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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT

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ARGUMENT

I. The trial court erroneously awarded Pope a new trial without requiring him to show a colorable claim of error.

The trial court's new trial order based solely on the lack of a trial transcript violates *State v. Perry*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987). No matter how much of the transcript is missing, or how long the trial, Pope must make a threshold showing that he has one or more colorable claims of error that the transcript might have sustained. *Id.* at 101, 103, 108. Pope has not made that showing.

Pope does not win a new trial by imagining a laundry list of generic errors that *could* occur at any trial but likely did *not* occur at his trial. (Pope's. Br. 18–21.) As a matter of "common sense," Pope had to allege that specific, non-trivial error actually occurred at trial. *State v. DeLeon*, 127 Wis. 2d 74, 80, 377 N.W.2d 635 (Ct. App. 1985). "[T]he error cannot be so trivial that it is clearly harmless." *State v. Raflik*, 2001 WI 129, ¶40, 248 Wis. 2d 593, 638 N.W.2d 690. *See also Herndon v. City of Massilon*, 638 F.2d 963, 965 (6th Cir. 1981) (per curiam) ("a new trial is not appropriate where the lack of a record is the only error charged"). *Compare Cole v. United States*, 478 A.2d 277, 279 (D.C. 1984) (before transcript was lost, counsel filed a timely appeal and alleged the evidence was insufficient and the trial court erroneously received a document into evidence without foundation).

Pope's theoretical claims of error are specious. Any challenge to the sufficiency of the evidence or to the sentence would be frivolous. (State's Br. 16–21.)

The same is true for the ineffective assistance claims that Pope conjured up for the first time in his 2014 habeas petition. (R. 43:18–24.) Even assuming those claims once had arguable merit, Pope can no longer prove them because trial counsel's memory and his file are both gone thanks to Pope's

foot-dragging. (State's Br. 21–22.) *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). *See State v. Robinson*, No. 2008AP2107-CR, 2009 WL 2498297 (Wis. Ct. App. Aug. 18, 2009) (unpublished) ("no *Machner* hearing was possible because Robinson's trial attorney had passed away before Robinson's postconviction and appellate rights were reinstated.").

Pope concedes he has no viable challenge to his preliminary hearing. (Pope's Br. 11 n.4.)

With regard to Pope's speculation about errors during voir dire and arguments of counsel, "we are unwilling to reverse a seventeen-year-old murder conviction based on the remote possibility that prejudicial error occurred during one of these phases" where the possibility of reversible error was based on "mere speculation." *Freeman v. United States*, 60 A.3d 434, 436–37 (D.C. 2013).[1]

If this Court remands for a hearing to let Pope present the colorable claims of error required by *Perry*, the parties can work to reconstruct what occurred at trial. Pope's assertion that "no detailed, reconstructed record can be made" of his trial (Pope's Br. 21), is wrong. One can substantially reconstruct what happened at trial because the contemporaneous trial docket reveals who testified. (R. 1:5–7). The exhaustively detailed criminal complaint (R. 3), the preliminary hearing testimony (R. 78), and the sentencing transcript (R. 80), reveal what the substance of the trial testimony and its impact likely was. In light of the jury's verdict, there is no basis for Pope's rank speculation that all of these witnesses were impeached or testified inconsistently with what they said in the complaint or swore to at the

[1] Pope does not explain, for example, what lesser-included offense instructions and verdicts should have been given for what was a planned execution of the victims. (Pope's Br. 20.)

preliminary hearing. (Pope's Br. 19–20.) Moreover, the prosecutor who tried this case, Mark Williams, is still available. The judge who tried this case, the Honorable John Franke, is still available. So is Pope.[2]

II. This Court should reverse because Pope is guilty of laches.

The doctrine of laches plainly applies to this case that arose directly out of a habeas corpus action. *State ex rel. Washington v. State*, 2012 WI App 74, ¶19, 343 Wis. 2d 434, 819 N.W2d 305. Pope concedes that laches applies in habeas. (Pope's Br. 23.)

As explained at pp. 25–26 of its opening brief, the State did not forfeit its laches defense by stipulating to let Pope file a direct appeal. The stipulation made no guarantee about the condition of the record, or the likelihood of Pope's success given the condition of the record, two decades later.

