STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1720-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT JAMES POPE, JR.,

Defendant-Respondent.

ON APPEAL BY THE STATE OF WISCONSIN FROM A FINAL ORDER GRANTING A NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Did the trial court err when it ordered a new trial because of trial counsel's failure to preserve Robert Pope's right to a direct appeal and because, after the passage of two decades between his conviction and reinstatement of his direct appeal, the transcript of Pope's 1996 double-homicide trial could no longer be produced?

The trial court ordered a new trial because the trial transcript could no longer be produced. It rejected the State's argument that *State v. Perry,* 136 Wis. 2d 92, 401 N.W.2d 748 (1987), required Pope to make a threshold showing that he had one or more colorable claims for appellate relief.

This court should reverse because the trial court's decision is directly contrary to *Perry*.

2. Is Pope guilty of laches for not more diligently pursuing his right to a direct appeal after trial counsel failed to properly preserve it?

The trial court rejected the State's laches argument.

This Court should reverse because Pope let an unreasonably long period of time pass before he properly pursued his right to a direct appeal in 2014; the State did not acquiesce in the delay or cause the loss of the transcript; and any retrial now due solely to the lack of a trial transcript without any allegation of reversible error would be extremely prejudicial to the State and to the victims' families, who were blameless.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument, but would not oppose it if this Court believes the complexities of this case warrant oral argument.

Publication may be of benefit as to both issues raised by the State.

STATEMENT OF THE CASE

On May 31, 1996, a Milwaukee County jury found Robert Pope guilty of two counts of first-degree intentional homicide while armed, as a party to the crime. (R. 18:1–2.) Pope and four others – Derek Kramer, Israel Gross, Dax Reed, and Jennifer Radler (Pope's girlfriend at the time) – all plotted to murder Joshua Viehland for supposedly threatening another woman (Chapman) they all knew. The five carried out their plan on September 27, 1995, when they lured Viehland and his innocent companion, Anthony Gustafson, to a house on North Astor St. in Milwaukee. When the two young men arrived, they were ambushed and shot multiple times by Pope, Gross and Kramer with handguns and a shotgun. Both died at the scene. Jennifer Radler encouraged the shootings, drove the getaway car and helped Pope dispose of the shotgun. Dax Reed set up the fatal ambush with a phone call luring the unsuspecting victims to the Astor St. address. (R. 3, A-App. 109–15.)[1]

Gross and Pope were the only ones to go to trial. A jury took 25 minutes to find Gross guilty. (A-App. 149–53.) Gross and Kramer (who pled no contest to both counts, A-App.147–48), were each sentenced to life without parole (A-App. 156–58; 161). Radler pled guilty to both counts and was

[1] Included in the appendix are copies of newspaper articles from the *Milwaukee Journal Sentinel* regarding Pope's and his cohorts' cases written between October 5, 1995 and July 3, 1996. They were obtained from the archives of "newsbank.com." (A-App. 140–163.)

sentenced to life with parole eligibility in 25 years. (A-App. 154–55.) Reed pled guilty to one count of murder and was sentenced to life with parole eligibility set at 13.5 years. (A-App. 145–46; 161.) Unlike his cohorts, Pope was still at large when the criminal complaint charging him with the homicides was filed in late January of 1996. (A-App. 156–58.) He was finally arrested January 29, 1996, four months after the murders. (R. 1:1.)

The state's theory, as reflected in the police statements of his cohorts, was that Pope fired the first shot into Viehland's chest, his gun jammed, and the barrage from the other two shooters (Kramer and Gross) followed. (R. 3:3–7, A-App. 111-15.) Pope was sentenced to life without parole July 2, 1996. (R. 26; 80:39; A-App. 162–163.)[2]

Pope and his attorney signed a Wis. JI-Criminal SM-33 form at the close of sentencing advising Pope of his right to file a postconviction motion or an appeal, and on which Pope acknowledged that he had 20 days to file a formal notice of intent to pursue postconviction relief. (R. 25; 80:40.) Wis. Stat. § (Rule) 809.30(2)(b). That notice of intent would have triggered the procedures for obtaining the trial transcripts and for the appointment of counsel. § 809.30(2)(c)–(h). Pope checked the box on the form stating that he "intends to seek postconviction relief. The required notice will be timely filed by counsel." (R. 25.) Trial counsel assured the court that he would file the notice on Pope's behalf. (R. 80:40.) The notice had to be filed by July 22, 1996.

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[2] A *Milwaukee Journal/Sentinel* article printed July 3, 1996, the day after sentencing stated the following: "Robert Pope, who was recruited for the assault because of his ties with a violent street gang, fired just one shot before his semi-automatic pistol jammed, but his bullet was the first fired as he led the way for two other gunmen." (A-App. 162.)

Nothing was done within those 20 days. Nothing was done for more than fourteen months.

On September 16, 1997, fourteen-and-one-half months after sentencing, Pope filed in this Court a pro se motion to extend the time to file his notice of intent to pursue postconviction relief. (A-App. 116–19.) He offered no excuse for the delay. On September 25, 1997, this Court denied the motion because Pope failed to show good cause for not filing the motion of intent to pursue postconviction relief within 20 days of sentencing, or at any point in the intervening fourteen months. (R. 27, A-App. 120-21.)[3] In so holding, this Court assumed that trial counsel "failed to commence postconviction proceedings, despite [Pope's] instructions that he do so." (R. 27:1, A-App. 120.)

On October 15, 1997, Pope filed a Wis. Stat. § 974.06 postconviction motion in circuit court seeking to reinstate his appeal because Attorney Michael Backes was ineffective for not filing a notice of intent to pursue postconviction relief. (R. 28.) The circuit court denied the motion October 20, 1997 (R. 29), and Pope filed a notice of appeal November 5, 1997. (R. 33.) In an order issued December 8, 1997, this Court remanded to the trial court to determine whether Pope was entitled to waiver of transcript preparation fees. (R. 30.) On December 15, 1997, the trial court held on remand that Pope was not entitled to free transcripts because he "has not set forth an arguably

[3] This Court may extend the time to file a notice of intent to pursue postconviction relief only on a showing of "good cause." *State v. Harris,* 149 Wis. 2d 943, 946, 440 N.W.2d 364 (1989). *See* Wis. Stat. § (Rule) 809.82(2) (authorizing this Court to extend the deadline "for doing any act" either "upon its own motion or upon good cause shown by motion").

meritorious claim for relief." (R. 31:1.) On December 23, 1997, this Court issued an order notifying Pope that he had not timely filed a Statement on Transcript and directing him to do so within five days. (R. 32.) Pope filed a Statement on Transcript January 2, 1998. In it, Pope stated that the July 2, 1996, sentencing transcript "is the only transcript[ ] necessary to prosecute this appeal." (R. 34, A-App. 122.) Pope filed another Statement on Transcript January 20, 1998, stating: "All transcripts necessary are already on file." (A-App. 123.) Accordingly, the circuit court clerk transmitted along with the rest of the trial record the transcripts of both the preliminary and sentencing hearings. (R. 35:2; 78; 80.)

