STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2016AP002012
Circuit Court Case No. 96-CM-710

PAULA L. ELBE,

Defendant-Appellant.

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2016AP002013
Circuit Court Case No. 96-CM-711

EMORY L. ELBE,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED ON SEPTEMBER 28, 2016 IN THE CIRCUIT COURT FOR SAUK COUNTY, BRANCH I, THE HONORABLE MICHAEL P. SCRENOCK, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions:

Statutes:

ISSUES PRESENTED

I. Whether the denial of counsel to an indigent criminal defendant who was sentenced solely to pay a fine for a misdemeanor violation invokes the right to counsel under the Sixth Amendment of the U.S. Constitution.

II. Whether the right to counsel for indigent defendants contained within Art. I, § 7 of the Wisconsin State Constitution is equivalent to that right as contained within the Sixth Amendment of the U.S. Constitution.

III. Whether conflict found within the Wisconsin Supreme Court case law should be resolved in favor of the most recent decisions.

IV. Whether a motion to vacate a twenty year-old misdemeanor conviction where only limited records are available is barred by the defense of laches.

V. Whether – based on the information available – the then-presiding judge's indigency determinations at the September 12, 1996 evidentiary hearing were clearly erroneous.

STATEMENT ON ORAL ARUGMENT AND PUBLICATION

The State is not requesting oral argument or publication.

STATEMENT OF FACTS

On July 03, 1996, law enforcement officers from the Wisconsin Department of Natural Resources responded to a disturbance in the Devil's Lake State Park. Appellants' Appendix, p. 101. The Rangers took multiple witness statements concerning the incident, including from Paula and Emory Elbe (hereinafter collectively referred to as "the Elbes"). *Id.* Paula told law enforcement that she struck Emory because he was being loud and embarrassing her. *Id.* Witnesses told law enforcement that Paula hit Emory in the face with her hand, and that Emory then grabbed Paula by the face and pushed her to the ground. *Id.*

Charges of disorderly conduct, in violation of Wis. Stat. § 947.01, were filed against the Elbes on August 27, 1996. *Id*. On August 28, 1996, both appeared before Court Commissioner Grill, who adjourned the case until September 18, 1996 at 1:15PM to allow time for the Elbes to contact an attorney. *Id*. at 103. The record is unclear as to any conversations between the Elbes and the state public defender; however, it is clear that on September 12, 1996, an indigency hearing was held. *Id.* at 107. This hearing took place in front of J. Patrick Taggart, District Attorney Patricia Barrett, and Attorney David Knaapen. *Id.* During the hearing, the notes describe (in somewhat wanting detail by today's standards) the Elbes'

employment (only Paula was employed), Paula's wage, their lack of other income, and their family size. *Id*. Additionally, the Clerk minutes in 96CM711 note that PD Atty. Knaapen informed the court that Emory would have qualified but for his marriage to Paula. *Id.* at 108. J. Taggart denied the Elbes' petitions for indigency/ request for a court-appointed attorneys. *Id.*

The case progressed and, on December 17, 1996, the Elbes appeared again and entered no contest pleas. *Id*. at 110-11. Based on the information available, it appears that the Elbes reached an agreement with the District Attorney's Office wherein each would enter into a deferred-prosecution agreement spanning one year and then have the case dismissed provided they enter into a domestic abuse program. Respondent's Appendix, pp. R1-R2.

On January 13, 1997, Paula sent a letter to a Mr. Hayes (a psychotherapist with the Sauk County Department of Human Services) that was forwarded to the District Attorney's Office and court wherein she said she would not be completing the program and, instead, wanted to "[change] her plea." Respondent's Appendix, pp. R3-R4. On January 27, 1997, Paula appeared before J. Evenson, was found guilty, and sentenced to pay fine and costs in the amount of $253. Appellants' Appendix, p. 110. On February 17, 1997, Emory was similarly found guilty, sentenced to pay fine and costs in the amount of $253, and adjudged one day of sentence credit (though no incarceration was ever imposed). *Id*. at 111.

