STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP000551

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAFEAL NEWSON,

Defendant- Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

**APPEAL FROM AN ORDER DATED MARCH 7, 2017,
IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Jeffrey Conen, Presiding
Trial Court Case No. 2000 CF 4309**

Respectfully submitted:

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ARGUMENT

I. NEWSON IS NOT PROCEDURALLY BARRED FROM HAVING HIS MOTION ADJUDICATED ON THE MERITS.

A. Because A Challenge To Jurisdiction Cannot Be Waived, It Was Incumbent Upon The Circuit Court To Address And Examine The Merits Of Newson's Motion.

Newson has advanced several bases for why the substantive issues raised on this appeal are not procedurally barred. There is one basis the State does not address: Newson's position that a collateral attack to a jurisdictionally defective and therefore void case cannot be waived. *Champlain v. State*, 53 Wis.2d 751, 193 N.W.2d 868 (1972). Newson posited that the proceedings against him were jurisdictionally defective, void *ab initio,* and therefore subject to attack at any time, without regard to prior efforts to raise the issue. The State does not respond to this issue. It therefore cannot complain if this Court takes that proposition as conceded. *Charolais Breeding Ranches v. FPC Securities*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Contrary to the State's claim that a court commissioner found probable cause on the complaint, (State's Brief, p. 2), this case began with a felony arrest warrant and request for extradition unquestionably signed by an *unknown* individual who appears to have been a district attorney. Contrary to section 968.04(3)(a)5., stats., the warrant did not include the name of any issuing judicial official. Thereafter, a request for extradition

was signed by a DA and judge, despite the fact a criminal complaint had never been filed. The extradition request certified a complaint was pending against Newson, and that the request had been duly recorded, neither of which was true. When Newson first appeared in Wisconsin on this case, he reserved any and all jurisdictional objections.[1]

The manner in which this case began, and jurisdiction putatively vested in the circuit court, was contrary to state and federal laws designed to protect prisoners and, to that end, to be liberally construed in a prisoner's favor, particularly one like Newson who refused extradition. *See. e.g.,*Sections 968.02 and 976.05; 18 U.S.C. App. § 2. *See also State v. Tarrant,* 2009 WI App 121, ¶7, 321 Wis.2d 69, 772 N.W.2d 750; *State v. Blackburn*, 214 Wis.2d 372, 379–80, 571 N.W.2d 695 (Ct. App. 1997); *Cuyler v. Adams,* 449 U.S. 433 (1981). This case was based not on a real complaint, but instead, on the fiction of such, the consequences of which must be analyzed against a long line of cases deeming complaints charging no offense

[1]The absence of any name affixed to the warrant, the illegible signature, the court's inability to identify to whom the signature belongs, and the unlikelihood that any judicial authority would issue a warrant devoid of a case number, a file-stamp, or any indicia of filing with a judge, or an otherwise pending case, all strongly suggest not only jurisdictional defects by omission, but also by commission. The presence of a party in Wisconsin improperly obtained via fraud signifies that any resultant verdict is void and cannot stand. *Townsend v. Smith,* 47 Wis. 623, 3 N.W. 439 (1879). As Lord Chancellor Hardwicke noted, where there is an irregular arrest, and an advantage taken of the irregularity to charge a defendant in custody at the suit of another party, courts will discharge the defendant from both. *In Ex parte Wilson*, 1 Atk. 152.

jurisdictionally defective, and the defect cannot be waived. *Champlain, supra. See also Howard v. State*, 139 Wis. 529, 534, 121 N.W.2d 133 (1909); *In re Carlson*, 176 Wis. 538, 545, 186 N.W. 722 (1922)*; State v. Lampe*, 26 Wis.2d 646, 648, 133 N.W.2d 349 (1965); *State v. Estrada*, 63 Wis.2d 476, 492, 217 N.W.2d 359 (1974); *State v. Aniton,* 183 Wis.2d 125, 303-04, 515 N.W.2d 302 (Ct. App. 1994).

