CHAPTER 974

CRIMINAL PROCEDURE — APPEALS, NEW TRIALS AND WRITS OF ERROR

Cross–reference: See definitions in s. 967.02.

974.01 Misdemeanor appeals.

(1) Appeals in misdemeanor cases are to the court of appeals.

(2) In lieu of a transcript on appeal, the oral proceedings may be presented in an agreed statement signed by all the parties to the appeal. This shall be a condensed statement in narrative form of all of the portions of the oral proceedings as are necessary to determination of the question on appeal.

History: 1971 c. 298; Sup. Ct. Order, 67 Wis. 2d 585, 784 (1975); 1977 c. 187.

974.02 Appeals and postconviction relief in criminal cases.

(1) A motion for postconviction relief other than under s. 974.06 or 974.07 (2) by the defendant in a criminal case shall be made in the time and manner provided in s. 809.30. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in ss. 808.04 (3) and 809.30. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 shall be taken under ss. 808.03 (2) and 809.50, with notice to the attorney general and the district attorney and opportunity for them to be heard.

(2) An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised.

History: 1971 c. 298; 1977 c. 187; 1977 c. 418 s. 929 (8m); 1979 c. 32; 1983 a. 27, 219; 2001 a. 16; 2003 a. 326.

Judicial Council Note, 1983: Sub. (1) is amended to repeal provisions relating to appeals under ch. 48, 51 or 55 cases. Those provisions have been relocated in their respective chapters for ease of reference. The subsection is also amended to clearly establish the time for bringing a postconviction motion other than under s. 974.06 and the manner for proceeding and the appeal times from a judgment of conviction, order denying a postconviction motion or both. Reference in sub. (1) to s. 809.30 is changed to s. 809.50 because the latter statute prescribes appropriate procedures for discretionary appeals while the former does not. [Bill 151–S]

Recantation by an accomplice who had testified for the state, stating that his testimony had been perjurious, did not constitute grounds for a new trial when it was uncorroborated by any other newly discovered evidence, and especially had no legal significance in light of positive identification of the defendant by the victim, as well as another eyewitness. Nicholas v. State, 49 Wis. 2d 683, 183 N.W.2d 11 (1971).

A motion for a new trial is a motion for the retrial of issues and is not an appropriate remedy for one convicted on a guilty plea. However, the motion may be considered a motion for leave to withdraw a plea of guilty and for a trial. The trial court has inherent power to hear the motion. State v. Stuart, 50 Wis. 2d 66, 183 N.W.2d 155 (1971).

Acceptance of the guilty plea could not be validated by the argument that the defendant's acts were within the proscriptions of the charged statute or that the defendant did in fact understand the charge, for the court has a duty to fulfill the *Ernst*, 43 Wis. 2d 661 (1969), requirements on the record. Such knowledge cannot be imputed to the defendant from defendant's other statements or by recourse to the preliminary transcript when the defendant never testified as to his knowledge of the charge or his understanding of the crime. McAllister v. State, 54 Wis. 2d 224, 194 N.W.2d 639 (1972).

A motion for a new trial on newly discovered evidence was properly not granted when the evidence consisted of the affidavits of two girls, one of which said that the crime was committed by someone else in their presence, and the other stated that both girls were frequently intoxicated and that the affiant had no recollection of the alleged facts. Swonger v. State, 54 Wis. 2d 468, 195 N.W.2d 598 (1972).

A motion for a new trial is directed to the discretion of the trial court and an order granting the motion will be affirmed unless there is an abuse of discretion. If the court has proceeded on an erroneous view of the law, that amounts to an abuse of discretion. State v. Mills, 62 Wis. 2d 186, 214 N.W.2d 456 (1974).

A claim of a constitutional right is waived unless timely raised in the trial court. Maclin v. State, 92 Wis. 2d 323, 284 N.W.2d 661 (1979).

A prerequisite to a claim on appeal of ineffective trial representation is preservation of trial counsel's testimony at a postconviction hearing in which the representation is challenged. State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

A defendant's escape during the pendency of postconviction motions constituted a forfeiture of the relief sought, and dismissal of the motion with prejudice was appropriate. State v. Braun, 185 Wis. 2d 153, 516 N.W.2d 740 (1994). But see Braun v. Powell, 77 F. Supp. 2d 973 (1999).

When new evidence is a recantation by a witness, the recantation must be sufficiently corroborated by other newly discovered evidence. State v. Terrance J.W., 202 Wis. 2d 496, 550 N.W.2d 445 (Ct. App. 1996), 95–3511.

The requirement of corroboration of a recantation as the basis of a post–sentencing motion to withdraw a guilty plea by other newly–found evidence is met if there is a feasible motive for the initial false statement when the motive was previously unknown and there are circumstantial guarantees of the trustworthiness of the recantation. State v. McCallum, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), 95–1518.

If a court decision entered after the appellant's conviction constitutes a new rule of substantive law, the appellant has not waived the right to seek postconviction relief based on the newly announced rule. State v. Howard, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), 95–0770.

A motion for a new trial based on new evidence that after sentencing a codefendant claimed full responsibility for a murder, recanting her trial testimony that neither codefendant was involved, required corroboration of the newly discovered evidence and a finding that there was a reasonable probability that a jury considering the original trial testimony and later statements would have a reasonable doubt about the defendants' guilt. State v. Mayo, 217 Wis. 2d 217, 579 N.W.2d 768 (Ct. App. 1998), 96–3656.