The appeal proceeded. Pope argued on appeal that the circuit court erred in denying his motion to reinstate his appeal. Pope notified this Court that he would voluntarily dismiss his appeal if it would reinstate his direct appeal rights. (R. 40:2.) On February 3, 1999, this Court issued an order denying an extension of time to file a direct appeal. (R. 40, A-App. 124–26.) Noting that it had already denied Pope this relief in September of 1997 for his failure to show good cause, it denied relief this time for the same reason:

> Now, sixteen months later, Pope again seeks an extension of that deadline. He again claims that trial counsel failed to follow his instructions. In now explaining his initial fifteen-month delay in seeking relief, Pope claims he was misinformed by a "jailhouse lawyer" as to the timetable for appeals. The court concludes that this explanation is simply insufficient and does not constitute good cause, especially when now coupled with an additional sixteen-month delay in offering this explanation. Further, Pope has failed to indicate in even the most cursory manner what issues he believes should be or could be raised in RULE 809.30, proceedings.

> Because Pope has not shown good cause for the extension he requests, the motion will be denied.

(R. 40:2, A-App. 125.) This Court gave Pope 10 days to decide whether he intended to voluntarily dismiss his appeal. It advised Pope that if he did not voluntarily dismiss the appeal by February 15, 1999, it would dispose of the appeal on its merits. (R. 40:3, A-App. 126.) Pope did not dismiss his appeal.

In an opinion and order issued March 5, 1999, this Court affirmed the trial court's order denying Pope's § 974.06 motion. (R. 36, A-App. 127–30.) It held that Pope "waived his right to appeal" by failing "to provide any reason for his fifteen-month delay before seeking § 974.06 relief." (R. 36:2, A-App. 128.) Pope never provided any explanation for failing to file the notice of intent after having been "properly advised of his appeal rights," which raised a presumption that he waived his right to appeal. Pope did not rebut the presumption with proof of "exceptional circumstances or good cause." Pope's claimed reliance on his attorney to file the notice of intent does not "explain why he waited for over a year before taking some action." (R. 36:3–4, A-App. 129–30.)

Pope filed a pro se petition for review March 8, 1999. On March 10, 1999, the Wisconsin Supreme Court dismissed the petition as untimely filed. (R. 37, A-App. 131.) The petition was untimely because, the Court held, it was nothing more than Pope's belated challenge to the court of appeals' September 25, 1997 order denying Pope's initial motion for an extension of time to file a notice of intent to pursue postconviction relief. "The petition should have been filed within 30 days of September 25, 1997. Reconsideration requests do not serve to extend that time indefinitely." (*Id.*) Pope filed another petition for review. The Supreme Court

again denied review June 7, 1999. (R. 42:2.) Nothing else happened for four years.

On June 20, 2003, Pope filed another Wis. Stat. § 974.06 motion in this Court again seeking an extension of time to file his notice of intent to pursue direct postconviction relief. (R. 41.) In this motion, Pope admitted that, "[t]hirteen months elapsed before Pope got concerned about his appeal and decided to write a letter of inquiry to the SPD office." (R. 41:2.) This Court summarily denied the motion on July 11, 2003, holding: "Now, Pope has returned to the court seeking the identical relief that was denied to him and reviewed in the prior litigation. This matter has been settled and will not be relitigated." (R. 42:2.) That is where this case stood for the next eleven years.

On July 21, 2014, 18 years after his sentence, Pope filed a *Knight* petition for a writ of habeas corpus[4] seeking to reinstate his direct appeal rights on the ground that his trial attorney was ineffective for not filing a notice of intent to pursue postconviction relief. (R. 43.) On March 9, 2015, this Court ordered the State to respond. (R. 45.) The State filed its response May 21, 2015. (R. 44.) . On September 23, 2015, Pope's trial attorney Michael Backes filed an affidavit in support of Pope's motion. (R. 47.) Backes stated that he could not recall the details of his representation of Pope and was unable to locate his case file. (R. 47:1.) Backes insisted that it has always been his practice to respond to every letter written by his client, or by anyone else regarding a client. Backes added that it was "inconceivable" that he would not have responded to a letter from Pope. (R. 47:2.) Backes located one letter written by him to Pope on

[4] *State v. Knight,* 168 Wis. 2d 509, 484 N.W.2d 540 (1992) (setting forth the procedure for challenging the effectiveness of appellate counsel).

December 28, 2006, in response to a letter from Pope, discussing a visit they had at Green Bay Correctional Institution during which Backes advised Pope he had "no specific recollection" of an issue Pope raised, and advising Pope the "case was so old that the file was shredded" recently. (R. 47:1, 3.) Backes stated in that 2006 letter to Pope that he could not recall whether or not he filed the notice of intent to pursue postconviction relief, and it is "possible" he did not but, "I noted to you that the filing of the notice is standard and is something we most certainly would have normally done the very same day of sentencing." (R. 47:3.) Backes also explained that had Pope raised the issue closer to sentencing, "I would have had a much better memory of the entire matter and, again, would have cooperated fully with insuring that your appellate rights were preserved." (R. 47:4.)

On November 13, 2015, this Court remanded to the circuit court for a fact-finding hearing to explore with Backes why a notice of intent was not filed. Counsel was appointed for Pope. (R. 48.) The fact-finding hearing, at which Attorney Backes and Pope both testified, was held April 1, 2016. (R. 79.) Backes could not recall much of anything and he said he shredded his case file years earlier. Backes insisted, however, that his usual practice was to immediately file a notice of intent with the clerk either in person or by mail and he would have done so here, given that this was a murder conviction. (R. 79:7–14.) Pope testified that he told Backes to file for postconviction relief and tried to contact him after he failed to file it to no avail. (R. 79:36–44.)

The trial court (Honorable J.D. Watts, presiding) issued Findings of Facts May 16 and June 28, 2016. (R. 56, 57, A-App. 132–34.) Judge Watts found as facts that Pope wrote two letters from jail asking Backes to file a notice of intent shortly after sentencing, Pope's testimony about his efforts to contact Backes "was credible," there was no

evidence that Backes received those letters, Pope "has been acting pro-se attempting to reinstate his appellate rights since 1996," and there was no evidence that Backes filed a notice of intent. (R. 56, 57, A-App. 132–34.) Based on those findings, the State and counsel for Pope stipulated on August 16, 2016, that Pope's direct appeal rights should be reinstated. (R. 60; A-App. 135–137.) Accordingly, on September 29, 2016 (misdated 2015), this Court ordered that Pope's direct appeal rights be reinstated. (R. 62; 63; A-App. 138–39.)