Newson posits that neither section 974.06(4), Stats., nor *State v. Escalona Naranjo,* 185 Wis.2d 169, 517 N.W.2d 157 (1994), can bar him from review, on the merits, of a judgment void *ab initio*, which thus can be collaterally attacked at any time. The circuit court's refusal to address this issue on the merits, both in 2010 and 2017, constituted an erroneous exercise of discretion. *Matter of Sullivan*, 218 Wis.2d 458, 470, 578 N.W.2d 596, 601 (1998) (misapplication or erroneous view of the law constitutes erroneous exercise of discretion). The State does not dispute the proposition. Accordingly, this Court should rule Newson entitled to consideration of his claims on the merits and proceed to consider and decide them.[2]

[2]The circumstances also implicate the circuit court's competency, another issue the State ignore. *Village of Trempealeau v. Mikrut,* 273 Wis.2d 76, 681 N.W.2d 190, 2004 WI 79.

B. There Are Sufficient Reasons Why Newson Did Not Raise All Issues In His First Post-Conviction Motion in 2004.

Citing and quoting *State v. Witkowski,* 163 Wis.2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (hereinafter *Witkowski II*) the State argues:

> A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.

(State's Brief, p. 14). This Court's decision in *Witkowski II* implicated a previous decision by this Court in *State v. Witkowski*, 143 Wis.2d 216, 218, 420 N.W.2d 420 (Ct. App. 1988) (hereinafter, *Witkowski I*).

The facts underlying both *Witkowski* cases involved a defendant convicted of armed robbery, even though he was not armed, because he had told the victim he was. The defendant appealed and the sole issue was whether a determination that a robbery victim reasonably believed the robber armed may be made on the basis of the robber's verbal representations alone, unaccompanied by any physical gestures or visual evidence of the weapon's existence. This Court answered that question "yes" and affirmed the conviction. *Witkowski I*, 143 Wis.2d at 218.

Thereafter, defendant brought a section 974.06 motion and argued his case was improperly tendered to the jury on the theory he in fact possessed a weapon when he threatened the victim, and that because he did not, there was insufficient evidence to sustain his conviction. *Witkowski II*, 163 Wis.2d at

987. To avoid application of *Witkowski I,* defendant argued his first appeal addressed the sufficiency of the evidence to establish the victim reasonably could believe she was being threatened with use of a weapon based on verbal representations alone, while his section 974.06 motion challenged the sufficiency of the evidence to establish he actually possessed a gun at the time. *Id.* at 990-91. *Witkowski II* saw no meaningful distinction between the merits of the issues resolved in *Witkowski I,* and thus concluded the new motion did not present an issue different from the one already litigated on the merits, decided, and denied. *Id.*

Against this backdrop, the State's use of *Witkowski II* is curious, because it is not pertinent to the procedural issue now before this Court. *Witkowski II* involved the rephrasing of an issue that had already been decided *on the merits*. Indeed, *Witkowski I* had already rejected, *on the merits*, the essence of the issue defendant was trying to raise again in a postconviction motion. The defendant was therefore barred from recycling and repackaging an issue already decided. The bar therefore arose not because the defendant had previously failed to raise the issue, which is the origin of the putative bar in this case, but precisely because the defendant *had* raised the issue already, and lost.

Consequently, the issue before this Court must be analyzed under *State v. Escalona Naranjo,* 185 Wis.2d 169, 517 N.W.2d 157 (1994), a case decided several years after *Witkowski II.* On that front, it is important to note that in this case, the *Escalona* die was cast when Newson, from Arizona, filed his first post-conviction motion in 2004, and did *not* raise the substantive issues presented here. When Newson first raised

these issues, in 2010, they were summarily denied because of the *Escalona* bar, and consequently, have never been addressed on the merits. The analysis, accordingly, should focus on whether there were "sufficient reasons" for why Newson did not raise these issues in 2004.

Before examining the circumstances underlying the 2004 motion, it must be remembered that this case implicates Newson's right of access to the courts. It is firmly established that prisoners have a fundamental, constitutional right of access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977). Access must be adequate, effective, and meaningful. *Bounds* at 822. Without this right, all other rights a prisoner may possess are illusory. *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973).

