STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP880-W

STATE OF WISCONSIN EX REL. JOSHUA M. WREN,

Petitioner-Petitioner,

v.

REED RICHARDSON, WARDEN,

Respondent.

APPEAL FROM A DECISION OF THE
COURT OF APPEALS DENYING A PETITION
FOR A WRIT OF HABEAS CORPUS

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT

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ISSUES PRESENTED

More than ten years after he pled guilty to first-degree reckless homicide, and after several postconviction filings in the circuit court, Wren petitioned for a writ of habeas corpus. He argued that his trial counsel was ineffective for failing to file a notice of intent to pursue postconviction relief, and he sought reinstatement of his direct appeal rights. In its response to Wren's habeas petition, the State took no position on the merits of his claim. Rather, the State opined that under controlling Wisconsin case law, Wren was entitled to a fact-finding hearing in the circuit court in which the State could present evidence on the defense of laches. The court of appeals agreed.

After the circuit court's hearing, it issued findings of fact. The court of appeals then requested a response from both parties considering those findings. After briefing, the court of appeals determined that the State proved all three elements of laches and that the equities favor its application. It therefore did not reach the merits of Wren's claim. Wren petitioned this Court for review, which it granted. The following issues are before this Court:

1. Did the State prove all elements of laches?

The court of appeals determined, Yes.

This Court should affirm.

2. Do the equities favor the application of laches to Wren's claim?

The court of appeals determined, Yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests both oral argument and publication.

STATEMENT OF THE CASE

Wren's plea, sentence, and postconviction proceedings

The State charged Wren with first-degree reckless homicide for the 2006 shooting death of Tony Tolliver. (R. 1.) Wren was 15 years old when he committed the homicide. (R. 1.) Wren pled guilty when he was 16 years old, and in November 2006 the court sentenced Wren to 21 years' initial confinement and 9 years' extended supervision. (R. 9; 53:40.) Wren later claimed in his state habeas petition that even though both he and his family contacted Attorney Nikola Kostich about an appeal, Attorney Kostich never responded to them. (R. 31:2.) The last time he or his family heard from Kostich was at the sentencing hearing. (R. 31:2.)

In the years that followed his conviction, Wren filed several *pro se* motions in the trial court. In 2010, he filed a motion to vacate his DNA surcharge. (R. 15.) The trial court denied the motion and Wren's 2011 motion for reconsideration. (R. 16; 18.) In 2013, Wren filed a motion to amend the judgment of conviction regarding restitution, and he again challenged the DNA surcharge. (R. 19.) The trial court amended the judgment to more accurately reflect the restitution ordered, but it denied the DNA surcharge challenge. (R. 20.) In 2015, Wren sought a copy of the presentence investigation report. (R. 22.) The trial court denied the motion, noting that "the direct appeal deadline has long since expired." (R. 23.) In 2016, Wren moved to modify his sentence. (R. 24.) The trial court denied the motion. (R. 25.)

Wren's petition for writ of habeas corpus

More than ten years after his conviction, and after his trial counsel died, Wren petitioned for habeas corpus in the court of appeals, arguing that his trial counsel was ineffective for failing to file a notice of intent to pursue postconviction relief. (R. 31:2.) He requested that his direct appeal rights be reinstated. (R. 31:10.)

The court of appeals ordered that the State respond to Wren's petition. (R. 27.) In its response, the State made no assessment on the possible merits of Wren's claim of ineffective assistance. (R. 30:4.) Instead, the State informed the court that it believed "the petition alleges sufficient facts to support a claim" of ineffectiveness "to warrant an evidentiary hearing." (*Id*.) The State also informed the court of appeals that at the hearing, where both Wren and his counsel could testify, the State would "seek to present evidence supporting a defense of laches." (R. 30:3.)

The court of appeals agreed that a hearing was required, and it remanded for a fact-finding hearing. (R. 49.)

The circuit court's fact-finding hearing

At the hearing, Wren, Wren's mother, Wren's father, and Wren's sister testified. They all testified that after sentencing, they tried to contact Kostich about an appeal, but Kostich never returned their calls. (R. 54:8, 17, 21, 36.)

Wren introduced at the hearing the standard form titled "Notice of Right to Seek Postconviction Relief." (R. 54:42–43.) The box that was checked indicated that Wren was undecided about whether he wanted to pursue postconviction relief. (R. 54:43, 51.)

Wren testified "in 2010 or 2011" he learned that he had no direct appeal. (R. 54:55.) He admitted that despite this knowledge, he filed a motion regarding DNA surcharge in

2010, a motion for reconsideration in 2011, a motion to amend the judgment of conviction in 2013, and a motion for sentence modification in 2016. (R. 54:56.) The State clarified with Wren: "So at least six years passed before you filed the habeas corpus seeking to reinstate your appellate rights?" Wren replied, "Yes." (*Id.*)

The circuit court did not hear testimony from Attorney Kostich about his actions or inactions after sentencing, however, because he died in 2014 before Wren filed his habeas petition. (R. 48:1.)