On March 7, 2017, nearly 21 years after his conviction, Pope finally filed his motion for direct postconviction relief pursuant to Wis. Stat. § (Rule) 809.30. (R. 64.) Before doing so, Pope's appointed counsel discovered that: (a) no trial transcripts had ever been ordered and prepared; and (b) the trial transcripts could not be prepared at this time because the reporters' notes were destroyed. (R. 64:4–5.)[5] Pope moved for a new trial due to the lack of transcripts. (R. 64:5–9.) The State, in reliance on *State v. Perry,* 136 Wis. 2d 92 (1987), opposed the motion. It argued that Pope failed to show as required by *Perry* that he had any colorable claims of reversible error that the missing transcripts might have supported. (R. 68:1–2.) The State also argued that his new trial motion was barred by the equitable doctrine of laches. (R. 68:2.)

The trial court, the Honorable Jeffrey A. Conen now presiding, rejected the State's arguments and ordered a new trial at a hearing held July 19, 2017 (R. 81:20–24, A-App. 103–07.) The court issued a written order to that effect

[5] Even though court records in Class A felonies must be kept 75 years, SCR 72.01(15), court reporters need only retain their trial notes for ten years. SCR 72.01(47).

July 21, 2017. (R. 74, A-App. 101.) The State appeals. (R. 75.)

INTRODUCTION

Pope did not file his Wis. Stat. § (Rule) 809.30 motion for direct postconviction relief until nearly 21 years after his conviction in 1996. It was only then the parties learned that the court reporters destroyed their trial notes in 2006, as allowed by law. The trial court awarded Pope a new trial simply because the transcript can no longer be produced.

1. The trial court erred as a matter of law in granting automatic reversal based only on the absence of a trial transcript. It did not require Pope to make the threshold showing that he has one or more colorable claims of reversible error the transcript might have sustained. *Perry,* 136 Wis. 2d at 101, 103, 108. The record shows that Pope would have no colorable claims even if there were a transcript.

This court should reverse and reinstate the conviction. In the alternative, this Court should reverse and remand to give Pope the opportunity to show he has one or more colorable claims of reversible error.

2. Pope is guilty of laches. He waited far too long to let anyone know he intended to pursue direct postconviction relief. He never did provide a legitimate excuse for seeking three retroactive extensions of time to file a notice of intent to pursue postconviction relief between 1997 and 2003. He did not properly challenge until 2014 the effectiveness of trial counsel for not filing a notice of intent.

The State did not acquiesce in Pope's delays. It reasonably believed postconviction review was finished in 1997, in 2003, and for 11 years thereafter. Because nothing was pending between 2003 and 2014, the court reporters lawfully destroyed their trial notes in 2006.

The State will be greatly prejudiced if Pope is awarded a new trial without even alleging error. The State is blameless as is the trial court. Equally blameless are the court reporters and the victims' families. The equities weigh heavily in favor of the State. This court should reverse outright.

STANDARDS FOR REVIEW

1. The trial court's decision whether to grant a new trial due to the lack of a transcript is discretionary. Its decision will be upheld on appeal "if due consideration is given to the facts then apparent, including the nature of the claimed error and the colorable need for the missing portion–and to the underlying right under our constitution to an appeal." *Perry,* 136 Wis. 2d at 109. A trial court erroneously exercises its discretion when it commits an error of law or does not base its decision on the facts in the record. *E.g., State v. Raye,* 2005 WI 68, ¶ 16, 281 Wis. 2d 339, 697 N.W.2d 407.

2. The State bears the burden of proving laches. *State ex rel. Coleman v. McCaughtry,* 2006 WI 49, ¶ 25 n.10, 290 Wis. 2d 352, 714 N.W.2d 900. The issues whether the delay was unreasonable, whether the State acquiesced in the delay, and whether the State suffered actual prejudice from it are questions of law based on the facts. *Coleman*, 290 Wis. 2d 352, ¶ 17. If laches is proven, the decision whether to deny relief to Pope for that reason is left to the discretion of this Court. *Id*.

ARGUMENT

I. The trial court erred in awarding Pope a new trial without the requisite threshold showing of a colorable claim for relief on appeal.

A. The showing required for a new trial due to the inability to produce trial transcripts for appeal.

Wisconsin law is clear that when all or part of the trial transcripts cannot be reproduced, the defendant is entitled to a new trial, but only after making a threshold showing that he has one or more colorable claims for relief that the transcript might sustain. *Perry,* 136 Wis. 2d at 101, 103, 108; *State v. DeLeon,* 127 Wis. 2d 74, 80, 377 N.W.2d 635 (Ct. App. 1985). "[C]ommon sense demands that the appellant claim some reviewable error occurred during the missing portion of the trial. Obviously, the trial court need not conduct an inquiry if the appellant has no intention of alleging error in the missing portion of the proceedings." *DeLeon*, 127 Wis. 2d at 80.

"The claim should be more than frivolous and the lacunae of the record should be of such substance as to lend credence to the claim that error was arguably prejudicial had the missing segment been produced." *Perry*, 136 Wis. 2d at 108. *See State v. Raflik,* 2001 WI 129, ¶ 40, 248 Wis. 2d 593, 638 N.W.2d 690 ("[T]he appellant has the burden to demonstrate that there is a 'colorable need' for the missing portion of the record. … The appellant is not required to show prejudice, but the error cannot be so trivial that it is clearly harmless."). The defendant must show a "colorable need" even when a significant portion of the transcript is missing because a per se reversal rule "would lend itself to manipulation." *Perry,* 136 Wis. 2d at 105 n. 5.

The defendant must "assert that the portion of the transcript that is missing would, if available, demonstrate a 'reviewable error.'" *Id.* at 101 (quoting *DeLeon,* 127 Wis. 2d at 80). A "reviewable error" is "a facially valid claim of error"; an error that "were there evidence of it revealed in the transcript, might lend color to a claim of prejudicial error." *Id.*

Only after this threshold showing of "reviewable," or "colorable" and arguably prejudicial error is made by the defendant does the court next determine whether the proceedings can be reconstructed without the transcript. The court looks to a number of factors including: the nature of the case, "the nature of the claim of error," *Raflik,* 248 Wis. 2d 593, ¶ 38, citing *Perry,* 136 Wis. 2d at 98, along with "the length of the missing portion in relation to the entire transcript, the time lapse from trial to the discovery of the hiatus in the record, and the availability of witnesses and counsel to reconstruct the record." *Perry,* 136 Wis. 2d at 101. "If the court determines that efforts to reconstruct will be insurmountable, then a new trial should be ordered." *Id.* at 116 (Ceci, J., dissenting).

