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

# REPLY BRIEF OF PETITIONER-PETITIONER

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## ARGUMENT

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

In his brief-in-chief, Mr. Wren explained why his habeas corpus petition, in conjunction with Judge Starks' factual findings, compel a conclusion that the failure of Mr. Wren's trial counsel to file a notice of intent as counsel had promised constitutes ineffective assistance of counsel. Brief 8-11. As a result, Mr. Wren was deprived of both direct postconviction proceedings and counsel in such postconviction proceedings.

The State did not in the Court of Appeals and does not in this Court challenge this claim. Rather, it seeks to interpose laches to avoid addressing the claim. The State thus does not contest the merits of Mr. Wren's petition, and elects to rely solely on laches.

### II. Laches should not preclude granting Mr. Wren relief

*1) Habeas Corpus and Laches*

In Mr. Wren's petition for review, the issue headings are precisely the same as in this brief. Thus, the issue concerning laches was phrased as above: "Laches

should not preclude granting Mr. Wren relief." Petition 9. The argument in the petition addressed this issue primarily by arguing that the State had not proved the elements of laches and failed to prove that equitable principles support applying laches to Mr. Wren. In his brief, Mr. Wren explored the origins of the application of laches to habeas corpus cases; this led to a further argument in support of this issue: laches should not preclude granting Mr. Wren relief because laches should not be a defense to a habeas corpus petition absent a statute or rule. Brief 11-19.

The State argues that by citing an alternate ground in support of the issue whether laches should preclude relief, Mr. Wren is thereby raising a "new issue." State's br. 10-11. He is not. The issue Mr. Wren argues is the same as he raised in his petition. The State seeks to expand this Court's order: "This Court's order specifically prohibited [Mr.] Wren from raising new *arguments*." State's br. 11 (emphasis added). This Court's order actually states that Mr. Wren "may not raise or argue *issues* not set forth in the petition." R-App 117 (emphasis added). Mr. Wren is arguing nothing more than is stated in the issue formulated in his petition: Laches should not preclude granting Mr. Wren relief.

As the State noted in its response opposing review, this Court "serves the primary function of 'law defining and law development.' *Cook v. Cook*, 208 Wis.2d 166, 188, 560 N.W.2d 246 (1997)." R-App. 106. This Court has reviewed the tests and elements of laches as applied generally in habeas corpus and (mostly) non-habeas corpus contexts. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶19-29, 290 Wis.2d 352, 714 N.W.2d 900. As the State notes, this Court recently made numerous references to applying laches in a habeas corpus context. State's br. 11-12, citing *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58. However, this Court has never considered how laches came to be a defense against habeas corpus petitions.

In the federal system, Justice Scalia explained that laches was never a defense against a habeas corpus petition under common law or equitable principles, and became a defense only by enactment of a rule in 1977. *Day v. McDonough*, 547 U.S. 198, 214-215 (2006) (Scalia, dissenting) (quoted in length in Mr. Wren's brief at 12-13). In Wisconsin, laches was first introduced in Wisconsin's habeas corpus jurisprudence in 1986 by reference to federal cases which, in turn relied on the

federal rule. *State ex rel. McMillian v. Dickey*, 132 Wis.2d 266, 281, 392 N.W.2d 453 (Ct. App. 1986). In response, the State argues that *McMillian's* recognition of laches as applicable in a habeas context is based not on a federal rule, but "'under the equitable doctrine of laches.'" State's br. 13, quoting *McMillian*. Indeed, the *McMillian* court may have believed it was merely applying an equitable doctrine. As the State points out, the two federal cases on which *McMillian* relied mention both the federal rule and the equitable doctrine. State's br. 13-14. However, neither of these cases cite to any prior case actually imposing *equitable* laches to bar a habeas petition. *See*, *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980); *Baxter v. Estelle*, 614 F.2d 1030 (5th Cir. 1980). The State cites no such case. This is understandable, as Justice Scalia suggests no such case exists. *Day v. McDonough*, 547 U.S.198, 214-215 (2006) (Scalia, dissenting). Equitable laches never applied to habeas proceedings in federal courts; laches came into use only after adoption of a federal rule.

The State suggests that no statute or rule should be necessary to impose equitable laches to habeas actions in Wisconsin, as equitable laches has a long history "in *other civil actions* in the absence of a rule or statute." State's br.

15 (emphasis added). Mr. Wren outlined the long history the equitable doctrine of laches in both federal and Wisconsin caselaw. Br. 11-13. However, this history simply does not include habeas cases. Habeas petitions and "other civil actions" should not be conflated, as habeas petitions arise from ancient practice, are enshrined in the Constitution, and address the greatest of stakes: a person's liberty:

> Often referred to as the "Great Writ," habeas corpus indisputably holds an honored position in our jurisprudence. Its roots spring from English common law, and its availability is guaranteed by the U.S. Constitution, the Wisconsin Constitution, and by state and federal statute.
>
> The Great Writ constitutes a bulwark against convictions that violate fundamental fairness. Founded on principles of equity, habeas corpus tests the right of a person to his personal liberty. The purpose of the writ is to protect and vindicate the petitioner's right to be free from illegal restraint. Its function is to provide a prompt and effective judicial remedy to those who are illegally restrained of their personal liberty.

