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SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN ex rel. JOSHUA M. WREN,

Petitioner-Petitioner,

Appeal No. 2017-AP-880-W

vs.

Trial No. 06-CF-2518

REED RICHARDSON, Warden,

Respondent.

On review of a decision of the Court of Appeals of November 12, 2018 denying Habeas Corpus relief

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BRIEF AND APPENDIX OF PETITIONER-PETITIONER

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STATEMENT OF THE ISSUES

1. Whether Mr. Wren was deprived of his direct appeal due to the ineffectiveness of his trial counsel.

The Court of Appeals apparently presumed an affirmative answer and proceeded to review that State's asserted affirmative defense of laches.

2. Whether the defense of laches should preclude granting relief to Mr. Wren.

The Court of Appeals found that the State had proved laches and exercised discretion to apply laches to preclude relief.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Wren believes that oral argument is appropriate. This Court has apparently determined that oral argument is appropriate: in the order granting review of May 14, 2019 this Court orders that this case be scheduled for oral argument on the same calendar assignment as argument in *State v. Pope*, 17-AP-1720-CR.

Mr. Wren also believes that publication would be appropriate to set forth the applicability and scope of the laches defense in future habeas corpus cases.

STATEMENT OF THE CASE

The underlying case

A criminal complaint dated May 16, 2006 charged 16-year-old Defendant-Appellant Joshua M. Wren with one count of first degree reckless homicide in violation of Wis. Stat. §940.02(1). 1: 1-5. A preliminary hearing was held on May 31, 2006. 52: 1-24.

On November 13, 2006 Mr. Wren entered a guilty plea to first degree reckless homicide in return for a promise by the State make no specific sentencing recommendation and to leave the sentence up to the Court. 14: 1; 53: 3, 8.

On March 13, 2007, Mr. Wren, represented by Attorney Nikola Kostich, appeared before Judge Wagner for sentencing. 53: 1. Judge Wagner imposed a sentence of 30 years imprisonment consisting of 21 years initial confinement and 9 years extended supervision.

The record contains no notice of intent to pursue postconviction relief.

Habeas Corpus proceedings

On May 15, 2017 Mr. Wren, *pro se*, filed a petition for habeas corpus in the Court of Appeals asserting that his trial counsel was ineffective for having failed to file a

notice of intent to seek postconviction relief after Mr. Wren had requested to appeal; as a remedy, Mr. Wren sought reinstatement of his direct appeal rights. 45: 1-14. The Court of Appeals ordered the State file a response. 27: 1; 28: 1. In its response, the State indicated an intent to interpose a laches defense to Mr. Wren's petition, but indicated that remand for a fact-finding hearing was necessary to establish the merits of both Mr. Wren's petition and laches. 30: 1-4.

The Court of Appeals remanded the case for a fact-finding hearing on Mr. Wren's petition and on the laches defense, specifying nine points to be addressed in the findings. 49: 3-5; 32: 2. On March 1, 2018 the Honorable Carolina Stark held an evidentiary fact-finding hearing at which Mr. Wren and three of his family members testified. 54: 1-68. On April 11, 2018 Judge Stark issued written findings of fact. Apx. 114-117; 48: 1-4. Upon receiving these finding, the Court of Appeals ordered further briefs. Apx. 113.

On November 12, 2018 the Court of Appeals issued an opinion and order that Mr. Wren's habeas corpus petition be denied. Apx. 101-110.

Facts relevant to the petition and laches

Mr. Wren was born on May 10, 1990. 54: 19. His case started in Children's Court but then moved to adult court. 54: 30. Attorney Nikola Kostich represented Mr. Wren in all adult court proceedings through sentencing. 54: 30. Mr. Kostich was appointed by the State Public Defender. 54: 29-30; 2: 1. Mr. Kostich died in 2014. Apx. 117; 48: 4.

Joshua Wren, his mother Beverly Cotton, his father Danny Wren and his sister Danielle Wren all testified at the fact-finding hearing as to events at Joshua Wren's sentencing. All three family members were present at the sentencing hearing. 53: 19; 54: 6, 14, 20. Ms. Cotton, Danny Wren and Joshua Wren testified that based on conversations with Mr. Kostich, the expected sentence or requested sentence would include 13 years of incarceration. 54: 6-7, 14, 30. The presentence report included a recommendation of 13 years initial confinement and 5 to 6 years of extended supervision. 13: 12; 53: 28; 54: 31.