Plea withdrawal motions made prior to sentencing impose a lesser burden on the defendant than those made after. A motion based on new evidence requires showing by a preponderance of the evidence that: 1) the evidence was discovered after entry of the plea; 2) the defendant was not negligent in seeking the evidence; 3) the evidence is material to an issue in the case; and 4) the evidence is not merely cumulative. If the evidence is a witness recantation, the court must in addition determine that the recantation has reasonable indicia of reliability. State v. Kivioja, 225 Wis. 2d 271, 592 N.W.2d 220 (1999), 97–2932.

Newly discovered evidence does not include the new appreciation of the importance of evidence previously known but not used. A new expert opinion, based on facts available to the trial experts, falls within evidence that was previously known but not used. State v. Fosnow, 2001 WI App 2, 240 Wis. 2d 699, 624 N.W.2d 883, 00–0122.

A defendant must show by a preponderance of the evidence that there is a fair and just reason for allowing the withdrawal of a plea. An assertion of innocence is important but not dispositive. State v. Leitner, 2001 WI App 172, 247 Wis. 2d 195, 633 N.W.2d 207, 00–1718.
Affirmed on other grounds. 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341, 00–1718.

A challenge to the sufficiency of evidence is different from other types of challenges not previously raised during trial, which justifies allowing a challenge to the sufficiency of the evidence to be raised on appeal as a matter of right despite the fact that the challenge was not raised in the circuit court. State v. Hayes, 2004 WI 80, 273 Wis. 2d 1, 681 N.W.2d 203, 02–1542.

For a new trial based on newly discovered evidence, the defendant must prove, by clear and convincing evidence, that: 1) the evidence was discovered after conviction; 2) the defendant was not negligent in seeking evidence; 3) the evidence is material to an issue in the case; and 4) the evidence is not merely cumulative. If the defendant meets this burden, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. State v. Armstrong, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98, 01–2789.

After determining that both parties presented credible evidence in a motion for a new trial based on newly discovered evidence, it is not the court's role to weigh the evidence. Instead, once the circuit court finds that newly discovered evidence is credible, it is required to determine whether there is a reasonable probability that a jury, hearing all evidence, would have a reasonable doubt as to the defendant's guilt. This question is not answered by a determination that the state's evidence is stronger. State v. Edmunds, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590, 07–0933.

Wisconsin affords a convicted person the right to postconviction counsel. It would be absurd to suggest that a person has a right to counsel at trial and on appeal, but no right to counsel at a postconviction proceeding in the circuit court, which is often the precursor to an appeal. However, a defendant does not have the right to be represented by: 1) an attorney he or she cannot afford; 2) an attorney who is not willing to represent the defendant; 3) an attorney with a conflict of interest; or 4) an advocate who is not a member of the bar. State v. Peterson, 2008 WI App 140, 314 Wis. 2d 192, 757 N.W.2d 834, 07–1867.

In order to set aside a judgment of conviction based on newly discovered evidence, newly discovered evidence must be material to an issue in the case. If evidence of third–party culpability would not be admissible at trial, then it could not be material to the issue of guilt or innocence. In order to present evidence and make argument suggesting that a third party may have committed the charged crime, a defendant must show that the third party had: 1) opportunity; 2) motive; and 3) a direct connection to the crime that is not remote in time, place, or circumstances. State v. Vollbrecht, 2012 WI App 90, 344 Wis. 2d 69, 820 N.W.2d 443, 11–0425.

In order to set aside a judgment of conviction based on newly discovered evidence, the newly discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." When the defendant has proven the first four criteria of the newly discovered evidence analysis (see note to *Kivioja*), it must then be determined whether a reasonable probability exists that had the jury heard the newly

discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. State v. Vollbrecht, 2012 WI App 90, 344 Wis. 2d 69, 820 N.W.2d 443, 11–0425.

Kivioja, 225 Wis. 2d 271 (1999), did not change the law controlling post–sentence plea–withdrawal motions. It modified the *McCallum*, 208 Wis. 2d 463 (1997), rubric only for pre–sentence motions. State v. Ferguson, 2014 WI App 48, 354 Wis. 2d 253, 847 N.W.2d 900, 13–0099.

Because a transcript is crucial to the right to an appeal, courts provide additional protection for appellants when they do not have a complete transcript. Under *Perry*, 136 Wis. 2d 92 (1987), and *DeLeon*, 127 Wis. 2d 74 (Ct. App. 1985), when a trial transcript is incomplete, a defendant may be entitled to a new trial, but only after the defendant makes a facially valid claim of arguably prejudicial error. The *Perry*/*DeLeon* procedure applies even when the entire trial transcript is unavailable. The court does not presume prejudice when the trial transcript is unavailable. State v. Pope, 2019 WI 106, 389 Wis. 2d 390, 936 N.W.2d 606, 17–1720.

Newly–discovered evidence must generally be of a fact that is true at the time of trial. State v. Watkins, 2021 WI App 37, 398 Wis. 2d 558, 961 N.W.2d 884, 19–1996.

By moving for a new trial, defendant does not waive the right to acquittal based on insufficiency of the evidence. Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

When postconviction counsel failed to assert a claim of ineffective assistance of trial counsel in a postconviction motion under this section, the defendant's opportunity to argue that claim on direct appeal was foreclosed. The appropriate forum for asserting ineffective assistance of postconviction counsel for failure to raise ineffective assistance of trial counsel was in a collateral motion under s. 974.06. Page v. Frank, 343 F.3d 901 (2003).

Failure to petition state supreme court for review precluded federal habeas corpus relief. Carter v. Gagnon, 495 F. Supp. 878 (1980).

Postconviction remedies in the 1970's. Eisenberg. 56 MLR 69.