The circuit court's findings of fact

After the hearing and pursuant to the court of appeals' order, the circuit court issued findings of fact, which included:

- "Wren personally contacted Attorney Kostich about filing a notice of intent to seek postconviction relief before expiration of the twenty-day deadline set forth in Wis. Stat. Rule 809.30(2)(b)."
- Attorney Kostich did not make himself available to Wren or his family during the twenty days after March 13, 2017, the day of sentencing. He had no communication with them, despite their multiple attempts.
- Attorney Kostich "intentionally led Wren" and his family "to believe that he would timely complete the requirements necessary" for an appeal, "and then he failed to do so" without informing them.
- "Sometime in 2010 or 2011, Wren concluded that Attorney Kostich had not filed an appeal." Wren wanted to seek relief regarding ineffective assistance of trial counsel and his sentence, "but he did not know how to do so."

- Unassisted by counsel, "Wren filed motions to the circuit court in 2010, 2011, 2013 and 2016 before filing his petition for *habeas corpus*."
- Attorney Kostich died in 2014.
- The State "did not know Wren would move to reinstate his postconviction/ appellate rights until he filed his petition for *habeas corpus* in August of 2017."

(R. 48:1–4.)

Upon receiving these findings from the circuit court, the court of appeals ordered the parties to file a response. (Pet-App. 113.)

Neither the State nor Wren challenged any of the circuit court's findings as clearly erroneous. (Pet-App. 103.) Nor did the State address the merits of Wren's claim that he was deprived of his direct appeal due to the ineffectiveness of his trial counsel. (Pet-App. 104.) Rather, the State argued that "based on the circuit court's factual findings the State proved that Wren's claim is barred under the doctrine of laches." (*Id*.) The court of appeals agreed. (*Id*.)

The court of appeals' application of laches

In *State of Wisconsin ex rel. Joshua M. Wren v. Reed Richardson,* No. 2017AP880W (Wis. Ct. App. Nov. 12, 2018) (unpublished) (Pet-App. 101–10), the court of appeals noted up front: "The Wisconsin Supreme Court has recognized laches as an available defense to a *habeas* petition." (Pet-App. 104) (citing *State ex rel. Washington v. State,* 2012 WI App 74, ¶ 19, 343 Wis. 2d 434, 819 N.W.2d 305 (citing *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 17, 290 Wis. 2d 352, 714 N.W.2d 900)). The court of appeals applied the three laches elements that the State must prove under *Coleman*: unreasonable delay in bringing the claim, the State's lack of

knowledge that a claim would be brought, and prejudice to the State. (Pet-App. 105–08.)

1. *Unreasonable delay*. With respect to the first element the court concluded that it "was unreasonable for Wren to wait ten years to raise concerns about the fact that no notice of intent to pursue postconviction relief or appeal was filed." (Pet-App. 105.) The court continued, "Wren knew 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 failed to preserve his right to seek postconviction relief is unreasonable." (Pet-App. 107.)

2. *State's lack of knowledge that a claim would be brought*. Regarding the second element, the parties stipulated that the State was unaware that Wren would move to reinstate his postconviction and appellate rights. (Pet-App. 107.)

3. *Prejudice to the State*. The court next determined that the State was prejudiced by Wren's delay: "Because trial counsel passed away in 2014 and his files could not be located, the State was unable to gather from trial counsel information concerning Wren's interest in pursuing postconviction relief, such as what Wren and Wren's family members told trial counsel, whether trial counsel attempted to contact them, and why the standard form that was filed after sentencing indicated that Wren was 'undecided about seeking postconviction relief.'" (Pet-App. 108.) According to the Court, "[t]his is sufficient to establish prejudice." (*Id*.)

Finally, because the State proved the defense of laches, the court had to determine whether it was equitable and appropriate to apply laches in Wren's case. In its analysis, the court noted that "Wren waited over ten years to raise concerns about the lack of the appointment of postconviction counsel and a direct appeal, despite the fact

that he sought relief numerous times from the trial court." (Pet-App. 109.) It concluded that "Wren knew by at least 2011 that he did not have a direct appeal; his failure to raise this claim in any court until 2017 was unreasonable and justifies the application of laches in this case." (*Id.*)

The court of appeals denied Wren's petition for a writ of habeas corpus. (Pet-App. 110.) This Court granted Wren's petition for review.

STANDARD OF REVIEW

This Court reviews "legal issues arising out of a habeas petition independently." *State ex rel. Lopez-Quintero v. Dittman*, 2019 WI 58, ¶ 11.

ARGUMENT

I. Because the procedural bar of laches applies, this Court need not reach the merits of Wren's claim that he received ineffective assistance of counsel.

The court of appeals did not address the merits of Wren's claim that he was deprived of his direct appeal due to the ineffectiveness of his trial counsel. While Wren argues that the circuit court'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" (Wren's Br. 9–10), the circuit court followed the court of appeals' order and made no legal conclusions on Wren's ineffectiveness claim (R. 48). Neither did the court of appeals. (Pet-App. 101–10.) It did not determine whether Wren proved *either* prong of deficiency or prejudice. Rather, as Wren acknowledges, because the court of appeals concluded that the procedural bar of laches barred Wren's claim, it did not reach the merits. (Wren's Br. 10–11.)

