

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-3530

STATE OF WISCONSIN,

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT GAREL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Robert Garel appeals an order denying his postconviction motion brought under § 974.06, STATS. In his motion, Garel sought to vacate a prior order placing him on probation, claiming this could not be done because he was then on parole from a previous sentence of imprisonment. We conclude the motion was properly denied because Garel has not shown

sufficient reason for not raising the issue in his earlier postconviction proceedings. We affirm.

Garel's argument relates to probation which was imposed in November 1992 on several counts of uttering a forged instrument. Garel challenged another aspect of this sentence by a motion under § 973.19, STATS., and the court modified the judgment of conviction in January 1993. Garel took no further action until after he was sentenced in August 1993 following revocation of probation. At that time Garel pursued postconviction proceedings under RULE 809.30, STATS. His attorney filed a no merit report, and we affirmed the judgment of conviction in appeal no. 94-0386-CR-NM. However, that sentence was vacated on certiorari review of the probation revocation. Garel was then revoked again and sentenced in February 1995. He did not pursue postconviction proceedings under RULE 809.30. He filed his present motion under § 974.06, STATS., in November 1996.

The State argues that this motion was properly denied because Garel does not show sufficient reason for basing it on grounds which he could have, but did not, raise in his earlier postconviction proceedings. *See* § 974.06(4), STATS., and *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). Garel responds that the State cannot make this argument on appeal because it was not presented to the trial court. Garel's response is correct only as to arguments made by appellants. The respondent on appeal may argue any ground that would support the judgment or order appealed from. *See State v. Holt*, 128 Wis.2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985). Garel makes no other response to the State's argument.

We conclude that Garel had two previous opportunities to raise this argument. The first was when he filed his motion to modify sentence under § 973.19, STATS., shortly after probation was first imposed. Although *Escalona-Naranjo* was written with reference to a defendant's prior motion under RULE 809.30, STATS., the court's reasoning would appear to apply equally to a motion to modify sentence under § 973.19. Rather than filing a modification motion under that section, Garel could have pursued relief under RULE 809.30 and raised the issue he now seeks to raise. Garel's second opportunity to raise this issue came during the postconviction proceedings which led to appeal no. 94-0386-CR-NM. We conclude Garel must show sufficient reason for not raising this argument previously, but he has not done so.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