Confusion in the court — Wisconsin's harmless error rule in criminal appeals. 63 MLR 641 (1980).

The Duties of Trial Counsel After Conviction. Eisenberg. WBB Apr. 1975.

974.05 State's appeal. (1) Within the time period specified by s. 808.04 (4) and in the manner provided for civil appeals under chs. 808 and 809, an appeal may be taken by the state from any:

(a) Final order or judgment adverse to the state, whether following a trial or a plea of guilty or no contest, if the appeal would not be prohibited by constitutional protections against double jeopardy.

(b) Order granting postconviction relief under s. 974.02, 974.06, or 974.07.

(c) Judgment and sentence or order of probation not authorized by law.

(d) Order or judgment the substantive effect of which results in:

1. Quashing an arrest warrant;
2. Suppressing evidence; or
3. Suppressing a confession or admission.

(2) If the defendant appeals or prosecutes a writ of error, the state may move to review rulings of which it complains, as provided by s. 809.10 (2) (b).

(3) Permission of the trial court is not required for the state to appeal, but the district attorney shall serve notice of such appeal or of the procurement of a writ of error upon the defendant or the defendant's attorney.

History: 1971 c. 298; Sup. Ct. Order, 67 Wis. 2d 585, 784 (1975); 1977 c. 187; 1983 a. 219; 1991 a. 39; 1993 a. 486; 2001 a. 16.

If the state appeals from an order suppressing evidence, the defendant can ask for a review of another part of the order, although he or she could not appeal directly. State v. Beals, 52 Wis. 2d 599, 191 N.W.2d 221 (1971).

That the state can appeal from an order suppressing evidence, but the defendant cannot, does not show a denial of equal protection of the law. State v. Withers, 61 Wis. 2d 37, 211 N.W.2d 456 (1973).

The granting of a motion to withdraw a guilty plea is a final order appealable by the state. State v. Bagnall, 61 Wis. 2d 297, 212 N.W.2d 122 (1973).

The trial court's setting aside of a jury finding of guilt and its dismissal of the information was not appealable by the state because it was a final judgment adverse to the state made after jeopardy had attached, and jeopardy was not waived; hence the judgment was not within those situations from which a state appeal is authorized by this section. State v. Detco, Inc., 66 Wis. 2d 95, 223 N.W.2d 859 (1974).

The trial court's order specifying conditions of incarceration was neither a judgment nor a sentence under sub. (1) (c). State v. Gibbons, 71 Wis. 2d 94, 237 N.W.2d 33 (1976).

Under s. 808.03 (2), both the prosecution and defense may seek permissive appeals of nonfinal orders. State v. Rabe, 96 Wis. 2d 48, 291 N.W.2d 809 (1980).

Sub. (1) (d) 2. authorizes the state to appeal an order suppressing a defendant's oral statements. State v. Mendoza, 96 Wis. 2d 106, 291 N.W.2d 478 (1980).

Sub. (2) does not confine the right of cross–appeal to final judgments or orders. State v. Alles, 106 Wis. 2d 368, 316 N.W.2d 378 (1982).

The state may appeal as a matter of right any pretrial order barring admission of evidence that might "normally" determine the success of the prosecution's case. State v. Eichman, 155 Wis. 2d 552, 456 N.W.2d 143 (1990).

This section does not prohibit the trial court from hearing a motion by the state to reconsider an order granting postconviction relief. A trial court has inherent power to vacate or modify an order pursuant to s. 807.03. State v. Brockett, 2002 WI App 115, 254 Wis. 2d 817, 647 N.W.2d 357, 01–1295.

A ruling that reduced a charge from operating while intoxicated (OWI) third offense to second offense was not appealable as a matter of right. Unlike a collateral challenge that would reduce an OWI charge from a fourth or greater offense to a third or lesser offense, the reduced number of prior convictions at issue in this case would not change the applicable prohibited alcohol level. The circuit court's ruling would not require the state to present any different evidence at trial regarding the defendant's actual level of intoxication that would prevent the successful prosecution of the current charge. State v. Knapp, 2007 WI App 273, 306 Wis. 2d 843, 743 N.W.2d 481, 07–1582.

974.06 Postconviction procedure. (1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(2) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be made at any time. The supreme court may prescribe the form of the motion.

(3) Unless the motion and the files and records of the action conclusively show that the person is entitled to no relief, the court shall:

(a) Cause a copy of the notice to be served upon the district attorney who shall file a written response within the time prescribed by the court.

(b) If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977.

(c) Grant a prompt hearing.

(d) Determine the issues and make findings of fact and conclusions of law. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the person as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the person or resentence him or her or grant a new trial or correct the sentence as may appear appropriate.

(4) All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The motion may be heard under s. 807.13.

(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the person.

(7) An appeal may be taken from the order entered on the motion as from a final judgment.

(8) A petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion,

to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

History: 1971 c. 40 s. 93; 1977 c. 29, 187, 418; 1981 c. 289; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1991 a. 253.

Judicial Council Note, 1981: Sub. (8) has been amended to reflect the fact that habeas corpus relief is now available in an ordinary action in circuit court. See s. 781.01, stats., and the note thereto and s. 809.51, stats. [Bill 613–A]

Judicial Council Note, 1988: Sub. (5) is amended to allow postconviction motions under this section to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Discussing plea bargaining as a basis for withdrawal of a guilty plea and a new trial. State v. Wolfe, 46 Wis. 2d 478, 175 N.W.2d 216 (1970).