A different result—one where a court determines that a meritorious claim could defeat a laches defense—would be contrary to the whole point of laches. Laches is designed to prevent a prejudiced party from the difficulties of litigating claims after an unreasonable delay. *See Lopez-Quintero,* 2019 WI 58, ¶ 29 ("The equitable defense of laches exists to address any prejudice to the State caused by a petitioner's unreasonable delay in the filing of a habeas petition."). In other words, the defense of laches has nothing to do with the merits of the claim against which it is asserted. *See id.* ¶ 24 ("As implicitly reflected in the elements of the test for laches, numerous factors may influence the determination of whether it is equitable to bypass the merits of a claim on the basis of unreasonable delay."). The State in this case, as the party forwarding the defense of laches, was not required to prove (or argue) that Wren's claim was without merit in order to prevail on a defense that was meant to free the State from litigating even meritorious claims. Similarly, the court of appeals, because it agreed with the State that laches did and should apply, correctly refused to address Wren's claim on the merits.

This Court should do the same.

II. The court of appeals correctly denied Wren's petition for a writ of habeas corpus. The State proved all three elements of laches, and the court reasonably determined that the equities favored its application.

Both parties agree that this Court need only consider whether the State proved two of the three elements of laches—unreasonable delay and prejudice—because the parties have stipulated to the second element. (Wren's Br. 19.) Because the State proves the two disputed elements, this Court next considers whether it is equitable to apply laches to Wren's case. But first, the State addresses the

applicable legal principles of laches and then responds to Wren's new issue on appeal that laches does not apply to habeas proceedings.

A. In *Lopez-Quintero*, this Court reaffirmed the legal principle that habeas relief may be denied by applying laches.

On May 29, 2019 this Court discussed the legal principles surrounding laches and petitions for a writ of habeas corpus. "A petition for writ of habeas corpus commences a civil proceeding wherein the petitioner claims an illegal denial of his or her liberty." *Lopez-Quintero*, 2019 WI 58, ¶ 12 (quoting *Coleman*, 290 Wis. 2d 352, ¶ 18). A petitioner "seeking habeas relief must be restrained of his liberty and 'show . . . that the restraint was imposed contrary to constitutional protections." *Id.* ¶ 14 (quoting *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶ 12, 252 Wis. 2d 133, 643 N.W.2d 771). Additionally, the party "must show that there was no other adequate remedy available in the law." *Id.*

"As the respondent, the State may assert equitable defenses such as laches in opposing a habeas petition." *Lopez-Quintero*, 2019 WI 58, ¶ 16. "The application of laches to bar habeas petitions is well-established." *Id.* (citing *Coleman*, 290 Wis. 2d 352, ¶¶ 2, 19–25). "Although our courts have described the elements of laches in various ways, we concluded in *Coleman* that the three-element test described in some of our cases 'provides the better analytic framework for assessing a laches defense.'" *Id.* (citing *Coleman*, 290 Wis. 2d 352, ¶ 29). "Under *Coleman*, the elements of the defense of laches are: (1) unreasonable delay in filing the habeas petition, (2) lack of knowledge on the part of the State that the petitioner would be asserting the habeas claim, and (3) prejudice to the State." *Id.* (citing *Coleman*, 290 Wis. 2d 352, ¶¶ 28–29). "As the party asserting the defense, the State

bears the burden to raise and prove all elements of the defense." *Id.* Notably, none of these elements requires a court to consider the strengths or weaknesses of a petitioner's underlying claim. *See id.* ¶ 24.

In this case, Wren seeks to reinstate his direct appeal rights, alleging that he was denied effective assistance of counsel when his attorney failed to file a notice of intent. As this Court provided in *State ex rel. Kyles v. Pollard*, "[f]iling a notice of intent to pursue postconviction relief with the circuit court is a prerequisite to filing an appeal with the court of appeals. Thus, ineffectiveness that results in the failure to file that notice is akin to ineffectiveness involving the failure to commence an appeal." 2014 WI 38, ¶ 37, 354 Wis. 2d 626, 847 N.W.2d 805 (citation omitted).

B. This Court prohibited Wren from raising new issues on appeal, including Wren's new issue that laches does not apply to habeas proceedings.

Despite this Court's recent and unambiguous language in *Lopez-Quintero*, in his appellate brief Wren argues that "[l]aches is not a defense to a habeas corpus petition" absent a statute or rule. (Wren's Br. 18–19.) But when Wren petitioned for review with this Court, he did not raise this claim. In the State's response to Wren's petition for review, the State specifically pointed this out: "In his petition for review, Wren does not argue that laches does not apply to habeas proceedings. Nor did he [ever] make that argument at the court of appeals. Nor could he, without asking this Court to overturn over 30 years of precedent." (R-App. 102.)

Rather, the State noted, Wren argued in his petition that the State failed to *prove* laches and that the court of appeals improperly weighed the equities of its application. (R-App. 102.)

In this Court's order granting Wren's petition for review, it instructed Wren that he "may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court." (R-App. 117.) Wren ignored this Court's order. He now argues, for the very first time, that laches does not apply to habeas corpus proceedings. (Wren's Br. 18–19.) This Court's order specifically prohibited Wren from raising new arguments; it should not allow him to disregard it.

Should this Court nevertheless consider Wren's new issue, *Lopez-Quintero* and thirty-years of precedent reject it.