On November 30, 2015, documents were received by the court asking for a *vacatur* of the convictions entered against the Elbes, claiming that they were

improperly denied counsel due to an improper indigency determination by the State Public Defender. *Id.* at 121. Briefs were filed by the Elbes and the State and, on June 6, 2016, J. Screnock held, orally, that 1) "the Elbes were not denied a constitutional right to counsel as one did not attach" and 2) J. Taggart conducted a sufficient *Dean* hearing during the original proceeding in 1996 and did not clearly err in his determination of the Elbes' indigency. *Id.* at 118-19. The Elbes subsequently moved for reconsideration and, on September 28, 2016, J. Screnock issued a written ruling. *Id*. at 127-32. In this decision, he upheld his own previous oral ruling and further held that there is no greater right to counsel under Art. I, § 7 of the Wisconsin Constitution than offered under the Sixth Amendment of the U.S. Constitution. He also held that,

> "[t]o the extent there is any conflict between *State ex rel. Winnie* … and the Wisconsin Supreme Court's later decisions regarding the constitutional right to counsel, the Court is bound to follow *Delebreau* and company, our supreme court's latest decisions." *Id.* at 125-26.

Subsequent to that final written order, the Elbes filed this appeal.

ARGUMENT

The Elbes challenge their respective 1996 disorderly convictions and have raised several issues to that end. It is the opinion of the State that these issues – as presented by the Elbes – fail to address the controlling legal issues concerning J. Screnock's written final order (dated September 28, 2016) as well as those concerning the requested *vacatur* of a twenty year-old misdemeanor conviction. As such, the State has reformulated the issues, as outlined *supra*.

In response to these seminal issues, the State argues that the Elbes' assertions of a violation of right to counsel is baseless, as no constitutional right – under either the Sixth Amendment of the U.S. Constitution or Art. I, § 7 of the Wisconsin State Constitution – attaches to a misdemeanor crime where the defendant is sentenced to a fine only. In furtherance of that argument, the State argues that any apparent conflict among Wisconsin Supreme Court jurisprudence should be resolved in accordance with its most recent pronouncements. Further, even if the right to counsel did attach, the State argues that, given the extreme delay in filing this action, the unavailability of records, and the prejudice such unavailability causes the State, an action to vacate the Elbes' convictions should be barred by laches. Lastly, even if the court concludes that the Elbes possessed a constitutionally valid claim and such claim is not barred by laches, the State further contends that – upon inspection of the available record – the Elbes have made no factual showing that J. Taggart erred in his determination of indigency. For all of the above-mentioned reasons, the State requests that the Court affirm J. Screnock's written final order and deny the Elbes' request for an evidentiary hearing and *vacatur* of their 1996 convictions.

Standard of Review

The issues presented in this appeal are constitutional in nature and mixed questions of law and fact, to which a two-step standard of review is applied. *See e.g., State v. Post*, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. The circuit

court's findings of historical fact are reviewed under the clearly erroneous standard. *Id.* The application of those facts to constitutional principles are reviewed independently. *Id.*

I. The denial of counsel to an indigent criminal defendant who was sentenced solely to pay a fine for a misdemeanor violation does not invoke the right to counsel under the Sixth Amendment of the U.S. Constitution.

The Elbes assert that they were wrongfully denied legal representation during this case in violation of the Art I, § 7 of the Wisconsin Constitution." But that assertion raises an importantly related question: did the Elbes have a constitutional right to representation during this case? In order to answer this question, we must first examine the federal right to counsel contained within the Sixth Amendment. The Supreme Court of the United States has already undertaken such examination in several cases, including *Scott v. Illinois*, 440 U.S. 367 (1979) and *Nichols v. United States*, 511 U.S. 738 (1994).

In *Scott*, the defendant was convicted of misdemeanor theft and fined $50. *Scott*, 440 U.S. at 368. Specifically, Scott was convicted of a misdemeanor which carried a potential penalty of up to a $500 fine, up to one year in jail, or both. *Id.* Scott appealed his conviction, relying on the holding in *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972) (holding that a defendant cannot be sentenced to imprisonment unless he/she is represented by counsel), and claiming that the state of Illinois violated his Sixth and Fourteenth Amendment rights by failing to

appoint state-paid counsel in a criminal action where imprisonment was an authorized penalty. *Id.* The Supreme Court disagreed, instead noting,

> "that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott v. Illinois*, 440 U.S. at 373 (emphasis in the original).

In its holding, the Court further clarified the preceding proposition, stating,

> "we therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-74.