The sentence imposed included 21 years of confinement. 14: 1; 53: 40. Joshua Wren was dissatisfied with this and immediately asked Mr. Kostich to appeal;

Judge Stark found:

> [U]pon conclusion of the sentencing hearing, while Wren was still in the courtroom and at the defense table, he told Attorney Kostich that he disagreed with the sentence. In response, Attorney Kostich told Wren not to worry because they would appeal, and as a result, Wren believed that Attorney Kostich would complete the requirements necessary to seek postconviction relief.

Apx. 115; 48: 2. Joshua Wren, being in custody, could not follow Mr. Kostich out of the courtroom. However, Ms. Cotton, Danny Wren and Ms. Wren all testified that they met with Mr. Kostich in the hallway after sentencing, and that Mr. Kostich told them not to worry as he would appeal. 54: 7-8, 16, 21.

Judge Stark addressed the Notice of Right to Seek Postconviction Relief form, finding that it was filed on March 13, 2007, the date of sentencing, although it was dated March 7, 2007. Apx. 114; 48: 1. The court found that the "undecided" box was checked, but that Mr. Wren did not check it and the court could not determine who checked this box. Apx. 114-115; 48: 1-2 and footnote 2. The court found that when Mr. Wren signed the form, he did not know which box would be checked, as Mr. Wren's

counsel did not discuss this with Mr. Wren. Apx. 115; 48: 2. Mr. Wren testified he never received a copy of this form. 54: 43-44. Judge Stark noted that both the original and the colored carbon copies of this form (exhibit 9) were in the court file, although not file-stamped. 54: 40-41; 47: 1-3.

After the sentencing hearing, Mr. Wren's family members made numerous attempts to contact Mr. Kostich regarding the appeal. Judge Stark found that Danielle Wren made multiple phone calls to Mr. Kostich, both within the 20 days after sentencing and for about 3 years afterward, but Mr. Kostich never responded. Apx. 116; 48: 3. Beverly Cotton and Danny Wren also tried calling Mr. Kostich, but without success. Apx. 116; 48: 3. Judge Stark found:

> Attorney Kostich was not available to Wren or third parties acting on his behalf during the twenty days after March 13, 2007. Attorney Kostich had no communication with Wren or third parties acting on his behalf after March 13, 2007, despite their multiple attempts to contact him. Attorney Kostich intentionally led Wren and third parties acting on his behalf to believe that he would timely complete the requirements necessary for the defendant to seek postconviction relief, and then he failed to do so without notifying Wren or third parties acting on his behalf.

Apx. 116; 48: 3.

Mr. Wren wrote to Mr. Kostich in June and December of 2007 inquiring about the status of his appeal, but received no response. Apx. 115; 48: 2; 45: 13. In 2010 or 2011, Mr. Wren concluded that Mr. Kostich had not filed an appeal on his behalf. Apx. 116; 48: 3. In the period from 2010 to 2016, with the help of non-attorneys, Mr. Wren filed several postconviction pleadings. Apx. 117; 48: 4; 54: 45-48. None of these sought reinstatement of Mr. Wren's direct appeal because Mr. Wren was not aware of that option; he would have sought such relief earlier had he known he could do so. 54: 49-50. Mr. Wren learned of his option to seek reinstatement of his appeal by corresponding with an uncle confined in another institution. 54: 50-51. Within 3 or 4 months after communicating with his uncle, Mr. Wren filed the habeas petition giving rise to this action. 54: 56-57. Judge Stark thus found:

> Sometime in 2010 or 2011, Wren concluded that Attorney Kostich had not filed an appeal on his behalf. After reaching this conclusion, Wren still wanted to seek postconviction relief regarding ineffective assistance of trial counsel and the sentence, but he did not know how to do so.

Apx. 116-117; 48: 3-4.

The Court of Appeals issued an opinion and order denying Mr. Wren Habeas relief based upon the State's assertion of the defense of laches. Apx. 101-110.

ARGUMENT

I. Mr. Wren was deprived of his direct appeal due to the ineffectiveness of his trial counsel.

Trial counsel has a duty, which extends beyond sentencing, to counsel his client on seeking postconviction relief and to file a notice of intent to seek postconviction relief if requested:

> Counsel representing the person at sentencing or at the time of the final adjudication shall continue representation by filing a notice [of intent to pursue postconviction or postdisposition relief] under par. (b) if the person desires to pursue postconviction or postdisposition relief unless counsel is discharged by the person or allowed to withdraw by the circuit court before the notice must be filed.