When the defendant makes a pro se motion within the time limited but counsel is not appointed until later, the court should hear the motion. A guilty plea can be withdrawn as a matter of right if it is established that: 1) there was a violation of a relevant constitutional right; 2) the violation caused the defendant to plead guilty; and 3) at the time of the guilty plea the defendant was unaware of potential constitutional challenges to the prosecution's case because of that violation. State v. Carlson, 48 Wis. 2d 222, 179 N.W.2d 851 (1970).

A defendant's contention that he concluded he was going to be sentenced under the Youth Service Act for no more than two years, whereas a 20–year sentence was imposed, constituted no grounds for withdrawal of the guilty plea when trial defense counsel asserted at the postconviction hearing that such a sentence was a desired objective but that no agreement had been made with the district attorney that it could be achieved nor representation made to his client that the lesser sentence would be imposed. State v. Froelich, 49 Wis. 2d 551, 182 N.W.2d 267 (1971).

The sentencing judge is not disqualified from conducting a hearing on a postconviction motion to withdraw a guilty plea unless the judge has interjected himself or herself into the plea bargaining to the extent that he or she may become a material witness or may otherwise be disqualified. Rahhal v. State, 52 Wis. 2d 144, 187 N.W.2d 800 (1971).

The defendant could not withdraw his guilty plea after entering a plea bargain for a recommendation of a one–year sentence by the prosecutor when the presentence report recommended two years and the defendant did not object. Farrar v. State, 52 Wis. 2d 651, 191 N.W.2d 214 (1971).

Postconviction procedure cannot be used as a substitute for appeal. Trial errors such as insufficiency of evidence and instructions and errors in the admission of evidence cannot be raised. State v. Langston, 53 Wis. 2d 228, 191 N.W.2d 713 (1971).

A motion under this section is not a substitute for a motion for a new trial. The motion is limited in scope to matters of jurisdiction or of constitutional dimensions and must not be used to raise issues disposed of by a previous appeal. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972).

No hearing need be granted when the record refutes a defendant's claims and they can be found to have no merit. Nelson v. State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972).

This section is not a remedy for an ordinary rehearing or reconsideration of sentencing on its merits. Only constitutional and jurisdictional questions may be raised. This section may be used to review sentences and convictions regardless of the date of prosecution. State ex rel. Warren v. County Court, 54 Wis. 2d 613, 197 N.W.2d 1 (1972).

A petition under this section is limited to jurisdictional and constitutional issues. It is not a substitute for a motion for a new trial. Vara v. State, 56 Wis. 2d 390, 202 N.W.2d 10 (1972).

A question of sufficiency of the evidence cannot be reached by a motion under this section. The complete failure to produce any evidence could be reached, because conviction without evidence of guilt would be a denial of due process. Weber v. State, 59 Wis. 2d 371, 208 N.W.2d 396 (1973).

A motion for postconviction relief may be denied without a hearing if the defendant fails to allege sufficient facts to raise a question of fact or presents only conclusory allegations, or the record conclusively demonstrates that he or she is not entitled to relief. If multiple grounds for relief are claimed, particularized rulings as to each are to be made in denying the motion without an evidentiary hearing. Smith v. State, 60 Wis. 2d 373, 210 N.W.2d 678 (1973).

In view of s. 971.31 (2), objection to an arrest, insufficiency of the complaint, or the use of illegal means to obtain evidence may not be raised for the first time under this section. State v. Kuecey, 60 Wis. 2d 677, 211 N.W.2d 453 (1973).

When a defendant, ordered to be present at a hearing under this section, escapes from prison, the court may summarily dismiss the petition. State v. John, 60 Wis. 2d 730, 211 N.W.2d 463 (1973).

The supreme court does not encourage the assignment of members of the prosecutor's staff to review petitions for postconviction relief. Holmes v. State, 63 Wis. 2d 389, 217 N.W.2d 657 (1974).

Facts must be alleged in the petition and the petitioner cannot stand on conclusory allegations, hoping to supplement them at a hearing. Levesque v. State, 63 Wis. 2d 412, 217 N.W.2d 317 (1974).

The failure to establish a factual basis for a guilty plea is of constitutional dimensions and is the type of error that can be reached by a motion under this section. Loop v. State, 65 Wis. 2d 499, 222 N.W.2d 694 (1974).

The necessity or desirability of the presence of the defendant at a hearing on postconviction motions is a matter of discretion for the trial court and depends upon the existence of substantial issues of fact. There was no abuse of discretion in the denial of defendant's motion to be present at the hearing on his motions under this section when only issues of law were raised and defense counsel had other opportunities to consult with the defendant. Sanders v. State, 69 Wis. 2d 242, 230 N.W.2d 845 (1975).

Although the defendant's allegation had no support in the record of the original proceedings, a silent record did not conclusively show that the defendant was entitled to no relief. When the defendant refuted his earlier statement that no promises were made to induce his confession other than that he would not have to go to jail that day and alleged a promise of probation, an issue of fact was presented requiring an evidentiary hearing. Zuehl v. State, 69 Wis. 2d 355, 230 N.W.2d 673 (1975).

Procedures made applicable by the postconviction relief statute shall be the exclusive procedure utilized to seek correction of an allegedly unlawful sentence. Spannuth v. State, 70 Wis. 2d 362, 234 N.W.2d 79 (1975).

State courts do not have subject–matter jurisdiction over postconviction motions of federal prisoners not in custody under the sentence of a state court. State v. Theoharopoulos, 72 Wis. 2d 327, 240 N.W.2d 635 (1976).

An issue considered on direct review cannot be reconsidered on a motion under this section. Beamon v. State, 93 Wis. 2d 215, 286 N.W.2d 592 (1980).

