STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP1720-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ROBERT JAMES POPE, JR.,

Defendant-Respondent.

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

BRIEF OF DEFENDANT-RESPONDENT

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ISSUES PRESENTED

1. Whether the postconviction court erred in granting Mr. Pope's §809.30 motion for a new trial based on the unavailability of any transcripts from his jury trial, which prevented him from identifying specific claims of error, thus depriving him of a meaningful appeal.

The postconviction court[1] ordered a new trial because it determined that, without a single transcript from his four-day jury trial held more than two decades ago, it was impossible for Mr. Pope to make a claim of error with specificity, and that his appeal could thus not proceed in any meaningful way.

2. Whether the State's stipulation to reinstatement of Mr. Pope's direct appeal rights - following an evidentiary hearing that established that trial counsel failed to file a notice of intent as directed by Mr. Pope at sentencing, and that Mr. Pope had been acting *pro se* in pursuing reinstatement of his direct appeal rights since 1996 – waived a laches claim? And, assuming a laches defense was not waived by the stipulation and can be applied to a properly-reinstated direct appeal, whether the State met its burden of proving laches.

The postconviction court found that Mr. Pope's direct appeal rights were properly reinstated, thus rejecting the State's laches argument and granting Mr. Pope's motion for a new trial.

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[1]The Honorable Jeffrey A. Conen decided Mr. Pope's §809.30 postconviction motion. The Honorable John A. Franke presided over Mr. Pope's 1996 jury trial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Pope believes the issues raised are straightforward and can be addressed solely on the briefs, but welcomes oral argument if it would be helpful to the Court. While the facts of this case are somewhat unique, publication may be warranted to clarify the interplay of a defendant's due process right to a meaningful appeal with the "colorable need" standard of *State v. Perry*.[2]

STATEMENT OF THE CASE

Following a four-day trial in May 1996, a jury convicted Robert James Pope, Jr., of two counts of first-degree intentional homicide as a party to a crime and, on July 2, 1996, the Honorable John A. Franke sentenced him to life in prison without the possibility of parole on both counts. (1:4-10; 18; 26; 80:39-41). The court advised him of his right to appeal and asked his lawyer, Michael Backes, to ensure that Mr. Pope understood his appellate rights and to file the appropriate form, which counsel assured the court he would. (80:40). Trial counsel then completed the Wis. JI-Criminal SM-33 form with Mr. Pope, checking the box reflecting that, "The defendant intends to seek postconviction relief. The required notice will be timely filed by trial counsel." (25; R-App. 101). However, counsel never filed the notice of intent as directed, and failed to respond to Mr. Pope's repeated letters and efforts thereafter to contact him. (56; A-App. 132-133; 57; A-App. 134; 79:30-40, 42-43). As a result, Mr. Pope's direct appeal rights expired with no appeal initiated.

[2] *State v. Perry*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987).

In the months and years that followed, Mr. Pope made repeated, desperate *pro se* procedural attempts to reinstate his right to direct appeal, lost through Attorney Backes's inaction. As recited in the State's opening brief (State's br. at 4-7), Mr. Pope filed multiple extension motions in this Court, a Wis. Stat. §974.06 motion in the circuit court alleging ineffective assistance of counsel for failing to timely file the notice of intent, and then an appeal and petition for review to the Wisconsin Supreme Court. Both the trial and appellate courts systematically denied relief, finding that Mr. Pope's efforts failed to provide sufficient reason for the 15-month delay that followed sentencing before he filed his initial *pro se* motion to extend the deadline for filing the notice of intent, and that he therefore "waived" his right to appeal. (27; App. 120-121; 29; 36; A-App. 127-130; 37; 40; A-App. 124-126). The Court also suggested that Mr. Pope's failure to identify specific issues he believed could be raised on direct appeal doomed his request for reinstatement of his appellate rights. (40:2; A-App. 125).

Then, on June 17, 2014, in *State ex rel. Kyles v. Pollard*, the Wisconsin Supreme Court held, as a matter of first impression, that the appropriate forum and vehicle for obtaining relief based on trial counsel's ineffectiveness in failing to timely file a notice of intent is through a habeas petition filed in the Court of Appeals. *Kyles*, 2014 WI 38, ¶¶ 1-3,16,19,24-38, 354 Wis. 2d 626, 847 N.W.2d 805. Within a month of the *Kyles* decision, Mr. Pope, following its direction, again sought reinstatement of his direct appeal rights, filing a habeas petition in this Court on July 21, 2014, alleging that trial counsel was ineffective for failing to timely file the notice of intent. (43:8-24). This Court then remanded to the circuit court for fact-finding. (48). After hearing testimony from trial counsel and Mr. Pope, the circuit court,

the Honorable J.D. Watts, made factual findings that included:

> (1) that Mr. Pope's testimony was credible regarding his efforts to contact trial counsel in the months following sentencing; (57:1, A-App. 134)
>
> (2) that within weeks of sentencing, Mr. Pope wrote two letters from the jail to trial counsel seeking information regarding his appeal; (56:1, A-App. 132)
>
> (3) that trial counsel did not follow through with filing the notice of intent, and that there was no evidence that trial counsel ever filed the notice of intent; (57:1, A-App. 134), and
>
> (4) that Mr. Pope had actively been attempting to reinstate his appellate rights *pro se* since 1996. (56:2, A-App. 133).