Wis. Stat. §809.30(2)(a); see also Wis. Stat. §973.18(5): "If the defendant desires to pursue postconviction relief, the defendant's trial counsel shall file the notice required by s. 809.30(2)(b)."

A person asserting that his trial counsel was ineffective due to a failure to file a notice of intent may seek relief, and the court of appeals is the proper forum in which to seek such relief. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶38, 354 Wis.2d 626, 847 N.W.2d 805.

Normally, a defendant asserting ineffective assistance of counsel must establish that counsel's actions were deficient, and that the defendant suffered prejudice as a result. However, no showing of prejudice is required when a defendant has been deprived of counsel. "Counsel's failure to file a notice of appeal after being instructed to do so constitutes the deprivation of counsel." *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶48, 354 Wis.2d 626, 847 N.W.2d 805, citing *United States v. Nagib*, 56 F.3d 798, 801 (7th Cir. 1995). The Supreme Court of the United States has very recently reaffirmed the principle that "when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed." *Garza v. Idaho*, 586 U.S. ___, 139 S.Ct. 738, 742 (decided February 27, 2019), citing *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). The Court in *Garza* recognized that this principle applies even in circumstances where the defendant has signed an appeal waiver as part of a plea agreement. *Garza*, 139 S.Ct. at 749.

Judge Stark's factual findings leave no room for any conclusion but that Mr. Wren's counsel failed to file a

notice of intent to seek postconviction relief after being instructed to do so. Judge Stark found that immediately after being sentenced, Mr. Wren expressed his dissatisfaction with the sentence, and Mr. Kostich assured him that he would complete the requirements necessary to seek postconviction relief. Apx. 115; 48: 2. Filing a notice of intent, like filing a notice of appeal, is an administrative task and not a strategic matter for counsel. See, *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000): "[F]iling a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." However, Mr. Kostich failed to do as promised; Judge Stark found:

> Attorney Kostich intentionally led Wren and third parties acting on his behalf to believe that he would timely complete the requirements necessary for the defendant to seek postconviction relief, and then he failed to do so without notifying Wren or third parties acting on his behalf.

Apx. 116; 48: 3.

The Court of Appeals acknowledged Mr. Wren's assertion that he was deprived of a direct appeal due to his trial counsel's failure to file a notice of intent to seek postconviction relief. Apx. 103-104. Noting that the State

does not address this claim, but instead asserts that Mr. Wren's claim is barred by laches, the Court of Appeals reached no express conclusion on Mr. Wren's claim. Apx. 104. Instead, the Court addresses laches.

II. Laches should not preclude granting Mr. Wren relief

1) Habeas Corpus and Laches

The Supreme Court of the United States has described the doctrine of laches as a defense requiring proof of two elements: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961). It has an ancient history in federal Supreme Court jurisprudence. See, *Galliher v. Cadwell*, 145 U.S. 368, 372-373 (1892) (surveying cases). The cases surveyed in *Galliher*, as well as *Galliher* itself, were all civil actions between private parties.

Despite the ancient nature of the laches defense, its utilization in the context of a habeas corpus action is relatively recent. Justice Scalia noted that federal courts created or adopted several threshold constraints on habeas corpus, including "exhaustion of state remedies, procedural default, nonretroactivity and (prior to AEDPA)

abuse of the writ." *Day v. McDonough*, 547 U.S. 198, 214 (2006) (Scalia, dissenting). However, federal courts never created or adopted any time limitation on habeas corpus petitions, including equitable laches; as Justice Scalia explains, laches entered federal habeas corpus jurisprudence only by rule and only since 1977:

> [P]rior to the enactment of AEDPA, we affirmatively rejected the notion that habeas courts' traditionally broad discretionary powers would support their imposition of a time bar. Historically, "there [wa]s no statute of limitations governing federal habeas, and the only laches recognized [wa]s that which affects the State's ability to defend against the claims raised on habeas"—which was imposed by Rule, and not until 1977. *Brecht v. Abrahamson*, 507 U. S. 619, 637 (1993); see also *United States v. Smith*, 331 U. S. 469, 475 (1947); 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4268.2, pp. 497-498 (2d ed. 1988) (hereinafter Wright & Miller). We repeatedly asserted that the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration. See *Pennsylvania ex rel. Herman v. Claudy*, 350 U. S. 116, 123 (1956); *Chessman v. Teets*, 354 U. S. 156, 164-165 (1957). For better or for worse, this doctrine was so well entrenched that the lower courts regularly entertained petitions filed after even extraordinary delays. See, *e. g., Hawkins v. Bennett*, 423 F. 2d 948, 949 (CA8 1970) (40 years); *Hamilton v. Watkins*, 436 F. 2d 1323,

> 1325 (CA5 1970) (at least 36 years); *Hannon v. Maschner*, 845 F. 2d 1553, 1553-1555 (CA10 1988) (at least 24 years).

