frames the argument under the guise of ineffective assistance of counsel, he is effectively raising the same argument from his first *pro se*

postconviction motion. Harvey may not relitigate a previously decided issue simply by reframing it. *See Witkowski*, 163 Wis. 2d at 990.<sup>3</sup>

For the foregoing reasons, we affirm the order denying Harvey's postconviction motion.

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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*Samuel A. Christensen*  
*Clerk of Court of Appeals*

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<sup>3</sup> To the extent Harvey raised arguments not addressed in this decision, we conclude that our resolution of the issues discussed are dispositive of his appeal. *See Blalock*, 150 Wis. 2d at 703.