In *Bounds*, the Supreme Court's offered a thorough analysis of the right of access to the courts, vis-a-vis the adequacy of prison law libraries:

> [T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Bounds at 828 (footnote omitted). *Bounds* further stated that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, the decision did not foreclose alternative means to achieve that goal. *Id*. at 830. The Supreme Court discussed some possible alternatives to

law libraries but declined to establish particular elements of an adequate legal access program, noting "any such plan must be evaluated as a whole to ascertain its compliance with constitutional standards." *Id*. at 832.

Adequacy of access to legal materials was also examined in *Corgain v. Miller*, 708 F.2d 1241, 1247 (7th Cir. 1983). Like this case, *Corgain* examined the adequacy of a prison that did not provide state laws or statutes, but which did allow prisoners to order materials with precise citations:

> The magistrate correctly concluded that the law library system at USP-Marion, without state law materials or supplemental legal aid, was inadequate. He aptly characterized the Shawnee Library System's requirement for precise citations for photocopying as a "Catch 22" because the inmate could obtain state law materials only by providing precise citations, and could obtain precise citations only if he could refer to state law materials.

Corgain, at 1250. The situation Newson faced in Arizona, as further developed below, was more onerous still, because it did not include any option to order Wisconsin state legal materials at all. Newson's situation was thus worse than the situation in *Corgain,* which did not pass constitutional muster.

To combat the reality of Newson's situation, the State endeavors to create "an inference" that Newson *did* have access to Wisconsin law while imprisoned in Arizona. (State's Brief, pp. 18-19). This is done by noting Newson managed to cite

some Wisconsin law in his 2010 motion. (*Id.*). One rightfully expects the State to address the documented denials by Arizona prison officials of access to Wisconsin law and explain how those established facts can be overcome by inferences. The State, however, simply ignores these facts of record.[3]

The record establishes the real barriers facing Newson during the run-up to filing his 2004 motion. This is not a case where Newson has manufactured convenient after-the-fact explanations for failing to raise issues in his first 974.06 motion. The barriers put in front of Newson, and his unsuccessful efforts to get around them, are documented in real time. In October of 2003, when Newson was putting together his first section 974.06, motion, his requests for access to Wisconsin law were twice rejected by Arizona prison officials. (R84-50; R84-51). The denials came with explanations that Newson would *not* be provided any laws from any state other than Arizona. (R84-52-54). That Newson could not access Wisconsin law is therefore an irrefutable fact of record.[4]

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[3]The State also tries to show Newson had adequate access to law by pointing out that in prior filings Newson "relied **heavily** on federal case law to advance his arguments . . . ." (State's Brief, p. 19) (emphasis added). This unsurprising truth, however, only further proves the limited scope of the resources available to Newson.

[4]This problem is also documented elsewhere, when Newson had to decline the circuit court's unsolicited offer to be allowed to represent himself and explain that in 1997, Arizona had restricted inmate access to law libraries in its prison system and that he could only proceed pro se with legal assistance from Wisconsin. (R35-2-3; R36-2).

The State points out that when Newson received the summary disposition of his 2010 motion, he requested reconsideration and presented, for the first time, sufficient reasons for why the issues had not been raised in his 2004 motion. Again the State argues this somehow demonstrates Newson really did have access to Wisconsin law. (State's Brief, p. 18). All this really demonstrates, however, is that when the summary disposition of his motion notified him he was barred by *Escalona,* and that he had not provided sufficient reasons for not raising the issues in 2004, Newson first learned of the *Escalona* bar and endeavored to provide the missing sufficient reasons. The circuit court summarily denied the reconsideration motion as well, without any meaningful explanation. (R65).

Against this backdrop, the "sufficient reasons" analysis should begin from, and focus on, Newson's 2004 motion, in which Newson did not raise the substantive issues *sub judice.* It is that motion, after all, and Newson's failure to raise the issues in that first motion, which made failure on both subsequent efforts to raise the issues a *fait accompli.* The failure to raise the issues in the 2004 motion was the basis for application of the *Escalona* bar in response to the 2010 motion and again, a basis for application of the *Escalona* bar in the motion currently on appeal. As already noted, Newson had been barred access to Wisconsin law during that time frame including, importantly, access to section 974.06 and *Escalona.* It would be improper to hold, under these circumstances, that Newson "knowingly, voluntarily and intelligently waived" any issues within the meaning of section 974.06(4).