This holding was reaffirmed in *Nichols*, wherein the High Court summarized its holding in *Scott* to be "that where no sentence of imprisonment was imposed, a defendant charged with a misdemeanor had no constitutional right to counsel." *Nichols*, 511 U.S. at 743.

In comparing the legal circumstances of the Elbes' case to those of *Scott*, it would appear that the *Argersinger*, *Scott*, *Nichols* rule should apply. The Elbes were found guilty (after rejecting the initially agreed-to deferred prosecution agreements) and not sentenced to imprisonment, but rather to pay fines and costs in the amount of $253 each. The fines were paid in a timely manner and no imprisonment was ever ordered. As such, pursuant to *Argersinger* and its progeny, no Sixth Amendment right to counsel ever attached to the Elbes, and therefore – irrespective of the Public Defender's and J. Taggart's decisions regarding the

Elbes' indigence – no Fourteenth Amendment due process right was deprived by non-representation.

The Elbes' claim for relief are founded upon the supposed violation of a Constitutional right. As has been shown, the claimed right could not have been violated as it never attached. If the right had not attached, then the Elbes' claims concerning lack of representation are moot and, unless a broader right is found within the Wisconsin Constitution, J. Screnock's oral ruling on the matter should be affirmed.

II. The right to counsel for indigent defendants contained within Art. I, § 7 of the Wisconsin State Constitution is equivalent to that right as contained within the Sixth Amendment of the U.S. Constitution.

The Elbes have argued that the right to counsel offered to criminal defendants by the Art I, § 7 of the Wisconsin Constitution is broader than that afforded under the Sixth Amendment to the U.S. Constitution. While it is understandable why one would think so, it is nevertheless not the case. Directly on point for this issue is the case of *State v. Delebreau*, 2015 WI 55, 362 Wis. 2d 542, 864 N.W.2d 852. In *Delebreau*, the Wisconsin Supreme Court re-examined its holdings in several other cases concerning whether Art. I, § 7 of the Wisconsin Constitution grants a broader right to counsel than the Sixth Amendment of the U.S. Constitution. The court explained that

> "where ... the language of the provision in the state constitution is 'virtually identical' to that of the federal provision or where no difference in intent is discernible, Wisconsin courts have normally construed the state constitution

> consistent with the United States Supreme Court's construction of the federal constitution." *Id*., ¶ 51 [quoting *State v. Agnello*, 226 Wis. 2d 164, 180-81, 593 N.W.2d 427 (1999), citing *State v. Tompkins*, 144 Wis.2d 116, 133, 423 N.W.2d 823 (1988)].

The court further noted that it "[saw] no discernible difference between these two provisions as they [related] to the right to counsel," and explained that "[nothing] suggests that 'the right to be heard by ... counsel'[1] should be any more expansive than 'the right ... to have the assistance of counsel[].[2]'" *Id*., ¶ 52 (internal quotations footnoted). The court continued, citing its own decision in *Klessig*, wherein it was stated that

> "[a] criminal defendant in Wisconsin is guaranteed this fundamental right to the assistance of counsel for his [sic] defense by both Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution.... The scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution." *Id.*, ¶ 55 citing *State v. Klessig*, 211 Wis.2d 194, 201–03, 564 N.W.2d 716 (1997) (footnotes and citations omitted).

Ultimately, after its dissection of the issue at hand, the court held that protections offered under Art. I, § 7 of the Wisconsin Constitution were "coextensive with the right under the federal constitution" and that, "because we hold that [the defendant's] right to counsel was not violated under the Sixth Amendment, we also hold that his right to counsel was not violated under Article I, Section 7 of the Wisconsin Constitution." *Id*., ¶ 57.

As the forgoing discussion has explained, Art. I, § 7 of the Wisconsin Constitution offers no greater right to counsel than that offered by the federal

[1] Referring to the operative language from Art. I, § 7 of the Wisconsin Constitution.
[2] Referring to the operative language from Sixth Amendment of the U.S. Constitution.

constitution. As such, pursuant to the Supremacy Clause of the federal constitution (U.S. CONST. art. VI, cl. 2), U.S. Supreme Court case law dictating that a criminal defendant has no right to counsel when not sentenced to incarceration should control on the operative issue in this case and J. Screnock's final order should be affirmed.

III. Any conflict found within the Wisconsin Supreme Court case law should be resolved in favor of the most recent decisions.