Based on these findings, in August 2016, the State and undersigned counsel entered a written stipulation that jointly moved this Court for reinstatement of Mr. Pope's direct appeal rights, and concomitant dismissal of his habeas petition. (60; A-App. 135-137). On September 29, 2016, this Court granted reinstatement of Mr. Pope's direct appeal and dismissed his habeas petition in a written order. (62[3]; A-App. 138-139).

Thus, pursuant to this Court's reinstatement of his direct appeal rights, Mr. Pope, by undersigned counsel, filed a notice of intent to pursue postconviction relief on October 4, 2016 (84), and transcripts and the court record were ordered. After learning that only the previously-prepared preliminary

[3] The Court's written order is mistakenly dated September 29, 2015 – the order was actually issued on September 29, 2016. (63).

hearing and sentencing transcripts were available, and that the court reporters could not prepare transcripts of any of the pretrial or jury trial proceedings as their notes had been destroyed, undersigned counsel filed a Rule 809.30 postconviction motion for a new trial on March 7, 2017, which argued that Mr. Pope was deprived of his right to a meaningful appeal by the unavailability of any transcripts from his trial. (64). In response, the State claimed, for the first time, that Mr. Pope's postconviction motion was "precluded by the defense of laches" because he "sat on his rights" and was not reasonably diligent in pursuing his direct appeal, and that the State had entered an "unknowing stipulation" to reinstatement of Mr. Pope's direct appeal rights. (69:2; 81:10-26). The State also asserted that Mr. Pope had failed to make a colorable claim of trial error, and therefore a new trial was not warranted based on the unavailable trial transcripts. (69:1-2; 81:9-10).

Following briefing and a hearing, the postconviction court, the Honorable Jeffrey A. Conen, rejected the State's claims and granted Mr. Pope's postconviction motion (68; 69; 74, A-App. 101; 81, A-App. 102-108).

With regard to the State's laches claim, the postconviction court found:

> THE COURT: This is a motion for a new trial. The State argues that the stipulation to reinstate the appellate procedures, which brings us here today to the motion for a new trial, was invalid. I disagree. It's up to the State to make itself aware of all of the circumstances and everything before it enters into a stipulation, and whenever it does, they are stuck with the decision that they made and the due diligence that they may have done to check everything out.
>
> . . .

> The agreement to reinstate the appellate rights in this case was done based on the law in equity, not based on practicality. In other words, I mean, if there's enough there to reinstate the appellate rights, there should be enough there whether you know there's a transcript available or you know there's a transcript that's not available. So it's a little disingenuous to say that, I mean, if we were going to lose, we would have never agreed to this.

(81:20-21; A-App. 104-105).

As to the State's claim regarding *Perry* and the "colorable need" for the transcript, the postconviction court held:

> THE COURT: … We have a motion for a new trial in this case, but we have no transcripts so we have no way of determining whether this matter should be – well, should go to either a new trial as ordered by the circuit court or go up on appeal. We have no basis for any of this.
>
> There are some issues that were raised with regard to ineffective assistance of counsel, but again, that's all supposition and speculation until we have the transcript, but there's no way, obviously, that anyone could come up with that. And we are looking to do justice across the board and make sure that the laws are followed. So not having the transcript and not being able to really proceed today in a meaningful way on a motion for a new trial, the Court has no other option but to order a new trial in this case.
>
> MR. HAYES [the prosecutor]: So is the Court finding that the defense has made out the facially valid claim of error as required under the case law?
>
> THE COURT: To the best of their ability. I mean, it's impossible to make that claim with specificity

> if you don't have a transcript. So there are things that have been brought up. This is not something that we just said, Oh, 20-plus years later we decided that, you know, we want to appeal because we know there's no transcript. That's not the way this came down.
>
> MR. HAYES: Right.

(81:22-23, A-App. 106-107).

The State appeals the postconviction court's grant of Mr. Pope's Rule 809.30 motion for a new trial.

SUMMARY OF ARGUMENT

The State contends that the postconviction court erroneously interpreted *State v. Perry* to require automatic reversal whenever the trial transcript cannot be produced, and that it erred in not requiring Mr. Pope to first demonstrate specific colorable claims for relief that would require the transcripts from his 1996 jury trial in order to pursue his direct appeal. (State's Br. at 15). In addition, despite its failure to raise a laches defense to Mr. Pope's now-dismissed habeas petition, and its stipulation and joint request for reinstatement of Mr. Pope's direct appeal rights, the State asserts that it has not waived a laches defense, and that this equitable doctrine applies to Mr. Pope's constitutional right to a direct appeal. (State's Br. at 24-33).

This Court should affirm the postconviction court. This Court reinstated Mr. Pope's direct appeal rights and he is constitutionally entitled to meaningful appellate review of his convictions. Here, the postconviction court granted a new trial not, as the State asserts, because it determined as a matter of law that *Perry* requires automatic reversal whenever a trial transcript cannot be produced, but instead because it

concluded that the unavailability of any transcripts from his 1996 jury trial made it "impossible" for Mr. Pope to make a claim of error with any specificity, and thus frustrated his right to a meaningful appeal of his convictions. (81:22-23, A-App. 106-107). Thus, the postconviction court implicitly found that the unavailability of any of the trial transcripts in this particular case established a colorable need under *Perry*, as such an utter deficiency in the record deprived Mr. Pope of any meaningful review of his convictions. The postconviction court therefore did not err in rejecting the State's assertion that Mr. Pope must allege specific errors from his trial held more than two decades ago in order to establish that the transcripts are necessary in order to proceed with his direct appeal.