C. This Court should not overrule *Lopez-Quintero* and decades of precedent applying laches to habeas proceedings.

As indicated above, this Court stated several times in *Lopez-Quintero,* 2019 WI 58, that laches applies to habeas proceedings:

- "[H]abeas relief may be denied under the well-established doctrine of laches. . . ." *Id.* ¶ 10;
- "[T]he State may assert equitable defenses such as laches in opposing a habeas petition." *Id.* ¶ 16;
- "The application of laches to bar habeas petitions is well-established." *Id.*;
- "Under the doctrine of laches, it is the State, not the petitioner, who bears the burden to show laches should be applied to bar a habeas petition." *Id.* ¶ 21;
- "Lopez-Quintero's articulated reasons for his delay in filing his habeas petition are properly considered after the State's assertion of laches in response to the petition, not before." *Id.* ¶ 26;

- "Laches provides a process to balance the State's concerns regarding the prejudice it could suffer in being forced to respond to decades-old claims, as well as the State's interest in the finality of judgments, against the Great Writ's protection of constitutional rights." *Id.* ¶ 27;
- "Laches similarly provides the process to address the dissent's complaint that 'it did not take Lopez-Quitero ten years to figure out that no appeal was pending.'" *Id.* ¶ 27 n.16;
- "Consistent with our previous decision, Lopez-Quintero's habeas petition, or any other, may be barred if the State successfully argues laches." *Id.* ¶ 27; and
- "The equitable defense of laches exists to address any prejudice to the State caused by a petitioner's unreasonable delay in the filing of a habeas petition." *Id.* ¶ 29.

Considering this Court's recent position reaffirming decades-old precedent that laches applies to habeas proceedings, this Court should not overrule *Lopez-Quintero*.

"Adherence to stare decisis is crucial because '[r]espect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 138, 264 Wis. 2d 60, 665 N.W.2d 257 (quoting *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶ 29, 244 Wis. 2d 613, 628 N.W.2d 376). "Thus, [this Court does] not overturn precedent unless there is strong justification." *Id.* Wren fails to provide one.

Wren argues that the application of laches to habeas proceedings is "relatively recent," and that "laches was introduced into Wisconsin habeas corpus jurisprudence

anomalously by implicit adoption of a federal rule." (Wren's Br. 11, 13, 18.) According to Wren, because laches was introduced to this state via the adoption of a federal rule, this Court should hold that laches does not apply to habeas proceedings absent an authorizing statute or rule. (Wren's Br. 18–19.) Wren is incorrect.

Contrary to Wren's assertion, laches is an equitable common-law doctrine, not one based on a federal rule. Wisconsin case law first recognized that "a habeas proceeding may be dismissed under the equitable doctrine of laches" in *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 281, 392 N.W.2d 453 (Ct. App. 1986) (citing *Baxter v. Estelle*, 614 F.2d 1030, 1032–33 & n.2 (5th Cir. 1980); *Mayola v. Alabama*, 623 F.2d 992, 999 (5th Cir. 1980)), *abrogated on other grounds by Coleman*, 290 Wis. 2d 352. The *Mayola* court noted that "[a] petition for habeas corpus may be dismissed under the equitable doctrine of laches or its embodiment in rule 9(a) of the Rules Governing s 2254 Cases."[1] *Mayola*, 623 F.2d at 999. The *Baxter* court likewise noted that "[a] petition for habeas corpus may be dismissed if the petitioner's unreasonable delay in filing the petition has prejudiced the state in its ability to respond." *Baxter*, 614 F.2d at 1032. It noted the two origins for this rule: "This rule has traditionally been applied to habeas corpus petitions under the equitable doctrine of

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[1] Rule 9(a) governed dismissal of delayed applications for federal habeas corpus from 1976 until 1996. It read: "A petition may be dismissed if it appears that the state . . . has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." *See* Former Rule 9(a), of the Rules Governing § 2254 Cases. In 1996, Congress passed a strict one-year statute of limitations. 28 U.S.C. § 2244(d)(1).

laches, and it continues to apply under the provisions of Rule 9(a) of the Rules Governing s 2254 Cases." *Id.* at 1032–33 (footnote omitted).[2] So, laches has long applied to federal habeas petitions as an equitable common-law doctrine, not just pursuant to a federal rule.

Since *McMillian*, Wisconsin courts have continued to recognize that "a habeas petition under *Knight* is subject to the doctrine of laches because a petition for habeas corpus seeks an equitable remedy." *State v. Evans*, 2004 WI 84, ¶ 35, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by Coleman*, 290 Wis. 2d 352. The fact that Wisconsin has no statute or rule comparable to the federal rule does not matter because laches is an equitable common-law doctrine. And as reaffirmed several times in *Lopez-Quintero,* Wisconsin courts may apply the common-law doctrine of laches in determining whether to grant habeas relief. It is this common-law doctrine, rather than the federal rule, that applies to state

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[2] *See also* Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139, 151 (2013), providing that "even the [AEDPA] statute of limitations enacted by Congress has an equitable corollary in the long-honored equitable doctrine of laches." Hashimoto explained:

> Over time, courts of equity refined the laches defense to make it resemble closely the defense found in statutes of limitations. Of particular importance, equity courts looked to the statutes of limitations that would govern similar suits at law and then applied those limitations even without a showing of prejudice. In addition, state legislatures began to pass statutes of limitations for equity suits, and courts did not hesitate to apply them. AEDPA's one-year statute of limitations, although short, mirrors the equitable considerations that underlie the laches doctrine.