This section does not supplant the writ of error coram nobis. Jessen v. State, 95 Wis. 2d 207, 290 N.W.2d 685 (1980).

A court had no jurisdiction under this section to hear a challenge of the computation of prisoner's good time. Habeas corpus is the proper avenue of relief. State v. Johnson, 101 Wis. 2d 698, 305 N.W.2d 188 (Ct. App. 1981).

The power of a circuit court to stay the execution of a sentence for legal cause does not include the power to stay the sentence while a collateral attack is being made on the conviction by a habeas corpus proceeding in federal court. State v. Shumate, 107 Wis. 2d 460, 319 N.W.2d 834 (1982).

The burden of proof under sub. (6) is clear and convincing evidence. State v. Walberg, 109 Wis. 2d 96, 325 N.W.2d 687 (1982).

A defendant's uncorroborated allegations will not support a claim of ineffective representation when counsel is unavailable to rebut the claim of ineffectiveness. State v. Lukasik, 115 Wis. 2d 134, 340 N.W.2d 62 (Ct. App. 1983).

Formal violation of s. 971.08 may not be remedied under this section. Motions under this section are limited to jurisdictional and constitutional matters. State v. Carter, 131 Wis. 2d 69, 389 N.W.2d 1 (1986).

While a trial court's failure to submit a lesser–included offense instruction to jury would probably result in reversal upon timely direct appeal, the error is not of constitutional proportion entitling a defendant to pursue relief under this section. State v. Nicholson, 148 Wis. 2d 353, 435 N.W.2d 298 (Ct. App. 1988).

A defendant challenging a sentence on due process grounds based upon a failure to receive a copy of the presentence investigation report is entitled to a hearing only upon showing that the court had a blanket policy of denial of access and the policy was specifically applied to the defendant, or that before sentencing the defendant personally sought access and was denied it. State v. Flores, 158 Wis. 2d 636, 462 N.W.2d 899 (Ct. App. 1990).

A court should permit post sentencing withdrawal of a guilty or no contest plea only to correct a "manifest injustice." State v. Krieger, 163 Wis. 2d 241, 471 N.W.2d 599 (Ct. App. 1991).

A defendant's death did not moot a motion under this section or the appeal of its denial. State v. Witkowski, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991).

If a defendant is represented by the same attorney at trial and after conviction, the attorney's inability to assert his or her own ineffectiveness is a sufficient reason under sub. (4) for not asserting the matter in the original motion under this section. State v. Robinson, 177 Wis. 2d 46, 501 N.W.2d 831 (Ct. App. 1993).

When a defendant must be present for a postconviction evidentiary hearing, the use of a telephone hearing is not authorized. State v. Vennemann, 180 Wis. 2d 81, 508 N.W.2d 404 (1993).

A defendant is prohibited from raising a constitutional issue on a motion under this section if the claim could have been raised in a previously filed s. 974.02 motion or a direct appeal. State v. Escalona–Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

Generally new rules of law will not be applied retroactively to cases on collateral review under this section. State v. Horton, 195 Wis. 2d 280, 536 N.W.2d 155 (Ct. App. 1995), 93–3380.

A motion may not be filed under this section while an appeal of the same case is pending. When an appeal has not been resolved, the time for appeal under sub. (1) has not expired. State v. Redmond, 203 Wis. 2d 13, 552 N.W.2d 115 (Ct. App. 1996), 94–1544.

The *Escanalona–Naranjo*, 185 Wis. 2d 169 (1994), rule that a prisoner is compelled to raise in an original motion all grounds for postconviction relief that could have all been brought at the same time is extended to appeals by certiorari from parole and probation revocation hearings. State ex rel. Macemon v. Christie, 216 Wis. 2d 337, 576 N.W.2d 84 (Ct. App. 1998), 97–0660.

Subject to any other bars, all defendants on probation have standing to pursue postconviction relief under this section. State v. Mentzel, 218 Wis. 2d 734, 581 N.W.2d 581 (Ct. App. 1998), 97–1814.

Section 973.13 commands that all sentences in excess of that authorized by law be declared void, including the repeater portion of a sentence. Prior postconviction motions that failed to challenge the validity of the sentence do not bar seeking relief from faulty repeater sentences. State v. Flowers, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), 97–3682.

Escalona–Naranjo, 185 Wis. 2d 169 (1994), did not overrule *Robinson*, 177 Wis. 2d 46 (Ct. App. 1993). State v. Hensley, 221 Wis. 2d 473, 585 N.W.2d 683 (Ct. App. 1998), 97–3052.

A motion to modify a sentence under this section, due to an improperly entered restitution order, does not allow granting a money judgment against the state for the recovery of improperly collected restitution under the improper sentence. State v. Minniecheske, 223 Wis. 2d 493, 590 N.W.2d 17 (Ct. App. 1998), 98–1369.

Whether a claim that newly discovered evidence entitles a probation revokee to an evidentiary hearing to determine whether a new probation revocation hearing should be conducted shall be governed by procedures analogous to those in criminal cases. Booker v. Schwarz, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361, 03–0217.

Trial courts may correct obvious errors in sentences when it is clear that a good faith mistake was made in an initial sentencing pronouncement, the court promptly recognizes the error, and the court, by reducing an erroneous original sentence on one count and increasing the original sentence on another, seeks to impose a lawfully structured sentence that achieves the overall disposition the court originally intended. State v. Gruetzmacher, 2004 WI 55, 271 Wis. 2d 585, 679 N.W.2d 533, 02–3014.