In addition, by its failure to raise laches as a defense in Mr. Pope's habeas action and by its ultimate stipulation to reinstatement of direct appeal deadlines, the State waived any laches claim. Moreover, on its merits, the State's contention that the equitable doctrine of laches bars Mr. Pope from pursuing his direct appeal fails.

ARGUMENT

I. The postconviction court properly ordered a new trial because the unavailability of any transcripts from Mr. Pope's trial denies him his constitutional right to meaningful appellate review.

A. Legal principles and standard of review.

The right to an appeal is absolute, and constitutionally guaranteed in Wisconsin. Wisconsin Constitution, Article I, §21(1). The right to meaningful judicial review is also protected by the due process clause of the Fourteenth Amendment to the United States Constitution. See *State v. Raflik*, 2001 WI 129, ¶14, 248 Wis. 2d 593, 636 N.W.2d 690. As our Supreme Court has recognized, "a thread runs through our entire jurisprudence that there not only be a right to appeal, but that the appeal be a meaningful one." *Perry*, 136 Wis. 2d at 99; *Raflik*, 2001 WI 129, ¶30.

Recognizing the importance of a transcript of the trial court proceedings to an appeal, our Supreme Court has held:

> Stemming from the right to a meaningful appeal is a criminal defendant's right to a full transcript of the proceedings. *Id.* Providing a defendant with a full transcript guarantees that the defendant has the opportunity to analyze the proceedings of the trial court and to challenge any errors. *Id.*

Raflik, 2001 WI 129, ¶31 (citing *Perry*, 136 Wis. 2d at 99).

The transcripts of the trial court proceedings (or a "functionally equivalent substitute") must portray in a way meaningful to the particular appeal and, in a criminal case, beyond a reasonable doubt, "exactly what happened in the course of trial." *Perry*, 136 Wis. 2d at 99. In *Perry*, the Supreme Court recognized that a statement of errors alleged to have been committed during trial and a showing that such

errors were prejudicial is "[b]asic to a criminal appeal," such that any failure of the appellate process that prevents an appellant from demonstrating possible error during the trial court proceeding constitutes a constitutional deprivation of the right to appeal. *Id.*

In addition, the United States Supreme Court has emphasized that, where a state appeal of a criminal conviction is a matter of right, the due process and equal protection provisions of the Fourteenth Amendment require that sufficient procedures must assure adequate appellate review, including production of transcripts. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (Fourteenth Amendment requires that indigent defendants be afforded the same appellate review as defendants who can pay for transcripts); *Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357 U.S. 214 (1958) (state court's denial of indigent defendant's motion for free transcript was a denial of due process under the Fourteenth Amendment); *Draper v. Washington*, 372 U.S. 387 (1963) (trial judge's conclusion that an indigent's appeal would be frivolous was an inadequate substitute for full appellate review available to nonindigents, where the effect of that finding prevented appellate review based on a complete trial record, violating the Fourteenth Amendment).

When determining whether the trial transcript is adequate for meaningful appellate review, the court has a duty to ensure that the defendant's right to a fair and meaningful review of his conviction is not frustrated by transcript errors or omissions. *Perry*, 136 Wis. 2d at 108-109. A circuit court's discretionary decision whether to grant a new trial due to the lack of a transcript 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.

B. Where meaningful appellate review is frustrated by the unavailability of any trial transcripts, and reconstruction of the record is impossible, a colorable need for the transcripts is established, necessitating a new trial.

The State claims that the postconviction court erred as a matter of law in granting a new trial because, it asserts, the court read *Perry* as requiring automatic reversal "whenever" the trial transcript is missing.[4] (State's br. at 13-15). The record contradicts the State's claim, as the court made no such sweeping ruling. Rather, the court's ruling reflects that, after briefing and discussion with the parties both on and off the record, it concluded that the unavailability of all of the transcripts from this 1996 jury trial made it "impossible" for Mr. Pope to make a claim of error with any specificity, and thus he was denied his right to a meaningful appeal of his

[4] While the State is correct that the preliminary hearing and sentencing transcripts are in the record (the preliminary hearing transcript filed on 2/14/1996 (1:3; 78), and the sentencing transcript filed on 7/22/1996 (1:12; 80)), this fact provides no cover for the State with regard to the right to a meaningful appeal of Mr. Pope's convictions, which occurred following his four-day jury trial, for which no transcripts exist. Moreover, the State's claim that this Court could review any claims of error occurring at the preliminary hearing is contradicted by *State v. Webb*, which holds that a defendant claiming error at his preliminary hearing may obtain relief only *prior to trial*. *Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). And, while Mr. Pope could potentially utilize the sentencing transcript to challenge the trial court's imposition of a life sentence without parole, development of some potential sentencing claims (such as inaccurate information at sentencing or harsh and excessive sentence) could be thwarted by the lack of a transcript of any of the evidence presented at trial.