Id. at 155 (footnotes omitted).

habeas petitions in Wisconsin. Neither the Wisconsin Legislature nor this Court has abrogated the common-law defense of laches. Therefore, should this Court address Wren's new issue, it should reject Wren's request that this Court disregard decades of precedent by holding that laches does not apply to habeas proceedings.

Finally, Wren is arguing that laches should not apply to habeas cases "in the absence of [state] statute or rule." (Wren's Br. 19.) But Wisconsin courts have long held that a party can assert laches in other civil actions in the absence of a rule or statute.[3] So if Wren is right—that laches does not apply because this State has no statute or rule authorizing laches—then laches would never apply (and should have never applied) to *any* civil action in Wisconsin. This would upend decades of precedent.

The State now addresses the only laches claim that Wren pursued in both the court of appeals and in his petition for review with this Court.

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[3] *See Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, 312 Wis. 2d 463, 752 N.W.2d 889 (holding that a party can assert laches as a ground for discharge of a mortgage). As the *Zizzo* Court stated: "Laches is an equitable doctrine whereby a party that delays making a claim may lose its right to assert that claim. Laches is distinct from a statute of limitations and may be found where the statute of limitations has not yet run. It may be asserted against actions founded in both equity and law." 312 Wis. 2d 463, ¶ 7 (citations omitted). *See also Sawyer v. Midelfort,* 227 Wis. 2d 124, 159–60, 595 N.W.2d 423 (1999) (determining that the defendants did not meet all of the laches elements on the plaintiff's professional negligence claims); and *Schafer v. Wegner*, 78 Wis. 2d 127, 254 N.W.2d 193 (1977) (holding that an action to recover household furnishings awarded in a divorce judgment 16 years earlier was barred by the doctrine of laches); (Wren's Br. 13 ("In Wisconsin case law, the equitable doctrine of laches is longstanding.")).

D. The State proved all three elements of laches.

Wren argues that the State did not meet its burden in proving all three elements of laches. (Wren's Br. 19.) The court of appeals disagreed, and the circuit court's findings support that decision.

1. The State proved unreasonable delay.

The court of appeals concluded that the State demonstrated Wren unreasonably delayed in bringing his habeas claim. (Pet-App. 105, 107.) It determined that "[e]ven if trial counsel was unavailable to Wren and his family in the days and weeks after sentencing, as the circuit court found, we conclude that it was unreasonable for Wren to wait ten years to raise concerns about the fact that no notice of intent to pursue postconviction relief or appeal was filed." (Pet-App. 105.)

Wren disagrees and argues that the court of appeals erroneously "relied heavily on the decision in *Washington*," and that in doing so the court "ignored the factual findings of the circuit court which explain Mr. Wren's" delay. (Wren's Br. 20.) Wren is incorrect. The court's reliance on *Washington* was appropriate, and its ultimate conclusion that Wren's delay was unreasonable was supported by the circuit court's findings.

In *Washington*, the petitioner sought habeas relief, arguing that his postconviction counsel deprived him of his right to a direct appeal. 343 Wis. 2d 434, ¶¶ 13, 22. The court of appeals remanded for an evidentiary hearing; on remand, the circuit court made findings of fact. *Id.* ¶¶ 13–14. When the case returned to the court of appeals, it concluded that the petition was barred by laches. *Id.* ¶ 26. The court noted that

Washington waited over five years to bring his claim and that, during the interim, Washington filed other collateral claims:

> Despite Washington's awareness in September 2003 that Attorney Backes had not filed an appeal on his behalf (allegedly at Washington's request) and that the timeline for filing any such appeal had passed, Washington waited well over five years, until March 2009, to raise the issue with the court. In the interim, however, he brought three other collateral issues in the criminal case to the court's attention: a "motion for writ of certiorari, and ... for sentence credit" (capitalization omitted) in January 2007, a motion Washington identified as one for sentence modification in August 2008, and a motion for plea withdrawal in November 2008. In none of these filings did Washington mention the ineffective assistance of his appellate counsel or the denial of his right to an appeal. Under these circumstances, a five-year delay in alleging the denial of his appellate rights is unreasonable.

Id. ¶ 22 (footnote omitted).

After addressing the facts of *Washington*, the court of appeals here stated that its "conclusion that Wren unreasonably delayed in seeking relief is consistent with *Washington*." (Pet-App. 105.) In doing so, the court of appeals did not "ignore" the circuit court's findings. (Wren's Br. 20.) It noted that Wren testified at the fact-finding hearing that he became aware that no appeal had been filed on his behalf in 2010 or 2011. (Pet-App. 105.) The circuit court so found.[4] The court of appeals also noted that despite Wren's knowledge, he subsequently filed multiple *pro se* motions challenging his conviction, but he never raised a concern in any court about

[4] The circuit court found, "[s]ometime in 2010 or 2011, Wren concluded that Attorney Kostich had not filed an appeal." (R. 48:3.)

the lack of a direct appeal. The circuit court so found.[5] So, the court of appeals did not ignore the circuit court's findings; it *applied* them consistently with *Washington*.