Now, with the holdings in *Delebreau* (2015) and *Klessig* (1997) in mind, it should nevertheless be noted that there is potentially unresolved conflict within the Wisconsin Supreme Court's jurisprudence on the seminal issue under consideration in this case: whether the defendant had a right to counsel in an action where only a fine was imposed under Art. I, § 7 of the Wisconsin Constitution.

Specifically among these decisions is that of *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 249 N.W.2d 791 (1977) and *State v. Novak*, 107 Wis. 2d 31, 318 N.W.2d 364 (1982). In *Winnie*, though not directly addressed by the facts of the case, the Wisconsin Supreme Court answered a question posed by the Public Defender and Attorney General: "[must] one charged with a crime that carries a jail or prison sentence be advised of his right to counsel and informed that counsel will be furnished at public expense if he is indigent irrespective of whether he is

ultimately incarcerated?" *Id*. at 550. The court answered this question in the affirmative, holding,

> "that whenever a defendant is charged with a crime, the penalty for which includes the requirement or option of incarceration, he must be advised of his right to counsel and further advised that if he is indigent counsel will be furnished to him at public expense unless he knowingly and intelligently waives such right to counsel." *Id*. at 556.

The second mentioned case, *Novak*, seemed to reiterate this holding by mentioning (in dicta) that, "[in *Winnie*], this court declared that criminal defendants in Wisconsin state courts were entitled to counsel if the offense for which they were charged was punishable by imprisonment." *Novak*, 107 Wis. 2d at 41.

In comparing the opinions of *Delebreau* and *Klessig* to those of *Winnie* and *Novak*, it would appear that there is a discrepancy. If the holding in *Winnie* and dicta in *Novak* (discussing potentially greater rights of defendants to counsel under the Wisconsin Constitution compared its federal counterpart) are to be held as inviolate, then – logically – the holdings of *Delebreau* and *Klessig* (clearly stating that there is no greater right to counsel offered to criminal defendants under the Wisconsin Constitution than those offered under the federal) must be incorrect. However, if the holdings in *Delebreau* and *Klessig* are to be followed, then the holdings of the older *Winnie* and *Novak* cases must either be viewed as correspondingly incorrect or potentially overruled.

The generally well-settled maxim of *stare decisis* holds that a court should follow its own precedent. *See Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67,

¶ 41, 281 Wis. 2d 300, 325, 697 N.W.2d 417, 429 (string citation omitted). However, the Wisconsin Supreme Court also has the "power to explain, modify, or overrule its own precedents…." *Beecher v. Labor & Indus. Review Comm'n*, 2004 WI 88, ¶ 26, 273 Wis. 2d 136, 155, 682 N.W.2d 29, 39. Further, when conflict exists between two supreme court cases, it is appropriate to follow the holding of the most recently decided case. *Zarnstorff v. Neenah Creek Custom Trucking*, 2010 WI App 147, ¶ 35, 330 Wis. 2d 174, 194, 792 N.W.2d 594, 604 (stating, "[when] we are unable to reconcile two supreme court cases, we follow the latter…") (further citation omitted); *See also Spacesaver Corp. v. Wis. Dep't of Revenue*, 140 Wis. 2d 498, 502, 410 N.W.2d 646, 648 (Ct. App. 1987) ("When the decisions of our supreme court appear to be inconsistent, we follow its most recent pronouncement.") citing *Bruns Volkswagen, Inc. v. DILHR*, 110 Wis. 2d 319, 324, 328 N.W.2d 886, 889 (Ct. App. 1982).

As the holdings in *Delebreau* and *Klessig* were more recently set forth than those in *Winnie* and *Novak*, per the rule laid out by the Court of Appeals in *Zarnstorff*, *Spacesaver*, and *Bruns Volkswagen*, the *Delebreau* and *Klessig* holdings should be followed. Further, as the holdings *Delebreau* and *Klessig* equate the right to counsel under the state and federal constitutions, then the holdings of the U.S. Supreme Court denying a defendant's right to counsel under the federal constitution when a criminal defendant is sentenced to only a fine

should control on this issue.[3] As such, the only conclusion is that the circuit court in this action did not err, and thus, J. Screnock's decision should be affirmed.

IV. A motion to vacate a twenty year-old misdemeanor conviction where only limited records are available is barred by the defense of laches.

