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**DISTRICT II**

January 29, 2020

To:

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

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2019AP341

State of Wisconsin v. Theodore W. Oswald (L.C. #1994CF227)

Before Reilly, P.J., Gundrum and Davis, 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).**

Theodore W. Oswald appeals from an order denying his motion for relief from a judgment which he filed under WIS. STAT. § 806.07 (2017-18).<sup>1</sup> Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

disposition. *See* WIS. STAT. RULE 809.21. We affirm as a criminal judgment of conviction may not be attacked via use of civil procedure statutes.

In 2005, Oswald was sentenced to over 500 years in prison and restitution was ordered. We summarily affirmed Oswald's conviction in 2007, finding that Oswald waived his right to challenge his conviction and sentence with the exception of a double jeopardy challenge, which we rejected. *State v. Oswald*, No. 2007AP24-CRNM, unpublished op. and order (WI App Aug. 8, 2007).

In 2014, we summarily affirmed the circuit court's denial of Oswald's WIS. STAT. § 974.06 motion seeking the appointment of counsel to argue for sentence modification based on *Miller v. Alabama*, 567 U.S. 460 (2012). *State v. Oswald*, No. 2013AP1354-CR, unpublished op. and order (WI App Feb. 12, 2014). In October 2018, Oswald filed a WIS. STAT. § 806.07 motion seeking relief from his judgment of conviction as it related to restitution, which is the subject of this appeal. The circuit court denied Oswald's motion on the ground that a civil procedure statute cannot be used to attack a criminal judgment of conviction. We agree. *See State v. Henley*, 2010 WI 97, ¶¶69-70, 328 Wis. 2d 544, 787 N.W.2d 350.

Oswald's direct appeal rights have been exhausted, and, therefore, his remedies are expressly set forth in WIS. STAT. § 974.06 and are limited to matters of jurisdiction or constitutional issues. *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972). A postconviction motion may not be utilized to raise issues that were or could have been raised by a previous appeal absent a sufficient reason for the defendant's failure to raise it previously. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); *Peterson*, 54 Wis. 2d at 381.

Oswald cites no case allowing him to utilize civil procedure statutes to challenge a criminal judgment of conviction as it relates to restitution. WISCONSIN STAT. § 967.01 provides that “[c]hapters 967 to 979 shall govern all criminal proceedings.” Restitution is governed by WIS. STAT. § 973.20 and is part of a defendant’s sentence. Oswald’s challenge to his restitution order was required to be brought in his direct appeal or a properly filed WIS. STAT. § 974.06 motion.<sup>2</sup>

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*

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<sup>2</sup> We agree with the State that if we would construe Oswald’s WIS. STAT. § 806.07 motion as a WIS. STAT. § 974.06 motion it would be denied as Oswald could have raised this issue in one of his earlier appeals. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).