B. Pope is not entitled to automatic reversal.

The trial court erroneously exercised its discretion because it erred as a matter of law when it ordered a new trial without requiring Pope to show some "reviewable error." The law plainly required Pope to show a colorable claim for relief that the transcript, or portions of it, would support. Pope only alleged that the trial transcript was not prepared, therefore he gets a new trial. He did not allege any likelihood that the missing transcript would show an arguably prejudicial error occurred. The trial court erroneously did not require Pope to make that threshold showing, directly contrary to *Perry* and its progeny. *Id.* at 103.

The trial court erroneously read *Perry* to require automatic reversal when the entire transcript is missing.[6] There is no such exception. In *Perry,* the "colorable claim" requirement applied even when a "significant portion" of the trial transcript was missing. 136 Wis. 2d at 96. The *Perry* Court expressly rejected an automatic reversal rule because it "would lend itself to manipulation." *Id.* at 105 n.5. That is the case here: Pope wants to be awarded a new trial more than two decades after his conviction even though he has never articulated any arguably meritorious claim for relief.

The *Perry* Court's rejection of an automatic reversal rule, and its requirement that the defendant allege that a specific, arguably prejudicial error occurred, is consistent with the rule in most jurisdictions. *E.g., Knoll v. Allstate Fire and Casualty Insurance,* 216 P.3d 615, 617–18 (Colo. App. 2009) (and cases cited therein); *Bradley v. Hazard Technology Co., Inc.,* 340 Md. 202, 665 A.2d 1050, 1054–55 (Md. App. 1995) (and cases cited therein). The trial court should require the defendant to "assert specifically what errors occurred at" trial. *Hazard Technology,* 665 A.2d. at 1055. The defendant must "demonstrate to the circuit court that the missing portion" of the transcript is relevant to the specific errors identified. *Id.* If the trial court determines that the missing portions of the transcript are "material to"

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[6] The entire transcript is *not* missing. The preliminary hearing and sentencing transcripts have always been in the record. (R. 78; 80.) The sentencing transcript must be prepared and filed in every case, with a free copy served on the prisoner. SCR 71.04(5)(a). So, this Court *can review* any claim raised by Pope related to the preliminary hearing and sentence. Indeed, on his 1998 appeal, Pope told this Court that only those transcripts were necessary. (R. 34; A-App. 122–23.) Pope does not claim that any error occurred at the preliminary hearing or at sentencing.

the specific errors identified, the defendant "must make diligent efforts to reconstruct the missing portions of the record through the use of affidavits and stipulations with the opposing party." *Id.* If that can be done, "the appeal should proceed on that record." *Id.*

Pope merely wants to review the transcript now to see whether any colorable claims exist. The defendant in *Perry* wanted to do the same but the Court required him to make a showing of one or more "colorable" claims for relief that would have been sustained by the missing "significant portion" of the trial transcript. He did so. Perry "alleged prosecutorial misconduct, the existence of which could be determined only from a complete record, which would include the closing arguments of the prosecutor." *Perry,* 136 Wis. 2d, at 103. It behooved Pope to identify one or more colorable claims at some point in the 21 years since his conviction. He has not done so.

The trial court erroneously exercised its discretion because it erred as a matter of law in reading *Perry* to require automatic reversal whenever the trial transcript cannot be produced. Because Pope did not identify any colorable claims for relief in the proceedings below, or at any time in the 21 years since his trial, this Court should reverse and reinstate the conviction.

C. Pope has no colorable claims even assuming some or all of the trial transcripts could have been produced.

This court could remand to give Pope the opportunity to specify colorable claims for relief that the transcript might sustain. That would be a needless exercise because the record as it exists, even without the transcript, shows that there are no arguably meritorious claims available to him.

Claims such as insufficient evidence to convict and erroneous exercise of sentencing discretion come immediately to mind. Those claims are routinely taken up and considered by this Court on direct no-merit appeals under Wis. Stat. § (Rule) 809.32. The record plainly shows that those claims would be meritless, i.e., not "reviewable" or "colorable."

Two of Pope's cohorts (including his girlfriend at the time) confessed and pointed the finger directly at Pope as a key participant in the planning and execution of the murders. Pope could not overturn the jury's verdict unless he proved that their testimony was inherently or patently incredible in that it conflicted with the laws of nature or with established or conceded facts. *State v. Tarantino,* 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

The extraordinarily aggravated and cold-blooded nature of these murders almost demanded the sentence of life without parole in the reasonable exercise of the trial court's sentencing discretion. The trial court thoroughly exercised its discretion after considering all relevant factors. (R. 80:26–39.)

The record is sufficient for Pope to challenge his sentence and preliminary hearing, as those transcripts are in the record. Pope can also try to challenge the effectiveness of his trial attorney on remand in a belated *Machner* hearing, but it will be difficult for him to overcome the presumption that attorney Backes performed competently at trial given that Backes cannot remember much of anything. *See State v. Lukasik,* 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). In short, there would be no colorable challenges to the sufficiency of the evidence, to the sentence, or to the effectiveness of trial counsel at this late date.

1. The record is sufficient to show that Pope would have no colorable claim of reversible error even with a transcript.

Pope has not identified any colorable claims of reversible error. That is not due to the lack of a transcript, but due to the lack of any conceivable reversible error. Despite the lack of a transcript, it is relatively easy to demonstrate how the trial testimony likely unfolded and why there are no colorable claims for relief that a full transcript arguably would have sustained. There is nothing to indicate that the State's witnesses were incredible as a matter of law. Their testimony was strongly corroborated by each other's police statements and by the physical evidence. There is nothing to indicate that there was any defect in the chain of custody of the bodies or of any other evidence recovered at the scene and later examined.

The witnesses who testified at trial are listed in the trial docket prepared in 1996. (R. 1:5–7.) Detectives Timothy Koceja and Michael Dubis both testified for the State at trial. According to the criminal complaint filed in 1995, both detectives responded to the scene of the shooting. (R. 3:2.) Koceja recovered 15 spent .9 millimeter cartridge casings, a spent 12-gauge shotgun shell casing, two live shotgun shells of the same make and size as the spent casing, and various spent bullet parts. (R. 3:2.) Koceja also gave detailed testimony at the preliminary hearing as to his observations of the victims' catastrophic injuries and the evidence he collected at the scene. (R. 78:4–8.) Koceja confirmed that he was present when the medical examiner pronounced both victims dead at the scene and Koceja asked that the bodies be transported to the medical examiner's office, which was done in his presence. (R. 78:7.)