Wren next asserts, "[o]nly when he learned that he could seek to reinstate his direct appeal did Mr. Wren finally file the petition at issue." (Wren's Br. 21; *see also* Wren's Br. 26 ("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.").) But the circuit court's findings, which Wren has never challenged as clearly erroneous, do not support this claim. Rather, the circuit court found that Wren knew by 2011 that no appeal had been filed. (R. 48:3.) And, that despite this knowledge, "Wren filed motions to the circuit court in 2010, 2011, 2013 and 2016 before filing his petition for *habe[a]s corpus*." (R. 48:4.) Applying the circuit court's findings, as the court of appeals did, Wren did not wait only "four months" to attempt to reinstate his appeal rights; he waited at least six years. Wren has not identified any finding that he did not learn he could reinstate his appeal rights only months before he filed his habeas petition.

In any event, Wren's unsupported claim about his lack of knowledge at most explains why he delayed in filing a habeas petition; it does not mean that his delay was reasonable. This Court in *Coleman*, for example, rejected the petitioner's argument that his delay in filing a habeas petition was reasonable "because he was without legal knowledge or financial means to hire another attorney." 290 Wis. 2d 352, ¶ 33. It noted that the petitioner had "made no showing of why he failed to attempt to bring his concerns before a court

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[5] The circuit court found, "Wren filed motions to the circuit court in 2010, 2011, 2013 and 2016 before filing his current petition for *habe[a]s corpus*." (R. 48:4.)

on a pro se basis, as so many incarcerated persons have." *Id.* ¶ 32. The *Washington* court similarly concluded that a delay in filing a habeas petition was unreasonable, despite the petitioner's claimed lack of knowledge and pro se status. 343 Wis. 2d 434, ¶ 23. The court reasoned that the petitioner had demonstrated his knowledge of postconviction procedure by filing several motions for collateral relief. *Id.* So too here. Because Wren filed several postconviction motions before filing a habeas petition, he should have been able to discover the legal basis for his habeas petition before he filed it. His alleged lack of legal knowledge does not make his delay reasonable. Were it otherwise, laches could very rarely, if ever, apply to a habeas petition.

Wren next cites to *Kyles*, 354 Wis. 2d 626, ¶ 56, to support his claim that he should not be denied the right to counsel and then be precluded from raising a claim because of errors resulting from the absence of counsel. (Wren's Br. 21.) *Kyles* is inapposite to Wren's case.

In *Kyles*, the petitioner filed a *pro se* habeas petition with the court of appeals seeking to reinstate his direct appeal rights immediately after he learned that the deadline for filing the notice of intent had passed. 354 Wis. 2d 626, ¶¶ 10–11. The court of appeals determined that it was not the correct forum, so Kyles—not sitting on his rights—filed a petition in circuit court. *Id.* ¶ 12. Kyles thereafter continued to seek to have his appeal rights reinstated in different forums until this Court determined that the court of appeals *was* the correct forum. *Id.* ¶ 38. This Court then addressed whether Kyles' petition was sufficiently pled to entitle him to an evidentiary hearing. *Id.* ¶ 46. This Court concluded it was sufficient. *Id.* ¶ 49. The issue of laches was never raised in *Kyles*.

Here, nothing, including the State or the courts, precluded Wren from seeking to have his appellate rights reinstated once he learned by 2011 that his direct appeal

rights had expired. Unlike the *pro se* petitioner in *Kyles*, who attempted to have his appellate rights reinstated right away, Wren did not attempt to reinstate his direct appeal rights in his circuit court filings in 2011, 2013, or 2016. He waited over six years to bring his claim.

Wren next argues that the court of appeals' reliance on *Washington* is misplaced because the petitioner in that case was older and "more sophisticated and capable than Mr. Wren." (Wren's Br. 22.) But the undisputed facts in Wren's case don't support this argument. First, Wren realized that Kostich had not filed an appeal in 2010 or 2011. (R. 54:55.) Wren was not a juvenile; he was 20 or 21 years old at this time. (R. 1:1.) Second, Wren testified at the fact-finding hearing that he filed numerous other claims in the circuit court *after* he arrived with this knowledge.

> Q. And yet on your behalf, in 2010 you filed a motion regarding the DNA surcharge, correct?
>
> A. Yes.
>
> Q. And in 2011 you filed a motion for reconsideration of your sentence, correct?
>
> A. Yes.
>
> Q. And in 2013 you filed a motion asking the Court to amend the judgement of conviction, correct?
>
> A. Yes.
>
> Q. An[d] in 2016 you filed a motion for sentence modification, correct?
>
> A. Yes.
>
> Q. So after finding out there was no appeal, you filed in the circuit court four separate motions, correct?
>
> A. Yes.

> Q. So at least six years passed before you filed the habeas corpus seeking to reinstate your appellate rights, correct?
>
> A. Yes.

(R. 54:56.) Thus, although Wren argues that he was too unskilled to present his current claim, the record shows that he was perfectly capable of availing himself of the court system.

Wren next argues that it was unfair for the court of appeals to penalize him for not seeking relief from that court when it was not clear until *Kyles* that the court of appeals was the correct forum to bring his claim. (Wren's Br. 24.) The court of appeals was "not persuaded" by Wren's argument (Pet-App. 107), nor should this Court be. As the court of appeals aptly determined, "[i]t is undisputed that Wren knew 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 failed to preserve his right to seek postconviction relief is unreasonable." (*Id*. (emphasis added).) So, while Wren asserts that 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" (Wren's Br. 23–24), Wren is wrong. The "premise" of the court of appeals' decision is that Wren, unlike the petitioner in *Kyles*, unreasonably waited years and years to pursue his claim in "*any* court." (Pet-App. 107 (emphasis added).) And in the same vein, while Wren belabors the circuit court's finding that Wren wanted to seek postconviction relief regarding ineffective assistance of counsel "but he did not know how to do so" (Wren's Br. 23, 26, 30), it is the court's next finding that shows Wren's delay was unreasonable: that even when he learned in 2010 or 2011 that Kostich had not filed an appeal, "Wren filed motions to the

circuit court in 2010, 2011, 2013, and 2016 before filing his petition for *habe[a]s corpus*." (R. 48:4.)