convictions. (81:22-23, A-App. 106-107). Thus, as the court implicitly found, the lack of any transcripts from his trial and the inability to reconstruct the record due to the passage of time, in itself established, in this instance, a "colorable need" for the record, as such an utter deficiency completely deprived Mr. Pope of his constitutional right to a meaningful review of his convictions:

> THE COURT: There are some issues that were raised with regard to ineffective assistance of counsel, but again, that's all supposition and speculation until we have the transcript, but there's no way, obviously, that anyone could come up with that. And we are looking to do justice across the board and make sure that the laws are followed. So not having the transcript and not being able to really proceed today in a meaningful way on a motion for a new trial, the Court has no other option but to order a new trial in this case.
>
> MR. HAYES [the prosecutor]: So is the Court finding that the defense has made out the facially valid claim of error as required under the case law?
>
> THE COURT: To the best of their ability. I mean, it's impossible to make that claim with specificity if you don't have a transcript. So there are things that have been brought up. This is not something that we just said, Oh, 20-plus years later we decided that, you know, we want to appeal because we know there's no transcript. That's not the way this came down.
>
> MR. HAYES: Right.

(81:22-23, A-App. 106-107).

In *Perry*, the Wisconsin Supreme Court emphasized "the absolute and constitutional necessity for providing a criminal defendant a transcript that will make possible a meaningful appeal." *Perry*, 136 Wis. 2d at 105. The Court

also noted the language of *Hardy v. United States*, which extolled the need for a complete trial transcript for pursuit of an appeal:

> [T]he most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law.

Perry, 136 Wis. 2d at 106 (quoting *Hardy*, 375 U.S. 227, 288 (1964)).

Our Supreme Court also recognized the crucial importance of the transcript to the role of the appellate court:

> …An appellate court cannot function if it has no way to determine whether error has been committed. In most instances, a transcript is required for appellant's counsel to locate error and for an appellate court to verify or disprove it. Frequently, plain error – error usually not pinpointed in the course of trial – can only be discovered and proved by a transcript. Moveover, whether error is prejudicial or harmless is usually determinable only in the context of the entire record.

Perry, 136 Wis. 2d at 105.

It is clear that the postconviction court did not, as the State suggests, misread *Perry* as requiring automatic reversal "whenever" the trial transcript is unavailable. Rather, the court recognized that, without a single transcript from a jury trial held over two decades previously, meaningful appellate review in this particular case was "impossible." (81:23; A-App. 107) As other courts have recognized in similar circumstances:

> …unlike the typical case in which only a portion of the trial transcript is unavailable, neither appellant or this court has had access to a verbatim transcript of any of the trial proceedings. As a general matter, the problems associated with a less-than-complete verbatim transcript – especially the inability to notice plain error – will be greater when a substantial portion of the transcript is altogether unavailable. Although the loss of an entire trial transcript will not necessitate a new trial in every instance, it does magnify the need for a complete and accurate substitute statement of the evidence and increases the likelihood that meaningful appellate review will be impossible.

Cole v. U.S., 478 A.2d 277, 286 (D.C. Circ. 1984) (footnote omitted).

In *Cole*, the court reporter's notes of defendant's two-day trial were lost. Cole challenged the reconstructed statement of the trial proceedings (consisting of a two-and-a-half page summary), as insufficient to permit meaningful appellate review. The D.C. Circuit Court of Appeals agreed, noting that the reconstructed statement, which contained no reference to opening statements, cross-examination of two trial witnesses, or jury instructions, was "at best a fragmentary account of appellant's trial." *Cole*, 478 A.2d at 286. The court also recognized that these insufficiencies were "greatly exacerbated" because appellate counsel did not participate in the trial and would have a "distinct disadvantage" in uncovering trial court errors without a transcript, which would increase the likelihood that prejudice to the defendant would result. *Id.* at 287. It concluded that a new trial was necessary, as the reconstructed record "lacks the completeness and the reliability necessary to protect appellant's right to pursue an appeal and this court's obligation to engage in meaningful review." *Id.* *See also*, *Johnson v. State*, 302 Ga. 188 (Ga. 2017)(new trial ordered

where trial transcripts destroyed by fire and 14-page summarized reconstruction was insufficiently detailed to allow meaningful appellate review); *State v. Hobbs*, 190 N.C.App. 183 (N.C. Ct.App. 2008)(new trial ordered where transcripts of three days of evidentiary phase of trial were unavailable and no adequate alternative to reconstruct record prevented meaningful appellate review); *People v. Jones*, 178 Cal.Rptr 44 (Cal. Ct. App. 1981)(new trial ordered where court reporter destroyed trial notes and no method of record reconstruction was available to afford meaningful appellate review); *accord People v. Serrato*, 47 Cal.Rptr. 543 (Cal. Ct. App. 1965) .