C. The *Escalona* Bar Should Not Be Applied To A Prisoner Not In Wisconsin Custody And Blocked From Access To Wisconsin Law.

Finally, Newson posits that section 974.06, Stats, should not be read to procedurally bar prisoners from having claims heard when the bar is based on a motion filed while incarcerated in another state. This case demonstrates good public policy reasons for doing so. A prisoner, like Newson, left to cobble together a motion to file in Wisconsin, while barred from accessing Wisconsin laws, should not suffer the added indignity of having that motion serve as the basis for barring a subsequent motion once access to Wisconsin law is restored.

It should be noted the State's analysis of this issue uses the wrong language, because it uses the phrase "*person* in custody under sentence of a court" when the actual language is "*prisoner* in custody under sentence of a court." This is notable given that in other contexts, this Court has defined the term "prisoner" to signify a prisoner in custody in a State of Wisconsin institution. *State ex rel. Speener v. Gudmanson*, 2000 WI App 78, ¶ 11, 234 Wis.2d 461, 610 N.W.2d 136. On that front, "prisoner" is specifically defined *not* to include a prisoner filing a motion pursuant to section 974.06, Stats.

The State's analysis is also contradictory, because while it endeavors to prop up the circuit court's reasoning on the issue, it simultaneously concedes that court's decision was erroneous. The circuit court rejected the argument reasoning that all consecutive sentences for crimes committed before December 31, 1999 are computed as one continuous sentence. Section 302.11(3), Stats. The State, however, argues:

> To be sure, Wisconsin courts have interpreted the phrase "state court" to mean the sentencing court that imposed the sentence under attack. See *State v. Bell*, 122 Wis.2d 427, 429, 362 N.W.2d 443 (Ct. App. 1984). But *Bell* and other cases address situations in which the person is barred from seeking relief after the person has completed the sentence. . . . **Those cases have no application here, where Newson had not yet begun to serve the sentence for the conviction that he sought to challenge.**

(State's Brief, p. 20) (emphasis added). The State thus concedes Newson had *not* yet begun serving his sentence in this case; ergo, the circuit court's reasoning was erroneous.

The State then turns to a long discussion of federal habeas law. There are Wisconsin decisions, however, recognizing that prisoners out of state should be viewed differently when it comes to imposing statutory limitations. This Court determined in *Speener, supra,* that an out-of-state facility is not a "correctional institution," and that a person who is incarcerated in an out-of-state facility is not a "prisoner" under section 801.02(7)(a)2, Stats. This Court also determined that because section 893.735 incorporates the definition of "prisoner" set forth in section 801.02(7)(a)2., a person incarcerated in an out-of-state facility is not bound by the statutory time limitation set forth in section 893.735(2). *State ex rel. Frohwirth v. Wisconsin Parole Comm'n*, 2000 WI App 139, ¶ 6, 237 Wis.2d 627, 614 N.W.2d 541. *See also State ex rel. Stinson v. Morgan*, 226 Wis.2d 100, 102, 593 N.W.2d 924 (Ct. App. 1999). To the extent this signifies out-of-state prisoners

would not be able to avail themselves of a statutory habeas corpus challenge, they could petition for a writ of coram nobis. *Jessen v. State*, 95 Wis.2d 207, 214, 290 N.W.2d 685 (1980).[5]

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Newson requests this Court vacate his conviction and sentence, and remand with directions for dismissal with prejudice.

Dated this 4th day of June, 2018.

/s/ Rex Anderegg
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[5]The State acknowledges Newson may be entitled to an evidentiary hearing. For a claim to be fully and fairly considered by state courts, where facts are disputed, full and fair consideration requires consideration by the fact-finding court, and the availability of meaningful appellate review by a higher state court, neither of which Newson has received regarding the claims he raises herein. *Lawhorn v. Allen*, 519 F.3d 1272, 1288 (11th Cir. 2008).

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,000 words.

Dated this 4th day of June, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the reply brief in *State of Wisconsin v. Rafeal Newson,* Appeal No. 2017AP000551, which complies with the requirements of s. 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 this 4th day of June, 2018.

/s/ Rex Anderegg
Rex Anderegg