A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. The mere assertion of a claim of manifest injustice, in this case the ineffective assistance of

counsel, does not entitle a defendant to the granting of relief. State v. Allen, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, 02–2555.

When a defendant's postconviction issues have been addressed by the no merit procedure under s. 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in a previous postconviction motion under this section, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously. State v. Tillman, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, 04–0966.

This section and *Escalona–Naranjo*, 185 Wis. 2d 169 (1994), preclude a defendant from pursuing claims in a subsequent appeal that could have been raised in his or her direct appeal, unless the defendant provides sufficient reason for failure to raise the claims in the first instance. That the appeal was dismissed pursuant to s. 809.83 (2) does not change the result. State v. Thames, 2005 WI App 101, 281 Wis. 2d 772, 700 N.W.2d 285, 04–1257.

A sufficiency of the evidence challenge may be raised directly in a motion under this section because such a claim is a matter of constitutional dimension. State v. Miller, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07–1052.

A defendant is not required to file a response to the no–merit report under s. 809.32, but the fact that a defendant does not file a response to a no–merit report is not, by itself, a sufficient reason to permit the defendant to raise new claims under this section. Defendants must show a sufficient reason for failing to raise an issue in a response to a no–merit report because the court will have performed an examination of the record and determined any issues noted or any issues that are apparent to be without arguable merit. State v. Allen, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, 07–0795.

A defendant gets review of issues not raised only if the court of appeals follows the no–merit protocol. If the no–merit procedure was followed, then it is irrelevant whether the defendant raised his or her claims. He or she got review of those claims from the court of appeals, and he is barred from raising them again. If it was not followed, it is similarly irrelevant whether the claims were raised. The failure to raise them may or may not have contributed to the court of appeals' failure to identify issues of arguable merit, but the court of appeals and appellate counsel should have found them and the defendant may not be barred from bringing an motion under this section if the no–merit procedure was not followed. State v. Allen, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, 07–0795.

If the court of appeals fails to discuss an issue of actual or arguable merit, the defendant has the opportunity to file: 1) a motion for reconsideration of the decision under s. 809.32 (1); 2) a petition for review with the supreme court; or 3) an immediate motion under this section, identifying any issue of arguable merit that was overlooked and, in the latter instance, explaining why nothing was said in a response to the no–merit report. Delay in these circumstances can seldom be justified. Failure of a defendant to respond to both a no–merit report and the decision on the no–merit report firms up the case for forfeiture of any issue that could have been raised. State v. Allen, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, 07–0795.

While a postconviction motion under this section is not subject to the time limits set forth in s. 809.30 or 973.19, a motion under this section is limited to constitutional and jurisdictional challenges. It cannot be used to challenge a sentence based on an erroneous exercise of discretion when a sentence is within the statutory maximum or otherwise within the statutory power of the court. State v. Nickel, 2010 WI App 161, 330 Wis. 2d 750, 794 N.W.2d 765, 09–1399.

There is no exception for postconviction discovery motions to the *Escalona–Naranjo*, 185 Wis. 2d 169 (1994), rule requiring criminal defendants to consolidate their postconviction claims into a single appeal absent a sufficient reason. State v. Kletzien, 2011 WI App 22, 331 Wis. 2d 640, 794 N.W.2d 920, 10–0296.

Sentence modification and postconviction relief under this section are separate proceedings such that filing one does not result in a waiver of the other. State v. Melton, 2013 WI 65, 349 Wis. 2d 48, 834 N.W.2d 345, 11–1770.

A claim for ineffective assistance of postconviction counsel must be filed with the circuit court, either as a motion under this section or as a petition for a writ of habeas corpus. A defendant arguing ineffective assistance of appellate counsel, conversely, may not seek relief under this section and must instead petition the court of appeals for a writ of habeas corpus. State v. Starks, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146, 10–0425.

A defendant who alleges in a motion under this section that his or her postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he or she wishes to bring are clearly stronger than the claims postconviction counsel actually brought. However, in evaluating the comparative strength of the claims, reviewing courts should consider any objectives or preferences that the defendant conveyed to his attorney. A claim's strength may be bolstered if a defendant directed his attorney to pursue it. State v. Romero–Georgana, 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668, 12–0055.

Newly discovered evidence that is cumulative does not support a motion for a new trial. When the credibility of a prosecution witness is tested at trial, evidence that again attacks the credibility of that witness is cumulative. In this case, the defendant had newly discovered evidence represented by the affidavits of three men who alleged that two witnesses lied when they testified during trial that the defendant was involved in the crimes for which he was convicted. The affidavits were merely cumulative evidence because they were additional evidence of the same general character as was subject to proof at trial, in other words, that the witnesses lied to achieve favorable plea bargains for themselves. State v. McAlister, 2018 WI 34, 380 Wis. 2d 684, 911 N.W.2d 77, 14–2561.

In this case, the affidavits attested to years after the trial that were offered as newly discovered evidence averred that two trial witnesses admitted to the affiants prior to trial that the witnesses intended to falsely accuse the defendant of involvement in crimes in order to reduce their own punishment. That evidence differed from classic recantation testimony in the temporal sense and also because there was no formal or public renunciation of the witnesses' testimony. However, the affidavits bore a similarity to recantation evidence in that they used what was claimed to be the witnesses' own words to allege the witnesses lied at trial. Under *McCallum*, 208 Wis. 2d 463 (1997), when recantation testimony is presented as newly discovered evidence, the recantation must be corroborated by other newly discovered evidence. No less was required for the affidavits presented in this case. State v. McAlister, 2018 WI 34, 380 Wis. 2d 684, 911 N.W.2d 77, 14–2561.