In contrast, in *Freeman v. U.S.*, the D.C. Circuit concluded that despite the unavailability of any transcripts from defendant's trial 17 years previously, the reconstructed record was sufficient to permit appellate counsel an opportunity to review "substantial and crucial portions of the trial for any error," thereby permitting a meaningful appellate review. *Freeman*, 60 A.3d 434, 435 (D.C. Circ. 2013). In that case, the court emphasized the "comprehensive reconstructed record," which included the "detailed and contemporaneous notes" of the trial judge covering the testimony of all the witnesses at the motion hearings and during trial, the jury instructions, and the length of jury deliberations. *Id.*

In Mr. Pope's case, contrary to *Freeman*, and similar to *Cole*, *Johnson*, *Hobbs* and *Jones*, given the passage of time, the participation of a different judge, prosecutor, and appellate counsel, and a trial attorney with no memory of the case (79:8-19), there is no possibility that the record could be reconstructed beyond a reasonable doubt to accurately reflect what actually happened at his jury trial. *See Perry*, 136 Wis. 2d at 99, *Raflik*, 2001 WI 129, ¶54. Nor has the State even

so much as suggested that a reliable reconstruction of the trial record could be made to the required level of proof. The postconviction court implicitly found as much.

Finally, the State asserts that Mr. Pope is not denied his right to direct appeal because "it has been reinstated with the appellate record as it is 21 years after conviction," and that he therefore "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." (State's br. at 23-24). This is not the law.

While an appellant is responsible to ensure that *available* necessary documents and exhibits are made part of the appellate record, *State v. Smith*, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972), this general rule fails to support the State's puzzling claim that Mr. Pope must litigate his direct appeal with a record that lacks transcripts *unavailable* due to the passage of time. The State's proposition is contradicted by the Supreme Court's decisions in *Perry* and *Raflik*, which consider the impact of transcript deficiencies on a defendant's constitutional right to a meaningful appeal, and in no way suggest that the defendant's right to appeal must suffer if transcripts are unavailable.[5] *Perry, Id.; Raflik, Id.* As the Court in *Perry* noted, where "'a portion of the record is lost

[5] The unpublished case cited by the State in support of its proposition, *State v. Robinson*, is inapposite. (State's br. at 24). *Robinson* does not support the State's claim that a defendant is "stuck" pursuing his direct appeal with a limited and insufficient record, simply due to the passage of time. *Robinson* merely addresses the faded memory of trial counsel in the context of an ineffective assistance of counsel claim in postconviction proceedings, not the state of the appellate record in general. *Robinson*, 2009 WI App 141, ¶21-28, 321 Wis. 2d 477, 774 N.W.2d 476 (Table).

through no fault of the aggrieved party, that party should not be made to bear the burden of the loss.'" *Perry*, 136 Wis. 2d at 111 (quoting *State v. DeLeon*, 127 Wis. 2d 74, 77, 377 N.W.2d 635 (Ct. App. 1985)).

Because the postconviction court gave due consideration to the facts and circumstances, including the unavailability of any transcripts from the trial and the length of time since the time of trial, as well as Mr. Pope's constitutional right to meaningful appellate review, this Court must affirm the grant of a new trial. *Perry*, 136 Wis. 2d at 109.

C. Alternatively, should this Court reverse the postconviction court on the basis that Mr. Pope can and must assert specific "colorable claims" despite the lack of any transcripts, in order to establish that trial transcripts are necessary for his appeal, it should remand with directions that a supplemental motion be filed.

If this Court determines that the postconviction court improperly concluded that meaningful appellate review was impossible given the unavailability of any trial transcripts, and instead finds that Mr. Pope can and must assert specific "colorable claims" in order to be establish that trial transcripts are necessary for a meaningful appeal, it should remand to give Mr. Pope the opportunity to file a supplemental motion raising any and all claims. The State also suggests this as an alternative remedy (State's br. at 10), although simultaneously advancing that any remand would be a "needless exercise" because it claims the record as it exists without the transcripts establishes there are no arguably meritorious issues. (State's br. at 15-22). This claim is sheer conjecture.

The State's speculative journey regarding the possible trial testimony thus begins: "Despite the lack of a transcript, *it is relatively easy to demonstrate how the trial testimony likely unfolded* …" (State's br. at 17). The State then proceeds to detail hearsay allegations from the criminal complaint, including police statements of Mr. Pope's co-defendants, and the preliminary hearing testimony of one police witness, in demonstration of its belief as to how the trial testimony "likely unfolded," and how this hypothetical testimony would establish that no colorable claims for relief exist that would require a transcript to prove.[6] (State's br. at 17-21). The State's acknowledgment that its recitation of the hypothetical testimony of its witnesses "assum[es] it was similar to what was alleged in the complaint and to the testimony of those who were called at the preliminary hearing" (State's br. at 20), merely illustrates the need for the transcript, in order for the parties and the reviewing court to see exactly what the trial testimony was in order to pursue, and review, claims of error, rather than to speculate about what might have occurred at trial. For, without a transcript of any of the trial proceedings, there is no possible way to determine:

(1) whether the jury was properly selected, or whether there were any objections to voir dire questioning or the jury venire or panel. (1:4).

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[6] The State includes in its appendix copies of newspaper articles regarding Mr. Pope's and his co-defendants' cases that are not part of the record. (A-App. 140-163). The State also cites to the articles' content as "facts" in its Statement of the Case and Argument sections. (State's br. at 2-3, 21 at n.9). This Court does not consider documents attached to a brief but not in the record, and will disregard assertions of facts not in the record. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-314, 311 N.W.2d 600 (1981).

(2) whether there were any arguably meritorious issues with opening statements. (1:5).