Day v. McDonough, 547 U.S. at 214-215 (Scalia, dissenting).

In Wisconsin case law, the equitable doctrine of laches is also longstanding. See, *e.g., Sheldon v. Rockwell*, 9 Wis. 166 (1859) (applying laches to deny relief to plaintiff seeking to enjoin his neighbor from rebuilding a dam). The exact formulation and elements of laches varied, although all variations required, at minimum, proof of an unreasonable deny by the claimant and prejudice to the party asserting the defense. See, *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶19-28, 290 Wis.2d 352, 714 N.W.2d 900, *opinion clarified* 2002 WI 121, 297 Wis.2d 587, 723 N.W.2d 424 (surveying elements applied in prior laches cases).

While laches as an equitable doctrine is long established in Wisconsin, its introduction into habeas corpus jurisprudence is anomalous. The first mention of laches in a Wisconsin appellate case in a habeas context arose in a case where the circuit court had dismissed the habeas petition as untimely. It is not clear from the

decision that either the circuit court or the parties ever invoked or discussed laches. The Court of Appeals stated:

> The circuit court's ruling was essentially premised on a finding of laches against McMillian. While we recognize that a habeas proceeding may be dismissed under the equitable doctrine of laches,[13] the delay on the part of the petitioner must be unreasonable.[14]

State ex rel. McMillian v. Dickey, 132 Wis.2d 266, 281, 392 N.W.2d 453 (Ct. App. 1986). The footnotes in this quotation cite not to any Wisconsin case, but to two federal cases: *Mayola v. Alabama*, 623 F.2d 992, 999 (5th Cir. 1980), cert. den., 451 U.S. 913 (1981); and, *Baxter v. Estelle*, 614 F.2d 1030, 1032-33 & n. 2 (5th Cir. 1980), cert. den., 449 U.S. 1085. These federal cases apply laches, not based on any constitutional or common-law principle, but based on Rule 9(a) of the rules governing cases under 28 U.S.C. §2254, the statute governing federal habeas corpus review of petitions arising from state court convictions. This is the rule Justice Scalia cited when noting that federal courts did not recognize laches in habeas corpus proceedings until it was adopted by rule in 1977. *Day v. McDonough*, 547 U.S. at 214-215 (Scalia, dissenting). Thus, to the extent the *McMillian* court

adopted laches as a defense to habeas corpus petitions, it was essentially adopting a federal rule.

Ultimately, *McMillian* declined to apply laches to justify the circuit court's dismissal of the habeas corpus petition, as it found that the delay could in no way be attributed to Mr. McMillian and was not unreasonable. *McMillian*, 132 Wis.2d at 283-284. The Court of Appeals' analysis was based on the notion that the circuit court's decision was "essentially premised" on laches. The *McMillian* court's gratuitous recognition, based ultimately on a federal rule, that "a habeas proceeding may be dismissed under the equitable doctrine of laches" was cited and relied upon in *State ex rel. Smalley v. Morgan*, 211 Wis.2d 795, 800, 565 N.W.2d 805 (Ct. App. 1997), overruled by *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58. Thereafter, *McMillian* and *Smalley* are cited as the basis for applying the laches defense in a habeas corpus context. See, *State. ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶25, 290 Wis.2d 352, 714 N.W.2d 900; *State v. Evans*, 2004 WI 84, ¶49, 273 Wis.2d 192, 682 N.W.2d 784 (not a habeas case, but discussing habeas procedure); *State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶9, 288 Wis.2d 707, 709 N.W.2d 515; *State*

ex rel. Washington v. State, 2012 WI App 74, ¶19 and footnote 13, 343 Wis.2d 434, 819 N.W.2d 305.