*State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶¶12-13 (internal citations, brackets, and most quotation marks omitted).

Laches was introduced into Wisconsin habeas law supported only by federal cases which in turn relied on a federal rule. No Wisconsin appellate court has recognized or addressed this origin of laches in a habeas context. Prior to 1977 federal courts did not apply laches to habeas petitions, and this changed after that year only due to adoption of a federal rule. Wisconsin never addressed laches in a habeas petition context until 1986, by reference to federal law. Thus, Mr. Wren renews his assertion that laches should not apply to habeas petitions in the absence of any rule or statute authorizing laches as a defense.

*2) Laches application to Mr. Wren*

*A. Reasonableness of delay*

The State maintains that the Court of Appeals was correct in concluding 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.

State br. 16, quoting Pet-Apx. 105. The State further takes issue with Mr. Wren's assertion that in reaching this conclusion, the Court of Appeals ignored the factual

findings of the circuit court. State's br. 16, 17. In the course of so arguing, the State also disregards the findings of the circuit court.

The circuit court 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 assistant 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 in the circuit court in 2010, 2011, 2013 and 2016 before filing his petition for habe[a]s corpus.

Pet. Apx. 116-117; 48: 3-4 (emphasis added).

As the first emphasized finding shows, at the time he learned his trial counsel had filed no appeal, Mr. Wren did not know how to seek postconviction relief. While this is found as fact, the State dismisses this finding as a merely Mr. Wren's "unsupported claim about his lack of knowledge" (State's br. 18) and an "alleged lack of legal knowledge" (State's br. 19). The State similarly argues that because Mr. Wren filed *pro se* motions, "he should have been able to discovery the legal basis for his habeas petition before he filed it." State's br. 19. The finding of the circuit court amounts to a finding of Mr. Wren's

ignorance of what to do to seek postconviction relief. The State is thus suggesting that the mere passage of time or the filing of *pro se* motions should be expected to cure such ignorance. The State provides no method of determining how much time or how many *pro se* motions should suffice to cure ignorance and enlighten Mr. Wren as to how to seek postconviction relief.

The State further ignores the finding (the second emphasized phrase in the quote, above) that Mr. Wren had non-attorney assistance in filing his *pro se* motions. The State repeatedly cites these *pro se* filings without mentioning this assistance. State's br. 18, 20-21, 22. Only by ignoring this assistance could the State assert that the record shows Mr. Wren was "perfectly capable of availing himself of the court system." State br. 21.

Finally, the State disclaims any responsibility for the delay in Mr. Wren's filing his habeas corpus petition. State's br. 22. However, the delay has its inception in the failure of his appointed trial counsel to file a notice of intent after assuring Mr. Wren and his family members that he would do so. This failure deprived Mr. Wren of postconviction counsel. These failures must be attributed to the State. *Coleman v. Thompson*, 501 U.S. 722, 754, 115

L. Ed. 2d 640, 111 S. Ct. 2546 (1991). The State argues that because of its assertion of laches, this Court need not reach the merits of his ineffective assistance claim. State's br. 7-8. However, the ineffective assistance of trial counsel, and the resulting denial of postconviction counsel, both attributable to the State, also explain the reasonableness of the delay. State action (or inaction) is the seminal source of the delay. Of course, being deprived of postconviction counsel, Mr. Wren was at a disadvantage in seeking to vindicate any of his rights.

Thus, the delay was caused and precipitated by the ineffectiveness of trial counsel and the resulting deprivation of postconviction counsel. It continued due to Mr. Wren's legal ignorance, found as fact by the circuit court. The delay was not unreasonable.

*B. Prejudice to the State*

Mr. Wren asserted that "[t]he State's claim of prejudice is based solely on the unavailability of Attorney Kostich, who died in 2014." Pet. br. 27. The State labels this "incorrect" and argues that the State's claim of prejudice is all about the consequences of the delay in Mr. Wren pursuing his direct appeal rights. State's br. 22. The remainder of the State's argument shows this to be a

distinction without a difference. State's br. 22-25. The State's chief complaint is that it "could not ask Attorney Kostich about Wren's claims against him." State's br. 25.

The State suggests that if he were alive to testify, Mr. "Kostich might have testified that Wren never told him to file a notice of intent." State's br. 23. Of course, this would require that his testimony directly contradict the sworn testimony of Mr. Wren, his mother, his father and his sister who all testified that Mr. Kostich assured them he would file an appeal. Whether Mr. Kostich would admit or deny that Mr. Wren requested an appeal is a matter of conjecture.