While it is the State's contention that the Elbes' raised issues are insufficient for the reasons stated in §§ I through III, the Elbes' request for *vacatur* should nevertheless further be denied pursuant to the State's invoked defense of laches. It is generally well-settled law that a criminal defendant

> "has a right to post[-]conviction relief that includes both a post[-]conviction motion under Wis. Stat. § 974.02..., and a direct appeal, pursuant to the Wisconsin Constitution, Article I, § 21(1) and Wis. Stat. § 809.30. Once the time for direct appeal has passed, a defendant in a criminal case may collaterally attack his conviction pursuant to a Wis. Stat. § 974.06 motion, *Peterson v. State,* 54 Wis.2d 370, 381, 195 N.W.2d 837 (1972), or via a petition for writ of habeas corpus. *Knight,* 168 Wis.2d at 522, 484 N.W.2d 540." *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 16, 290 Wis. 2d 352, 361, 714 N.W.2d 900, 904, *opinion clarified on denial of reconsideration*, 2006 WI 121, ¶ 16, 297 Wis. 2d 587, 723 N.W.2d 424.

That said, there are instances where a criminal defendant may attempt to seek post-conviction relief (via one of the aforementioned routes), but nevertheless have such relief procedurally barred due to the defense of laches.

On point is the case of Marvin Coleman, an inmate who petitioned for state habeas corpus relief on the grounds that his appellate counsel did not attempt to

[3] "[T]he Supremacy Clause of the United States Constitution compels adherence to United States Supreme Court precedent on matters of federal law...." *State v. Jennings,* 2002 WI 44, ¶ 3, 252 Wis.2d 228, 647 N.W.2d 142.

appeal a prior conviction. *Id.*, ¶ 3. He commenced his habeas challenge seventeen years after the initial conviction, and – in response – the State asserted the defense of laches. The Wisconsin Supreme Court, in addressing the applicability of the State's laches defense to Coleman's petition held that it did apply (though it was applied incorrectly by the court of appeals in this particular case). *Id.*, ¶ 17. The court adopted a three-element test for the application of laches to such cases, noting that

> "the question of whether laches applied to Coleman's petition requires [1] a determination of the reasonableness of the delay in bringing the issue before the court; [2] a determination that the State did not have knowledge that Coleman would be bringing this claim; and [3] a determination of whether the State suffered prejudice due to the delay." *Id.*

In *Coleman*, our supreme court held that the seventeen year delay in filing the petition was unreasonable and that the State did not have notice of the forthcoming claim; however, that the court of appeals erred when they *assumed* that the State suffered actual prejudice. *Id.*, ¶ 37. The court noted that though such an assumption may be correct, "it [was] not the only possible outcome that could result from an inquiry of post[-]conviction counsel." *Id.*, ¶ 36. The court further explained that if the post-conviction counsel *did not* remember the information requested concerning the discussions with Coleman, then the appellate court's assumption would be correct; however, if the attorney *did* have relevant information, then further proceedings on the claim would be required. *Id.*

The *Coleman* case, though presented through the lens of habeas corpus, bears a partial resemblance to this case in that the Elbes are seeking post-conviction relief for a purported violation of Constitutional rights and that their claim is being brought an extraordinarily long time after sentences were imposed. Such time which – under the analysis espoused in *Coleman* – should be deemed to meet the first element of the laches test.

A further similarity is that the State is unable to adequately address the issues presented by the Elbes due to a lack of notice. Perhaps somewhat obviously, had the Elbes chosen to pursue action on this matter within even ten years of conviction, court transcripts and District Attorney's Office case files would still be in existence. Clearly, if the State had even an inkling that the Elbes would challenge their convictions, we would have preserved our case files (as is our standard practice with typically challenged cases). Given the extreme amount of time lapsed, as well as the non-controversial and non-applicability of the Elbes' conviction toward any enhanced penalties for further conviction, it should be clear that the State had no knowledge that the Elbes would bring this claim, thus meeting the second element of the laches test.