This court recently stated: "The application of laches to bar habeas petitions is well-established. *See Coleman*, 290 Wis.2d 352, ¶¶2, 19-25." *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶16. The paragraphs from *Coleman* cited in support of this statement survey laches cases and the various two-, three- and four-element configurations of laches used in these cases. However, these paragraphs mention only two Wisconsin cases with a habeas petition at issue: *McMillian* and *Smalley*. *Coleman*, ¶¶24-25. This Court in *Lopez-Quintero* overruled *Smalley*. *Lopez-Quintero*, ¶¶2, 10, 19. Thus, while the discussion in *Coleman* shows that laches *generally* as a defense is well-established (although its elements varied), it also shows that the application of laches *in habeas cases* is rooted through *Smalley* to *McMillian*. *McMillian* first introduced laches into Wisconsin habeas jurisprudence in by implicit adoption of a federal habeas rule.

In *Lopez-Quintero*, this Court determined that an allegation of untimeliness, without more, is not grounds to dismiss a habeas petition. This Court found that the

"'prompt and speedy'" pleading requirement imposed by *Smalley* is "unsupported either by the statutory text or Wisconsin cases." *Lopez-Quintero*, ¶21. While noting that some language in *Coleman* suggests a timeliness factor in habeas petitions, this Court stated that the only source of such a requirement is *Smalley*, which "erroneously conjured this requirement from a statute that is entirely silent on the subject." *Lopez-Quintero*, footnote 12.

Just as *Smalley* improperly introduced a prompt and speedy pleading requirement into habeas corpus law without a basis in Wisconsin statute or cases, so did *McMillian* introduce laches into Wisconsin habeas law without a basis in Wisconsin statute or cases. Nothing in the *McMillian* decision acknowledges that the court was breaking new ground, or that no prior Wisconsin case had ever found laches applicable as a defense to a habeas petition. In fact, laches was merely how the Court of Appeals interpreted the basis for the circuit court's ruling, although the quoted language of the circuit court implicates only timeliness. *McMillian*, 132 Wis.2d at 280-281.

As noted above, although federal law utilized laches since at least the nineteenth century, laches did not appeal

in federal habeas actions until 1977, by rule. Thus, federal courts declined to impose laches or time limitations on habeas petitioners, giving varied rationales. One such rationale was the continuing nature of the detention which necessarily underlies every habeas petition:

> We also recognize that the passage of time between appellant's conviction and his request for relief renders the gathering of evidence difficult. We do not condone the long delay. However, if appellant's constitutional rights were violated in 1926, the passage of 44 years does not serve to cure the wrong. And he, just as the man recently convicted, must be afforded a meaningful opportunity to prove his claims.

Hawkins v. Bennett, 423 F.2d 948, 951 (8th Cir. 1970) (footnote omitted). Likewise, construing a waiver from the mere passage of time, however long, does not comport with the classic definition of waiver: an intentional relinquishment or abandonment of a known right or privilege. *Hamilton v. Watkins*, 436 F.3d 1323, 1326 (5th Cir. 1970), citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Because laches was introduced into Wisconsin habeas corpus jurisprudence anomalously by implicit adoption of a federal rule, Mr. Wren prays this Court hold

that Laches is not a defense to a habeas corpus petition in the absence of an authorizing statute or rule. In the event this Court declines to so rule, Mr. Wren assert that laches should not apply to him to preclude relief.

2) Laches application to Mr. Wren

To prove laches as a defense to a habeas corpus petition, the State must prove three elements: "(1) the petitioner unreasonably delayed in bringing the claim; (2) the State lacked knowledge that the claim would be brought; and (3) the State has been prejudiced by the delay." *State ex rel. Washington v. State*, 2012 WI App 74, ¶17, 343 Wis.2d 434, 819 N.W.2d 305. Even if the State proves all three elements, applying laches is not automatic; application of the defense is a discretionary decision based upon application equitable principles. *Washington*, ¶¶20, 26. Mr. Wren agrees only with the contention that, prior to Mr. Wren filing his petition, the State had no notice of his ineffective assistance claim. Mr. Wren so stipulated. 54: 3-4. The fact-finding court so found. Apx. 114; 48: 4. Thus, the second element of laches is not in dispute. Mr. Wren asserts that the State has failed to prove the other two elements of laches and that equitable principles do not support interposing laches in this case.

