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MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT I**

May 11, 2021

To:

Hon. Joseph R. Wall  
Circuit Court Judge  
Safety Building, Room 313  
821 W. State St.  
Milwaukee, WI 53233

John D. Flynn  
Assistant District Attorney  
District Attorney's Office  
821 W. State. St., Suite 405  
Milwaukee, WI 53233

John Barrett  
Clerk of Circuit Court  
821 W. State St., Room 114  
Milwaukee, WI 53233

Rufus Patterson West 225213  
Green Bay Correctional Inst.  
P.O. Box 19033  
Green Bay, WI 54307-9033

Sonya Bice  
Wisconsin Department of Justice  
17 W Main St.  
Madison, WI 53703

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

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2020AP756-CR

State of Wisconsin v. Rufus Patterson West  
(L.C. # 1994CF942994)

Before Brash, P.J., Dugan and Donald, 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).**

Rufus Patterson West, *pro se*, appeals an order denying his motion for sentence modification. Upon review of the briefs and record, we conclude at conference that this matter is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> West's claims are barred. Therefore, we summarily affirm.

In 1995, a jury found West guilty of armed robbery with his identity concealed and possessing a firearm as a felon. The circuit court found that he committed his crimes as a repeat offender. West faced sixty-three years in prison. The matters proceeded to sentencing in 1996, and West's postconviction counsel successfully moved to vacate the original sentences. In 1997, the circuit court resentenced West and imposed a twenty-eight-year sentence for armed robbery, consecutive to any other sentence that he was already serving, and a concurrent six-year sentence for possessing a firearm as a felon. West appealed, and his appellate counsel filed a no-merit report. We affirmed. *See State v. West (West I)*, No. 1996AP3348-CRNM, unpublished op. and order (WI App Mar. 13, 1997). Our supreme court denied West's petition for review.

West went on to file a series of *pro se* motions and appeals. In March 2003, he filed a postconviction motion in which he raised twelve claims pursuant to WIS. STAT. § 974.06. The circuit court denied relief, concluding that the claims were procedurally barred. West appealed, and we affirmed. *See State v. West (West II)*, No. 2003AP963, unpublished slip op. (WI App Oct. 26, 2004). In 2005, West filed a second postconviction motion pursuant to § 974.06, alleging that newly decided case law warranted a reversal of his convictions. The circuit court denied the motion and then denied reconsideration. We affirmed, concluding that any error was harmless. *See State v. West (West III)*, No. 2006AP82, unpublished slip op. (WI App Dec. 5, 2006). While proceedings in *West III* were underway, West petitioned this court for a writ of habeas corpus. We denied relief on the ground that West sought to raise the same claims that we rejected in *West*

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

*II. See State ex rel. West v. Schneider (West IV)*, No. 2006AP435-W, unpublished op. and order (WI App May 25, 2006).

In 2012, West moved for postconviction discovery. The circuit court denied the motion, and West did not appeal. In 2013, West filed his fourth postconviction motion, raising eighteen issues pursuant to WIS. STAT. § 974.06. The circuit court denied the motion as procedurally barred, and we affirmed. *See State v. West (West V)*, No. 2013AP1121, unpublished slip op. (WI App June 10, 2014).

In 2014, West moved for sentence modification based on an alleged new factor, namely, his discovery in 2011 that he had spent his childhood in fewer foster homes than the thirty to one hundred foster homes described to the circuit court at his resentencing. The circuit court denied the motion, and we affirmed, concluding that West’s information was not a new factor. *See State v. West (West VI)*, No. 2014AP2779-CR, unpublished op. and order (WI App Sept. 15, 2015).

In 2016, West moved again for sentence modification, this time alleging that both the statute governing presumptive mandatory release and a change in Wisconsin’s parole policy were new factors warranting relief. The circuit court denied the motion and then denied West’s motion for reconsideration. We affirmed, concluding that West failed to show a new factor. *See State v. West (West VII)*, No. 2017AP328-CR, unpublished op. and order (WI App Apr. 6, 2018).

In 2020, West filed the motion for sentence modification underlying the instant appeal. As in the proceedings underlying *West VI*, he alleged that he had discovered after sentencing that he “had been in no more than four foster homes as a child.” He contended that the circuit court therefore relied on inaccurate information at sentencing and that this constituted a new factor warranting relief. He also alleged that the circuit court “failed to exercise any discretion” when

ordering West to serve his armed robbery sentence consecutive to a sentence previously imposed and that the decision was tainted by the circuit court's reliance on inaccurate information about his foster home placements. The circuit court rejected his claims, and he appeals.

