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OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

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State of Wisconsin

Plaintiff-Respondent,

Appeal No. 2016AP002012

v.

Paula L. Elbe,

Defendant-Appellant.

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State of Wisconsin

Plaintiff-Respondent,

Appeal No. 2016AP002013

v.

Emory J. Elbe,

Defendant-Appellant.

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Consolidated Appeals From Orders of the Circuit Court For

Sauk County, Branch I, Case No. 96-CM-710 and 96-CM-711,

Hon. Michael P. Screnock, Presiding.

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REPLY BRIEF OF APPELLANTS

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## ARGUMENT

### I. THERE ARE TWO SEPARATE ASPECTS OF THE CONSTITUTIONAL RIGHT TO COUNSEL: ONCE CHARGES ARE FILED, OR WHEN MIRANDA APPLIES.

There are two separate aspects to the constitutional right to counsel: once charges are filed, and once Miranda applies. State v. Coerper 199 Wis. 2d 216, 222, 544 NW2d 423 (1996). Wisconsin's constitution has been consistently applied to afford the same protection as the Federal constitution only with respect to the right to counsel concerning Miranda. State v. Hanson 136 Wis. 2d 195, 213, 401 NW2d 771 (1987). The Winnie decision, and this case, deal only with the right to counsel once charges are filed.

Delebreau equally applies the right to counsel under both the Federal and State constitutions only concerning Miranda. The State extrapolates Delebreau to apply to once charges are filed based upon ongoing reciprocity with the Federal constitution.

The 1996 Supreme Court decision of State v. Pultz, 206 Wis. 2d 112, 131, 556 NW2d 707 (1996), recognizes a bright line rule. This bright line rule provided the right to

counsel in the context of civil contempt brought by the State. Despite the fact a respondent could purge the contempt and obtain dismissal, the threat of jail required appointment of counsel for an indigent respondent even if the purge condition was met.

Since Pultz was decided after U.S. v. Nichols, and Circuit Courts have continued to advise defendants of the right to counsel, Winnie is still good law.

The State's argument laches bars the motion to vacate does not apply when the judgment is void. Helbach v. Helbach 259 Wis. 329, 331, 48 NW2d 617 (1951). In the criminal context, the State's reliance upon Coleman is ineffective for the reason collateral attack is allowed based upon denial of the right to counsel. State v. Hahn 238 Wis. 2d 889, 903-905, 618 NW2d 528, 2000 WI 118 ¶28-29 (2000).

## **II. JUDGE TAGGART FAILED TO PROPERLY APPLY THE MARITAL PROPERTY LAWS.**

The State misquotes the record at Page 19 of its brief saying the worksheet was not before the trial court on September 12, 1996. The worksheet is attached to the Motion For Appointment of Counsel. See page 5 of the Brief of Appellant.

At page 3 of the State's Brief it is alleged the record states Mr. Elbe would have qualified if he was not married. Both the SPD and Circuit Court considered the joint assets of Mr. and Mrs. Elbe as being jointly available for the legal fees of each. Cost of counsel of \$400 would be exceeded for each spouse by applying the entire marital assets of \$790.

Legal fees of each spouse represented a debt which was non-marital for the reason the basis for the need for the legal services was not in the interest of the marriage. In re Grimm 82 BR 989, 994 (USBC-Wis. 1997). Only one-half of the marital property can be reached by a creditor of the legal fees. In re Marriage of Curda-Derickson v. Derickson, 266 Wis. 2d 453, 466, 668 NW 2d, 2003 WI APP 167 ¶17 (Ct. App, 2003).

Each spouse could apply \$395 dollars toward the \$400 cost of counsel. Both are partially indigent and both were entitled to counsel.



## CONCLUSION

The dismissal of the motions to vacate must be reversed and these cases remanded with directions for an evidentiary hearing as to the applicability of PD3.04(1). Should defendants prevail the convictions must be vacated and the defendants allowed to withdraw their pleas. In that event defendants will seek dismissal for violation of the right to speedy trial found at the Sixth Amendment to the Federal Constitution and Article I, Section 7 of the State Constitution.

Respectfully submitted this 28<sup>th</sup> day of December 2016.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is four (4) pages.

Dated: December 28, 2016

/s/ Robert A. Kennedy, Jr.

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Attorney For Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief,  
which complies with the requirements of §809.19 (12). I  
further  
certify that:

This electronic brief is identical in content and  
format to the printed form of the brief filed as of this  
date.

A copy of this certificate has been served with the  
paper copies of this brief filed with the court and served on  
all opposing parties.

Dated: December 28, 2016.

Kennedy Law Office

/s/ Robert A. Kennedy, Jr.\_\_\_\_\_

Robert A. Kennedy, Jr.  
Attorney For Appellant

CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this day 28<sup>th</sup> of December, 2016. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

District Attorney

Courthouse

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Dated: December 28, 2016.

/s/ Robert A. Kennedy, Jr.  
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