Off-duty Deputy Sheriff John Davis testified for the State at trial. According to the complaint, Davis recovered a

shotgun from the Milwaukee River below the Locust Street Bridge on September 27, 1995. The shotgun was turned over to Detective Dubis who transported it along with the spent shotgun shell casings to the State Crime Laboratory. (R. 3:2.) State Crime Lab firearms and toolmark expert Reginald Templin testified for the State at trial. According to the complaint, Templin determined that the spent shell casing was fired from the same shotgun recovered by John Davis from the river. (R. 3:2.)

Milwaukee County Medical Examiner Jeffrey Jentzen testified at trial. According to the complaint, he pronounced both victims dead at the scene. (R. 3:2.) Jentzen performed the autopsy on Joshua Viehland and determined the cause of death to be "exsanguination and cerebral injuries due to a shotgun wound to the face and two shotgun wounds to the chest." (R. 3:2.) Assistant Milwaukee County Medical Examiner K. Alan Stormo testified for the State at trial. According to the complaint, Stormo performed the autopsy on Anthony Gustafson and determined the cause of death to be "exsanguination and cardiac destruction due to multiple gunshot wounds" from both a shotgun and handgun. (R. 3:2.) Dr. Stormo gave similar testimony at the preliminary hearing regarding the autopsy performed by him on Gustafson, and the autopsy performed by Dr. Jentzen on Viehland. (R. 78:17–21.) Detective Jerome Koszuta did not testify at trial, but the parties stipulated to what his testimony would have been and he was excused. (R. 1:5.) According to the complaint, Koszuta attended both autopsies and was informed of the causes of death. (R. 3:2.)

Pope's accomplice and girlfriend at the time, Jennifer Radler, testified for the State at trial. Her lengthy statement to Milwaukee Detective Lewandowski, who testified, and to Detective Spingola, who did not, implicating Pope in the planning and execution of the murders is set forth fully in the complaint. (R. 3:5–7.) Radler explained

that she was angry with Viehland who supposedly threatened a friend. She said Dax Reed, who testified for the State at trial, telephoned the victims to lure them to a residence on Astor Street where they would be ambushed. Radler drove the others to the scene, dropped them off, and waited a short distance away. (R. 3:5–6.) When the men returned to her car after the shooting, she described how Pope "was all excited and was breathing very heavily." She described how Pope said his gun "jammed after he fired the first shot into the chest of one of the people." Pope said he thought they had "killed them." (R. 3:6.) According to Radler, Israel Gross told her and Pope to get rid of the shotgun. Pope suggested throwing it into the Milwaukee River near the Locust Street Bridge, which is what they did. "Pope took the gun out of a black gym bag and threw it in the water." (R. 3:6.) Radler dropped Pope off at his home on North 16th Street. The next day, Pope told Radler he was worried about Dax Reed, the "weak link," and he might have to "take care of" Reed. (R. 3:6–7.) Radler described how Pope re-enacted his role in the shootings. She said Pope was "glad" the victims were both dead so they could not identify anyone, and he "did not care who died because he didn't know the people that they shot anyway, and he could give two shits." (R. 3:7.) Both Radler and Israel Gross (who did not testify) said in their statements to Detectives Lewandowski and Spingola that Dax Reed set this up with a telephone call luring the unsuspecting victims to the Astor Street address. Reed telephoned Jesse Letendre, who they all thought would accompany Viehland, and their shared intent was to kill both Viehland and Letendre (R. 3:2–3, 4, 5–6.)

Dax Reed testified for the State at trial. He confirmed his role and Pope's involvement in the planning as described by the others. Reed was not present at the shootings. His

only job was to make the telephone call to lure the victims to their deaths.[7]

Pope testified in his own defense. (R. 1:7.) He put on no other witnesses.[8]

It is difficult to imagine how Pope could possibly poke holes in the testimony of the State's witnesses, assuming it was similar to what was alleged in the complaint and to the testimony of those who were called at the preliminary hearing. One does not need a transcript to conclude that the

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[7] In his statement, Gross, who did not testify at trial, confirmed that Pope fired the first shot and his gun then jammed. (R. 3:3.) Gross said he told Radler to throw the shotgun into the river. The next day, Radler told Gross that she did so. (R. 3:3–4.) Derek Kramer also did not testify at trial, but his statement to police also appears in the complaint. He confirmed that Dax Reed telephoned Letendre to lure him and Viehland to the Astor Street house to shoot them both, Pope was armed with a Glock .9 millimeter handgun, Pope fired the first shot, Radler was to dispose of the shotgun, and they all "discussed an alibi and what they would tell the police." (R. 3:4.) It is not clear whether either Gross or Kramer would be available to testify at a retrial.

[8] One person who testified at the preliminary hearing but not at trial was Roderick McGinnis, a jailhouse informant. McGinnis was in custody with Pope on February 2, 1996, when Pope told him that he, two "white guys," and a white girl named "Jennifer" planned to rob the victims of marijuana and money, they waited in the "bushes or something," some "white guys" came up and "they just started shooting them and shit." (R. 78:11–12.) Pope told McGinnis that he had a Glock .9 millimeter handgun and another guy had a 12-gauge shotgun. They ran to the car after the shooting and left. (R. 78:13.) Pope told McGinnis that they threw the gun into the river and this happened in September of 1995. (R. 78:13–14.)

evidence was sufficient for a rational jury to find Pope guilty as a participant in the planning and execution of the murders. *State v. Poellinger*. 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Even assuming Pope could imagine one or more colorable claims of error, the State would have a compelling harmless error argument in light of this overwhelming evidence of guilt.

2. Any ineffective assistance challenge would fail because Pope could not prove prejudice even assuming deficient performance.

Pope mentioned possible ineffective assistance claims in his 2014 *Knight* petition. (R. 43:18–24.) He claimed that Attorney Backes was ineffective for not calling alibi witnesses from his family and for revealing to the jury during Pope's testimony that he was a gang member. The claims are conclusory and undeveloped.[9] Pope does not

[9] Radler apparently testified at Pope's trial that she recruited him because he was a gang member. As shown at sentencing, Pope was indeed affiliated with gangs for 10 years. (R. 80:5–6; A-App. 159, 162–63.) Unless Pope was willing to deny under oath that he was a gang member, or had independent proof that he was not a gang member, it is hard to see how his acknowledgment of gang membership during his own testimony was prejudicial in light of Radler's testimony. An alibi defense likely would have gone nowhere because both Radler and Reed included Pope in the planning and execution of the murders, and Pope offers no reason for them to falsely accuse him after they admitted their own guilt and truthfully accused each other; accusations that were all strongly corroborated by the physical evidence. Also, the State would show at a retrial that Pope had plenty of time in the four months he remained at large after the shootings to concoct a phony alibi.

explain what went wrong. Presumably, their strategic discussions about whether to call alibi witnesses and whether Pope should reveal his gang-member status during his testimony were discussed outside of court and not on the record, so a trial transcript would be of little help in addressing those issues.

