

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1039

Cir. Ct. No. 1997CF972944

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID L. GRAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve
Judge.

¶1 PER CURIAM. David L. Gray appeals from an order denying his postconviction “motion to correct” as procedurally barred. We conclude that Gray’s “motion to correct” is procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), for his failure to allege why he

did not (adequately) raise these issues on direct appeal, or in his two previous postconviction motions. Therefore, we affirm.

¶2 A jury found Gray guilty of attempted first-degree intentional homicide and armed robbery. For the homicide, the trial court imposed a forty-year prison sentence, and for the armed robbery, the trial court withheld sentence and imposed a twenty-five-year consecutive probationary term. Gray moved for a new trial on the basis of ineffective assistance of counsel. After an evidentiary hearing, the trial court denied the motion. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). On direct appeal, this court affirmed the judgment of conviction and the postconviction order. *See State v. Gray*, No. 2000AP1495-CR, unpublished slip op. at 10 (WI App Jan. 4, 2002).¹

¶3 Less than six months after our decision on Gray's direct appeal, he moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2001-02), alleging the ineffective assistance of postconviction counsel. The trial court denied the motion. We affirmed the trial court's order denying Gray's postconviction motion on its merits. *See State v. Gray*, No. 2002AP1799, unpublished slip op. at 6 (WI App Oct. 17, 2003). Less than six months after our order affirming the denial of Gray's postconviction motion, Gray filed a second postconviction motion pursuant to § 974.06 (2003-04), which the trial court denied as procedurally barred, citing § 974.06(4) (2003-04) and *Escalona*, 185 Wis. 2d at 178. We affirmed the trial court's order on appeal. *See State v. Gray*, No. 2004AP1194, unpublished slip op. at 5 (WI App Aug. 15, 2006).

¹ We ordered the trial court on remittitur to amend the judgment to conform to its oral sentencing pronouncements. The amendment was inconsequential to that appeal, and to this appeal.

¶4 Gray has now filed a “motion to correct,” contending that his counsel was ineffective on many of the same bases as he alleged in his earlier motions. The trial court summarily denied the motion as procedurally barred, again citing WIS. STAT. § 974.06(4) (2005-06)² and *Escalona*, 185 Wis. 2d at 178.

¶5 To avoid *Escalona*’s procedural bar in a subsequent postconviction motion, Gray must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See Escalona*, 185 Wis. 2d at 185-86. Gray alleges no reason for failing to previously raise these issues (adequately).³ Consequently, Gray’s “motion to correct” is procedurally barred by WIS. STAT. § 974.06(4) and *Escalona*. Insofar as these issues have been previously litigated, or re-characterized to essentially relitigate them, they are also barred. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

³ Many, if not all of these issues had been raised and litigated previously.