Who should bear the equitable burden of the lack of a trial transcript here? Pope or the State? The answer is obvious: Pope and his trial attorney are *solely* responsible. The State is blameless.[3]

The court reporters are also blameless. Pursuant to Supreme Court Rule 72.01(47), they were authorized by law

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[2] Pope complains that the State included in its appendix *Milwaukee Journal Sentinel* newspaper articles written contemporaneously with the proceedings in Pope's and his four co-defendants' cases. (Pope's Br. 18 n.6.) Those articles are readily accessible by anyone with rudimentary computer skills. This Court has the discretion to take judicial notice of them. Wis. Stat. § 902.01(3). They come from reliable sources that can be used to help reconstruct the events of that time. Wis. Stat. § 902.01(2)(b). *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶¶10–11, 313 Wis. 2d 411, 756 N.W.2d 667.

[3] Pope seems to blame this Court for his troubles. (Pope's Br. 28 ("Pope should not be subjected to further obstacles erected *by the court system*." (emphasis added)).)

to destroy their notes in 2006, ten years after conviction, because (a) Pope had nothing pending then, and (b) Pope did not order the transcripts until 2016. Not surprisingly, those transcripts could no longer be produced by the time Pope filed his Wis. Stat. § (Rule) 809.30 motion on March 7, 2017. (Pope's Br. 4–5.) Pope's waiting twenty years to order trial transcripts he knew he should have ordered in 1996, and then claiming that the lack of transcripts he did not order entitles him to a new trial, is classic "sandbagging."

The State had no reason to know before 2014 that Pope would file a *Knight* petition, and had no reason to know until Pope filed his new trial motion that he now wanted the rest of the transcripts but the reporters' notes were destroyed. The trial court, therefore, erred in concluding that the State forfeited its laches defense by not asserting it before Pope sprung his new trial motion on it March 7, 2017. (R. 81:20–22, A-App. 103–05.)[4]

A. Pope unreasonably delayed in seeking habeas corpus relief and in seeking production of the trial transcripts.

The reasonableness of Pope's delay is a legal conclusion subject to independent review here based on the trial court's findings of fact. *Washington*, 343 Wis. 2d 434, ¶20.

Pope understandably emphasizes the trial court's finding that he has "been acting pro-se attempting to reinstate his appeal rights since 1996." (R. 56:2, A-App. 133.) Standing alone, that finding is not clearly erroneous. Missing,

[4] Pope's sloth in seeking the trial transcripts *he undeniably had the right to receive* renders inapposite the Supreme Court cases cited in his brief where the State unconstitutionally *denied* an indigent transcripts on appeal. (Pope's Br. 10.) The State neither denied Pope his right to an appeal nor to transcripts.

however, is a finding by the trial court that he did so "diligently" or "properly."

If the trial court meant to also imply diligence and procedural regularity, then those implications are clearly erroneous. Pope was not diligent and did not follow proper procedures for challenging counsel's effectiveness regarding the notice of intent.

Pope had two avenues for reinstating his direct appeal after the twenty days for filing the notice of intent expired in late July 1996: (1) file a motion for an extension of time to file the notice of intent supported by "good cause," *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶22, 354 Wis. 2d 626, 847 N.W.2d 805; *State v. Harris*, 149 Wis. 2d 943, 947, 440 N.W.2d 364 (1989); (2) file a habeas petition challenging the effectiveness of trial counsel for not filing a notice of intent. He did neither until 2014.

Pope is solely to blame for his procedural foot-dragging. Even though Pope knew at his July 6, 1996, sentencing that a notice of intent had to be filed by July 26, 1996, to preserve his right to direct review (and transcripts), he did nothing until September 16, 1997, when he filed a motion for an extension of time to file a notice of intent. (A-App. 116–19.) The motion failed because Pope did not support it with the requisite "good cause" showing. (R. 27, A-App. 120–21.)