(3) whether Detective Koceja testified at trial consistently with his preliminary hearing testimony and report regarding his crime scene investigation and, if not, whether trial counsel impeached him. (State's br. at 17) (1:5; 3:2; 78);

(4) whether Medical Examiner Jeffrey Jentzen testified consistently with his autopsy report on Joshua Viehland, and if not, whether he was impeached. (State's br. at 1) (3:2);

(5) whether Asst. Medical Examiner Alan Stormo testified consistently with his preliminary hearing testimony and his autopsy report of Anthony Gustafson and if not, whether he was impeached. (State's br. at 18)(3:2);

(6) whether Deputy John Davis testified consistently with his report regarding recovery of the shotgun, and if not, whether he was impeached. (State's br. at 17-18) (3:2);

(7) whether Detective Michael Dubis testified consistently with his reports regarding his investigation of the crime scene and the chain of custody of the shotgun and if not, whether he was impeached. (State's br. at 17-18) (3:2);

(8) whether State Crime Lab firearms expert Reginald Templin testified consistently with his report regarding the shotgun, and if not, whether he was impeached. (State's br. at 18) (1:7; 3:2);

(9) whether co-defendants Dax Reed and Jennifer Radler testified consistently with their police statements and if not, whether they were impeached. (State's br. at 18-20) (1:6; 3:5-7);

(10) whether Detective Lewandowski testified regarding co-defendant Jennifer Radler's statement to him, and whether there was any basis to impeach Radler based on that testimony. (State's br. at 18-19) (1:6; 3:5-7);

(11) whether defense counsel was ineffective for failing to have called Detective Spingola (who was apparently not called as a witness at trial) to testify regarding Radler's statement to him. (State's br. at 18-19) (3:5-7);

(12) whether there was any basis for an ineffective assistance of counsel claim based upon counsel's stipulation to the substance of Detective Jerome Koszuta's testimony in lieu of his live testimony. (State's br. at 18) (1:5);

(13) whether the trial court conducted a proper colloquy regarding Mr. Pope's right not to testify. (State's br. at 20) (1:7);

(14) whether the trial court erred in granting the State's request for a jury view of the crime scene. (1:4,5);

(15) whether the trial court properly instructed the jury, and whether any defensive instructions such as coercion, or any lesser-included offenses, were requested, granted, or denied. (1:5,8);

(16) whether there were any arguably meritorious issues with closing arguments. (1:8);

(17) whether the court received and responded to a jury request during deliberations on May 30, 1996, requesting an exhibit or evidence of a taxi dispatcher's tag. (16);

(18) whether the trial court properly answered the jury's question during deliberations on May 31, 1996,

regarding reasonable doubt, and whether any objections were made to the court's response. (17; 1:9);

(19) whether there were any issues with the jury polling following the verdicts. (1:10);

(20) whether the evidence presented at trial was sufficient to sustain the verdicts. *See State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

For example, should Mr. Pope allege that the evidence was insufficient to convict him of first-degree intentional homicide as party to a crime, he would be required to establish that the State failed to present sufficient evidence to prove beyond a reasonable doubt, either by directly committing or intentionally aiding and abetting another, that (1) he caused the death of the victim; and that (2) he acted with intent to kill the victim. See Wis. JI-Criminal 1010 and Wis. JI-Criminal 400. And, in reviewing such a sufficiency claim, this Court would be required to determine whether the evidence presented at trial, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *Poellinger*, 153 Wis. 2d at 507. But, as there is no record of any testimony or other evidence introduced at his trial, would Mr. Pope simply assert that there is nothing in the record that supports his conviction, and thus the evidence is insufficient? And, how would this Court review such an insufficiency claim, without a record of the trial testimony and evidence? As the postconviction court concluded, the lack of any trial record renders meaningful appellate review impossible in this circumstance, where no detailed, reconstructed record can be made.

Moreover, the State's assertion that Mr. Pope has failed to ever identify any possible claims for relief at any

point in the years since his trial (State's br. at 15) is simply inaccurate, as in his 2014 pro se habeas petition which resulted in reinstatement of his direct appeal deadlines, Mr. Pope raised claims of ineffective assistance of trial counsel for failure to present an alibi, and eliciting prejudicial gang testimony during Mr. Pope's testimony.[7] (43:26-32).

Additionally, contrary to the State's claim, trial counsel's lack of memory of the trial in itself would not preclude a determination of ineffective assistance of counsel (State's br. at 22), if a record existed from which such claims could be developed, as required, in the context of the trial. Such ineffective assistance claims, however, while perhaps possible to assert, would certainly be impossible to establish without a transcript of the trial[8] so that the court may consider the totality of the evidence, as required in applying the well-defined ineffective assistance of counsel standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

Thus, should this Court believe, contrary to the postconviction court, that meaningful appellate review of Mr. Pope's trial is possible despite the unavailability of any trial transcripts, and that Mr. Pope can and must assert specific "colorable claims" in order to establish the need for trial transcripts, it should remand for filing of a supplemental motion raising any and all remotely possible claims, a sampling of which is detailed above.

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[7] The State subsequently discusses these claims in its brief (at 21-22), so its assertion that Mr. Pope has never identified any possible claims for relief in the 21 years since his trial is surprising.