Pope will not be able to prove deficient performance because Attorney Backes does not recall anything about the case and he shredded the case file long ago. *See Lukasik,* 115 Wis. 2d at 140 (If the attorney whose performance is challenged cannot appear to testify "because of death, insanity or unavailability for other reasons, then the defendant should not, by uncorroborated allegations, be allowed to make a case for ineffectiveness. The defendant must support his allegations with corroborating evidence."). Attorney Backes' loss of memory about the trial is due to the passage of two decades since it occurred, and not to the destruction of the court reporters' notes ten years after trial. Pope's uncorroborated challenges to his performance would not carry the day on remand. *See State v. Robinson*, 2009 WI App 141, ¶ 24, 321 Wis. 2d 477, 774 N.W.2d 476 (Table), 2009 WL 2498297 (authored opinion cited for persuasive value) ("Here, however, no *Machner* hearing was possible because Robinson's trial attorney had passed away before Robinson's postconviction and appellate rights were reinstated.")

Pope will not be able to prove prejudice because the evidence of his guilt was overwhelming. Alibi testimony from family members and his silence about, or denial of, gang membership would not have created a reasonable probability of a different outcome.

This Court should, therefore, reverse and reinstate the conviction.

D. Requiring Pope to show a colorable claim for relief does not deny him the right to a direct appeal.

Pope will argue that denying him a new trial effectively denies him the right to a direct appeal. Pope has the right under the Wisconsin Constitution to a direct appeal. *Coleman,* 290 Wis. 2d 352, ¶ 16; *State ex rel. Flores v. State,* 183 Wis. 2d 587, 604 n. 3, 516 N.W.2d 362; *Perry,* 136 Wis. 2d at 98. Pope has the right under the United States Constitution to the effective assistance of counsel on that direct appeal. *Flores,* 183 Wis. 2d at 605, citing *inter alia Evitts v. Lucey,* 469 U.S. 387, 396–97 (1985).

Pope's argument lacks merit because his right to a direct appeal *was reinstated* upon stipulation of the parties. (R. 60; 62; 63.) But, it has been reinstated with the appellate record as it is 21 years after conviction. The content of the appellate record, regardless when he litigates the direct appeal, is Pope's responsibility. *State v. Smith*, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972); *State v. Dietzen*, 164 Wis. 2d 205, 212, 474 N.W.2d 753 (Ct. App. 1991); *State ex rel. Cox v. Dep't of Health and Social Services*, 105 Wis. 2d 378, 383 n.4, 314 N.W.2d 148 (Ct. App. 1981). Pope did not pursue the proper avenue for relief for reinstatement of his direct appeal, a *Knight* habeas corpus petition, until 2014. This resulted in reinstatement of his right to a direct appeal, but it was long after the court reporters lawfully discarded their notes that they were only required to keep until 2006, and long after Attorney Backes shredded his file and forgot almost everything about this case. Pope now has the right to litigate a direct appeal, but it is with a record that is limited because he waited so long to pursue the proper avenue for relief.

The State asks this court, assuming it is disinclined to reverse and reinstate the conviction outright, to instead remand to the trial court (1) to give Pope the opportunity to

identify colorable claims for relief, *Perry*; and (2) assuming one or more of his challenges is to the effectiveness of trial counsel, for a belated *Machner* hearing.

This will be an uphill battle for Pope due to the passage of all this time, but that is entirely Pope's and his attorney's fault. Pope has the right to a direct appeal, it is has been reinstated, but he must prosecute that direct appeal with the appellate record as it exists, and with the memories of witnesses as they are, now 21 years after conviction. *Robinson,* 321 Wis. 2d 477, ¶ 25.

II. Pope's new trial motion is barred by laches.

A. The equitable doctrine of laches.

The equitable doctrine of laches recognizes that a party should not be heard if he failed to assert his right for an unreasonable length of time or lacked diligence in discovering and asserting that right, thereby placing the other party at a disadvantage. *E.g., Flejter v. Estate of Flejter,* 2001 WI App 26, ¶ 40, 240 Wis. 2d 401, 623 N.W.2d 552. The elements of laches are: (1) unreasonable delay; (2) lack of knowledge of or acquiescence in the course of events by the party asserting laches; and (3) prejudice to the party asserting laches. *Id.* ¶ 41. The issue of the reasonableness of the delay is one of law subject to independent review in this Court, but with some deference to the trial court's decision because it is so intertwined with the facts. *Id.* ¶ 42.

Each case must be decided on its own facts. Excused but lengthy delay that is non-prejudicial might not bar relief, while short but unexcused delay that is prejudicial might bar relief. *Id. See Likens v. Likens,* 136 Wis. 321, 327, 117 N.W. 799 (1908).

The State, as the party asserting laches here, bears the burden of proving all three elements. *Coleman,* 290 Wis. 2d 352, ¶ 25 n. 10. The issues whether the delay was

unreasonable, whether the State acquiesced in Pope's delay knowing that he would continue to pursue a direct appeal, and whether the State suffered prejudice are questions of law based on the facts. *Coleman,* 290 Wis. 2d 352, ¶ 17. If laches is proven, the decision whether to deny relief to Pope for that reason is left to the discretion of this Court. *Id*.

B. The State did not forfeit its laches argument.

In rejecting the Stat's laches argument, the trial court erroneously ruled that the State's decision to stipulate to reinstatement of Pope's direct review rights waived (forfeited) that equitable defense. It found fault with the State for stipulating to reinstatement of the direct appeal without knowing for sure whether a trial transcript could be produced. (R. 81:20–22; A-App. 103–05.) In so ruling, the court erred as a matter of fact and law because the State did nothing wrong and its stipulation waived or forfeited nothing.