The relief of vacating and setting a judgment aside under sub. (3) (d) is designed to address defects with respect to a conviction or sentence, not to provide a second chance or a fresh start as is intended by s. 973.015, the expunction statute. Vacatur invalidates the conviction itself, whereas expunction merely deletes the evidence of the underlying conviction from court records. Expunction does not invalidate a conviction. State v. Braunschweig, 2018 WI 113, 384 Wis. 2d 742, 921 N.W.2d 199, 17–1261.

The *Knight*, 168 Wis. 2d 509 (1992)/*Rothering*, 205 Wis. 2d 675 (Ct. App. 1996), framework remains the correct methodology for determining the appropriate forum for a criminal defendant to file a claim relating to the alleged ineffectiveness of counsel after conviction. Both *Knight* and *Rothering* premise their decisions on the forum in which the alleged ineffectiveness took place. Applying this framework, the circuit court is the appropriate forum for a claim that postconviction counsel is ineffective for failing to assert an ineffective trial counsel claim. State ex rel. Warren v. Meisner, 2020 WI 55, 392 Wis. 2d 1, 944 N.W.2d 588, 19–0567.

Because an individual has no underlying constitutional right to appointed counsel in state collateral postconviction proceedings, an individual may not insist upon implementation of *Anders*, 386 U.S. 738 (1967), procedures. Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

When postconviction counsel failed to assert a claim of ineffective assistance of trial counsel in a postconviction motion under s. 974.02, the defendant's opportunity to argue that claim on direct appeal was foreclosed. The appropriate forum for asserting ineffective assistance of postconviction counsel for failure to raise ineffective assistance of trial counsel was in a collateral motion under this section. Page v. Frank, 343 F.3d 901 (2003).

This section does not constitute direct review for purposes of calculating the date in which a judgment became final by the conclusion of direct review or the expiration of the time for seeking such review under 28 USC 2244 (d) (1) (A). This section is, in fact, a statute addressing collateral relief. Graham v. Borgen, 483 F.3d 475 (2007).

Motions under this section challenging the effectiveness of appellate counsel should be filed directly in the court of appeals. But motions under this section challenging the effectiveness of appellate counsel on the grounds that appellate counsel should have challenged trial counsel's effectiveness should be filed in the trial court. Morales v. Lundquist, 580 F.3d 653 (2009).

Postconviction remedies in the 1970's. Eisenberg. 56 MLR 69.

Wisconsin postconviction remedies. 1970 WLR 1145.

Postconviction procedure; custody requirements. 1971 WLR 636.

State v. Escalona–Naranjo: A Limitation on Criminal Appeals in Wisconsin? Hunt. 1997 WLR 207.

The Duties of Trial Counsel After Conviction. Eisenberg. WBB Apr. 1975.

New Laws Reflect the Power and Potential of DNA. Findley. Wis. Law. May 2002.

974.07 Motion for postconviction deoxyribonucleic acid testing of certain evidence. (1) In this section:

(a) "Government agency" means any department, agency, or court of the federal government, of this state, or of a city, village, town, or county in this state.

(b) "Movant" means a person who makes a motion under sub. (2).

(2) At any time after being convicted of a crime, adjudicated delinquent, or found not guilty by reason of mental disease or defect, a person may make a motion in the court in which he or she was convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

(a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.

(b) The evidence is in the actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(3) A movant or, if applicable, his or her attorney shall serve a copy of the motion made under sub. (2) on the district attorney's office that prosecuted the case that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect. The court in which the motion is made shall also notify the appropriate district attorney's office that a motion has been made under sub. (2) and shall give the district attorney an opportunity to respond to the motion. Failure by a movant to serve a copy of the motion on the appropriate district attorney's office does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.

(4) (a) The clerk of the circuit court in which a motion under sub. (2) is made shall send a copy of the motion and, if a hearing

on the motion is scheduled, a notice of the hearing to the victim of the crime or delinquent act committed by the movant, if the clerk is able to determine an address for the victim. The clerk of the circuit court shall make a reasonable attempt to send the copy of the motion to the address of the victim within 7 days of the date on which the motion is filed and shall make a reasonable attempt to send a notice of hearing, if a hearing is scheduled, to the address of the victim, postmarked at least 10 days before the date of the hearing.

(b) Notwithstanding the limitation on the disclosure of mailing addresses from completed information cards submitted by victims under ss. 51.37 (10) (dx), 301.046 (4) (d), 301.048 (4m) (d), 301.38 (4), 302.105 (4), 304.06 (1) (f), 304.063 (4), 938.51 (2), 971.17 (6m) (d), and 980.11 (4), the department of corrections, the parole commission, and the department of health services shall, upon request, assist clerks of court in obtaining information regarding the mailing address of victims for the purpose of sending copies of motions and notices of hearings under par. (a).

(5) Upon receiving under sub. (3) a copy of a motion made under sub. (2) or notice from a court that a motion has been made, whichever occurs first, the district attorney shall take all actions necessary to ensure that all biological material that was collected in connection with the investigation or prosecution of the case and that remains in the actual or constructive custody of a government agency is preserved pending completion of the proceedings under this section.

(6) (a) Upon demand the district attorney shall disclose to the movant or his or her attorney whether biological material has been tested and shall make available to the movant or his or her attorney the following material:

1. Findings based on testing of biological materials.

2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material.