A. Reasonableness of delay

The Court of Appeals found that Mr. Wren unreasonably delayed bringing his ineffective assistance of counsel claim seeking reinstatement of his direct appeal. Apx. 105-107. The Court relied heavily on the decision in *Washington*. In particular, the Court of Appeals found it unreasonable the Mr. Wren pursued "a series of *pro se* motions without alerting any court to the fact that he believed his trial counsel filed to preserve his right to seek postconviction relief." Apx. 107. In so holding, the Court appeals ignored the factual findings of the circuit court which explain Mr. Wren's failure to bring this claim earlier was due to ignorance that he could bring such a claim. The Court of Appeals also ignored the admonition of this Court that a defendant who was denied the right to counsel should not be faulted for errors made due to the absence of counsel.

Mr. Wren did file a number of postconviction motions prior to filing the habeas court petition which is the subject of this appeal, but he did so only with the help of others. Mr. Wren had assistance from another inmate in drafting the DNA surcharge motion, and could not explaining the meaning of "State versus Cherry" or the

numbers that followed it in the motion. 54: 45. Someone else prepared the reconsideration motion, and Mr. Wren could not have prepared it himself. 54: 46. Likewise, the last two pleadings were prepared and typed by someone else, and Mr. Wren understood only the basic premise of these documents. 45: 47-48. Only when he learned that he could seek to reinstate his direct appeal did Mr. Wren finally file the petition at issue. Mr. Wren should not be faulted for this, for he had no counsel. As this Court has observed:

> "[O]ne principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit." *Betts v. Litscher*, 241 F.3d 594, 596 (7th Cir. 2001). It is incongruous to state that a defendant was denied the right to counsel and then preclude the defendant from raising a claim because of errors made due to the absence of counsel. *Page v. Frank*, 343 F.3d 901, 909 (7th Cir.2003); *see also Coleman v. Thompson*, 501 U.S. 722, 754, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) ("if the procedural [error] is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the [error] be imputed to the State").

State ex rel. Kyles v. Pollard, 2014 WI 38, ¶56, 354 Wis. 2d 626, 847 N.W.2d 805.

The Court of Appeals' reliance on the *Washington* decision is misplaced. *Washington* differs from Mr. Wren's case in several important respects.

Mr. Washington was more sophisticated and capable than Mr. Wren. He was 25 years old at the time of his offense (not 15 as was Mr. Wren). *Washington*, ¶2. While both Mr. Wren and Mr. Washington filed other motions before filing the respective habeas petitions at issue, nothing in the *Washington* opinion suggests that Mr. Washington had assistance; thus, the court found Mr. Washington to be "hardly a novice." *Washington*, ¶23.

Mr. Washington, unlike Mr. Wren, was not deprived of postconviction counsel. He retained postconviction counsel, who filed a motion to withdraw his plea. *Washington*, ¶6. While Mr. Washington asserted he had wanted to appeal the denial of this motion, the fact-finding court found that Mr. Washington had instructed his postconviction counsel to drop the plea-withdrawal issue. *Washington*, ¶14. Moreover, Mr. Washington denied receiving any of the 6 letters postconviction counsel had sent; the fact-finding court found this denial incredible. *Washington*, ¶14.

Finally, Mr. Washington's timing was not merely

delayed; Mr. Washington filed his habeas petition when his sentence was nearly complete, but *after* he learned he would face commitment as a sexually violent person under Wis. Stat. Ch. 980. *Washington*, ¶10. The court thus admonished that a litigant "cannot lay in the weeds and wait to raise an issue of potential merit." *Washington*, ¶23.

The equities of Mr. Wren contrast sharply with Mr. Washington. As a 16-year-old defendant who had just been sentenced to 21 years confinement, he expressed his dismay to his attorney, who promised to appeal but did not. The record reveals no belated reason to desire an appeal (such as the filing of commitment proceedings). The fact-finding court found that even after realizing in 2010 or 2011 that no appeal had been filed, "Wren still wanted to seek postconviction relief regarding ineffective assistance of trial counsel on the sentence, but *he did not know how to do so*." Apx. 113-114; 48: 3-4 (emphasis added). While Mr. Washington's claims of lack of legal acumen were apparently unsupported by any factual findings, Mr. Wren's legal ignorance is found as fact.

