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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT III**

February 28, 2017

To:

Hon. Michael W. Gage  
Circuit Court Judge  
Outagamie County Courthouse  
320 S. Walnut Street  
Appleton, WI 54911

Barb Bocik  
Clerk of Circuit Court  
Outagamie County Courthouse  
320 S. Walnut Street  
Appleton, WI 54911

Carrie A. Schneider  
District Attorney  
320 S. Walnut St.  
Appleton, WI 54911

Tiffany M. Winter  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Alan W. Gursky 86626  
New Lisbon Corr. Inst.  
P.O. Box 4000  
New Lisbon, WI 53950-4000

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

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2016AP610

State of Wisconsin v. Alan W. Gursky (L. C. No. 1996CF359)

Before Stark, P.J., Hruz and Seidl, JJ.

Alan Gursky appeals an order denying his WIS. STAT. § 974.06 (2015-16)<sup>1</sup> motion in which he alleged ineffective assistance of postconviction counsel for failing to raise four issues regarding trial counsel's performance. The circuit court held a hearing to determine whether an evidentiary hearing should be held, and denied the motion without an evidentiary hearing, concluding the motion was procedurally barred. Upon our review of the parties' briefs and the record at conference, we conclude the order should be summarily affirmed.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In 1997, a jury convicted Gursky of nine offenses. His attorney filed a postconviction motion and subsequent appeal. This court affirmed his convictions. *State v. Gursky*, No. 97-3173-CR, unpublished slip op. (WI App May 19, 1998).

In 1999, Gursky filed a pro se WIS. STAT. § 974.06 motion alleging ineffective assistance of trial and appellate counsel. The circuit court concluded Gursky did not establish sufficient reason for failing to raise the issues on direct appeal. Gursky appealed that decision, but he failed to file a brief and the appeal was dismissed.

In 2002, Gursky again filed a motion under WIS. STAT. § 974.06, repeating the claims he raised on direct appeal and arguing ineffective assistance of appellate counsel. The circuit court denied the motion as untimely, and further concluded the issues were either fully addressed at trial or were without merit. Gursky did not appeal that decision.

In 2015, Gursky filed the present postconviction motion, again arguing ineffective assistance of trial and postconviction counsel. The circuit court concluded the motion was procedurally barred because the claims had already been considered or could have been presented in Gursky's previous postconviction motions.

We affirm the circuit court's order for three reasons. First, Gursky has not established sufficient reason for his failure to have raised the present issues in his pro se postconviction motions. Issues that were raised or could have been raised in a prior postconviction motion may not serve as the basis for a new postconviction motion unless the defendant can demonstrate a sufficient reason why the new argument was not previously raised. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Gursky faults his postconviction counsel for

failing to raise the present issues. However, he offers no justification for his own failure to have raised the issues in his pro se motions.

Second, the present postconviction motion is untimely. A defendant may not sit on his WIS. STAT. § 974.06 claims indefinitely. *See State v. Allen*, 2010 WI 89, ¶73, 328 Wis. 2d 1, 786 N.W.2d 124. Gursky offers no justification for waiting fifteen years after his postconviction counsel's allegedly deficient performance to file the present motion.

Third, Gursky did not order a transcript of the hearing at which the circuit court determined the present issues were either previously considered or could have been raised. When an appellate record is incomplete, we must assume the missing material supports the circuit court's ruling. *State v. Provo*, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272.

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*