The stipulation only allowed Pope to belatedly file a notice of intent to pursue direct postconviction relief. The State only agreed in response to his *Knight* petition that Pope had the right to reinstatement of his direct appeal because his trial attorney was ineffective for not preserving it. Pope has now been afforded that right. The stipulation made no representations as to the content of the appellate record after 21 years. The stipulation made no representations as to whether Pope would prevail on the reinstated appeal. The right to an appeal and the adequacy of the appellate record are entirely separate issues. The fact that the State was unaware a transcript could no longer be produced only strengthens its equitable position because

Pope is responsible for the record.[10] Even on a timely direct appeal, if the appellant fails to order all transcripts necessary to sustain his claim(s) of error, he loses. The State agreed that Pope had the right to a direct appeal more than two decades after his conviction, but his appeal, like any other appeal, would rise or fall based on what is or is not in the record.

C. This Court should reverse because Pope unreasonably delayed filing for habeas relief, the State did not acquiesce in his delay, and the State will suffer great prejudice if the new trial order stands.

This appeal grew directly out of the habeas corpus proceedings initiated by Pope's 2014 *Knight* petition. The fact-finding hearing ordered by this Court, the lower court's findings of fact, the stipulation for reinstatement of Pope's right to a direct appeal based thereon, the actual filing of a Wis. Stat. § (Rule) 809.30 postconviction motion by current counsel, and the dismissal order all arose directly out of Pope's *Knight* habeas action. Laches remains a viable equitable defense to that equitable proceeding seeking as it does an equitable remedy. "As an equitable doctrine, habeas corpus is subject to the doctrine of laches." *State ex rel. Smalley v. Morgan,* 211 Wis. 2d 795, 800, 565 N.W.2d 805 (Ct. App. 1997).

If there is a remand, this Court may authorize the trial court to consider the laches defense "on any potential issues, such as ineffective assistance of counsel, suppression

[10] It is not clear whether counsel for Pope was also unaware of the absence of a transcript when she entered into the stipulation.

or a retrial of the crimes of which [Pope] stands convicted." *Coleman,* 290 Wis. 2d 352, ¶ 38 n.13. It follows that, in deciding whether to reverse the trial court's order outright, or to reverse and remand for further proceedings, this Court should consider the equitable defense of laches in deciding whether to award Pope a new trial given that he has yet to offer any colorable claim of reversible error at his trial and the State is blameless. This court should not, however, remand. It should reverse outright because the State has proven laches and it will suffer great prejudice if the new trial order stands.

1. Pope's delays were unreasonably long.

Pope may have, as the trial court found, "been acting pro se attempting to reinstate his appellate rights since 1996" (R. 56:2, A-App. 133), but he has not done so diligently or properly.

Pope delayed unreasonably by waiting until 2014 to file his habeas petition challenging counsel's effectiveness. "The purpose of habeas corpus 'is to provide a prompt and effective judicial remedy to those who are illegally restrained of their personal liberty.' Smalley's petition does not allege facts demonstrating that he sought prompt and speedy relief. Such a showing is required." *Smalley,* 211 Wis. 2d at 802 (quoted source omitted). If the delay is proven to be unreasonable and the State suffers actual prejudice, "dismissal on the ground of laches may be warranted." *Id.* at 800.

Pope's delays were unreasonable. He should have known by the end of July, 1996, that a notice of intent to pursue postconviction relief was not filed. He waited over fourteen months to bring the matter to anyone's attention

when, by his own admission, he finally became "concerned about his appeal" and wrote the Public Defender. (R. 41:2.) When he moved for an extension of time September 16, 1997, Pope gave this Court no good cause for the lengthy delay. In 1999, the only excuse Pope offered was that a jailhouse lawyer failed to properly advise him of the appeal deadlines. (R. 40:2, A-App. 125.) But that makes no sense because Pope knew when he signed the SM-33 form at sentencing that he only had 20 days to file the notice of intent. Pope did not need a jailhouse lawyer to tell him that if nothing happened within 20 days, he risked losing his appeal right. Pope did nothing to pursue relief until over fourteen months later when he admitted that he finally "got concerned about his appeal" after thirteen months had already passed. (R. 41:2.)

Pope did nothing between his unsuccessful appeal in 1999 and 2003. After losing in 2003, Pope did nothing for the next *eleven years* when he finally got around to filing the *Knight* habeas petition. This avenue of relief was fully available to him from the beginning. The *Knight* decision on which Pope relied in 2014 was, after all, decided *in 1992,* four years before his trial.[11] At the very least, Pope could

[11] If Pope was uncertain about whether his challenge to Backes' failure to file a notice of intent was in his capacity as appellate counsel, which would be the subject of a *Knight* petition in the court of appeals, he could have alternatively challenged Backes' performance in his capacity as postconviction counsel in circuit court. *State ex rel. Rothering v. McCaughtry,* 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). *Rothering* was on the books for a year before Pope filed his first extension motion in September 1997. The law is now clear that the way to challenge trial counsel's failure to file a notice of intent to pursue postconviction relief is with a *Knight* habeas petition in the court of appeals. *State ex rel. Kyles v. Pollard,* 2014 WI 38, ¶¶ 38–44, 354 Wis. 2d 626, 847 N.W.2d 805. But, Pope did not file either a *Rothering* or *Knight* petition until 2014. Had he done so before July 2006, this

have filed a *Knight/Rothering* habeas petition after his appeals failed in 1999 and 2003. Had he done so and prevailed in getting his appeal right reinstated at any point before July of 2006, the transcript would have been prepared because this would have been within the ten-year period during which the court reporters had to retain their notes from his July 1996 trial. Had he filed the *Knight* petition in 1995, 1996 or even before July of 2006, the transcript would have been prepared and chances are that Backes' file and memory would still have been relatively intact.

The only "good causes" offered by Pope from sentencing to 2003 for obtaining an extension of time were: (1) Attorney Backes' failure to respond to his letters shortly after sentencing; and (2) a jailhouse lawyer's misinforming him of the deadlines for filing an appeal. Those excuses were not good enough in the eyes of this Court to excuse his delay.

The procedures adopted by the courts for challenging the effectiveness of postconviction/appellate counsel were on the books since 1992 (*Knight*) and 1996 (*Rothering*). Pope did not file his first extension motion until September 16, 1997. Had Pope provided "good cause" for an extension in 1997 or at any point before 2003, or had Pope filed a *Rothering/Knight* petition at some point between sentencing on July 2, 1996 and 2006 when the court reporters still had their notes, his appeal would have been reinstated with access to the full transcript. But he did nothing between 2003 and 2014.