The State disagrees with Mr. Wren's characterization of the factual issues underlying the claims in his habeas petition as "simple and straight-forward." State's br. 24. The issue is simply whether Mr. Wren asked Mr. Kostich to file an appeal. Mr. Wren presented evidence that he did request an appeal and Mr. Kostich promised him an appeal. If, as he asserts, Mr. Wren asked Mr. Kostich for an appeal, Mr. Kostich could have no strategic reason for not carrying out this "purely ministerial task." *Garza v. Idaho*, 586 U.S. 738, 745 (2019). The State's only possible defense would be to

establish that Mr. Wren did *not* request an appeal.

The State would have this court find it was prejudiced solely by the unavailability of Mr. Wren's trial counsel, and that for this reason he should be denied an opportunity to brief his claim of ineffective assistance of counsel. However, a defendant's ineffective assistance claim is not extinguished when the attorney becomes unavailable. In such circumstances the defendant whose counsel is unavailable must present corroborating evidence. *State v. Lukasik*, 115 Wis.2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). The requirement of corroboration may often defeat an ineffective assistance claim, as it did in *Lukasik* when the defendant was unable to produce evidence beyond his own testimony to support his claim. In contrast, Mr. Wren presented three corroborating witnesses to support his assertions that he requested an appeal and Mr. Kostich promised to file an appeal. The corroboration rule serves to protect the State from ineffective assistance claims based on nothing more than a defendant's testimony when trial counsel has become unavailable.

*C. Equitable considerations*

The State faults Mr. Wren actions both because he "'sat on his hands'" and because he "filed multiple requests for collateral relief." State's br. 26. It is true that upon learning he had no appeal, Mr. Wren did not immediately seek reinstatement on his direct appeal rights. As Judge Stark found, he did not know how to seek postconviction relief. Pet. Apx. 116-117; 48: 3-4. But he did, with the help of non-lawyer assistance, try to do *something* to seek relief: he filed collateral motions. This shows he wanted relief. Indeed, had he filed nothing else prior to filing his habeas motion, such *lack* of filings would tend support a conclusion that he unreasonably delayed seeking relief. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶32-33, 290 Wis.2d 352, 714 N.W.2d 900. To the extent he filed motions seeking collateral relief, Mr. Wren showed his desire for relief. To the extent he failed to file the "right" claim, reinstatement of his direct appeal, until he filed the habeas petition leading to this appeal, he merely shows his lack of legal acumen.

When discussing the equities of applying laches, the State's primary focus is on seeking to disclaim any responsibility of the State for Mr. Wren's situation, and on

seeking to distinguish *Coleman v. Thompson*, 510 U.S. 722, 111 S.Ct. 2546, 115 L.Ed. 2d 640 (1991). State's br. 26-28. Indeed, as the State asserts, *Coleman* is a federal habeas case with issues involving procedural default, while Mr. Wren's case is not. This has no bearing on Mr. Wren's equitable argument.

Mr. Wren was entitled to trial counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). He was entitled to effective assistance from his trial counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Wren was entitled to counsel to represent him in his first appeal as of right in state court. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). He was entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

The State provided Mr. Kostich to Mr. Wren as appointed trial counsel. 2: 1. Mr. Kostich performed deficiently by failing to effect and preserve Mr. Wren's right to appeal, and to counsel on appeal. The Circuit Court 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.

Pet. Apx. 116; 48: 3. Thus, Mr. Wren cited *Coleman v. Thompson* for the following proposition:

> 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.

510 U.S. at 754. The "claim" at issue is Mr. Wren's direct appeal, along with counsel for that appeal. This claim was "defaulted" by his appointed counsel's ineffectiveness in failing to initiate and appeal after Mr. Wren asked him to do so.

The State asserts this reasoning is circular, and counsel's ineffectiveness is an irrelevant consideration because laches bypasses the merits of the claim. State's br. 27. Indeed, laches does bypass the merits of a claim once it is proved and found equitable. Mr. Wren's claim is based on the failure of his state-appointed trial counsel. He would have no reason to file his habeas petition seeking

reinstatement of his direct appeal if his State-appointed trial counsel had not failed to file a notice of intent. To this claim the State seeks to interpose the equitable defense of laches. A party invoking equity must have clean hands, i.e., the party must not be guilty of substantial misconduct in regard to the matter in litigation. *Wisconsin Patients Compensation Fund v. St. Mary's Hosp.*, 209 Wis. 2d 17, 37, 561 N.W.2d 797 (Ct. App. 1997). *Coleman* directs that the State be responsible for the denial of effective assistance of counsel. Thus, equity weighs against interposing 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,

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John T. Wasielewski
Attorney for Joshua Wren

## FORM AND LENGTH CERTIFICATION

I hereby certify that this reply 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 2990 words.

_____
John T. Wasielewski

## 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