The Court of Appeals' decision rests on the premise that upon finally concluding in 2010 or 2011 that his trial counsel had failed to initiate an appeal, Mr. Wren should

have known to file a petition in this court to seek reinstatement of his direct appeal. However, the state of the law on this point was not clarified until 2014, when this Court held, apparently for the first time, that a defendant claiming ineffectiveness of trial counsel based upon a failure to file a notice of intent to seek postconviction relief should make that claim in the Court of Appeals. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶¶16 and 58, 354 Wis. 2d 626, 847 N.W.2d 805. The court in *Kyles* noted that prior cases generally held that ineffective assistance claims must be addressed to the court where the deficient conduct allegedly occurred. *Kyles*, ¶¶26-27. Thus, a claim based on failure to raise issues before the Court of Appeals should be addressed to the Court of Appeals. *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992). However, a claim based on failure to raise issues in a postconviction motion should be raised in the Circuit Court. *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996). The decision in *Kyles* clarified that even though the error in failing to file a notice of intent occurred in the Circuit Court, only the Court of Appeals had authority to grant appropriate relief. Thus, even if Mr. Wren had legal

acumen and knew to seek reinstatement of his direct appeal, the proper forum in which to raise such a claim was not clear prior to this Court's decision in *Kyles* in 2014.

The Court of Appeals acknowledged much of what Mr. When asserts above regarding: distinguishing *Washington*; that the Circuit Court found as fact that Mr. Wren did not know how to seek reinstatement of his direct appeal; and that this Court's 2014 decision in *Kyles* clarified for the first time the proper forum in which to seek reinstatement of a direct of appeal based a trial counsel's failure to file a notice of intent. Apx. 106-107. The Court of Appeals entire analysis of these arguments is as follows:

> We are not persuaded. It is undisputed that Wren know by 2011 that no appeal had been filed on his behalf. Pursuing a series of *pro se* motions without alerting any court to the fact that he believed his trial counsel filed to preserve his right to seek postconviction relief is unreasonable. We conclude the State has demonstrated that Wren unreasonably delayed in bringing his claim.

Apx. 107.

Mr. Wren did not unreasonably delay his habeas

filing. After his sentencing in 2007, his trial counsel had assured Mr. Wren and Mr. Wren's family members that he would pursue and appeal. Thus, as Judge Stark found, it was only in "2010 or 2011" that Mr. "Wren concluded that Attorney Kostich had not filed an appeal on his behalf." 48: 3. After reaching this conclusion, Mr. Wren sought relief from aspects of his conviction and sentence through various *pro se* filings. None of these filings were directed at reinstating Mr. Wren's direct appeal. However, they do show Mr. Wren's desire for relief from his conviction and sentence. *Cf. State. ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶32, 290 Wis.2d 352, 714 N.W.2d 900 (noting that *failure* to file anything relative to an appeal over a 16-year period tends to support a conclusion of unreasonable delay). Judge Stark's findings explain why these *pro se* filings did not seek reinstatement of Mr. Wren's direct appeal: Mr. "Wren still wanted to seek postconviction relief regarding ineffective assistance of trial counsel and the sentence, but he did not know how to do so." Apx. 116-117; 48: 3-4. Mr. Wren learned that he could seek to reinstate his appeal rights only three or four months before filing the habeas petition after he corresponded with his uncle James Wren who was imprisoned in another

institution. 54: 50-51, 56-57. Joshua Wren's petition was not unreasonably delayed.

B. Prejudice to the State

The State's claim of prejudice is based solely on the unavailability of Attorney Kostich, who died in 2014. Apx. 107. Mr. Wren sought to locate Mr. Kostich's file in this case, without success. 54: 2-3; 38: 1.

In support of the claim of prejudice, the State again relies primarily on *Washington*. Apx. 107-108. *Washington* concerns multiple claims of alleged failures of postconviction counsel to inform Mr. Washington. Thus, Mr. Washington claims that after his postconviction motion was denied, his postconviction counsel failed to tell him of the denial, of the right to appeal and the deadline to appeal the denial, and of no-merit rights and options. *Washington*, ¶17. These issues implicate factual disputes in which the State relied on the testimony of postconviction counsel. Since postconviction counsel no longer had any independent recollection of his representation and had destroyed the file (except for 6 letters recovered from a computer), the State's ability to challenge Mr. Washington's numerous factual allegations was impaired by the delay.