In his second extension motion filed in 1999, Pope proffered to this Court as "good cause" the failure of a "jailhouse lawyer" to properly advise him of the appeal deadlines. That excuse was insufficient in this Court's eyes to explain the initial fourteen-month delay, "especially when now coupled with an additional sixteen-month delay in offering this explanation." (R. 40:2, A-App. 125.) It was also not credible. Pope did not need a jailhouse lawyer to tell him that if a notice of intent was not filed within twenty days of sentencing, he might lose his right to a direct appeal and

transcripts. Pope acknowledged this when he signed the Wis. JI–Criminal SM-33 form so advising him at sentencing on July 6, 1996. (R. 25; 80:40.)

This Court next held in an opinion issued on March 5, 1999, 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 failed to overcome the presumption of waiver after having "been properly advised of his appeal rights" at sentencing with proof of "exceptional circumstances or good cause." (R. 36:3–4, A-App. 129–30.)

Four years passed. In 2003, Pope filed another extension motion. (R. 41.) This Court summarily denied it because Pope was "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.)

Eleven more years passed. Finally, in 2014, Pope filed a habeas petition alleging ineffective assistance of counsel.

Pope should have known from 1996-on that habeas corpus was the proper vehicle for challenging trial counsel's effectiveness for failing to preserve his right to a direct appeal. (State's Br. 28–30.) Pope insists he had no reason to know this until the Wisconsin Supreme Court so held in *Kyles*, 354 Wis. 2d 626, ¶¶38–44. (Pope's Br. 3, 27.) The *Kyles* court confirmed that the proper way to challenge trial counsel's effectiveness for not filing a notice of intent is by filing a habeas corpus petition in this Court, pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), rather than in the trial court.

The *Kyles* decision was not made out of whole cloth. It was the logical result of over two decades of litigation, much of it by pro se prisoners, beginning in 1992, where similar habeas challenges were brought in this Court. *See* cases discussed at *Kyles*, 354 Wis. 2d 626, ¶¶34–37. "Thus, ineffectiveness that results in the failure to file that notice [of

intent] is akin to ineffectiveness involving the failure to commence an appeal. It is not a great stretch to extend the exception . . . to this type of claim." *Id*. ¶37 (citations omitted). *See State ex rel. Smalley v. Morgan*, 211 Wis. 2d 795, 798–99, 565 N.W.2d 805 (Ct. App. 1997) (counsel's failure to commence a direct appeal or a no-merit appeal was cognizable in a *Knight* habeas petition "because counsel's inaction in this court is at issue."); *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶9–11, 32–33, 290 Wis. 2d 352, 714 N.W.2d 900 (pro se petitioner filed a *Knight* habeas petition in 2004, ten years before *Kyles*, challenging counsel's effectiveness for not filing a direct appeal).

One thing Pope definitely could not do is what he did from 1997 to 2003: file repetitious extension motions unsupported by "good cause." *Kyles*, 354 Wis. 2d 626, ¶¶40–44; *State v. Evans*, 2004 WI 84, ¶59, 273 Wis. 2d 192, 682 N.W.2d 784.

If Pope was uncertain where to file his habeas corpus challenge to counsel's effectiveness, he could have filed it in circuit court in reliance on *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). Although *Kyles* clarified the law, Pope should have known from day one that he had to file a habeas petition challenging counsel's effectiveness either in circuit court or this Court. He did neither for eighteen years. Pope did not seek "prompt and speedy relief" by way of habeas corpus. *Smalley*, 211 Wis. 2d at 802.

Pope is charged with both actual and constructive knowledge of appellate procedures and deadlines. Constructive knowledge is knowledge that Pope might have gained upon inquiry. *Mut. Fed. Saving & Loan Assoc. v. Am. Med. Servs., Inc.*, 66 Wis. 2d 210, 219, 223 N.W.2d 921 (1974); *Tele-Port Inc. v. Ameritech Mobile Commc'ns, Inc.*, 2001 WI App 261, ¶11 n.3, 248 Wis. 2d 846, 637 N.W.2d 782. Pope knew at sentencing that he had 20 days to preserve his right

to appeal. Pope knew when this Court denied his first extension motion in September 1997 that he had to support any future extension motion with a showing of "good cause." Pope knew in 1996, constructively at least, that he could file a habeas corpus petition in either circuit court or this Court challenging counsel's effectiveness. As noted above, many other pro se litigants in similar situations pursued habeas relief in this Court from 1992 on. *Kyles*, 354 Wis. 2d 626, ¶¶34–37.