In *State ex rel. Coleman v. McCaughtry,* 290 Wis. 2d 352, the Court held that a delay of sixteen years between the date when Coleman sent letters to appointed counsel indicating that he wanted to appeal despite counsel's

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Court may have allowed him to pursue direct relief at a time when the transcripts could still be prepared.

determination that there were no meritorious issues (1988), and the date when Coleman filed a pro se *Knight* petition challenging counsel's effectiveness for not pursuing his appeal (2004), was unreasonable. *Id.* ¶¶ 9–11, 32–33. The Court held, "the uncontroverted fact [is] that Coleman knew of his claim for more than 16 years but he did nothing, year after year. Accordingly, we agree with the court of appeals that the State has proved Coleman's delay was unreasonable as a matter of law." *Id.* ¶ 33.

The same reasoning applies here. After the time for pursuing direct postconviction relief expired, neither the State nor the trial court had any reason to believe that Pope intended to pursue direct relief until September of 1997. Moreover, when he filed an appeal in 1998, Pope told this Court in his Statements on Transcript that he did not need any transcripts other than the preliminary hearing and sentencing transcripts already in the file. Not knowing what Pope intended to argue on appeal, the State reasonably relied on Pope's representation, at least until his appeal rights were reinstated in 2016, that he did not need any other transcripts to prosecute an appeal. More important, the 1996 trial *court reporters* reasonably relied on Pope's statements to this Court in 1998 that he did not need any other transcripts, and on the fact that nothing was pending in any court after 2003, and they accordingly destroyed their notes in 2006, ten years after his trial, as allowed by law.

2. The State had no knowledge that Pope intended to file a *Knight* petition, and did not acquiesce in Pope's unreasonably long delay in pursuing state habeas relief.

The State had every reason to believe that Pope was no longer pursuing his direct appeal rights for the four years

where nothing happened after his appeal failed in 1999, and most certainly after his unsuccessful 2003 appeal when he did nothing for the next eleven years. The State had no reason to believe that Pope would try to resurrect his direct appeal in 2014, long after the transcripts and the attorney's file were gone and the attorney's memory had faded through no fault of the State.

The State did nothing to prevent Pope from appealing at any time. The State did nothing to prevent Pope from pursuing a *Knight* habeas petition challenging the effectiveness of counsel for not filing the notice of intent at any time. The State had every reason to believe as each year passed after Pope's unsuccessful appeal in 2003 that he no longer intended to pursue appellate relief of any kind. Then, "out of the blue" in 2014, Pope filed the *Knight* petition that has resulted in this litigation. *Compare Coleman,* 290 Wis. 2d 352, ¶ 29 ("[I]f the State had knowledge that Coleman would bring his claim of ineffective appellate counsel, but destroyed all the records that it possessed that were relevant to that claim, the State might be prejudiced in defending against the claim, but it would nevertheless fail on its laches defense.").

The State acquiesced in nothing because it had no idea until 2014 that Pope was still interested in pursuing a challenge to the effectiveness of counsel for not filing a notice of intent to pursue postconviction relief eighteen years earlier. Had Pope filed his *Knight* petition as recently as 2006, a full ten years after his conviction, he would have gotten the trial transcripts. He did not and must now suffer the equitable consequences for his lack of diligence.

3. The unreasonable delay is severely prejudicial to the State.

The State is obviously severely prejudiced by the 21-year delay because it cannot now produce the transcripts

and it cannot feasibly retry Pope due to lost evidence, missing witnesses and the faded memories of those few who are still around. While Pope and his attorney are at fault for the entire 21-year delay, the State is blameless. So is the trial court.

So, too, are the families of the victims. The interests of the victims' families must also be taken into account. Their rights are to be "honored and protected by . . . judges in a manner no less vigorous than the protections afforded" Pope's right to appeal. Wis. Stat. §§ 950.01 and 950.02(4)(a)4.a. The families' rights to closure and justice for their slain loved ones should be given equal weight by this Court to Pope's right to reopen their wounds 21 years after the trial through no fault of the victims' families, the courts or the State.

Assuming Pope would be entitled to automatic reversal had the trial transcript been lost on a normal, timely direct appeal, chances are that witnesses would still be available and memories still relatively fresh, making a retrial feasible even without a transcript to refresh everyone's memories. That is definitely not so after 21 years have passed. The inability to produce the transcript is due to the passage of time and is not the State's fault. Attorney Backes' inability to remember anything is not the State's fault. Backes' lack of recall is prejudicial to the State especially if he did nothing wrong at trial. *See Coleman,* 290 Wis. 2d 352, ¶ 36 ("[A]ppellate counsel may be able to recall or to reconstruct what happened during his communications with Coleman, what Coleman's response was, and how they reached the ultimate decision not to appeal. If he cannot, then the court of appeals is correct that the State suffered prejudice in being able to meet Coleman's claim of ineffective assistance of appellate counsel."). The result is that Pope

gets a windfall reversal and outright release while the State's right to a fair trial and the right of the victims' families and Society to justice go by the wayside due to no fault of their own. Equity demands better.

Attorney Backes is to blame if he failed to respond to a timely request by Pope to pursue an appeal. But, Pope shares most of the blame by waiting over 14 months after the notice of intent had to be filed to bring this to anyone's attention, by doing next to nothing between 1999 and 2003, by doing nothing whatsoever between 2003 and 2014, and by waiting until his *Knight* petition in 2014 to finally provide this Court with the "good cause" to excuse his initial 14-month delay that this Court asked him to provide in 1997.

It is simply unfair to the State and the victims' families, who were blameless, to let Pope walk free without proving any error occurred at his trial because his unreasonable delay resulted in the loss of the trial transcripts along with Attorney Backes' file and memory. *See Hazard Technology,* 665 A.2d at 1053. ("We believe it is unfair to the prevailing party and the witnesses, as well as a waste of judicial resources, to automatically grant the losing party a new trial in cases where a full trial transcript is unavailable due to no fault of the litigants.").

Fairness and equity strongly favor the State, who is entirely blameless here, on balance with Pope's right to pursue a late direct appeal. The compelling interests in the finality of the conviction, in preserving what by every indication was a just conviction after a fair jury trial with overwhelming evidence of guilt, in preventing the waste of judicial resources, and in protecting the interests of the victims' families to closure and justice, all far outweigh Pope's claimed right to a windfall new trial because due only to his lack of diligence he no longer can get a copy of the trial transcript to see whether he can find any errors. The balance of equities strongly favors the State here.

CONCLUSION

This court must reverse.

Dated this 12th day of January, 2018.

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 9,929 words.

_____
DANIEL J. O'BRIEN
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).

I further certify that:

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

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

Dated this 12th day of January, 2018.

_____
DANIEL J. O'BRIEN
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Appendix
State of Wisconsin v. Robert James Pope, Jr.
Case No. 2017AP1720-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 using one or more initials or other appropriate pseudonym or designation, 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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DANIEL J. O'BRIEN
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I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

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

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

Dated this 12th day of January, 2018.

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