We conclude that West's claim of an alleged new factor is barred by the rule that "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). West previously sought sentence modification based on his allegation that the circuit court did not know the true number of his foster placements. See *West VI*, No. 2014AP2779-CR at 2. He may not again pursue sentencing relief on this basis.

We also conclude that West is barred from challenging his consecutive sentence as an erroneous exercise of sentencing discretion. This claim is untimely under the statutory scheme permitting such challenges.

Specifically, a defendant may move for sentence modification within ninety days after sentencing pursuant to WIS. STAT. § 973.19. The circuit court sentenced West in 1997, more than twenty years before he filed his instant motion. Section 973.19 therefore is not available here.

A defendant may also challenge the circuit court's exercise of sentencing discretion as a component of a direct postconviction challenge and appeal within the deadlines imposed by WIS. STAT. § 974.02 and WIS. STAT. RULE 809.30. See *State v. Nickel*, 2010 WI App 161, ¶5, 330 Wis. 2d 750, 794 N.W.2d 765. Here, West's appointed appellate counsel filed a direct appeal and a no-merit report on his behalf pursuant to WIS. STAT. RULE 809.32. Cf. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 605, 516 N.W.2d 362 (1994) (explaining that "[t]he [n]o [m]erit report option is available as part of the appeal as a matter of right"). We independently reviewed the

record and concluded that it did not provide a basis for challenging the circuit court's exercise of sentencing discretion. See *West I*, No. 1996AP3348-CRNM at 6. Our supreme court denied review in June 1997, and the record does not show that West filed a petition for a writ of certiorari in the United States Supreme Court. Accordingly, West exhausted his direct appeal rights, see *State v. Lagundoye*, 2004 WI 4, ¶20 & n.13, 268 Wis. 2d 77, 674 N.W.2d 526, and he cannot now proceed under RULE 809.30 to challenge the circuit court's exercise of sentencing discretion.

West does not demonstrate that he has any other basis on which he may challenge his consecutive sentence in this proceeding. A convicted person may allege that a sentence is unduly harsh, but such a claim constitutes a challenge to the circuit court's exercise of sentencing discretion. See *State v. Klubertanz*, 2006 WI App 71, ¶37, 291 Wis. 2d 751, 713 N.W.2d 116. As we have discussed, such claims must be pursued under WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30, and within the time limits that those statutes impose.

A convicted prisoner may invoke WIS. STAT. § 974.06 to seek sentencing relief outside of the time limits set forth in WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30, but a motion under § 974.06 is limited to constitutional and jurisdictional challenges. See *Nickel*, 330 Wis. 2d 750, ¶7. Such a motion does not encompass challenges to the circuit court's exercise of sentencing discretion when the sentence is within the statutory maximum and does not exceed the circuit court's statutory authority. See *id.* As we explained to West long ago, the aggregate sentence here was well within the maximum allowed by law. See *West I*, No. 1996AP3346-CRNM at 6. Further, the circuit court had the statutory authority to impose a sentence consecutive to any other sentence imposed at the same time or previously. See WIS. STAT. § 973.15(2)(a) (1997-98).

A convicted prisoner may raise a constitutional challenge to a sentence on the ground that the sentence is based on inaccurate information. *See State v. Tiepelman*, 2006 WI 66, ¶¶9, 291 Wis. 2d 179, 717 N.W.2d 1. West, however, was required to pursue such a challenge under WIS. STAT. § 974.06. *See Nickel*, 330 Wis. 2d 750, ¶7. West's motion did not invoke that statute. Moreover, a convicted prisoner pursuing claims under § 974.06 must allege, within the four corners of the prisoner's postconviction motion, a sufficient reason for failing to raise or adequately develop the claims in earlier proceedings. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994); *State v. Allen*, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433. West's postconviction motion did not include such an allegation.

Finally, West suggests in his submissions to this court that, if he is required to state a sufficient reason for his belated challenge to his consecutive sentence, he has such a reason. Specifically, he asserts that his appellate counsel was ineffective for filing a no-merit report instead of pursuing relief from his consecutive sentence, and this court erred by failing to identify a viable sentencing issue. West did not make these allegations in his postconviction motion and cannot do so for the first time on appeal. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997); *see also Allen*, 274 Wis. 2d 568, ¶¶9, 27. For all the foregoing reasons, we affirm.

IT IS ORDERED that the postconviction order is summarily affirmed. *See* 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