A dissimilarity from *Coleman*, however, can be found in the attached appendices, specifically at Respondent's Appendix, p. R5. The only defense attorneys ever involved in the case (prior to Atty. Kennedy, of course) – the State Public Defender's Office – have already informed the court that they have no

records of the incident. *See id*. As such, the only non-biased[4] sources of information to proceed upon are the Clerk's minutes and judgements of conviction. Therefore, the court is forced to try to make a determination based upon the information contained therein. While it is admirable that the Clerk's Office has maintained the records diligently for such a period, it is regrettable that they are not more detailed. It seems they meet the statutory guidelines for minutes [requiring that clerks "write in that record a brief statement of all proceedings in open court showing motions and orders during trial, names of witnesses, jurors drawn, the officer sworn to take them in charge, jury verdicts and openings and adjournments of court." Wis. Stat. § 59.40(2)(d) (1995-96)]; however, their lack of specific information concerning the exact words of the particular colloquies between the Judge and the Elbes makes it extraordinarily difficult for the State to proceed against the claims levelled in the Elbes' motions. Such difficulty prejudices the State and its ability to fairly recreate and examine a twenty year-old proceeding and, as such, should meet the third element of the laches defense.

Considering the nearly twenty-year time lapse in commencing this action, the State's lack of knowledge of a forthcoming challenge to the conviction, and the prejudice caused by the scant information available, the State requests the court deny the Elbes' request for *vacatur* based on the defense of laches.

[4] While the information provided in letter form from the Elbes (Appellants' Appendix, p. 109) can be noted, as they espouse the position of an involved party in this litigation, their value as reflective of historical fact can and must be discounted.

V. Based on the information available, J. Taggart's indigency determinations at the September 12, 1996 evidentiary hearing were not clearly erroneous.

The State has first argued that, considering the facts of this case, the charges levelled against the Elbes, and the outcome of the criminal actions, no constitutional right to counsel attached (under either the federal or Wisconsin State constitutions) and thus could not be violated. The State has also invoked the defense of laches, which – if successful – would bar the Elbes' claims. If, however, the court overturns J. Screnock's final order by ruling that the Elbes *did possess* a constitutional right to counsel in this matter *and* holds that the State's invocation of the laches defense for some reason fails, the State would argue that – based on the information available – the Elbes have failed to make a prima facie showing that J. Taggart erred in his indigency determination and, therefore, their request for *vacatur* should be denied.

As dictated by statute, when a criminal defendant seeks public defender representation, he or she shall apply with the office, and an indigency determination will take place. Wis. Stat. § 977.06(1m) (1995-96). Once that determination is made, "[a] circuit court may review any indigency determination upon its own motion or the motion of the defendant." Wis. Stat. § 977.06(4)(a) (1995-96). In this review,

> "although the legislature's indigency criteria are not met, the court can still declare the defendant indigent for purposes of appointing counsel to protect the defendant's constitutional right to counsel. While the trial court clearly has the

> power to appoint under these circumstances, the defendant also has a well-defined role. In review of a public defender indigency determination, the defendant has the burden of proving indigency by a preponderance of the evidence. Whether the defendant has the financial means to obtain counsel is a question of fact. ... The same reasoning in *Buelow* leads us to conclude that the burden of proof in *Buelow* also applies to situations where the defendant seeks to invoke the court's inherent power to appoint counsel. Whether the facts require the appointment of counsel is left to the sound discretion of the trial court." *State v. Dean*, 163 Wis. 2d 503, 513-14, 471 N.W.2d 310, 314-15 (Ct. App. 1991) citing *Douglas County v. Edwards*, 137 Wis. 2d 65, 76, 403 N.W.2d 438, 444 (1987) and *State v. Buelow*, 122 Wis. 2d 465, 363 N.W.2d 255 (Ct. App. 1984) (internal citations omitted).

The question of whether or not a trial-level court erred in a factual determination, such as that of indigency, is usually reserved for appellate review. Nonetheless, such court's "finding of fact may not be overturned … unless it is clearly erroneous." *Dean,* 163 Wis. 2d at 511 citing *Buelow*, 122 Wis. 2d at 470 n. 1 (Ct. App. 1984). In order to make the necessary determination regarding indigency,

> "[the] trial court is not required to conduct an independent inquiry but must ask enough questions of the defendant so that the trial court can decide the question of indigency or order the defendant to report further to the trial court on the issue of indigency. When the trial court is deciding the question of indigency, it must consider whether the defendant has sufficient assets to retain private counsel at the market rate prevailing in the community. *Id.* at 514.