[8] Indeed, the State appears to acknowledge as much, as it dismisses Mr. Pope's claims as "conclusory and undeveloped." (State's br. at 21).

II. The State's stipulation to reinstate Mr. Pope's direct appeal rights waived any laches defense it could have raised to his habeas petition. Laches cannot be applied to a direct appeal and, in any event, the State fails to prove its elements.

A. The State waived laches by its stipulation to reinstatement of Mr. Pope's direct appeal, which is not subject to equitable relief.

The State cites no legal support for its assertion that Mr. Pope's motion for a new trial, brought in direct appeal and pursuant to Wis. Stat. §809.30(2)(h), is barred by the equitable doctrine of laches. (State's br. at 24-33). As its novel claim has no basis in the law, it must fail.

The doctrine of laches is recognized as an available defense to a habeas petition. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶17, 290 Wis. 2d 352, 714 N.W.2d 900; *State ex rel. Washington v. State*, 2012 WI App 74, ¶19, 343 Wis. 2d 434, 819 N.W.2d 305. Mr. Pope's 2014 habeas petition once again sought reinstatement of his direct appeal rights, and the State was afforded an opportunity to raise an equitable laches defense to his petition, but did not do so. (43; 44:4). Instead, following this Court's remand for an evidentiary hearing and fact-finding by the circuit court (48; 56; 57), the State, by the Attorney General's office, stipulated and jointly moved with the defense for reinstatement of Mr. Pope's direct appeal rights. (60; A-App. 135-137). This Court granted reinstatement of Mr. Pope's direct appeal rights. (62; A-App. 138-139). Despite its stipulation, the State now makes a blatant attempt to avoid its waiver by asserting a laches defense against his direct appeal.

Notably, the State fails to cite a single instance in which laches has been applied to a direct appeal. And, while

the State argues that Mr. Pope's direct appeal "grew directly out of" his habeas proceedings (State's br. at 26), this observation fails to transform his direct appeal into an equitable action to which laches applies. The equitable doctrine of laches simply cannot be applied to deprive a defendant of his constitutional right to direct appeal of his conviction.

B. Assuming that laches can be applied to deny a direct appeal, the State has failed to prove its elements.

Even assuming that the equitable doctrine of laches can be applied to deny a defendant's postconviction motion pursuant to Wis. Stat. §809.30, thus denying his direct appeal, the State fails to prove its three elements. The burden is on the State to show that (1) Mr. Pope unreasonably delayed in bringing his direct appeal; (2) the State lacked knowledge that Mr. Pope intended to bring a direct appeal; and (3) the State has been prejudiced by the delay in the direct appeal. *See Washington,* 2012 WI App 74, ¶19. The reasonableness of the delay and whether there is prejudice to the State are legal conclusions this Court makes based on circuit court's factual findings. *Id.* at ¶20. If laches is proven, whether to deny relief on that basis is within this Court's discretion. *Id.*

With regard to the first two elements - the reasonableness of the delay and the State's knowledge of his intent - it is clear that Mr. Pope not only did not unreasonably delay pursuing his direct appeal, but instead actively sought it, and that the State had knowledge of his intent. Given the courts' repeated denials of Mr. Pope's multiple efforts at reinstatement of his direct appeal rights from 1997 through 2003, and his prompt filing of his *pro se* habeas petition on the heels of the Supreme Court's definitive directive in *Kyles*

in 2014 regarding the proper manner for seeking relief, the State was plainly on notice that Mr. Pope sought to appeal his convictions. And, the State's claim that Mr. Pope's efforts at reinstatement were not "diligent" and resulted in unreasonable delay is refuted by the record. (State's br. at 27-30).

The record reflects Mr. Pope made his intent to seek an appeal known immediately after the circuit court sentenced him to two life terms without the possibility of parole. Mr. Pope and trial counsel both signed the SM-33 form, which was filed in the circuit court, with the box checked indicating that Mr. Pope intended to seek postconviction relief, and that the required notice would be timely filed by trial counsel. (25). As found by the circuit court on remand, trial counsel subsequently failed to file the notice of intent as directed by Mr. Pope, and failed to follow through despite two letters Mr. Pope wrote counsel from the jail shortly after sentencing. (58:1; A-App. 132; 59; A-App. 134).

Moreover, the circuit court's findings – which the State approved – found that Mr. Pope has been seeking reinstatement of his direct appeal rights *pro se* since 1996. (58:2; A-App. 133). As the State acknowledges (State's br. at 4-7), beginning in 1997, Mr. Pope filed multiple extension motions in this Court, a Wis. Stat. §974.06 motion in the circuit court alleging ineffective assistance of counsel for failing to timely file the notice of intent, and then an appeal and petition for review to the Wisconsin Supreme Court, and that both the trial and appellate courts systematically denied relief. (27; App. 120-121; 29; 36; A-App. 127-130; 37; 40; A-App. 124-126).