Wren's delay was unreasonable. The State bears no responsibility for his delay, and the record does not reflect any reasonable justification for his six-year delay in seeking his current habeas relief.

2. The State had no knowledge that Wren would bring this claim.

The parties have stipulated that the State was unaware that Wren would move to reinstate his appellate rights. (R. 54:4.) Wren does not contest this element. (Wren's Br. 19.)

3. The State proved prejudice.

Wren argues that "[t]he State's claim of prejudice is based solely on the unavailability of Attorney Kostich, who died in 2014." (Wren's Br. 27.) Wren is incorrect. The State's claim of prejudice is all about Wren's unreasonable six-year delay in pursing his direct appeal rights and the *consequences* of that delay.

But first, in *Lopez-Quintero*, this Court reaffirmed the principle that the State must not only allege prejudice, but also "prove a factual basis for it." 2019 WI 58, ¶ 22. The circuit court's factual findings support the court of appeals' decision that the State proved prejudice:

- "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."

- "Ultimately, with the assistance of people other than legal counsel, Wren filed motions to the circuit court in 2010, 2011, 2013 and 2016 before filing his petition for *habe[a]s corpus*."
- "Attorney Kostich passed away in 2014."

(R. 48:3–4.)

Wren's delay prevented the State from being able to defend against his ineffective assistance claim. Because Wren waited until 2017 to bring his current claim, as opposed to when he learned about it "in 2010 or 2011," the State was deprived of an opportunity to question Attorney Kostich about his representation of Wren, as well as his communications with Wren's family, during the relevant timeframe. Had Wren filed his habeas petition while Kostich was still alive and his memory was fresh, Kostich might have testified that Wren never told him to file a notice of intent. As the circuit court noted in its order:

- "[T]he evidence received and the record developed at the evidentiary hearing does not support a finding regarding whether Attorney Kostich sought to extend the deadline for filing a notice of intent to pursue postconviction relief and if not, *why not*."
- "[N]o evidence was received regarding any effort on [Kostich's] part to seek extension of the deadline for filing a notice of intent to pursue postconviction relief or reasons for failing to do so."

(R. 48:1 (emphasis added).)

In *Washington*, the court of appeals concluded that the State had established prejudice where trial counsel was unable to provide information about the decision not to pursue an appeal:

> The circuit court found that, because of the time that had passed, [trial counsel] no longer had any independent recollection of his representation of Washington and that the relevant case file was destroyed in 2005 or 2006. A finding that counsel cannot "recall or ... reconstruct what happened during his communications with [a defendant]; what [the defendant's] response was; and how they reached the ultimate decision not to appeal," is sufficient to establish prejudice.

Id. ¶ 25 (quoting *Coleman,* 290 Wis. 2d 352, ¶ 36) (ellipses and second two sets of bracketing supplied by *Washington).*

Similarly, the court of appeals in this case determined that the State was prejudiced by Wren's delay: "Because trial counsel passed away in 2014 and his files could not be located, the State was unable to gather from trial counsel information concerning Wren's interest in pursuing postconviction relief, such as what Wren and Wren's family members told trial counsel, whether trial counsel attempted to contact them, and why the standard form that was filed after sentencing indicated that Wren was 'undecided about seeking postconviction relief.'" (Pet-App. 108.) As the court of appeals concluded, "[t]his is sufficient to establish prejudice." (*Id.*)

But Wren argues that the factual issues in his case "are simple and straight-forward," and therefore the State was not prejudiced by Wren's delay. (Wren's Br. 27–28.) Namely, Wren argues that he presented "overwhelming evidence" that he informed Attorney Kostich that he wanted to appeal, and Kostich assured him that he would appeal. (Wren's Br. 28.) But the facts are not simple and straight-forward. The missing evidence from the hearing was testimony from Attorney Kostich. We do not know from Attorney Kostich what happened *after* he told Wren and his family at sentencing "not to worry because they would appeal." (R. 48:2.) We do not know, as the circuit court recognized, "whether [he] sought to extend the deadline for filing a notice

of intent to pursue postconviction relief and if not, *why not*." (R. 48:1 (emphasis added).) Kostich was not alive to answer to Wren's claims of ineffective assistance as the result of Wren's unreasonable delay in filing his habeas petition.

Because Wren waited several years and did not bring his habeas petition until after Kostich's death, the only evidence received at the fact-finding hearing came from Wren and Wren's family. The State could not ask Attorney Kostich about Wren's claims against him. The State could not put on any possible testimony from Kostich discussing his notes or his file. The State was prejudiced in its ability to respond to the *merits* of Wren's allegation of ineffective assistance of counsel as a result of the passage of time due to Wren's delay pursuing his habeas remedies. Wren's unreasonable delay prejudiced the State.