(b) Upon demand the movant or his or her attorney shall disclose to the district attorney whether biological material has been tested and shall make available to the district attorney the following material:

1. Findings based on testing of biological materials.

2. The movant's biological specimen.

(c) Upon motion of the district attorney or the movant, the court may impose reasonable conditions on availability of material requested under pars. (a) 2. and (b) 2. in order to protect the integrity of the evidence.

(d) This subsection does not apply unless the information being disclosed or the material being made available is relevant to the movant's claim at issue in the motion made under sub. (2).

(7) (a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).

2. It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense.

3. The evidence to be tested meets the conditions under sub. (2) (a) to (c).

4. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

(b) A court in which a motion under sub. (2) is filed may order forensic deoxyribonucleic acid testing if all of the following apply:

1. It is reasonably probable that the outcome of the proceedings that resulted in the conviction, the finding of not guilty by reason of mental disease or defect, or the delinquency adjudication for the offense at issue in the motion under sub. (2), or the terms of the sentence, the commitment under s. 971.17, or the disposition under ch. 938, would have been more favorable to the movant if the results of deoxyribonucleic acid testing had been available before he or she was prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense.

2. The evidence to be tested meets the conditions under sub. (2) (a) to (c).

3. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

(8) The court may impose reasonable conditions on any testing ordered under this section in order to protect the integrity of the evidence and the testing process. If appropriate, the court may order the state crime laboratories to perform the testing as provided under s. 165.77 (2m) or, after consulting with the movant and the district attorney, may order that the material be sent to a facility other than the state crime laboratories for testing. If ordered to perform testing under this section, the crime laboratories may, subject to the approval of the movant and the district attorney, arrange for another facility to perform the testing.

(9) If a court in which a motion under sub. (2) is filed does not order forensic deoxyribonucleic acid testing, or if the results of forensic deoxyribonucleic acid testing ordered under this section are not supportive of the movant's claim, the court shall determine the disposition of the evidence specified in the motion subject to the following:

(a) If a person other than the movant is in custody, as defined in s. 968.205 (1) (a), the evidence is relevant to the criminal, delinquency, or commitment proceeding that resulted in the person being in custody, the person has not been denied deoxyribonucleic acid testing or postconviction relief under this section, and the person has not waived his or her right to preserve the evidence under s. 165.81 (3), 757.54 (2), 968.205, or 978.08, the court shall order the evidence preserved until all persons entitled to have the evidence preserved are released from custody, and the court shall designate who shall preserve the evidence.

(b) If the conditions in par. (a) are not present, the court shall determine the disposition of the evidence, and, if the evidence is to be preserved, by whom and for how long. The court shall issue appropriate orders concerning the disposition of the evidence based on its determinations.

(10) (a) If the results of forensic deoxyribonucleic acid testing ordered under this section support the movant's claim, the court shall schedule a hearing to determine the appropriate relief to be granted to the movant. After the hearing, and based on the results of the testing and any evidence or other matter presented at the hearing, the court shall enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the movant's judgment of conviction, judgment of not guilty by reason of mental disease or defect, or adjudication of delinquency.

2. An order granting the movant a new trial or fact–finding hearing.

3. An order granting the movant a new sentencing hearing, commitment hearing, or dispositional hearing.

4. An order discharging the movant from custody, as defined in s. 968.205 (1) (a), if the movant is in custody.

5. An order specifying the disposition of any evidence that remains after the completion of the testing, subject to sub. (9) (a) and (b).

(b) A court may order a new trial under par. (a) without making the findings specified in s. 805.15 (3) (a) and (b).

(11) A court considering a motion made under sub. (2) by a movant who is not represented by counsel shall, if the movant claims or appears to be indigent, refer the movant to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j).

(12) (a) The court may order a movant to pay the costs of any testing ordered by the court under this section if the court determines that the movant is not indigent.

(b) A movant is indigent for purposes of par. (a) if any of the following apply:

1. The movant was referred to the state public defender under sub. (11) for a determination of indigency and was found to be indigent.

2. The movant was referred to the state public defender under sub. (11) for a determination of indigency but was found not to be indigent, and the court determines that the movant does not possess the financial resources to pay the costs of testing.

3. The movant was not referred to the state public defender under sub. (11) for a determination of indigency and the court determines that the movant does not possess the financial resources to pay the costs of testing.

(c) The state crime laboratories shall pay for testing ordered under this section and performed by a facility other than the state crime laboratories if the court does not order the movant to pay for the testing.

(13) An appeal may be taken from an order entered under this section as from a final judgment.

History: 2001 a. 16; 2005 a. 60; 2007 a. 20 s. 9121 (6) (a); 2009 a. 28; 2011 a. 38.

Sub. (6) compels the state to turn over evidence for independent DNA testing, subject to protective conditions imposed by the trial court. State v. Hudson, 2004 WI App 99, 273 Wis. 2d 707, 681 N.W.2d 316, 03–2083.

The interpretation of sub. (6) by *Moran*, 2005 WI 115, that it gives a movant the right to test the sought–after evidence containing biological material at his or her own expense, is incorrect. The textually and contextually manifest statutory purpose of this section is for a movant to obtain an order requiring forensic DNA testing of certain evidence under sub. (2). Sub. (6) says nothing about allowing the movant to conduct forensic DNA testing of evidence. Sub. (6) (a) states only that the district attorney must "make available" the specified physical evidence. It does not authorize the movant to send away the evidence for testing. State v. Denny, 2017 WI 17, 373 Wis. 2d 390, 891 N.W.2d 144, 15–0202.

Preserving Due Process: Violations of the Wisconsin DNA Evidence Preservation Statute as Per Se Violations of the Fourteenth Amendment. Kipp. 2004 WLR 1245.