Thus, it is clear that Mr. Pope did not unreasonably delay pursuit of his direct appeal, and that the State was

aware, through his repeated efforts from the filing of the SM-33 through his reinstatement attempts in both the circuit and appellate courts, that Mr. Pope sought to appeal his convictions, but that his efforts were stymied by the court system.[9] And, within weeks of the issuance of the Supreme Court's decision in *Kyles*, which definitively determined, as a matter of first impression, that the proper venue for seeking relief based on ineffective assistance of counsel due to failure to timely file a notice of intent is in the Court of Appeals, Mr. Pope promptly followed its procedural directive, filing a habeas petition pursuant to *Knight*.[10] (43). This Court, now also benefitting from the instruction of *Kyles*, subsequently remanded for fact-finding (48; 56; A-App. 132-133; 57; A-App. 134), which led to reinstatement of Mr. Pope's direct appeal rights after stipulation by the State and undersigned counsel. (60; A-App. 135-137; 62; A-App. 138-139).

Further, the State's claim (State's br. at 28-29) that, after this Court's final denial in 2003 of his efforts to seek reinstatement, Mr. Pope could have successfully filed a *Knight* petition in this Court challenging trial counsel's failure to file the notice of intent "in his capacity as appellate

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[9] The State asserts that Mr. Pope's *pro se* filing of a Statement on Transcript (A-App. 122-123) in this Court in his 1997 appeal of the circuit court's denial of his Wis. Stat. §974.06 motion seeking reinstatement of his direct appeal rights resulted in the State's and the court reporters' "reasonable reliance" that no additional transcripts were needed to prosecute an appeal. (State's br. at 30). This claim is baseless, as it ignores that that appeal did not address the merits of his case, but rather was simply an appeal of the circuit court's denial of his §974.06 motion seeking reinstatement of his direct appeal rights. (A-App. 124-130). Thus, Mr. Pope was only required to designate in his Statement on Transcript the transcripts necessary, or indicate that a transcript was not necessary, for prosecution of that limited procedural appeal. Wis. Stat. §809.11(4)(b).

[10] *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

counsel," or alternatively a *Rothering*[11] claim in the circuit court challenging trial counsel's performance "in his capacity as postconviction counsel" is refuted by both the law and appellate practice as it then existed, pre-*Kyles*. As an initial matter, trial counsel was neither "appellate counsel" nor "postconviction counsel" for Mr. Pope, and thus a *Knight* or *Rothering* claim would not have addressed trial counsel's ineffectiveness in failing to file the notice of intent. Moreover, as noted by the Supreme Court in its decision in *Kyles*, the defendant in that case attempted just such a challenge in 2003 – filing a *pro se* habeas petition in the Court of Appeals pursuant to *Knight*, seeking reinstatement of his direct appeal rights based on trial counsel's failure to file a notice of intent - which this Court *dismissed*, concluding that the alleged error occurred before the circuit court, and that therefore his claim should be raised as a habeas petition or a motion under Wis. Stat. §974.06 in the circuit court. *Kyles*, 2014 WI 38, ¶11. But, when Kyles followed those instructions and filed a *pro se* habeas petition in the circuit court, it also denied relief.[12] *Id.* at ¶¶12-13. Thus, the State's assertion that Mr. Pope, unlike Kyles, would have been successful in reinstating his direct appeal rights had he

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[11] *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).

[12] The circuit court's basis for denying Kyles' *pro se* habeas petition based on ineffective assistance of counsel was that he did not state a viable claim for relief, noting that he did not specifically allege that he informed trial counsel he wished to appeal. *Kyles* at ¶12. But, as the Supreme Court found, the circuit court did not have the authority to extend the deadline for filing a notice of intent, so it could not have granted that relief in any event. *Kyles*, 2014 WI 38, ¶¶31-38. Thus, such a *Rothering* petition, which the State suggests Mr. Pope could have pursued in the circuit court, could not have provided the relief he sought – a reinstatement of his direct appeal rights - as only this Court could grant that relief.

filed a *Knight* petition in this Court or *Rothering* claim in the circuit court, rings hollow.

As to the third laches element - whether the State is prejudiced by the delay – the State asserts it cannot now produce the transcripts for Mr. Pope's appeal, and it cannot feasibly retry his case due to the passage of time. (State's br. at 31-33). While, if true, this certainly prejudices the State, this element alone cannot provide a basis for granting equitable laches relief. And, the State's assertion that it, the victim's families, and the courts are "blameless" in the delay of the appeal, and that "Mr. Pope and his attorney are at fault for the entire 21-year delay" (State's br. at 32-33) ignores Mr. Pope's repeated efforts to pursue his direct appeal in a timely manner. Moreover, Mr. Pope is no more to blame than the State or the families of the victims for his trial counsel's failure to file the notice of intent.

Given Mr. Pope's clear indication of his intent to pursue an appeal by the filing of the SM-33 following sentencing, and the repeated denials by the court system of his pleas for reinstatement of his direct appeal rights in 1997, 1998, 1999, 2003, and his final successful effort due to the *Kyles* decision in 2014, there is simply no basis to support the State's suggestion that Mr. Pope laid in wait or "sandbagged" the State or the courts by delaying his direct appeal. Nor is the granting of a new trial a "windfall reversal" for Mr. Pope (State's br. at 33), as he has served over 20 years in prison while repeatedly attempting to pursue his constitutional right to appellate review of his convictions. Mr. Pope should not be subjected to further obstacles erected by the court system which block his constitutional right to direct appeal.

CONCLUSION

For the reasons stated, this Court should affirm the postconviction court's grant of Mr. Pope's motion for a new trial.

Dated this 8th day of March, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 7,695 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 8th day of March, 2018.

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