E. The court of appeals reasonably exercised its discretion when it balanced the equities and applied laches.

Because the court of appeals concluded that the State proved laches, it next weighed the equities and determined that laches should apply. Wren argues that the court of appeals' application of laches was "improper and inequitable." (Wren's Br. 30.) It wasn't.

"If the defense of laches is proved, whether to apply laches and dismiss the habeas petition is left to the discretion of the court of appeals." *Coleman*, 290 Wis. 2d 352, ¶ 17. This Court upholds a discretionary decision if it is reasonable and based on the relevant facts and law. *State v. Rhodes*, 2011 WI 73, ¶¶ 25–26, 336 Wis. 2d 64, 799 N.W.2d 850.

In its analysis, the court of appeals noted that "Wren waited over ten years to raise concerns about the lack of the appointment of postconviction counsel and a direct appeal, despite the fact that he sought relief numerous times from

the trial court." (Pet-App. 109.) It also stressed that "Wren knew by at least 2011 that he did not have a direct appeal." (*Id*.) Therefore, the court concluded that Wren's "failure to raise this claim in any court until 2017 was unreasonable and justifies the application of laches in this case." (*Id*.) The court of appeals in *Washington* relied on similar facts when it concluded that applying laches was equitable in that case. 343 Wis. 2d 434, ¶ 26.

Yet Wren argues that it was improper for the court of appeals to "h[o]ld Mr. Wren solely responsible for the delay in requesting reinstatement of his appeal." (Wren's Br. 30.) But it was Wren, and only Wren, who was responsible for the six-year delay. He "sat on his hands" (*Washington*, 343 Wis. 2d 434, ¶ 26) for at least six years after discovering that Kostich had not advanced his direct appellate rights. (R. 48:3.) What is more, instead of seeking reinstatement of his appellate rights, he filed multiple requests for collateral relief from his conviction during that time. (R. 48:4.)

To the extent that Wren is arguing that any delay on his part is imputed to the State under *Coleman v. Thompson*, 501 U.S. 722, 754 (1991) (Wren's Br. 31), he is mistaken. As Wren notes in his brief, *Coleman* provides, "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 federal habeas review entails." *Id.* So, under *Coleman*, a petitioner in a federal habeas proceeding can overcome a procedural default by proving that he received ineffective assistance of counsel. 501 U.S. at 753–54. *Coleman* does not help Wren for three reasons.

First, Wren's case is not a federal habeas proceeding, and the State is not asserting that Wren procedurally defaulted a claim. A federal habeas claim is procedurally

defaulted if (1) it wasn't fairly presented in state court or, (2) it was presented and the state courts rejected it on adequate and independent state-law grounds. *Coleman*, 501 U.S. at 735 & n.1. The federal procedural-default doctrine discussed in *Coleman* has no bearing here.

Second, there has *never* been a judicial determination as to whether Kostich was actually ineffective. No court has ever concluded that Wren proved (1) Kostich was deficient and, (2) Wren was prejudiced by the deficient performance. Wren's argument is circular: he posits that because Kostich was ineffective, the State cannot assert laches against his ineffective assistance claim. But this argument does not work because the laches doctrine "bypass[es] the merits of a claim." *Lopez-Quintero*, 2019 WI 58, ¶ 24; *see also Evans,* 273 Wis. 2d 192, ¶ 49 (noting that, "even if it is determined that appellate counsel was deficient, a claim of ineffective assistance of appellate counsel is subject to the defense of laches"), *abrogated on other grounds by Coleman,* 290 Wis. 2d 352. Because the laches doctrine bars Wren's claim of ineffective assistance, he cannot rely on the alleged *merits* of that claim to overcome the laches bar.[6]

Third, Wren cannot blame Kostich for Wren's own unreasonable, prejudicial delay. The Supreme Court in *Coleman* recognized that a federal habeas petitioner bears the burden of a procedural default that occurred when the state was not constitutionally required to supply him with counsel.

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[6] This conclusion would hold true even if federal habeas principles applied to Wren's case. In a federal habeas case, a petitioner cannot rely on a defaulted ineffective assistance claim to overcome the default of that very claim. *Costa v. Hall*, 673 F.3d 16, 25 (1st Cir. 2012) (citing *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000)).

501 U.S. at 754. Because there is no constitutional right to counsel in pursuing a "state habeas appeal," a petitioner must "bear the risk" of filing that action "late." *Id.* at 752–53. So, if the Supreme Court's decision in *Coleman* applies here, it shows that Wren must bear the burden of his delay in filing his state habeas petition.

In short, the State proved laches, and it would be inequitable to permit Wren's unreasonable long-delayed claim to proceed when he could have brought it years ago. Convictions must eventually become final. Wren's habeas claim could have and should have been raised years ago. The court of appeals properly determined that equities favor the application of laches in Wren's case.

CONCLUSION

This Court should affirm the court of appeals' decision denying Wren habeas relief based on the well-established doctrine of laches.

Dated this 9th day of July 2019.

Respectfully submitted,

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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 produced with a proportional serif font. The length of this brief is 7,727 words.

Dated this 9th day of July 2019.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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

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Dated this 9th day of July 2019.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin ex rel. Joshua M. Wren
v. Reed Richardson, Warden
No. 2017AP880-W

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 first names and last initials 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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SARA LYNN SHAEFFER
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