The factual issues in Mr. Wrens' case are simple and straight-forward, in contrast to those in *Washington*. Mr. Wren's case involves the simple failure to perform the "purely ministerial task" of filing a notice of intent. *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Mr. Wren presented overwhelming evidence that he wanted to appeal, that he expressed this desire to his counsel and that his counsel had assured Mr. Wren and his family members that he would file an appeal. No appeal was filed. Judge Stark noted that due to the death of Attorney Kostich in 2014, it could not find facts as to whether Attorney Kostich sought an extension, and if he did not, his reasons for not doing so. Apx. 111; 48: 1.

The Court of Appeals found that showing the unavailability of trial counsel and his file was sufficient to prove prejudice. Apx. 108. The Court never suggests what information the State might have hoped to elicit from trial counsel, or how its absence prejudiced the State.

The State suggests, in its response opposing review, that it needed trial counsel to relate: Mr. Wren's interest in pursuing postconviction relief; what Mr. Wren and his family members told trial counsel; whether trial counsel attempted to contact them; and why the postconviction

rights form is checked "undecided." Response 8. Judge Stark made findings with regard to all these matters after considering both the file documents and the direct- and cross-examinations of Mr. Wren and three of his family members. Apx. 114-117; 48: 1-4. Mr. Wren's interest in an appeal arose because he "disagreed with the sentence." Apx. 115; 48: 2. Mr. Wren and his family members all heard Mr. Kostich's assurance, in response to their concern, that he would initiate and appeal. Apx. 115; 48: 2. While Judge Stark did not expressly find why the appeal rights form was marked undecided or by whom, she did find that the form was dated six days before sentencing, when the sentencing result could not factor into Mr. Wren's decision whether to appeal. Apx. 114; 48: 1.

Trial counsel failed to file an appeal after Mr. Wren requested one and trial counsel had promised to file one. The Court of Appeals does not explain what potential testimony from trial counsel would negate or excuse these facts. The Court of Appeals erred in finding that the State was prejudiced.

C. Equitable considerations

Mr. Wren bought the habeas petition which is the subject of this petition within three or four months after

learning from his uncle of the possibility of doing so. Prior to this, although he wanted to have an appeal, Judge Stark found as fact that "he did not know how to do so." 48: 3-4. The court of appeals acknowledged that Mr. Wren "asserts that trial counsel's failure to file a notice of intent to pursue postconviction relief deprived him of both a direct appeal and counsel to represent him on direct appeal, which led Wren to make 'the kind of procedural errors unrepresented defendants tend to commit'" Apx. 109. The court of appeals nonetheless found application of laches equitable and appropriate. In so doing, the Court of Appeals held Mr. Wren solely responsible for the delay in requesting reinstatement of his appeal and faulted him for seeking other forms of relief. Apx. 109. It was improper and inequitable to so hold.

Mr. Wren had a right to counsel in a direct appeal. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Mr. Wren's trial counsel failed to file the notice necessary to initiate his direct appeal and trigger appointment of appellate counsel. See Wis. Stat. §809.30(2)(c)1. In such circumstances, subsequent delays are attributable not to the unrepresented defendant, but to the State. Thus the Supreme Court of the United States has

stated:

> Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that [collateral] review entails.

Coleman v. Thompson, 501 U.S. 722, 754 (1991). Therefore, the Court of Appeals should not have attributed all delays and Mr. Wren's missteps as an unrepresented litigant when weighing the equities of applying laches.

Furthermore, under circumstances similar to Mr. Wren's, where the defendant was denied any direct appeal due to trial counsel's failure to file a notice of intent, the this Court held that collateral filings should not preclude relief. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶¶55-56, 354 Wis. 2d 626, 847 N.W.2d 805 (quoted in part above at page 21). The failure of trial counsel to file a notice of intent deprived Mr. Wren not only of his direct appeal, but also of counsel to represent him on direct appeal. Unrepresented, he made the kind of procedural errors unrepresented defendants tend to commit. His procedural missteps should not preclude relief. *Kyles*, ¶56.

The equities favor granting Mr. Wren relief and

denying the State's request to interpose laches.

CONCLUSION

Petitioner-Petitioner Joshua M. Wren prays that this court vacates the decision of the Court of Appeals and remand with instructions to reinstate his direct appeal and enlarge the time to file a notice of intent to seek postconviction relief.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for Joshua Wren

FORM AND LENGTH 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 7233 words.

John T. Wasielewski

APPENDIX CERTIFICATION

I hereby certify that I filed with this brief, an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 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.

John T. Wasielewski
Attorney for Joshua M. Wren

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

_____

John T. Wasielewski

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