This case is analogous to *Coleman* where the court held that laches applied to a pro se prisoner's sixteen-year delay from 1988, when he discovered counsel's failure to file an appeal, to 2004, when he filed a *Knight* petition challenging counsel's effectiveness for not filing the appeal. *Coleman*, 290 Wis. 2d 352, ¶¶9–11, 32–33. The State would suffer actual prejudice if trial counsel "could not recall what happened during his communications with Coleman." *Id*. ¶36.

This case is analogous to *Washington* where this Court held that laches applied to a pro se petitioner's unreasonable delay in challenging counsel's effectiveness. "Despite Washington's awareness in September 2003 that Attorney Backes had not filed an appeal on his behalf (allegedly at Washington's request) and that the timeline for filing any such appeal had passed, Washington waited well over five years, until March 2009, to raise the issue with the court." *Washington*, 343 Wis. 2d 434, ¶22 (footnote omitted); *id.* ¶26 ("Washington sat on his hands for at least five years after allegedly discovering he was denied an appeal, failing to immediately seek reinstatement of his appellate rights.").

B. The State had no knowledge that Pope would file a *Knight* petition.

The State is not chargeable with the knowledge that Pope *had the right* to file a *Knight* petition. The State is only chargeable with the knowledge that Pope "would assert the

right" to file a *Knight* petition. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). The State had no inkling that Pope would file a *Knight* petition until he filed one in 2014. When Pope did nothing between 2003 and 2014, the State had every reason to believe the case was over. *See Washington*, 343 Wis. 2d 434, ¶24 ("[T]he State has proven that it lacked knowledge that Washington would raise an issue of ineffective assistance of appellate counsel eleven years after entry of the judgment.").

C. The State will suffer actual prejudice.

Forcing the State to retry Pope at least twenty-two years after conviction is manifestly prejudicial. The record conclusively shows that, *as a matter of law*, the State is prejudiced by trial attorney Backes' loss of memory and destruction of his file long before Pope's right to a direct appeal was reinstated. *Lukasik*, 115 Wis. 2d at 140. *See Coleman*, 290 Wis. 2d 352, ¶36. "The circuit court found that, because of the time that had passed, Attorney Backes no longer had any independent recollection of his representation of Washington and that the relevant case file was destroyed in 2005 or 2006." *Washington*, 343 Wis. 2d 434, ¶25.

Pope's pro se status is no excuse. *Washington*, 343 Wis. 2d 434, ¶23. Pope may not rely on his lack of legal acumen "to lay in the weeds and wait to raise an issue of potential merit" that he should have raised long ago when memories were fresh and transcripts still available. *Id.*

D. If this Court remands, it should instruct the trial court to apply the doctrine of laches to any colorable claims Pope can muster.

If this Court remands for a *Perry* hearing to let Pope present colorable claims for relief, it should instruct the trial court to apply the laches defense to those claims. *Coleman*, 290 Wis. 2d 352, ¶38 n.13. Those claims would include the

ineffective assistance challenges broached in Pope's 2014 *Knight* petition to counsel's performance with respect to his alibi witnesses and gang affiliation. (R. 43:18–24.)

Pope's ineffective assistance challenges are, however, non-starters for the reasons discussed above.

The balance of equities favors the State. This Court should hold that "applying laches is appropriate and equitable here." *Washington*, 343 Wis. 2d 434, ¶26.

CONCLUSION

This Court should reverse and reinstate Pope's conviction.

In the alternative, this Court should remand for a *Perry* hearing and instruct the trial court to apply the laches doctrine to any colorable claims identified by Pope.

Dated this 27th day of March, 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 2,983 words.

Dated this 27th day of March, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 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. § (Rule) 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 27th day of March, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

SUPPLEMENTAL APPENDIX TO
REPLY BRIEF OF PLAINTIFF-APPELLANT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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DANIEL J. O'BRIEN
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