In the case discussed (*Dean*), both the trial-level and post-conviction judges expressed a similar (and later held to be improper) sentiment: that it was not their practice to go beyond what the public defender's office recommended in terms of determining indigency, despite the fact that the District Attorney's Office stipulated to the defendant's indigency. *Id.* at 509.

The case at bar, however, is importantly dissimilar. Rather than perfunctorily dismissing the Elbes' requests for a review/determination of indigency (as in *Dean*), J. Taggart had a colloquy with the Elbes as to (at least) wages, income, and family size. This is according to the Clerk's minutes, which – while admirably maintained – are not now, nor ever were likely intended to be a substitute for transcripts. The limited record indicates that J. Taggart did not solely rely on the judgement of the public defender's office when making his indigency determination for the Elbes, but rather engaged in an appropriate colloquy concerning the facts material to such determination. *See* Appellants' Appendix, pp. 108-09. Further, while it has been submitted as part of the Appellants' Appendix in this matter, there is no indication that the "worksheet" (a hand-written expense report with the name "Paula" on it several times) was created prior to the September 12, 1996 *Dean* hearing or ever given to J. Taggart. *Id.* at 109. However, even if it was given to him at that time, based on that Affidavit of State Public Defender Regional Supervisor Michael Tobin, it would not have mattered; the Elbes would not have qualified for indigency in this case. *See* Respondent's Appendix, pp. R6-R7.

Given the information available concerning the nearly twenty year-old proceedings in this case, including the fact that no tacit assumptions nor administrative rubber stamps were utilized by J. Taggart in his review of the Elbes' indigency petitions, and that a well-qualified supervisor within the Public

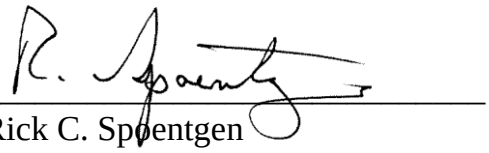
Defender's Office again notes that the Elbes didn't qualify for representation, the State thus sees no information to persuade us that J. Taggart's exercise of discretion was clearly erroneous. As such, the Elbes' request for *vacatur* should be denied.

CONCLUSION

The Elbes were each fined for a misdemeanor violation; no imprisonment was imposed. As such, no federal constitutional right to counsel attached. Further, as the Wisconsin Supreme Court has most recently found equivalent the right to counsel offered to criminal defendants under Art. I, § 7 of the Wisconsin Constitution and the Sixth Amendment to the U.S. Constitution, and as conflict among Wisconsin Supreme Court cases should be resolved in favor of the most recent ruling, no greater right to counsel presently exists under the Wisconsin Constitution than those provided by the Sixth Amendment. Therefore, the holdings of the Supreme Court of the United States should control on the issue, and the circuit court's ruling that Elbes were not entitled to an attorney as a matter of right should be affirmed. Additionally, even if the right did attach, considering the undue delay in bringing this action, the State's lack of notice, and the prejudice caused by such a delay, the Elbes' claim is barred by the defense of laches. Finally, if the court finds that the right to counsel attached *and* that the Elbes' claim is not procedurally barred by laches, then – simply based on its merits – the

claim should be denied as there is no evidence to suggest that J. Taggart's determination of indigency in this case was clearly erroneous.

Respectfully submitted this 20th day of December, 2016.



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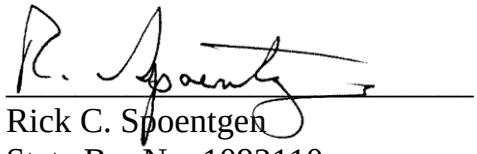
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,173 words.

Signed:



Rick C. Spoentgen
State Bar No. 1092110

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

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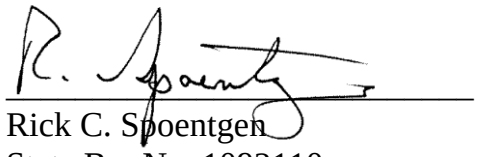

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(3)(b)

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § 809.19(3)(b) and that contains a table of contents and that complies with the confidentiality requirements of §§ 809.19(2)(a) and (b). I further certify that it contains portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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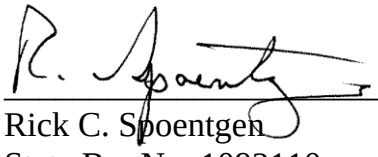

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